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

Summary of Legislative Restrictions

I. Provisions Regarding All of Indochina: Limitation on Use of Funds to Finance Cross-Border Operations

Section 31 of the Foreign Assistance Act of 1973 (Pub. L. 93-189) provides that no funds authorized or appropriated under any provision of law shall be available to finance military or paramilitary combat operations by foreign forces in Laos, Cambodia, North Vietnam, South Vietnam or Thailand unless such operations are conducted by the forces of the recipient government within its own borders. (See also Section III A of this summary, below, with regard to further restrictions on Vietnamese forces in Cambodia.)

II. Provisions Regarding Cambodia

A. Financial Ceiling for Cambodia

Section 655 of the Foreign Assistance Act of 1961, as amended (Added by § 304(b) of Foreign Assistance Act of 1971, Pub. L. 92-226, February 7, 1972).

This section imposes a ceiling of $377 million for the fiscal year 1975 on the obligation of funds "for the purpose of carrying out directly or indirectly any economic or military assistance, or any operation, project or program of any kind, or for providing any goods, supplies, materials, equipment, services, personnel, or advisers in, to, for, or on behalf of Cambodia during the fiscal year ending June 30, 1975." In addition to this ceiling, this section places a limit of $75 million on the use during fiscal year 1975 of the President's authority under Section 506 of the Foreign Assistance Act to provide defense articles from DOD stocks and defense services to Cambodia.

B. U.S. Citizens and Third Country National Personnel Ceilings for Cambodia

Section 656 of the Foreign Assistance Act of 1961, as amended (Added by Section 304(b) of the Foreign Assistance Act of 1971).

This section contains two separate personnel restrictions:

(1) a limit of 200 is placed on the total number of officers and employees of the Executive Branch who are U.S. citizens, including members of the Armed Forces of the United States, "present in Cambodia at any one time." Excluded are members of the Armed Forces while they are actually engaged in air operations in or over Cambodia originating outside Cambodia;

(2) the United States is precluded from paying at any time "in whole or in part, directly or indirectly "the compensation or allowances of more than 85 individuals in Cambodia who are citizens of countries other than Cambodia or the United States. Volunteer workers and employees of private relief organizations engaged in humanitarian assistance are excepted from these ceilings.

III. Vietnam

A. Limit on Military Assistance and Proviso that it Shall not be Used to Finance Vietnamese Troops to go to Aid of Governments of Laos or Cambodia

Section 401(a)(1) of the Armed Forces Supplemental Appropriation Authorization Act of 1966, as amended, places a limit of $1,126,000,000 on DOD funds which may be expended for Vietnam and limits the purpose of such expenditures to support of "Vietnamese and other free world forces in support of Vietnamese forces." A proviso prohibits the use of these funds (Military Assistance Service Funded - or "MASF") to support Vietnamese or other free world forces in actions designed to give military support and assistance to the Governments of Laos or Cambodia. (The legislative history of this proviso makes clear that cross-border operations in sanctuary areas were not intended to be precluded by the section.)

B. Ceiling on U.S. Citizen and Third Country National Personnel in Vietnam

Section 38 of the Foreign Assistance Act of 1974 imposes the following limitations:

(1) Effective June 30, 1975, a limitation of 4,000 is placed on the total number of civilian officers and employees, including contract employees, of executive agencies of the U.S. Government present in South Vietnam at any one time, not more than 2,500 of which may be members of the U.S. Armed Forces and DOD direct-hire and contract employees. Effective December 30, 1975, these numbers are reduced to 3,000 and 1,500 respectively.

(2) Effective June 30, 1975, the total number of third country nationals in Vietnam at any one time whose "compensation or allowances" are paid "in whole or in part, directly or indirectly" by the U.S. Government shall not exceed 800. Effective December 30, 1975, this number is reduced to 500.

Volunteer workers or employees of private relief organizations engaged in humanitarian assistance are excepted from these ceilings.

IV. Laos: Financing

Section 40(a) of the Foreign Assistance Act of 1974 places a ceiling of $70,000,000 on funds which may be obligated during FY 1975 for assistance-related activities in Laos, $30,000,000 of which may be utilized for provision of military assistance.

[April 1975?]

#3

LEGISLATIVE RESTRICTIONS ON EXECUTIVE AUTHORITY: WAR POWERS, EXECUTIVE AGREEMENTS AND EXECUTIVE PRIVILEGE

I. Restrictions on the President's War Powers Authority

Over the last five years many statutes have been enacted which restrict the President's ability to affect overseas hostilities, principally in Southeast Asia, through material and advisory assistance to friendly governments. Inasmuch as these restrictions do not directly restrict the President's authority as Commander-in-Chief, they are not discussed in detail in this paper. A brief description of the most important of them is attached.

Only three legislative restrictions directly affect the war powers of the President: The Cooper-Church Amendment; the prohibition against "combat activities" by United States military forces "in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia after August 15, 1973; and the War Powers Resolution.

A. Cooper-Church Amendment (Section 7(a) of the Special Foreign Assistance Act of 1971, as amended)

Description. As originally enacted in 1971, Section 7(a) prohibited the use of any "funds authorized or appropriated pursuant to this or any other act . . . to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia." In 1972 this section was amended to prohibit the introduction into Cambodia of U.S. ground combat troops and "United States advisers to or for military, paramilitary, police, or other security or intelligence forces in Cambodia."

Issues. The Cooper-Church Amendment was in response to the introduction of American forces into Cambodia in the Spring of 1970. It never became a subject of conflict between the executive and legislative branches because soon after the introduction of these forces it became the stated policy of the Administration that, after July 1, 1970, "the only

remaining American activity in Cambodia . . . will be air missions to interdict the movement of enemy troops and materiel." (President Nixon's Report on Cambodia, June 3, 1970.) This intention was also expressed by Secretary Rogers in hearings before the Senate when he said "We have no intention of getting ground troops involved in Cambodia, and we are not going to get involved with military advisers in Cambodia; we are not going to." */ Indeed, the amendment itself clearly indicates that the congruence of executive intentions with congressional desires was an important consideration in its enactment. **/ Thus, no arguments have been raised on behalf of the executive branch in opposition to this restriction.

B. Prohibition against Combat Activities by United States Military Forces in Indochina

Description. This restriction was originally enacted in the Second Supplemental Appropriations Act of 1973 and in the resolution continuing appropriations into fiscal year 1974. ***/ It has since been repeated in several other statutes. ****/ The effect of all of these restrictions is to prohibit the use of any appropriations for the direct or indirect financing of "combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." *****/

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*/ Senate Report 91-1437, December 14, 1970, page 9.

**/ Section 7(a) begins: "In line with the expressed intention of the President of the United States . . . ."

***/ Pub. L. 93-50 §307 (Second Supplemental Appropriations Act, 1973) and 93-52 §108 (Continuing Appropriations, 1974).

****/ See Pub. L. 93-126 §13 (Department of State Appropriations Act of 1973; Pub. L. 93-189 §31 (Foreign Assistance Act of 1973), Pub. L. 93-155 §806 (Department of Defense Authorization Act of 1974), Pub. L. 93-238 §741 (Department of Defense Appropriation Act, 1974), and Pub. L. 93-437 §849 (Department of Defense Appropriation Act, 1975).

*****/ Pub. L. 93-238 §741 (Department of Defense Appropriations Act, 1974).

Issues. This restriction was originally enacted as the result of a compromise between the President and the Congress in the summer of 1973. Its enactment was not, as a formal matter, opposed by the executive branch. However, an earlier version which would have cut off funds at the end of June rather than on August 15, 1973, was vetoed.

The arguments raised in opposition to the earlier cut-off did not relate to broad questions of executive authority. Rather, they dealt with specific issues such as the effect of an American bombing halt on the prospects for a negotiated settlement, the likelihood that such a halt would lead to a Communist military victory and the effect of United States acquiescence in Communist violations of the Paris Agreement on our general creditability abroad. Though one could argue that events have vindicated the position of the executive branch on these issues, we have not done so, at least not in relation to the "combat activities" prohibitions.

C. War Powers Resolution (Pub. L. 93-148, November 7, 1973)

Description. The War Powers Resolution requires that the President submit a report to Congress whenever United States Armed Forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," or into the territory of a foreign state while equipped for combat or in numbers which substantially enlarge our combat equipped forces already located in such territory. The Resolution further requires that the President "terminate any use" of U.S. Armed Forces introduced into hostilities or into situations when imminent involvement in hostilities is indicated within 60 days unless the Congress (1) has declared war or enacted a specific authorization for the activity in question, (2) has extended by law the 60-day period or (3) is physically unable to meet as a result of an armed attack. The Resolution also provides that the Congress may require, by concurrent resolution, the earlier termination of the involvement of U.S. forces in hostilities.

Issues. The long arguments over the War Powers Resolution concerned essentially two issues: the constitutionality of certain parts of the Resolution and the Resolution's possible effect on our ability to use our armed forces decisively and effectively in a variety of situations.

(1) Constitutionality. The principal constitutional objection raised by the executive branch related to the requirement that forces be withdrawn within 60 days unless Congress took positive action to authorize their continued involvement in hostilities and to the requirement that such forces be withdrawn even earlier if so directed by a concurrent resolution of the Congress. With respect to the first requirement, it was argued that since the authority of the President to introduce forces into hostilities is based on his constitutional authority as Commander-in-Chief and Chief Executive, the Congress may not effectively terminate a given exercise of that authority by a mere failure to take positive action. Nor, it was argued, could such an exercise of constitutional authority be terminated by concurrent resolution -- "an act which does not normally have the force of law, since it denies the President his constitutional role in approving legislation."*/

(2) Policy Issues. The basic policy argument of the Administration, as set forth in the veto message, was that enactment of the War Powers Resolution would "seriously undermine this nation's ability to act decisively and convincingly in times of international crises." This, it was further argued, would undermine the confidence of our allies in our ability to assist them and interject a "substantial element of unpredictability . . . into the world's assessment of American behavior, further increasing the likelihood of miscalculation and war."

Subsidiary, more specific arguments were also raised. It was pointed out that the 60-day termination requirement could serve to prolong or intensify a crisis situation in the hope that the United States would be forced to withdraw at the end of 60 days. Certainly, it was argued, there would be little incentive for an adversary to enter into negotiations until such time as the Congress had authorized continued military involvement. It was also claimed that the Resolution might force the President to intensify our military actions more than otherwise would have been necessary in order to achieve certain objectives within the 60-day time limit.

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*/ President's Veto Message regarding the War Powers Resolution, October 24, 1973, in the Department of State Bulletin, November 26, 1973, page 662.

Present Position. Though there has been no comprehensive statement of the attitude of the executive branch toward the War Powers Resolution since its enactment, we have been following a policy of conscientious attention to the requirements of the Resolution. No situation has yet arisen which, in our view, has required the submission of a report under Section 4(a) of the Resolution. Procedures have been established, however, for prompt consideration by the Departments of State and Defense of any movement of United States forces which might require such a report.*/ We also, of course, have not yet had to face a situation which presented a real constitutional question. We cannot now determine how we would deal with such a situation should one ever arise. Hypothetical questions of this sort might be answered along the following lines:

> "We do not anticipate any constitutional crisis in the operation of this new law because it is our hope that cooperation between the two branches will be such that the Congress will support the President if and when military action becomes necessary to protect the interests of this nation."

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*/ The Chairmen of the House Foreign Affairs Committee and the Senate Foreign Relations Committee were advised of these procedures on October 7, 1974.

Anything need to be done on this?

This can be filed

P.

THE WHITE HOUSE
WASHINGTON

For
Mr Buchen

THE WHITE HOUSE

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Neutral ships.

STATEMENT OF BENJAMIN FORMAN
ASSISTANT GENERAL COUNSEL, DEPARTMENT OF DEFENSE
BEFORE THE SENATE JUDICIARY
SUBCOMMITTEE ON SEPARATION OF POWERS
SEPTEMBER 9, 1975

Mr. Chairman and Members of the Committee:

I am appearing here today, together with Mr. Morton I. Abramowitz, Deputy Assistant Secretary of Defense (International Security Affairs) for East Asia and Pacific Affairs, in response to the invitation of the Subcommittee to the Secretary of Defense to testify "regarding the extent of the President's Commander-in-Chief power unilaterally to introduce U.S. armed forces into hostilities and regarding certain instances of the President's exercise of such power or of the possible future exercise of such power."

As our nation enters its bicentennial year, it would appear eminently fitting that attention be focused on our Constitution, and since we have but recently terminated an extended period of unpopular hostilities, that the respective war power of the President and the Congress be particularly examined. It should be noted, however, that after 200 years of extended and often intensive debate about the war power no fresh insights may reasonably be expected to come from these hearings.

The records of the Constitutional Convention and the contemporaneous writings of the Founding Fathers are familiar

ground to historians and students of Constitutional law. Like biblical texts, they have been subjected to exacting exegesis in an effort to extract detailed commandments for our guidance from the very general and broad wording of Article II of the Constitution. To quote Mr. Justice Jackson in the Steel Seizure case about the vagueness of the language of Article II (72 S. Ct. 863, 869-870):

> "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."

Mr. Justice Jackson further observed with respect to the Commander-in-Chief clause that (Id. at 873):

> "These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued Presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends."

Similarly, the governing court decisions--which are relatively few in number--have not definitively resolved the full scope of Presidential Commander-in-Chief power. In part, these decisions are inconclusive because of the tradition that

Constitutional issues are dealt with on the narrowest grounds possible. In part, they reflect the fact that challenged actions of the President in the war power context do not normally rely solely on the Commander-in-Chief power. The President's Executive Power, his Foreign Relations Power, his duty to take care that the laws--including the Constitution and treaties made under the authority of the United States--be faithfully executed, the responsibility to protect the States of the Union against invasion, his Constitutionally-prescribed oath of office, and his statutory powers exercisable during national emergency have all been cited, sometimes conjunctively, as the basis for various exercises of the war power by the President.

Because these judicial precedents and the debates of the Founding Fathers do not provide ready answers to war power issues which recur periodically, Presidents, legislators, litigants and scholars have also relied on the precedents established by prior Presidential or Congressional actions. While opposing parties have been known to claim the same incident as a precedent for their side because of varying emphasis placed on the facts of the incident or because of disputed facts, it is generally accepted that such precedents are a valid tool in Constitutional interpretation. As Mr. Justice Frankfurter declared in the Steel Seizure case (op. cit. supra at 897):

> "The Constitution is a framework for government. Therefore the way the framework has consistenly operated fairly establishes that it has operated accordingly to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, ... a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."

Inasmuch as war power issues have far from been ignored by the Congress during the past 200 years, it is not surprising that all the relevant materials have previously been collected and published by the Congress. Within the past three decades--spurred by the so-called Great Debate of 1951 on the issue of stationing U.S. forces in Europe and the subsequent debates about the Korean War, the Vietnam War, the National Commitment Resolution, and the War Powers Resolution--there have been repeated hearings before various committees and extensive floor debate on a number of bills and resolutions. Compilations of background materials were assembled. Testimony was heard from Executive Branch witnesses, from Members of Congress, from practicing lawyers, and from other scholars. Learned articles from law reviews and other journals were incorporated into the

hearing records or separately published in the Congressional Record.

Rather than plagiarize these materials and pretend to a degree of erudition that I do not claim, and because I do not believe that I can up with definitive answers where others have failed, I will not attempt to duplicate or synthesize what has already been written on the subject. I am also guided in this respect by the oft-quoted observation of Mr. Justice Holmes that "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." The Committee and those who may read these hearings may draw their own conclusions from the existing materials, the most significant of which I shall now list for the record:

The Constitution of the United States of America--Analysis and Interpretation, (Sen. Doc. No. 92-82, pp. 448-473; prepared by the Congressional Research Service, Library of Congress); Background Information on the Use of United States Armed Forces in Foreign Countries (H. Rept. No. 127, 82d Cong., 1st sess., of the House Foreign Affairs Committee, Feb. 20, 1951, and its 1970 revision by the Foreign Affairs Division, Legislative Reference Service, Library of Congress); Powers of the President to Send the Armed Forces Outside the United States (prepared by the Executive Branch for the use of the Joint Committee of the Senate Foreign Relations and Armed Services Committees, Feb. 28, 1951, Committee Print, 82d Cong., 1st sess.); The Powers of the

President as Commander-in-Chief of the Army and Navy of the United States (H. Doc. No. 443, 84th Cong., 2d sess., June 14, 1956); U.S. Commitments To Foreign Powers, Hearings Before the Senate Foreign Relations Committee on S. Res. 151 (90th Cong., 1st sess., Aug. 16, 17, 21, 23, and Sept. 19, 1967); National Commitments (S. Rept. No. 91-129, April 16, 1969, of the Senate Foreign Relations Committee on S. Res. 85, 91st Cong., 1st sess.); Documents Relating to the War Power of Congress, The President's Authority as Commander-in-Chief and the War in Indochina (Committee Print, 91st Cong., 2d sess., of the Senate Foreign Relations Committee, July 1970); War Powers (S. Rept. No. 220, June 14, 1973, of the Senate Foreign Relations Committee on S. 440, 93d Cong., 1st sess.); War Powers Resolution of 1973 (H. Rept. No. 93-287, June 15, 1973, of the House Foreign Affairs Committee on H. J. Res. 542, 93d Cong., 1st sess.); War Powers (H. Rept. No. 93-547, Oct. 4, 1973, Conference Report on H.J. Res. 542, 93d Cong., 1st sess.); and Vetoing House Joint Resolution 542, a Joint Resolution Concerning the War Powers of Congress and the President, Message from the President of the United States, October 24, 1973 (H. Doc. No. 93-171, October 25, 1973, 93d Cong., 1st sess.). See also the following hearings held by the House International Relations Committee and the Senate Foreign Relations Committee

on War Powers: House--1970, 1971 and 1973; Senate--1971 and 1973.

The Committee may find it helpful, however, if I were to present an overview of the attempts made by the Congress over the past thirty years to deal with the war power issue. This period has been characterized by some as one in which the Congress initially surrendered its power to the President and subsequently redressed the balance and regained its authority. I for one, however, view the period as exemplifying a continuing effort at compromise solutions which failed to reach any conclusive results. The outer limits of Presidential versus Congressional authority are still, in my opinion, unresolved. They are necessarily unresolved because these authorities overlap and conflict, and were deliberately designed to do so in accordance with the fundamental concept of separation of powers. The President's power as Commander-in-Chief is no less subject to checks and balances than his other Constitutional powers. It is subject in appropriate cases to judicial review, and, as I shall later indicate, is also subject in certain areas to legislative restraints.

Thirty years ago this summer, the Congress engaged in a preliminary round of the so-called Great Debate. The issue was whether the Armed Forces of this country could become involved,

without a declaration of war, in a war pursuant to a Resolution of the United Nations Security Council under Article 42 of the Charter, which was then pending United States ratification. The forces at the disposal of the Security Council were those to be made available by the Members of the United Nations in accordance with special agreements negotiated between the Members and the Security Council under Article 43 of the Charter, which expressly provided that the agreements "shall be subject to ratification by the signatory states in accordance with their respective constitutional processes." The result of the debate was the enactment by the Congress of section 6 of the United Nations Participation Act of 1945 (Public Law 79-264):

> "The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such

> purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements." (Emphasis supplied.)

The compromise embodied in section 6 of the United Nations Participation Act of 1945 resolved undoubtedly the most serious challenge during the summer of 1945 to the Senate's advice and consent to the ratification of the U.N. Charter.

In 1949, the President submitted the North Atlantic Treaty to the Senate for advice and consent to ratification. Two of the principal issues raised by the Treaty language were the extent of the nation's commitment and the respective roles of the President and the Congress in meeting that commitment.

With respect to the commitment in Article 5 of the Treaty that, in the event of an armed attack against one or more of the Parties, each Party will assist the Party or Parties so attacked by taking such action as it deems necessary "to restore and maintain the security of the North Atlantic Area", the Committee on Foreign Relations emphasized in its report that (Sen. Exec. Rept. No. 8, 81st Cong., 1st sess., pp. 13-14):

> "this clearly does not commit any of the parties to declare war. Depending upon the gravity of the attack, there are numerous measures short of the use of armed force which might be sufficient to deal with the situation. Such measures could involve anything from a diplomatic protest to the most severe forms of pressure.
>
> "In this connection, the committee calls particular attention to the phrase 'such action as it deems necessary.' These words were included in article 5 to make absolutely clear that each party remains free to exercise its honest judgment in deciding upon the measures it will take to help restore and maintain the security of the North Atlantic area. The freedom of decision

> as to what action each party shall take in no way reduces the importance of the commitment undertaken. Action short of the use of armed force might suffice, or total war with all our resources might be necessary. Obviously article 5 carries with it an important and far-reaching commitment for the United States; what we may do to carry out that commitment, however, will depend upon our own independent decision in each particular instance reached in accordance with our own constitutional processes."

As for the second issue, the Committee Report recalled that (Id. at p. 14):

> "During the hearings substantially the following questions were repeatedly asked: In view of the provision in article 5 that an attack against one shall be considered an attack against all, would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack on New York City? In such an event does the treaty give the President the power to take any action, without specific congressional authorization, which he could not take in the absence of the treaty?"

Continuing, the Committee declared that (Ibid.):

> "The answer to both these questions is 'No.' . . .
>
> "In the event any party to the treaty were attacked the obligation of the United States Government would be to decide upon and take forthwith the measures it deemed necessary to restore and maintain the security of the North Atlantic area. The measures which would be necessary to accomplish that end would depend upon a number of factors, including the location, nature, scale, and significance of the attack. The decision as to what action was necessary, and the action itself, would of course have to be taken in accordance with established constitutional procedures as the treaty in article 11 expressly requires.
>
> "Article 5 records what is a fact, namely, that an armed attack within the meaning of the treaty would

> in the present-day world constitute an attack upon the entire community comprising the parties to the treaty, including the United States. Accordingly, the President and the Congress, within their sphere of assigned constitutional responsibilities, would be expected to take all action necessary and appropriate to protect the United States against the consequences and dangers of an armed attack committed against any party to the Treaty. The committee does not believe it appropriate in this report to undertake to define the authority of the President to use the armed forces. Nothing in the treaty, however, including the provision that an attack against one shall be considered an attack against all, increases or decreases the constitutional powers of either the President or the Congress or changes the relationship between them." (Emphasis supplied.)

In June 1950, in response to the attack by the North Koreans upon the forces of the Republic of Korea, the U.N. Security Council acted under Article 39 of the Charter to call upon "all Members to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities" and to recommend that "the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." The political and Constitutional concerns expressed in the Congress during 1945 which resulted in the compromise of section 6 of the United Nations Participation Act of 1945 were apparently disregarded by the President when he ordered U.S. forces into combat action in Korea in response to the Security Council's request, since the section was

technically not applicable to the June 1950 Security Council's Resolution. The President's "failure to respect the spirit of the 1945 compromise" was subsequently objected to by Senator Taft at the commencement of the "Great Debate" on January 5, 1951 (Congressional Record, vol. 97, p. 54 at pp. 57, 65), although the well-known State Department legal memorandum of July 3, 1950, had quoted speeches by Senators Wiley and Austin on July 26 and 27, 1945 (i.e., preceding the enactment of sec. 6) declaring that the President's obligation to faithfully execute the laws included the U.N. Charter as a whole and that his constitutional power is in no manner "impaired" by article 43 of the Charter (American Foreign Policy 1950-1955, Basic Documents, Dept. of State pub. 6446, Dec. 1957, Vol. II, p. 2542 at pp. 2547-2548).

On September 9, 1950, the President announced to the press that he had that day "approved substantial increases in the strength of United States forces to be stationed in Western Europe in the interest of the defense of that area" and that the "extent of these increases and the timing thereof will be worked out in close coordination with our North Atlantic Treaty partners." (Ibid., Vol. I, p. 1504). On January 8, 1951, at the conclusion of the "State of the Union" address, Senator Wherry introduced S. Res. 8, 82d Congress: "Resolved,

That it is the sense of the Senate, that no Ground Forces of the United States should be assigned to duty in the European area for the purposes of the North Atlantic Treaty pending the formulation of a policy with respect thereto by the Congress." (Congressional Record, Vol. 97, p. 94).

The Wherry Resolution was referred to a joint committee of the Foreign Relations and Armed Services Committees for hearings which became the focal point of the "Great Debate". (Assignment of Ground Forces of the United States to Duty in the European Area, Hearings Before the Senate Foreign Relations and Armed Services Committees, Feb. 1, 15, 16, 19, 20, 21, 22, 23, 24, 26, 27, and 28, 1951). During his testimony on the Resolution, Secretary of State Acheson was asked to "comment as to the power of the Executive to send troops to Europe". In response, Secretary Acheson filed for the record what he termed "a very substantial brief in that regard," which discussed the matter under the following headings:

"A. That the President's power to send the Armed Forces outside the country is not dependent on congressional authority has been repeatedly emphasized by numerous publicists and constitutional authorities.

"B. It is important to examine some of the purposes for which the President as

Commander-in-Chief has dispatched American troops abroad. In many instances, of course, the Armed Forces have been used to protect specific American lives and property. In other cases, however, United States forces have been used in the broad interests of American foreign policy.

"C. In other cases United States forces have been used to implement provisions of treaties to which the United States was a party. It is the President's duty under the Constitution to take care that the laws are faithfully executed. That this applies to treaties (which are a part of the supreme law of the land) as well as to statutes is unquestioned. As stated by ex-President William H. Taft: 'The duty that the President has to take care that the laws be faithfully executed applies not only to the statutory enactments of Congress but also to treaties***' (The Boundaries Between the Executive, the Legislative, and the Judicial Branches of the Government, 25 Yale Law Journal 613).

"D. Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution." (Ibid., p. 77 at pp. 88-93).

The "Great Debate" concluded on April 4, 1951, with the adoption by the Senate of S. Res. 99 by a vote of 69-21 (and, by a vote of 45-41, of a slightly different resolution which sought the concurrence of the House of Reprentatives, S. Con. Res. 18; Congressional Record, Vol. 97, pp. 3282-83, 3293-94). S. Res. 99, 82d Congress, approved the

President's designation of General Eisenhower as SACEUR and his action "in placing Armed Forces of the United States in Europe under his command" and, inter alia, resolved that:

> "6. it is the sense of the Senate that, in the interests of sound constitutional processes, and of national unity and understanding, congressional approval should be obtained of any policy requiring the assignment of American troops abroad when such assignment is in implementation of article 3 of the North Atlantic Treaty; and the Senate hereby approves the present plans of the President and the Joint Chiefs of Staff to send four additional divisions of ground forces to Western Europe, but it is the sense of the Senate that no ground troops in addition to such four divisions should be sent to Western Europe in implementation of article 3 of the North Atlantic Treaty without further congressional approval;" (Emphasis supplied).

The kindred formulation of paragraph 6 of S. Res. 99 with the compromise contained 6 years earlier in section 6 of the United Nations Participation Act of 1945 is striking. The joint committee had recommended on March 14, 1951, the text of S. Res. 99 which did not contain in paragraph 6 the final sense of the Senate clause commencing with the word "but" (S. Rept. No. 175, March 14, 1951, 82d Cong., 1st sess., p. 3). The joint committee report commented:

> "Paragraph 6 is limited in scope. It refers only to ground troops sent abroad for the purpose of implementing article 3 of the North Atlantic Treaty. It does not call for congressional approval to send naval or air forces abroad. It does not apply to American troops in occupied areas or to armed forces sent to Europe under article 5 of the North Atlantic Treaty. Nor is it concerned with armed forces which the President might send abroad under his constitutional powers as Commander-in-Chief of the Army and Navy.

"The term 'congressional approval' as used in paragraph 6 is subject to different interpretations. On the one hand, some members of the joint committee expressed the view that congressional approval could only be given by formal legislation. Others believed that both the letter and the spirit of paragraph 6 might be met, in certain circumstances, as a result of consultation by the administration with, and the approval of, the appropriate committees of the Congress. In any event, it should be noted that the resolution expresses the sense of the Senate that congressional approval should be given; it is not a legislative mandate.

* * *

"One of the most perplexing problems that the joint committee faced related to the constitutional authority of the President to send American ground forces abroad in time of peace to serve as part of an integrated defense force . . . .

"With the exact line of authority between the President and the Congress in doubt for the past 160 years, the committee did not endeavor to resolve this issue definitively at this time . . . .

"In considering the power of the President to send American armed forces abroad, the committee was aware that his constitutional authority to use our armed forces abroad would be the same whether applied to ground, air, or naval forces. It is also understood that General Eisenhower will command all units --land, air, or sea--within his jurisdiction. The committee was primarily concerned, however, with the policy with respect to the assignment of American ground forces to Europe because of the numbers of men involved and the concern on the part of some individuals that sending additional ground troops now might be but a first step in sending larger contingents to Europe." (Emphasis supplied; ibid., pp. 8, 18-19).

What was the net result of the "Great Debate" of 1951? According to the Foreign Affairs Division, Legislative Reference Service of the Library of Congress (1970 Revision of Background Information on the Use of United States Armed Forces in Foreign Countries, p. 22), it was "something of a draw":

> "Since the Troops-to-Europe resolution was adopted, the President has not raised the issue of further ground troops for Europe beyond the additional four divisions specified. There has thus been no direct test of whether the 'further congressional approval' specified in the resolution would in fact have been sought. The 'Great Debate' seems to have resulted in something of a draw between the President and the Congress --an occurrence itself which was unusual in a long period of generally declining congressional power on the issue vis-a-vis the President."

I should also add my personal observation that in retrospect the "Great Debate" appears to have been an academic exercise. Regardless of whether the President had the power, without Congressional assent, to deploy the armed forces to Europe, it is apparent that they could not have been effectively deployed for any substantial length of time without Congressional enactment of specific construction authorizations and appropriations for the facilities required by them in Europe.

The next major occasions for Congressional consideration of the war power issue were the enactments of the Formosa, Middle East, Cuban, and Gulf of Tonkin Resolutions. An apt summary of the position taken by the Congress as to the language

of these Resolutions may be found in the Report of the International Relations Committee on the Middle East Resolution (H. Rept. No. 2, 85th Cong., 1st sess., p. 7):

> "The division of that power as between the executive branch and the legislative branch is not pertinent here. As was stated in the committee report on the Formosa resolution:
>
> > "The committee considered the relation of the authority granted by the resolution and the powers assigned to the President by the Constitution. Its conclusion was that the resolution in this form, while making it clear that the people of the United States stand behind the President, does not enter the field of controversy as to the respective limitations of power in the executive and legislative branches. Acting together, there can be no doubt that all the constitutional powers necessary to meet the situation are present (H. Rept. No. 4, 84th Cong., 1st sess., p. 4).
>
> "This resolution does not detract from or enlarge the constitutional power and authority of the President of the United States as Commander in Chief, and the language used in the resolution does not do so.
>
> "Likewise, the resolution does not delegate or diminish in any way the power and authority of the Congress of the United States to declare war, and the language used in the resolution does not do so."

The "Great Debate" was then renewed this past decade as the scale of United States involvement in Indochina intensified. While much of the debate--both in the Congress and in other forums--focused on questions of policy, the Constitutional issues were also prominent. An extensive collection of articles and addresses on the subject is contained in the three volume series sponsored by the American Society of International Law,

entitled "The Vietnam War and International Law." Among those included are the Department of State's Memorandum of March 4, 1966 on the Legality of United States Participation in the Defense of Viet-Nam (Vol. I, pp. 583-603) and the May 1970 address by Mr. Justice Rehnquist-then Assistant Attorney General, Office of Legal Counsel, Department of Justice--on the Constitutional aspects of the Cambodian incursion of 1970. (Vol. III, pp. 163-174).

As the debate intensified, two actions were taken by the Congress in 1969. First, the Senate on June 25, 1969, adopted S. Res. 85, 91st Congress which resolved that:

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

In my view, the National Commitment Resolution is defective in several respects as a statement of law. First, it is clearly

inaccurate insofar as it implies that the President does not have independent authority under the Constitution to "use" the armed forces on foreign territory. Certainly, if our armed forces abroad are attacked, they may defend themselves in accordance with Presidential directives without awaiting adoption of a statute or concurrent resolution; similarly, no such Congressional action is required as a predicate to Presidential use of the armed forces on foreign territory if the United States itself is attacked. Second, it is undoubtedly within the President's authority to make commitments of future financial assistance, conditioned upon the subsequent availability of appropriations for the purpose. Third, it should be noted that while concurrent resolutions are indicative of Congressional views they are not the law of the land and cannot therefore confer upon the President any authority that he does not already have.

The second major Congressional action in this sphere was the enactment of the following prohibition in the Department of Defense Appropriation Act for fiscal year 1970 (P.L. 91-171, sec. 643):

> "In line with the expressed intention of the President of the United States, none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand."

This prohibition was re-enacted in the subsequent Defense Appropriation Acts for fiscal years 1971, 1972 and 1973 (P.L. 91-668, sec. 843; P.L. 92-204, sec. 742; and P.L. 92-570, sec. 741). It was replaced in the Department of Defense Appropriation Act, 1974 (P.L. 93-238, sec. 741) by the following prohibition:

> "None of the funds herein appropriated may be obligated or expended after August 15, 1973, to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia."

For enactments similar to this latter one, see also P.L. 93-50, sec. 307; P.L. 93-52, sec. 108; P.L. 93-126, sec. 13; P.L. 93-189, sec. 31; and P.L. 93-437, sec. 839.

No objection on Constitutional grounds was made by the President to this latter current series of prohibitions (cf Veto Message of June 27, 1973 on the Second Supplemental Appropriation Act of 1973, H. Doc. No. 93-125, 93d Cong., 1st sess.), although such objections were voiced to earlier proposed amendments aimed at reducing and terminating the U.S. presence in Indochina which had failed of adoption. A possible critical distinction between the White House position on those earlier riders and the ones which did become law is that the former preceded the January 27, 1973 Agreement on Ending the War and Restoring Peace in Vietnam and the subsequent withdrawal of American forces from the country.

On the other hand, the President had made no constitutional complaint in 1969 against the prohibition on the introduction of

ground combat troops into Laos or Thailand, and, as I recall, that amendment was a compromise text approved in advance by the White House. With due respect to the then White House Counsel and Attorney General whom I presume advised the President on that amendment, it was in my view unconstitutional. If it be assumed that our participation in the on-going hostilities at that time was lawful under United States law, the amendment was an impermissible attempt to control the tactical direction of the armed forces in conflict. By way of analogy, would anyone seriously contend that during World War II it would have been constitutionally valid to have prohibited the landing in North Africa or the deployment of troops to Australia?

Before turning to the War Powers Resolution, I should also like to call attention to section 847 of the Department of Defense Appropriation Act, 1975 (P.L. 93-437), which states as follows:

> "None of the funds appropriated by this Act shall be available for use after May 31, 1975, to support United States military forces stationed or otherwise assigned to duty outside the United States in any number greater than 452,500, not including military personnel assigned to duty aboard United States naval vessels."

One will look in vain for Constitutional objections, notwithstanding the "substantial brief" --to use Secretary Acheson's

characterization--submitted by the Truman Administration during the "Great Debate" of 1951, in the legislative history of this legislative ceiling under which the Department of Defense has now been operating for over three months now. (S. Rept. No. 93-1104, August 16, 1974, of the Senate Appropriations Committee, 93d Cong., 2d sess., pp. 11-15.)

I think it also noteworthy that when President Ford approved the Department of Defense Appropriation Act, 1975, he declared:

> ". . .Thus, as I sign such a bill for the first time as President, I want to renew my pledge to build a new partnership between the executive and legislative branches of our Government, a partnership based on close consultation, compromise of differences, and a high regard for the constitutional duties and powers of both branches to work for the common good and security of our Nation." (Emphasis supplied; Weekly Compilation of President Documents, Vol. 10, No. 41, p, 1250.)

Coming now to the War Powers Resolution, certain features thereof warrant highlighting for the purposes of this hearing. First, it does not deal with the subject matter of the "Great Debate" of 1951, i.e., the deployment of troops in support of the broad purposes of United States foreign policy; rather it is directed at issues left unresolved during the ratification of the North Atlantic and other defense treaties, namely, the introduction of the armed forces into hostilities or into situations where imminent involvement into hostilities is clearly

indicated. But even in this respect, the Resolution reiterates the earlier compromises that "Nothing in this joint resolution--is intended to alter the constitutional authority of the Congress or of the President . . ." (Sec. 8(d)). Second, although section 2(c) seemingly is a comprehensive definition of the President's constitutional authority, the legislative history of the Resolution demonstrates that it is not so intended. Third, the basic structure of the Resolution is a reporting requirement designed to assure that the Congress has an opportunity to participate in a collective judgment with respect to the use of the war power. Fourth, the Resolution resolves the dispute which flowered during the Indochina War as to whether the Congress could validly authorize United States involvement in hostilities without a declaration of war (Secs. 5(b) and 8(a)). Fifth, and of minor moment, the Resolution contradicts the earlier National Commitment Resolution (Sec. 8(a)(2)). As for the constitutionality of the Resolution, I refer the Committee to President Nixon's Veto Message cited previously in this Statement.

As the Committee knows, there have been 4 reports to the Congress under the War Powers Resolution since its enactment. They are dated April 4, 1975, April 12, 1975, April 30, 1975, and May 15, 1975.

The first concerned the evacuation of refugees from Danang and other seaports in South Vietnam to safer areas in South Vietnam. As indicated in that report, the circumstances of the incident involved section 4(a)(2) of the Resolution and the action undertaken by our personnel was under the combined authority of the President's constitutional powers and pursuant to the Foreign Assistance Act of 1961, as amended.

The succeeding three events involved solely the President's constitutional powers. The April 12th action was the evacuation of personnel from Cambodia; the April 30th action was the evacuation of personnel from Vietnam; and the May 15th incident was the recapture of the Mayaguez and the rescue of its crew.

A number of legal questions have been raised concerning these 4 reports. These questions have been addressed in letters jointly signed by the Legal Adviser of the Department of State and the former General Counsel of the Department of Defense to the Chairman Zablocki of the House Subcommittee on International Security and Scientific Affairs and Senator Javits. Rather than unduly lengthen my Statement by repeating their contents, I am appending them to the Statement for incorporation in the Record of these hearings.

Mr. Chairman, these remarks conclude my prepared testimony. Mr. Abramowitz is with me to provide answers to such factual questions as you may have concerning these War Power Resolution reports.

DEPARTMENT OF STATE

Washington, D.C. 20520

3 June 1975

The Honorable Clement J. Zablocki
Chairman, Subcommittee on International
Security and Scientific Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

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

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

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

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

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

Subject to the foregoing caveats, we turn to our working definitions of these terms. As applied in the first three war powers reports, "hostilities" was used to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and "imminent hostilities" was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.

You also ask which of the first three war powers reports referred to situations involving hostilities. In our view, the April 30, 1975 report refers to a situation where at least one incident of hostilities existed (see point 5 below); and in the Cambodia evacuation referred to in the April 12, 1975 report, an imminent

involvement in hostilities may have existed (as to the factors that would enable one to reach a conclusion on whether hostilities did in fact exist, see point 4 below). The April 4, 1975 report concerning the Danang evacuation, however, does not refer to a situation where hostilities existed.

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

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

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

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

3. Your letter refers to the President's authority as Commander-in-Chief. The three war powers reports you referred to all cite two sources of authority: Article II, Section 1 of the Constitution

which provides that the "executive Power shall be vested" in the President, and the Commander-in-Chief clause (Article II, Section 2).

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

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

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

5. Your letter notes that the April 30, 1975 report relating to the Saigon evacuation indicates (a) that U.S. fighter aircraft "suppressed North Vietnamese anti-aircraft artillery firing on evacuation helicopters," and (b) that U.S. ground forces returned fire during the course of the evacuation. The first situation on its face constituted "hostilities."

The evidence concerning the second situation is inconclusive as to whether the fire was of sufficient intensity so as to be part of a purposeful confrontation by opposing military forces; but in view of the actions of the U.S. fighter aircraft, a characterization of the second situation may be academic. In any event, as discussed under point number 2 above, there were other circumstances present in the evacuation operation which precluded a conclusion that section 4(a)(1) alone, and no other provision of section 4, pertained to the operation.

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

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

8. Your letter notes that the first three war powers reports contain the phrase "taking note of . . . ." You inquire whether this suggests anything other than a

full binding legal responsibility upon the President. This phrase connotes an acknowledgement that the report is being filed in accordance with section 4 of the War Powers Resolution. No constitutional challenge to the appropriateness of the report called for by section 4 was intended. As you are aware, President Nixon in his veto message of October 24, 1973 indicated that portions of the War Powers Resolution, including sections 5(b) and 5(c), are unconstitutional. No such position was expressed as to section 4.

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

Sincerely,

Monroe Leigh
Legal Adviser
Department of State

Martin R. Hoffmann
General Counsel
Department of Defense

Enclosure:

Memorandum.

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

1. The Constitutional Authority of the President

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

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

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

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

* * *

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

The Supreme Court in In Re Neagle, 135 U.S. 1, 63-64 (1889), noted that the President had certain exclusive "rights, duties and obligations growing out of the Constitution itself" which included an implied obligation to protect U.S. citizens abroad. The Court then referred to a military action to protect one Martin Koszta, a foreign national who had merely indicated his intent to become a naturalized U.S. citizen:

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

See also the Slaughterhouse Cases, 83 U.S. 79 (1872) where the Supreme Court said that one of the privileges and immunities of a U.S. citizen "is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."

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

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

This remains the position of the executive branch.

2. Effect of Statutes Restricting Use of Funds in Indochina

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

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

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

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

Representative Ford then asked if it was correct "that the President as Commander in Chief has certain constitutional military responsibilities" which were beyond the scope of the funds limitation provision. Congressman Addabbo responded, "His rights under the Constitution as Commander in Chief, yes". 119 Cong. Rec. 21313 (June 26, 1973).

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

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

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

One might ask, if Presidential authority for evacuating U.S. citizens is so clear, why was the Congress asked to enact legislation clarifying that authority for the recent Indochina evacuations? A major consideration involved the national concern and controversy over the United States' overall role in Indochina, and the desire that any evacuation be supported by Congress as well as by the constitutional authority of the President. The protection of American citizens, the

executive branch believed, should not be subject to potential disputes over interpretation of the Constitution or of the various statutes relating to Indochina.

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

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

APPENDIX A

Instances where U.S. Armed Forces Have Been Directed to Protect U.S. Citizens Without Congressional Authorization

1. Following the burning of the American and British legations in Japan in 1863, the U.S. minister in Japan was instructed to direct the Commander of the USS Wyoming to use "all necessary force" to insure the safety of Americans residing in Japan.

2. In 1868 a detachment of Japanese troops assaulted foreign residents including some Americans in the city of Hiogo. Naval forces of the United States and other Western powers made a joint landing to protect the foreign settlement.

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

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

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

6. When local disturbances broke out in Nicaragua in 1926, the government of that country requested that American forces undertake to protect the lives and property of Americans and other foreigners in Nicaragua. A U.S. naval commander was then instructed to establish neutral zones in Nicaragua to protect "lives and property of Americans and foreigners." In May of that year, a force of marines was landed for the purpose of establishing a neutral zone. Additional neutral zones were established later in the year. The American military presence in Nicaragua continued until 1933.

7. In 1964, more than 1000 civilians of 18 nationalities, including Americans, were held as hostages by Congolese rebels near Stanleyville. With the authorization of the Government of the Congo, U.S. military transport planes landed Belgian paratroops in Stanleyville who effected a rescue during a four-day joint operation. Some of the foreign hostages had been killed by the rebels, including three Americans.

8. In 1965, President Johnson ordered U.S. armed forces to land in the Dominican Republic to evacuate Americans and foreign nationals. The U.S. Embassy in Santo Domingo had reported that the Dominican Government was unable to guarantee the safety of Americans and other foreigners during the insurrection then taking place. Between April 28 and May 9, 1975, 2711 Americans and 1726 other foreign nationals were evacuated.

For additional examples, see "Authority of the President to Repel the Attack in Korea", 23 Department of State Bulletin, 173 (1950); Memorandum of the Solicitor for the Department of State, October 5, 1912, "Right to Protect Citizens in Foreign Countries by Landing Forces", (2d ed., 1929); "Power of the President to Send the Armed Forces Outside the United States", Committee print prepared for the Joint Committee made up of the Committee on Foreign Relations and the Committee on Armed Services of the Senate, February 28, 1951, 82 Congress, 1st session.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

23 JUN 1975

Honorable Jacob K. Javits
United States Senate
Washington, D.C. 20510

Dear Senator Javits:

This letter responds to your notes of June 4, 1975 to Secretary Schlesinger and myself forwarding a copy of your recent Statement before Congressman Zablocki's Subcommittee of the House International Relations Committee with respect to the functioning of the War Powers Resolution. We welcome your invitation to comment on your testimony.

Many of the issues raised by you were addressed by me and by Mr. Monroe Leigh, the State Department Legal Adviser, in our own testimony before that Subcommittee. Our testimony was also supplemented by a subsequent joint letter to Congressman Zablocki, responding to a number of questions asked by him of us at the conclusion of our testimony. A copy of that joint letter is enclosed for your convenience.

As you note in your Statement, a major portion of your remarks is devoted to the problem of consultation. In large measure, you criticize the substance of the consultations as well as the procedure followed. Not having been present during those consultations, it would be inappropriate for me to comment on the adequacy thereof.

With respect to the procedures for consultation, it is my view that the Congressional decision not to specify such procedures in section 3 of the War Powers Resolution was eminently sound. It correctly recognizes that circumstances may be such as to preclude the possibility of holding the formal meetings of the Foreign Relations and International Relations Committees which your statement contemplates.

Insofar as concerns the format and mode of delivery of the four initial reports under the War Powers Resolution, I cannot agree

with your conclusion that they are "questionable in law". In this respect, your Statement first complains that the reports are cast in the form of a personal letter to the Speaker of the House and the President Pro Tempore of the Senate. As you know, however, section 4(a) of the War Powers Resolution specifically requires that the reports be submitted to the Speaker and the President Pro Tempore. Further, these four initial reports follow the customary format of other executive communications to the Speaker and the President Pro Tempore; see, for example, House Document No. 94-142, printing a letter dated May 9, 1975 from the President to the Speaker, complying with the notification requirement of section 652 of the Foreign Assistance Act of 1961, as amended. As to the objection that reports were delivered to the residences of the Speaker and the President Pro Tempore, rather than to their official offices at the Capitol, it should be observed that (1) the timing for submittal of a report may be such that the expiration of the statutory 48-hour period occurs at a time of day or night when the offices at the Capitol of these officials are closed, and (2) the full 48 hours (or most of that period) may be required for the collection of available information to be included in the report and for the preparation of the report. In this connection, you will recall that, in the case of the first report, the 48-hour period began to run at 0400 a.m. EDT on April 3, 1975; the President was in California; the report was telegraphed at 2149 p.m. EDT on April 4, 1975; and, further, that the Congress was not in session.

Furthermore, a record copy of each notification was provided to each House of the Congress as a formal matter. See the following pages in the Congressional Record (daily ed.) for acknowledgment of the receipt of these formal notifications: S5279-S5280 and H2465, April 7, 1975; S5872 and H2706-H2707, April 14, 1975; S7297 and H3592, May 1, 1975; S8268 and H4080-H4081, May 15, 1975.

As to your observation that the reports were "brief to the point of being in minimal compliance with the content requirements set forth in the law", I can only note again that circumstances may be such that complete information is not available within 48 hours. You will no doubt recall in this connection the uncertainty which persisted for several days as to the extent of the casualties incurred in connection with the Mayaguez. Moreover, I cannot accept the inference made

by you that these reports "do not suggest a readiness within the Executive Branch to provide the full and timely disclosure of relevant facts and judgments . . . ." It is my understanding that we have honored every request from Congressional committees for amplifying information.

On the afternoon of May 14, 1975, prior to the initiation of the assault on Koah Tang, the Assistant Secretary of Defense (Legislative Affairs) and a representative of the Chairman, Joint Chiefs of Staff, briefed the Chairmen of the Senate and House Armed Services Committees, as well as the Senate Foreign Relations Committee in closed session. I understand you participated in that briefing session. On May 15, 1975, when the President made his report under the War Powers Resolution, these men briefed the House International Relations Committee and the House Defense Appropriations Subcommittee.

I am enclosing a copy of a detailed chronology of the Mayaguez incident. With respect to the factual allegations contained in your testimony on the Mayaguez, I respectfully submit that many of these allegations are in error. In particular,

- The amphibious assault by the Marines was made on the right island. Koah Tang was within weapons range of Mayaguez and would have required neutralization by assault or otherwise even if we were convinced that the crew was not on the island. In fact, we believed that it was likely that the crew was on the ship or the island or the mainland or parts of all three places.

- The assault on Koah Tang began not 20 minutes after the release of the crew was made known, as the testimony suggests, but with the arrival of assault helicopters in the airspace off the shore of Koah Tang at about 7:09 p.m. EDT, 14 May, long before the return of the crew to US control which took place at about 11:15 p.m. on that date.

- The insertion of the first assault wave was completed at 8:15 p.m. EDT, 14 May, while the boat containing the Mayaguez crew was not spotted until 10:23 p.m. As a practical matter, when a helicopter crashed on the beach at Koah Tang at 7:45 p.m., we were irrevocably committed.

- US losses were 18 KIA/MIA.

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- US losses were 18 KIA/MIA.

- The attack missions against the mainland were flown against a petroleum storage facility, not against a refinery. Indeed there was no refinery. The Cambodian aircraft struck were attacked in the firm belief, both then and now, that some or all of them were operational. These operations were intended to ensure that Koah Tang Island was not reinforced during the operation to rescue the crew, and during the subsequent withdrawal of American Mariner from the island.

- There was no standard warning being given ships as to dangers in this area which was not also given to the Mayaguez.

I trust that the foregoing comments, and the enclosures, are responsive to the concerns you have expressed. We are, of course, gratified by your assessment that the procedures established in the law worked reasonably well in these instances.

Sincerely yours,

Signed Martin R. Hoffmann

Martin R. Hoffmann

Enclosures
as

File War Powers

For Filing

THE WHITE HOUSE

WASHINGTON

August 5, 1976

MEMORANDUM FOR: PHIL BUCHEN

FROM: JACK MARSH

Please note the attached. Monroe Leigh gave me a call and indicated that they had had some inquires from Senator Javits' Office about the observance of the War Powers legislation in reference to the Lebanese evacuations.

Monroe was not aware of the notifications of the House and Senate Leadership which we had made and I offered to send him copies of our reports on the same.

Many thanks.

August 5, 1976

MEMORANDUM FOR: MONROE LEIGH

FROM: JACK MARSH

Attached are copies of the reports on the Congressional contacts we made in reference to both of the Lebanese evacuations.

As you know, we keep a very close hold on these, and I would appreciate your maintaining their confidentiality.

Many thanks.

cc: Phil Buchen

JOM/dl

THE WHITE HOUSE
WASHINGTON

Ken:
Please prepare
a memo for
me to send on.
P.

THE WHITE HOUSE

WASHINGTON

War Powers Resol.

August 18, 1976

MEMORANDUM FOR: JACK MARSH

FROM: PHIL BUCHEN P.

SUBJECT: War Powers Resolution

This is in response to your memorandum of August 3, requesting my views on the advisability of seeking a court determination regarding the constitutionality of the War Powers Resolution. For the reasons discussed below, I would not encourage the recommendation advanced by Senator Goldwater for such a determination.

BACKGROUND

The War Powers Resolution [Pub. L. 93-148;H.J.Res. 542, 93d Cong., 2d Sess. (1973)] was enacted by Congress on November 7, 1973, over the veto of former President Nixon. Never before had Congress undertaken to codify or define rules applicable to the introduction of United States armed forces into war or threatened war.

The announced purpose of the resolution, set forth in Sec. 2(a), is:

* * *

". . . to insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."

* * *

Section 2(c) expresses a congressional understanding that the "constitutional powers of the President as Commander-in-Chief" to commit military forces exist only when: (1) Congress has declared war, (2) legislated specific authority, or (3) the United States is under attack.

Section 3 provides that the President will consult with Congress "in every possible instance" before each use of armed forces in hostilities or threatened hostilities and regularly thereafter, until United States forces are disengaged or removed from such situations. The applicability of the resolution is initiated by Sec. 4, which requires that, absent a declaration of war, whenever United States armed forces are introduced (1) into hostilities or imminent hostilities; (2) into the territory, air space, or waters of a foreign nation, when equipped for combat (other than solely for the supply, replacement, repair or training of forces); or (3) in numbers which substantially enlarge United States forces equipped for combat already located in a foreign nation, the President must report it in writing to Congress within 48 hours and periodically afterwards. It is significant that situations (2) and (3) are <u>not</u> tied to the actual outbreak of or imminent involvement in hostilities, but restrict the mere deployment of combat forces into another country, whether or not hostilities might be anticipated. Even the strengthening of units already located in foreign countries is similarly restricted.

Once the reporting provision has been triggered, Sec. 5 takes effect. This section mandates that no later than 60 days after a report is required, "the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), "unless Congress grants specific authority for the operation to continue or "is physically unable to meet as a result of an armed attack upon the United States." The 60-day period can be extended for an additional 30 days if the President determines and certifies to Congress that the safety of United States troops demands their continued use in the course of bringing about their prompt removal.

DISCUSSION

Senator Goldwater and others have argued that the War Powers Resolution represents a legislative encroachment upon the President's exclusive constitutional province in violation of the Commander-in-Chief clause [Art. II, Sec. 2, cl. 1]. It is not clear whether their argument relates only to the effects of Section 5 or whether it also relates to the requirements that the President must consult with Congress and must report concerning the use of armed forces when there has been no declaration of war.

As you know, on a number of occasions, most notably the Mayaguez incident, President Ford has directed military operations which came within the purview of the War Powers Resolution. A practice has developed in these instances which is neither cumbersome nor unseemly. The practice calls for the President to provide the Congress with notice of troop movement and to consult with members of the Congressional leadership on the general nature of the problem and his intended solution. Although noting the War Powers Resolution, the President has, for the record, consistently relied solely on his constitutional powers to effect these actions (see attachment).

Therefore, I see no point in trying to challenge the consultation and notification procedure of the resolution. However, the more serious objection is Section 5 which requires the President to terminate military action after a specified period unless the Congress grants specific authority to continue the operation. It is possible to imagine a situation where the President would want to continue despite the refusal of Congress to approve his operation, but until we arrive at that situation, I do not see that there would be a case or controversy for submission to a court. Also, the initiative to bring a court action would probably have to come from Members of Congress who would seek to stop the continuation of the operation if it went beyond the period specified in the statute. At that point, the Department of Justice would enter the case for the President, and I see no reason why private funds would be required to defend the case against the President.

I fear that Senator Goldwater has not realized that it is impossible to go at will into court for the purpose of challenging a particular statute. A federal court will only hear a "case or controversy" and will not decide in the abstract on the validity or interpretation of a statute. As you recall, we have wanted to challenge statutes allowing for Congressional "veto" of Executive actions, but we are not able to initiate a suit and must await the occasion of an actual veto that we defy and then are challenged for defying it. Therefore, I would discourage the Senator from the fund raising effort which he proposes in his letter to Bill Whyte.

THE WHITE HOUSE

WASHINGTON

August 10, 1976

MEMORANDUM FOR: JACK MARSH

FROM: PHIL BUCHEN

SUBJECT: War Powers Resolution

This is in response to your memorandum of August 3, requesting my views on the advisability of seeking a court determination regarding the constitutionality of the War Powers Resolution. For the reasons discussed below, I would not encourage the recommendation advanced by Senator Goldwater for such a determination.

Background

The War Powers Resolution [Pub. L. 93-148; H. J. Res. 542, 93d Cong., 2d Sess. (1973)] was enacted by Congress on November 7, 1973, over the veto of former President Nixon. Never before had Congress undertaken to codify or define rules applicable to the introduction of United States armed forces into war or threatened war.

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Discussion

Senator Goldwater and others have argued that the War Powers Resolution represents a legislative encroachment upon the President's exclusive constitutional province in violation of the Commander-in-Chief clause [Art. II, Sec. 2, cl. 1]. ~~Although I share the concerns of Senator Goldwater and others in this regard, I do not believe that any gain would be realized in seeking a confrontation with the Congress on this issue at any time in the foreseeable future. My views in this regard have been reinforced by my working experiences with the Resolution.~~

Surprisingly little discussion of the Commander-in-Chief clause is found in the Convention or in the ratifying debates. From the evidence available, it appears that the Framers vested the duty in the President

", . . . to be Commander in Chief of the Army and Navy of the United States . . .", because experience in the Continental Congress had disclosed the inexpediency of vesting command in a group and because the lesson of English history was that danger lurked in vesting command in a person separate from the responsible political leaders [May, "The President Shall Be Commander in Chief," in E. May (ed.), The Ultimate Decision -- The President as Commander in Chief (New York: 1960)].

The purely military aspects of the Commander-in-Chiefship were those which were originally stressed. Hamilton said the office "would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy." [The Federalist No. 69 (Modern Library ed. 1937), 448]

Story wrote in his Commentaries:

* * *

> "The propriety of admitting the president to be commander in chief, so far as to give orders, and have a general superintendence, was admitted. But it was urged, that it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. The consent of both houses of Congress ought, therefore, to be required, before he should take the actual command. The answer then given was, that though the president might, there was no necessity that he should, take the command in person; and there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents." [J. Story, Commentaries on the Constitution of the United States (Boston: 1833), §1486.]

* * *

In 1850, Chief Justice Taney, for the Court, said:

* * *

> "His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military

> forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it ot the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power."
> [Fleming v. Page, 9 How. (50 U.S.) 603, 615, 618 (1850)]

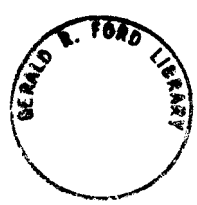
* * *

The basis for a broader conception of the power was laid in certain early acts of Congress authorizing the President to employ military force in the execution of the law. [1 Stat. 424 (1795): 2 Stat. 443 (1807), now 10 U.S.C. §§331-334.] Later, Lincoln advanced the claim still further by asserting that the "war power" was his for the purpose of suppressing rebellion, and in the Prize Cases [2 Bl. (67 U.S.) 635 (1863)] of 1863, a divided Supreme Court sustained this theory.

A broad view of the President's power as Commander in Chief continued to develop during World Wars I and II. A succession of presidents claimed that the Commander-in-Chiefship carried with it independent powers to utilize military forces not only to protect the nation from attack but to further the nation's interests across a wide spectrum of activity, without significant Congressional limitation.

During World War II, President Roosevelt claimed the power authorized him to impose mandatory price controls, to create new government agencies, to evacuate Japanese from the West Coast and to create the National War Labor Board prohibiting all labor disputes.

During the post-war years, there was some diminution of the power asserted under the Commander-in-Chief clause. However, this was largely a reaction against the wartime exercise of power by Presidents Roosevelt and Truman and this fact was recognized by the Supreme Court when it struck down the President's action in seizing the steel industry while it was struck during the Korean War [Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)].



Despite this temporary setback, the trend of growth in the war power was not reversed. President Truman did not seek congressional authorization before sending troops to Korea and subsequent presidents similarly acted on their own in putting troops into Lebanon and the Dominican Republic as well as most notably into Indochina. Eventually, however, public opposition to the Vietnam War precipitated a constitutional debate as to the appropriate scope of Presidential power in this area, a debate which went on inconclusively between Congress and the Executive and one which the courts were content generally to avoid. It was against this backdrop that the War Powers Resolution was enacted.

The central observation to be made regarding the War Powers Resolution is that it has established certain limited precedents of practice and policy rather than constitutional rules. At this particular time in our history, it is a realistic solution to a fundamental conflict between the Legislative and Executive Branches and should not be assaulted frontally.

On a number of occasions, most notably the Mayaguez incident, President Ford has directed military operations which came within the purview of the War Powers Resolution. A practice has developed in these instances which is neither cumbersome nor unseemly. The practice calls for the President to provide the Congress with notice of troop movement and to consult with members of the Congressional leadership on the general nature of the problem and his intended solution. Although noting the War Powers Resolution the President has, for the record, consistently relied solely on his constitutional powers to effect these actions (see attachment).

Conclusion

In view of the fact that the War Powers Resolution has led to Presidential practices and policies which are both workable and dignified, there would appear to be no pressing need to disturb them. Additionally, the President always retains the flexibility to take a firmer position on the subject should that ever become a necessity. Finally, this issue raises the kind of fundamental rub between the Legislative and Executive Branches which best lends itself to solutions grounded in comity. For these reasons, I cannot support the recommendation of Senator Goldwater to seek a court challenge to the War Powers Resolution.

#

THE WHITE HOUSE

WASHINGTON

August 3, 1976

MEMORANDUM FOR: PHIL BUCHEN

FROM: JACK MARSH

Please note the attached letter to Bill Whyte, a copy of which was sent to the White House.

The President has raised the question as to whether the course suggested by Senator Goldwater should be pursued on getting a court determination of the War Powers Act.

I would appreciate your views.

Many thanks.

cc: Dick Cheney

BARRY GOLDWATER
ARIZONA

United States Senate

WASHINGTON, D.C. 20510

COMMITTEES:
AERONAUTICAL AND SPACE SCIENCES
ARMED SERVICES
PREPAREDNESS INVESTIGATING SUBCOMMITTEE
TACTICAL AIR POWER SUBCOMMITTEE
INTELLIGENCE SUBCOMMITTEE
MILITARY CONSTRUCTION SUBCOMMITTEE
RESEARCH AND DEVELOPMENT SUBCOMMITTEE

July 21, 1976

Mr. William Whyte
U. S. Steel
1625 K Street, Northwest
Washington, D. C. 20006

Dear Bill:

Ever since the Congress foolishly passed the War Powers Act about two years ago, I had been discussing the desirability and possibility of bringing a suit so that an ultimate decision could be made by the Supreme Court testing the constitutionality of this measure.

In my humble opinion, it is unconstitutional, but far beyond that, it makes the Congress, all 535 members, the group which will determine foreign policy, the group which will determine if, when and with whom we go to war and, to be honest with you, it scares the daylights out of me.

Now, my question to you is that if we can reach a determination as to how much this course of action might cost, and I'm thinking of at least a quarter of a million dollars, do you think we can put enough men together to raise the money for that purpose? I will be very willing to help in any way that I can, but let me suggest, Bill, that you first discuss this with the President. I have very quickly brushed it by him, but I have a feeling that he would be very desirous of having the test made. I know that Nixon had that feeling and I haven't spoken with a former Secretary of State yet who doesn't feel that this legislation can be destructively dangerous to the future of our country. I would appreciate hearing from you. I am writing no one else until the two of us can either agree or disagree.

Sincerely,

Barry Goldwater

THE WHITE HOUSE

WASHINGTON

April 30, 1975

Dear Mr. Speaker:

On April 4, 1975, I reported that U.S. naval vessels had been ordered to participate in an international humanitarian relief effort to transport refugees and U.S. nationals to safety from Danang and other seaports in South Vietnam. This effort was undertaken in response to urgent appeals from the Government of South Vietnam and in recognition of the large-scale violations by the North Vietnamese of the Agreement Ending the War and Restoring the Peace in Vietnam.

In the days and weeks that followed, the massive North Vietnamese attacks continued. As the forces of the Government of South Vietnam were pushed further back toward Saigon, we began a progressive withdrawal of U.S. citizens and their dependents in South Vietnam, together with foreign nationals whose lives were in jeopardy.

On April 28, the defensive lines to the northwest and south of Saigon were breached. Tan Son Nhut Airfield and Saigon came under increased rocket attack and for the first time received artillery fire. NVA forces were approaching within mortar and anti-aircraft missile range. The situation at Tan Son Nhut Airfield deteriorated to the extent that it became unusable. Crowd control on the airfield was breaking down and the collapse of the Government forces within Saigon appeared imminent. The situation presented a direct and imminent threat to the remaining U.S. citizens and their dependents in and around Saigon.

On the recommendation of the American Ambassador there, I ordered U.S. military forces to proceed by means of rotary wing aircraft with an emergency final evacuation out of consideration for the safety of U.S. citizens.

In accordance with my desire to keep the Congress fully informed on this matter, and taking note of the provision of section 4 of the War Powers Resolution (Public Law 93-148), I wish to report to you that at about 1:00 A.M. EDT, April 29, 1975, U.S. forces entered South Vietnam airspace.

A force of 70 evacuation helicopters and 865 Marines evacuated about 1400 U.S. citizens, together with approximately 5500 third country nationals and South Vietnamese, from landing zones in the vicinity of the U.S. Embassy, Saigon, and the Defense Attache Office at Tan Son Nhut Airfield. The last elements of the ground security force departed Saigon at 7:46 P.M. EDT April 29, 1975. Two crew members of a Navy search and rescue helicopter are missing at sea. There are no other known U.S. casualties from this operation, although two U.S. Marines on regular duty in the compound of the Defense Attache Office at Tan Son Nhut Airfield had been killed on the afternoon (EDT) of April 28, 1975, by rocket attacks into a refugee staging area. U.S. fighter aircraft provided protective air cover for this operation, and for the withdrawal by water of a few Americans from Can Tho, and in one instance suppressed North Vietnamese anti-aircraft artillery firing upon evacuation helicopters as they departed. The ground security forces on occasion returned fire during the course of the evacuation operation.

The operation was ordered and conducted pursuant to the President's Constitutional executive power and his authority as Commander-in-Chief of U.S. Armed Forces.

The United States Armed Forces performed a very difficult mission most successfully. Their exemplary courage and discipline are deserving of the nation's highest gratitude.

Sincerely,

GERALD R. FORD

The Honorable
The Speaker
United States House of Representatives
Washington, D. C. 20515