100TH CONGRESS
2D SESSION

S. J. RES. 323

Amending the War Powers Resolution to provide expedited procedures for legislation requiring the disengagement of United States Armed Forces involved in hostilities or providing specific authorization for their continued engagement in such hostilities, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 19 (legislative day, MAY 18), 1988

Mr. BYRD (for himself, Mr. NUNN, Mr. WARNER, and Mr. MITCHELL) introduced the following joint resolution; which was read twice and referred to the Committee on Foreign Relations

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JOINT RESOLUTION

Amending the War Powers Resolution to provide expedited procedures for legislation requiring the disengagement of United States Armed Forces involved in hostilities or providing specific authorization for their continued engagement in such hostilities, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This joint resolution may be referred to as the "War Powers Resolution Amendments of 1988".

SEC. 2. REPEAL.

Section 2(c) of the War Powers Resolution (50 U.S.C. 1541(c); Public Law 93–148), relating to the exercise of war powers by the President under the Constitution, is repealed.

SEC. 3. PERMANENT CONSULTATIVE GROUP.

Section 3 of the War Powers Resolution (50 U.S.C. 1542) is amended—

(1) by inserting "(a)" after "SEC. 3."; and

(2) by adding at the end thereof the following new subsections:

"(b)(1)(A) Except as provided in paragraph (2), in every instance in which consultation is provided under subsection (a), the President shall consult with—

"(i) the Speaker of the House of Representatives and the President pro tempore of the Senate; and

"(ii) the Majority Leader and the Minority Leader of the House of Representatives and the Majority Leader and the Minority Leader of the Senate.

"(B) In order to ensure adequate consultation on vital national security issues. the President and the Members of Congress listed in subparagraph (A) shall establish a schedule of regular meetings of those Members with the President.

"(2) Whenever a majority of the Members listed in paragraph (1)(A) so request. the President shall consult with the permanent consultative group established under subsection (c) unless the President determines that limiting consultation

to the Members listed in paragraph (1)(A) is essential to meet extraordinary circumstances affecting the most vital security interests of the United States.

"(c)(1) There is established within the Congress a permanent consultative group composed of—

"(A) the Speaker of the House of Representatives and the President pro tempore of the Senate;

"(B) the Majority Leader and the Minority Leader of the House of Representatives and the Majority Leader and the Minority Leader of the Senate;

"(C) the chairman and ranking minority member of each of the following committees of the House of Representatives:

"(i) the Committee on Foreign Affairs;

"(ii) the Committee on Armed Services; and

"(iii) the Permanent Select Committee on Intelligence; and

"(D) the chairman and ranking minority member of each of the following committees of the Senate:

"(i) the Committee on Foreign Relations;

"(ii) the Committee on Armed Services; and

"(iii) the Select Committee on Intelligence.

"(2) During odd-numbered Congresses, the Speaker of the House of Representatives shall serve as Chairman of the permanent consultative group and the Majority Leader of the

Senate shall serve as Vice Chairman. During even-numbered Congresses, the Majority Leader of the Senate shall serve as Chairman and the Speaker of the House of Representatives shall serve as Vice Chairman.

"(d)(1)(A) In addition to the consultations provided for in subsection (b)(2), the permanent consultative group shall hold such meetings as may be necessary to carry out its responsibilities under section 5(b) whenever called by the Chairman or, in his absence, the Vice Chairman or, in accordance with subparagraph (B), a majority of the membership of the permanent consultative group.

"(B)(i) If a majority of the membership of the permanent consultative group desires the Chairman or, in his absence, the Vice Chairman to call a meeting of the group, such members may file with the Clerk of the House of Representatives and the Secretary of the Senate or their designees a written petition, signed by a majority of the membership of such group, requesting the calling of such meeting, and the Clerk and the Secretary shall make every effort to notify the Chairman or, in his absence, the Vice Chairman of that request.

"(ii) If, within 3 calendar days after the filing of the petition, the Chairman or, in his absence, the Vice Chairman does not call the requested meeting, to be held within 6 calendar days after the filing of the petition, a majority of the membership of the group may file with the Clerk of the

House of Representatives and the Secretary of the Senate, or their designees, a written notice of the date, hour, and location of that meeting, and the Clerk and the Secretary shall notify all members of the group from their respective Houses of Congress that such meeting will be held and shall inform them of its date, hour, and location. The group shall meet on that date and hour and at that location.

"(iii) If both the Chairman and the Vice Chairman are not in attendance at the requested meeting, then the attending ranking Member of the group from the same House of Congress as the Chairman shall preside at that meeting.

"(2) For purposes of section 5(b), a majority of the members of the permanent consultative group shall constitute a quorum.".

SEC. 4. CONGRESSIONAL ACTION; JUDICIAL REVIEW.

(a) IN GENERAL.—Section 5 of the War Powers Resolution (50 U.S.C. 1544) is amended by striking out subsections (b) and (c) and inserting in lieu thereof the following:

"(b)(1) Whenever the United States Armed Forces are engaged in hostilities or other situations described in a report submitted under section 4(a)(1) (or for which such a report was deemed under paragraph (3) to be required to be submitted) outside the United States, its possessions, and territories without a declaration of war or specific statutory authorization, it shall be in order in the Senate or the House of Repre-

sentatives to consider, in accordance with section 7, a joint resolution described in paragraph (2).

"(2) A joint resolution referred to in paragraph (1) is a joint resolution—

"(A) which is introduced in a House of Congress by the Chairman or Vice Chairman of the permanent consultative group described in section 3, after approval of the group by a recorded, affirmative vote of a majority of those voting, a quorum being present, or, if the Chairman or Vice Chairman is not in the majority, then by a Member of the respective House designated by the permanent consultative group; and

"(B) which either—

"(i) requires the President to disengage such forces from such hostilities or to remove them from such situations, as the case may be, or

"(ii) provides specific authorization for the continued engagement of such forces in such hostilities or for the continued use of such forces in such situations, as the case may be.

"(3) For purposes of this subsection, a report described in section 4(a)(1) shall be deemed to be required to be submitted if the permanent consultative group, by a majority of those voting, a quorum being present, so finds. The perma-

nent consultative group shall cause such finding to be published in the Congressional Record.

"(4) Nothing in this subsection alters or modifies the right of any Member of Congress to introduce a joint resolution or bill in a House of Congress which—

"(A) would require that the President disengage such forces from such hostilities or remove them from such situations, as the case may be; or

"(B) would provide specific authorization for the continued engagement of such forces in such hostilities or for the continued use of such forces in such situations, as the case may be.

"(c) Any Member of Congress may bring an action in the United States District Court for the District of Columbia for declaratory judgment and injunctive relief on the ground that the President or the United States Armed Forces have not complied with any provision of law described in paragraph (1) or (2) of section 6(a).".

(b) CONFORMING AMENDMENT.—The section heading of section 5 of the War Powers Resolution is amended to read as follows:

"CONGRESSIONAL ACTION; JUDICIAL REVIEW".

SEC. 5. PROHIBITION ON USE OF FUNDS.

The War Powers Resolution is amended by striking out section 6 (50 U.S.C. 1545) and inserting in lieu thereof the following:

"PROHIBITION ON USE OF FUNDS

"SEC. 6. (a) No funds appropriated or otherwise made available under any law may be obligated or expended for any activity which would have the purpose or effect of violating—

"(1) any provision of law enacted pursuant to section 7; or

"(2) any other provision of law relating to the actions described in clause (A) or (B) of section 5(b)(4).

"(b) Nothing in this section prohibits the use of funds to remove the United States Armed Forces from hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances.".

SEC. 6. CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTIONS.

(a) IN GENERAL.—The War Powers Resolution is amended by striking out section 7 (50 U.S.C. 1546) and inserting in lieu thereof the following:

"CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTIONS

"SEC. 7. (a) For purposes of this section—

"(1) the term 'joint resolution' means a joint resolution described in section 5(b)(2); and

"(2) the term 'session days' means days on which the respective House of Congress is in session.

"(b) A joint resolution introduced in the House of Representatives shall be referred to the Committee on Foreign Affairs of the House of Representatives. A joint resolution introduced in the Senate shall be referred to the Committee on Foreign Relations of the Senate.

"(c)(1) If the committee to which is referred a joint resolution has not reported such joint resolution (or an identical joint resolution) at the end of 7 calendar days after its introduction, such committee shall be discharged from further consideration of such joint resolution, and such joint resolution shall be placed on the appropriate calendar of the House involved.

"(2) After a committee reports or is discharged from a joint resolution described in section 5(b)(2), no other joint resolution under such section with respect to the same hostilities, or the same situation in which imminent involvement in hostilities is clearly indicated by the circumstances, may be reported by or be discharged from such committee while the first joint resolution is before the respective House of Congress (including remaining on the calendar), a committee of conference, or the President.

"(d)(1)(A) When the committee to which a joint resolution is referred has reported, or has been discharged under subsection (c) from further consideration of such joint resolution, notwithstanding any rule or precedent of the Senate,

including Rule 22, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the joint resolution and, except as provided in subparagraph (B) of this paragraph or paragraph (2) of this subsection (insofar as it relates to germaneness and relevancy of amendments), all points of order against the joint resolution and consideration of the joint resolution are waived. The motion is highly privileged in the House of Representatives and is privileged in the Senate and is not debatable. The motion is not subject to a motion to postpone. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall be in order, except that such motion may not be entered for future disposition. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the respective House, to the exclusion of all other business, until disposed of, except as otherwise provided in subsection (e)(1).

"(B) Whenever a point of order is raised in the Senate against the privileged status of a joint resolution that has been laid before the Senate and been initially identified as privileged for consideration under this section upon its introduction pursuant to paragraph (2)(A) of section 5(b), such point of order shall be submitted directly to the Senate. The

point of order, 'The joint resolution is not privileged under the War Powers Resolution', shall be decided by the yeas and the nays after four hours of debate, equally divided between, and controlled by, the Member raising the point of order and the manager of the joint resolution, except that in the event the manager is in favor of such point of order, the time in opposition thereto shall be controlled by the Minority Leader or his designee. Such point of order shall not be considered to establish precedent for determination of future cases.

"(2)(A) Consideration in a House of Congress of the joint resolution, and all amendments and debatable motions in connection therewith, shall be limited to not more than 12 hours, which, except as otherwise provided in this section, shall be equally divided between, and controlled by, the Majority Leader and the Minority Leader, or by their designees. The Majority Leader or the Minority Leader or their designees may, from the time under their control on the joint resolution, allot additional time to any Senator during the consideration of any amendment, debatable motion, or appeal.

"(B) Only amendments which are germane and relevant to the joint resolution are in order. Debate on any amendment to the joint resolution shall be limited to 2 hours, except that debate on any amendment to an amendment shall be limited to 1 hour. The time of debate for each amendment

shall be equally divided between, and controlled by, the mover of the amendment and the manager of the joint resolution, except that in the event the manager is in favor of any such amendment, the time in opposition thereto shall be controlled by the Minority Leader or his designee.

"(C) One amendment by the Minority Leader is in order to be offered under a one-hour time limitation immediately following the expiration of the 12-hour time limitation if the Minority Leader has had no opportunity to offer an amendment to the joint resolution prior thereto. One amendment may be offered to the amendment of the Minority Leader under the preceding sentence, and debate shall be limited on such amendment to one-half hour which shall be equally divided between, and controlled by, the mover of the amendment and the manager of the joint resolution, except that in the event the manager is in favor of any such amendment, the time in opposition thereto shall be controlled by the Minority Leader or his designee.

"(D) A motion to postpone or a motion to recommit the joint resolution is not in order. A motion to reconsider the vote by which the joint resolution is agreed to or disagreed to is in order, except that such motion may not be entered for future disposition, and debate on such motion shall be limited to 1 hour.

"(3) Whenever all the time for debate on a joint resolution has been used or yielded back, no further amendments may be proposed, except as provided in subparagraph (B), and the vote on the adoption of the joint resolution shall occur without any intervening motion or amendment, except that a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House may occur immediately before such vote.

"(4) Appeals from the decisions of the Chair relating to the application of the Rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a joint resolution shall be limited to one-half hour of debate, equally divided between, and controlled by, the Member making the appeal and the manager of the joint resolution, except that in the event the manager is in favor of any such appeal, the time in opposition thereto shall be controlled by the Minority Leader or his designee.

"(e)(1) Except as provided in paragraph (2), if, before the passage by one House of a joint resolution of that House. that House receives from the other House a joint resolution. then the following procedures shall apply:

"(A) The joint resolution of the other House shall not be referred to a committee.

"(B) With respect to a joint resolution of the House receiving the joint resolution—

"(i) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

"(ii)(I) the joint resolution of the other House shall be considered to have been read for the third time; and

"(II) the vote on final passage shall be on the joint resolution of the other House, if such joint resolutions are identical, or on the joint resolution of the other House if not identical, with the text of the joint resolution of the first House inserted in lieu of the text of the joint resolution of the second House, and such vote on final passage shall occur without debate or any intervening action.

"(C) Upon disposition of the joint resolution received from the other House, it shall no longer be in order to consider the joint resolution originated in the receiving House.

"(2) If one House receives from the other House a joint resolution before any such joint resolution is introduced in the first House, then the joint resolution received shall be referred, in the case of the House of Representatives, to the Committee on Foreign Affairs and, in the case of the Senate, to the Committee on Foreign Relations, and the procedures

in that House with respect to that joint resolution shall be the same under this section as if the joint resolution received had been introduced in that House.

"(f) If one House receives from the other House a joint resolution after the first House has disposed of an identical joint resolution, it shall be in order to proceed by nondebatable motion to consideration of the joint resolution received by the first House, and that received joint resolution shall be disposed of without debate and without amendment.

"(g)(1)(A) The time for debate in a House of Congress on all motions required for the disposition of amendments between the Houses shall not exceed 2 hours, equally divided between, and controlled by, the mover of the motion and the manager of the joint resolution at each stage of the proceedings between the two Houses, except that in the event the manager is in favor of any such motion, the time in opposition thereto shall be controlled by the Minority Leader or his designee. In the case of any disagreement between the two Houses of Congress with respect to a joint resolution which is not resolved, any Member of Congress may make any motion or motions referred to in this subparagraph within 2 session days after action by the second House or before the appointment of conferees, whichever comes first. In the event the conferees are unable to agree within 72 hours after the second House is notified that the first House has agreed to

conference, they shall report back to their respective House in disagreement.

"(B) Notwithstanding any rule in either House of Congress concerning the printing of conference reports in the Congressional Record or concerning any delay in the consideration of such reports, such report, including a report filed or returned in disagreement, shall be acted on in the House of Representatives and the Senate not later than 2 session days after the first House files the report or, in the case of the Senate acting first, the report is first made available on the desks of the Senators. Debate in a House of Congress on a conference report or a report filed or returned in disagreement on any such joint resolution shall be limited to 3 hours, equally divided between, and controlled by, the Majority Leader and the Minority Leader, and their designees.

"(2) If a joint resolution is vetoed by the President, the time for debate in consideration of the veto message on such measure shall be limited to 20 hours in each House of Congress, equally divided between, and controlled by, the Majority Leader and the Minority Leader, and their designees.

"(h) This section is enacted by the Congress—

"(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the

procedure to be followed in that House in the case of a joint resolution, and it supersedes other rules only to the extent that it is inconsistent with such rules; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.".

(b) REPEAL.—Section 1013 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (50 U.S.C. 1546a), relating to expedited procedures for certain joint resolutions and bills, is repealed.

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TESTIMONY OF ABRAHAM D. SOFAER
STATE DEPARTMENT LEGAL ADVISER
BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE
ON THE WAR POWERS RESOLUTION

I am honored to have the opportunity to present this distinguished Committee with views of the Executive branch concerning the War Powers Resolution. I am also prepared to offer some general comments on current proposals to amend the Resolution.

This Committee is intimately familiar with the provisions and the history of the Resolution. I see no need to offer an extended desciption of either. Some general observations do seem in order, however, to place into proper context the Resolution's key provisions.

The War Powers Resolution has been controversial from the day it was adopted over President Nixon's veto. Aspects of the Resolution have been regarded as unconstitutional and unwise by every Administration since the Resolution was passed. During each Administration since 1973, Executive officials and many Members of Congress have criticized the Resolution repeatedly. Furthermore, it is widely regarded - by its critics and its supporters alike - as ineffective. Presidents dispute its constitutionality in certain fundamental respects; and Congress has failed to enforce its most questionable provisions.

The intense debate generated by the War Powers Resolution is part of our beloved system of government. No sooner had George Washington become President when debates commenced about the relative powers of the three branches under the Constitution. President Washington's declaration of U.S. neutrality in the war between England and France, for example, spawned a debate on the relative powers of the political branches over foreign policy and war. Legal argument has been a national pastime, particularly over the crucial powers of war and foreign affairs. We must expect it to continue.

Debate about the War Powers Resolution, however, has not only been intense; it has often been sterile, focussing on particular requirements of the Resolution rather than on the principles that govern Executive/Congressional relations. It has also tended to divert the attention of Congress from the wisdom and effectiveness of policies to the legal niceties of this subject. It has led, and will continue to lead, to unnecessary and undesirable legal faceoffs between Congress and the President, at times when the nation most needs to formulate and implement policy effectively and wisely. The issues this Committee is addressing are therefore of the greatest importance.

What should be done about the War Powers Resolution? The Administration firmly believes it should be repealed. The Resolution serves no useful purpose that could justify the controversy and uncertainty it has caused and seems certain to cause in the future. It incorporates a view of the relative powers of the political branches of our government, and of their proper roles, that is fundamentally at odds with the Constitution's scheme and with over two hundred years of relatively consistent experience. It is, moreover, based on erroneous assumptions about the power of both Congress and the President. Congress has substantial power under the Constitution in matters concerning war. And the Resolution can give Congress no more power in such matters than the Constitution allows.

The notion that this Resolution is necessary to curb Presidents who claim unlimited "inherent" or unilateral power to use force is a myth. No President has been able to exercise exaggerated claims of power to act in the face of legislative constraints. Congress has powers that enable it to curb any Executive pretension, including the power to declare war; to raise and support armies; to tax and spend; to regulate foreign commerce; and to adopt measures necessary and proper to implement its powers.

President Johnson did not make war in Vietnam; the United States made war there, until Congress decided to end its support. Indeed, it is ironic that the Vietnam War was the purported basis for the War Powers Resolution when Congress was in fact a full player in that war. President Nixon regarded repeal of the Gulf of Tonkin Resolution as insufficient to prevent him from continuing the war. But this was in the context of Congress continuing to pay for - and thereby to authorize - his actions. Once Congress denied funds for certain military activities, President Nixon ultimately had to comply. President Ford properly regarded as a strategic catastrophe Congress' insistence that we completely abandon Indochina, and later take no action in Angola to offset Soviet and Cuban intervention. He complied, however, as did Presidents Carter and Reagan in Angola, until the Clark Amendment was repealed.

Congress may not limit the President's constitutional authority to defend the U.S. or to take other measures within the President's authority. But Congress has powers that enable it to predominate in such matters.

The Resolution is intended to prevent the President from acting, beyond a limited time period, even when Congress has not ordered him to stop, and even though the President is acting for purposes traditionally regarded as appropriate. This constitutes, as former Legal Adviser Monroe Leigh put it, a procedure by which Congress attempts "to restrain the Executive without taking responsibility for the exercise of that restraint in time of crisis."

In a great many instances over the past two hundred years, Presidents have used military force without first obtaining specific and explicit legislative authorization. In our system of government, explicit legislative approval for particular uses of force has never been necessary, and the War Powers Resolution cannot and should not be permitted to make it necessary.

Congress and the American people in fact expect that the President will use the military forces placed by Congress at his disposal for long-recognized purposes, including the defense of the United States, its bases, its forces, its citizens, its property, its fundamental interests, and its allies. This is true even with respect to the most serious forms of military power - the use of nuclear weapons. In placing such weapons at the President's disposal, Congress intends that the President have authority to use them without prior approval, in order to deter effectively an enemy attack. We should not be surprised, therefore, that the War Powers Resolution has failed to alter Executive conduct with respect to the use of force.

This Administration therefore recognizes that Congress has a critical role to play in the determination of the circumstances under which the United States should commit its forces to actual or potential hostilities. No Executive policy or activity in this area can have any hope of success in the long term unless Congress and the American people concur in it and are willing to support its execution.

Conversely, however, Congress must recognize and respect the role which the President plays under the U.S. constitutional scheme. As repository of the Executive Power of the United States, Commander-in-Chief of the armed forces, and as the officer in charge of the diplomatic and intelligence resources of the United States, the President is responsible for acting promptly to deal with threats to U.S. interests, including the deployment and use of U.S. forces where necessary in the exercise of the national security of the United States. Congress should not, as a matter of sound policy, and cannot, as a matter of constitutional law, impose statutory restrictions which impede the President's ability to carry out these responsibilities.

It is against these basic concepts that the adequacy of the key provisions of the War Powers Resolution should be judged. If the Resolution is repealed, this Administration would certainly continue to consult and involve Congress in decisions involving the introduction of U.S. forces in hostilities. And if some future Administration attempted to behave otherwise, Congress could compel it to mend its ways.

* * *

My remaining remarks will focus on those features of the Resolution that have led Presidents to call for its repeal. I will also comment on proposals to amend the Resolution.

Section 2

Section 2(c) of the Resolution states the view of Congress as to circumstances under which the President may introduce U.S. Armed Forces into actual or imminent involvement in hostilities. The list of circumstances in Section 2(c) is clearly incomplete, however. As my predecessors as Legal Adviser have advised this Committee, the list fails to include several types of situations in which the United States would clearly have the right under international law to use force, and in which Presidents have used the armed forces on many occasions.

Specifically, Section 2(c) omits, among other types of action, the protection or rescue from attack of U.S. nationals in difficulty abroad, including terrorist attacks; the protection of ships and aircraft of U.S. registry from unlawful attack; responses to attacks on allied countries with whom we may be participating in collective military security arrangements or activities, even where such attacks may threaten the security of the United States or its armed forces; and responses by U.S. forces to unlawful attacks on friendly vessels or aircraft in their vicinity.

It is not clear whether Congress really intended Section 2(c) as an exclusive enumeration of the President's authority, but in any event such an enumeration is neither possible not desirable. Congress cannot define the constitutional rights of the President by statute, and any attempt to do so is bound to be incomplete and to engender controversy between the branches. The solution to this problem is to delete Section 2(c) altogether, as proposed by the Byrd-Nunn-Warner bill. The only way that the character and limits of such fundamental constitutional powers can be defined and understood is through the actions of the two branches in coping with real world events over the years. No convenient shortcut exists.

Section 3

Section 3 of the Resolution requires the President to consult with Congress "in every possible instance" before introducing U.S. Armed Forces into actual or imminent hostilities. Over the years, both before and after the Resolution was adopted, the Executive branch has engaged in consultations with the Congress in a variety of circumstances involving the possible deployment of U.S. forces abroad. Consultations have whether or not called for by the Resolution. Consultations are intended to keep Congress informed, to determine whether Congress approves of a particular action or policy, and in the period immediately before an action to give Congressional leaders an opportunity

to provide the President with their views. Consultations are not intended to enable Congress to review the detailed plans of a military operation.

The Resolution requires consultation "in every possible instance" and thus recognizes that consultation may be impossible in particular cases. No President has challenged the merits of statutory obligation to consult, because the statute leaves to the President the discretion to decide whether consultation is possible, and if so, to determine the form and substance of the consultation according to the circumstances of each case. In some instances, such as the introduction of U.S. forces into Egypt to participate in peacekeeping operations, detailed consultations were held with many interested members of Congress well in advance of the action contemplated. In other instances, consultation was limited to a smaller number of members, and was less extensive. In the case of the Tehran rescue mission, President Carter concluded that prior consultation was not possible because of extraordinary operational security needs.

The President's flexibility respecting the number of persons consulted and the manner and timing of consultation must be preserved in any revision of this Section. For example, any requirement for a schedule of regular meetings (as in the Byrd-Nunn-Warner bill) should preserve the same flexibility as the current language of Section 3 -- that is,

"in every possible instance". Without this element of flexibility, a schedule of regular meetings would impermissibly interfere with exercise of the President's Article III powers. Further, the Byrd-Nunn-Warner bill could result in the President being required to engage in prior consultation with 18 members, except in "extraordinary circumstances affecting the most vital security interests of the United States." The Administration regards this as excessively burdensome and undesirable in many cases even if "vital security interests" might not be affected.

An additional constitutional problem arises from the provisions of Section 3(2) of the Byrd-Nunn-Warner bill regarding the proposed Permanent Consultative Group. Under that proposal, the requirement that the President consult with the Group is triggered by a majority vote of that Group. This is inconsistent with the Supreme Court's decision in INS v. Chadha, which precludes the Congress from taking actions having legal effect on the Executive Branch except by approval of both Houses and presentment to the President for signature or veto.

On the other hand, we agree on the desirability of encouraging ongoing consultations between the leaders of the Executive branch and Congress on national security issues generally. Secretary Shultz has raised this concept from time to time during his tenure in office, and it deserves thorough consideration. The procedure proposed in the Byrd-Nunn-Warner

bill creates an unwieldy cabinet-like institution, thereby eliminating necessary flexibility, on precisely the most sensitive and vital kinds of issues such as military operations.

Section 4

Section 4 requires that the President submit, within 48 hours after the introduction of U.S. forces, a written report to the Congress in three circumstances: where U.S. forces are introduced into actual or imminent hostilities; where U.S. forces are introduced into foreign territory, waters or airspace "while equipped for combat", with certain exceptions; and where such forces are introduced in numbers which "substantially enlarge" the combat-equipped U.S. forces already located in a foreign country.

Presidents have uniformly provided written reports to the Congress with respect to U.S. deployments abroad, as a means of keeping the Congress informed, while reserving the Executive branch's position on the applicability and constitutionality of the Resolution. Indeed, the Executive branch has provided information to the Congress in many cases where no relevant statutory requirement existed.

The Executive branch's administration of this Section has satisfied any special need for information that Congress may have in this area. Section 4 does not require the President to state the particular subsection under which reports are made,

and no President has felt compelled to do so. A definitive judgment at the outset of a deployment as to whether hostilities will result is often difficult to make. Furthermore, this practice is a useful way for the Executive to avoid unnecessary constitutional confrontations over whether Section 4(a)(1) is applicable, or whether -- even if its conditions are met -- it can properly be deemed to trigger an automatic termination under Section 5.

The Byrd-Nunn-Warner proposal would make explicit what has always been true - that Congress is free to make its own judgment on whether Section 4 (a)(1) has been triggered, and to act as Congress sees fit on any such conclusion. We oppose any such change, because we regard any such judgment as unnecessary and undesirable. Congress is free to enact legislation, for example, even if "hostilities" are not found to exist, to be likely, or to be continuous.

Section 5

Section 5 of the Resolution purports to require the President to withdraw U.S. forces from a situation of actual or imminent hostilities in two circumstances: where 60 days have elapsed without specific Congressional authorization for the continuation of their use, with some specific exceptions; and where the Congress at any time enacts a concurrent resolution requiring such withdrawal. These provisions are, in our view, unconstitutional and unwise.

The 60-day provision is inconsistent with our constitutional scheme, in which the President has the constitutional authority and responsibility as Commander-in-Chief and Chief Executive Officer to deploy U.S. forces in a variety of circumstances, such as the exercise of self-defense, including the protection of American citizens, forces and vessels from attack. The provision is particularly troublesome because it would require the withdrawal of U.S. forces by reason of the mere inaction of Congress within an arbitrary 60-day period. The Resolution itself appears to recognize the President has independent authority to use the armed forces for certain purposes; on what basis can Congress seek to terminate such independent authority by the mere passage of time?

In addition to this general, constitutional objection, this provision has several harmful effects:

- o the imposition of arbitrary and inflexible deadlines interferes with the effective and successful completion of the Executive initiative undertaken;

- o such limits may signal a divided nation, giving our adversaries a basis for hoping that the President may be forced to desist, or at least feel pressured to do so - as Senator Tower recently testified: "The important thing is that we be perceived as being able to act with dispatch, and that the policy that we employ will not be picked to pieces through Congressional debates or nitpicking Congressional action";
- o such limits could increase the risk to U.S. forces in the field, who could be forced to withdraw under fire;
- o debates over the time deadline provide an undesirable occasion for interbranch or partisan rivalry, potentially misleading our adversaries into assuming an absence of national resolve, thus escalating the military and political risks;
- o the automatic nature of the deadline, if obeyed, would result in the termination of Executive protection of the national interest without any legislative action taking full responsibility for that action;
- o the deadline also reduces the effectiveness of the legislature's potential role by placing unnecessary pressure on Congress to act where the President has not sought specific legislative approval to continue an action beyond the designated time limits;

- o the nation has successfully defended its interests by following a pattern of government in which Congress withholds final judgment on Executive actions until their outcome becomes more clear - once again as Senator Tower said: "Congress is not structured to maintain the day-to-day business of the conduct of diplomacy. Congress is not structured to devise and maintain a long-term, comprehensive, reliable foreign policy."

The concurrent-resolution aspect of Section 5 is clearly unconstitutional under Chadha v. INS. In that case, the Supreme Court held that Congress may not regulate matters beyond its own internal affairs other than through legislation, subject to the veto. To the extent Congress can impose restrictions relating to military action, it can only do so by legislation subject to an Presidential veto. Because the War Powers Resolution's concurrent resolution procedure violates this principle, it is unconstitutional and should be repealed. Moreover, Section 5(c) contemplates Congressional action that may intrude on the President's authority as Commander-in-Chief and Chief Executive Officer.

Sections 5(b) and (c) should be stricken, as proposed by the Byrd-Nunn-Warner bill. This would be consistent with the Constitution and with U.S. national interests.

Section 6

Section 6 of the Resolution contains procedures for the expedited consideration of joint resolutions introduced pursuant to Section 5(b). Since we favor repeal of Section 5(b), we likewise favor repeal of this provision.

The Byrd-Nunn-Warner bill contains a somewhat different set of expedited procedures than the War Powers Resolution, designed to serve somewhat different purposes. Under that bill, expedited procedures would apply in either of two situations to any joint resolution approved by a majority of the "Permanent Consultative Group" which authorizes the President to continue a particular deployment of U.S. forces or prohibits him from doing so. The two situations are where the President has reported to Congress under Section 4(a)(1), or where a majority of the 18-member Permanent Consultative Group finds that he should have done so.

The Byrd-Nunn-Warner bill would, however, add two other provisions that would create undesirable consequences as a result of the adoption of a joint resolution opposing or disapproving Executive action. One provision would automatically prohibit the use of funds for any activity which would have the purpose or effect of violating any provision of such a joint resolution; the other would give standing in U.S. District Court to any Member of Congress to seek declaratory and injunctive relief on the ground that any provision of such a joint resolution had been violated. We oppose both of these proposals for both constitutional and policy reasons.

Congress has broad power to control the expenditure of funds. Specifically, Congress may not use its funding power to restrict or usurp the independent constitutional authority of another branch. For example, Congress could not require the Supreme Court to decide a case in a particular way as a condition on the use of funds for the judiciary. By the same token, Congress could not lawfully deny funds for the armed forces to compel the President to cease exercising functions which are lawfully his as Commander-in-Chief, such as the defense of U.S. public vessels from attack on the high seas in a particular region. Congress could also exceed its authority by ordering the President to conduct a particular type of military operation in a specific manner; the power to control spending cannot properly be used to interfere with the President's discretion over the conduct of military operations.

We believe the proposal to permit suit by any Member of Congress would be inconsistent with current case law, and a grave setback for the system of seperation of powers established by the Framers. The federal courts have prudently decided that they will not exercise jurisdiction over suits based on the War Powers Resolution. The courts have held that such suits raise non-justiciable political questions which should be resolved by the political branches. Congress has no institutional interest in having the courts pass on such questions. As the courts have concluded, judicial supervision is inherently unsuited to resolving political controversy over the propriety of military actions outside the United States. Congress, as we have seen, has ample power concerning the President's use of military forces. It should not resort to the courts to perform its proper function.

Particularly troublesome is the concept that any single Member of Congress would have the right to sue. This provision is objectionable both from a legal and a policy perspective. As a legal matter, we believe the Congressional standing provision purports unconstitutionally to expand the jurisdiction of the federal courts to litigation not presenting an Article III case or controversy. We believe that membership in Congress, without more, is insufficient to confer standing under Article III. The amendment purports to grant standing to members of Congress merely for the purpose of enforcing a generalized grievance about governmental conduct; but this is insufficient to confer standing on a member of Congress, just as it is for a member of the general public.

The Congressional standing provision fares no better when viewed from a policy perspective. For example, under the Byrd-Nunn-Warner proposal, Congress might enact a joint resolution authorizing continuation of the President's use of the Armed Forces, subject to certain conditions, and the Congress as a whole might be perfectly satisfied with the President's compliance with the resolution; and yet, one or more dissatisfied Members of Congress would be authorized to bring the matter into the courts with the objective of obstructing or disrupting the President in his direction of U.S. Armed Forces in a situation of actual or potential hostilities.

The Constitution intended that such situations be resolved by the Congress and the Executive branch in the exercise of their respective constitutional powers, ideally in a spirit of cooperation and concern for the national interest. Whether or not Congress as a whole would act in a partisan manner in such situations, the risks of partisan motivation are great indeed when a single Member is authorized to sue.

Section 8(a)

Section 8(a) of the Resolution purports to instruct future Congresses on the manner in which they may choose to authorize the introduction of U.S. Armed Forces into actual or imminent hostilities. Specifically, it states that no law passed - or treaty ratified - can ever authorize such action unless it contains an explicit statutory statement that it is intended to constitute specific authorization within the meaning of the Resolution.

This provision appears to be a response to the fact that the Tonkin Gulf Resolution, contemporaneous appropriation legislation, and the SEATO Treaty were construed by courts in the 1970's to authorize conduct of the Vietnam war. In our view, Section 8(a) ineffectively attempts to restrict the rights of future Congresses to authorize deployments in any way they choose, as well as the right of future Presidents to interpret and act in reliance on such authorizations.

If a Congress chooses to adopt a statutory provision which authorizes the President to act, but fails to mention the Resolution, that authorization is nonetheless valid and effective, whatever the Congress may have said to the contrary in 1973. Indeed, the passage of such a law would properly be regarded as the equivalent of an amendment of the War Powers Resolution, since subsequent statutes are controlling over earlier ones that contain inconsistent provisions. In short, if Congress supports an Executive initiative to the extent Congress supported the President in Vietnam, the initiative would, we believe, be upheld in court as lawful. We therefore favor repeal of Section 8(a), to remove any misunderstanding as to its constitutional effect.

Conclusion. This review of the key provisions of the War Powers Resolution makes clear that the Administration has constitutional objections to various provisions of the Resolution in its current form. We believe it should be repealed altogether. If it is to be amended, rather then repealed, we strongly urge repeal of Sections 2(b), 5(b), 5(c) and 8(a). The Byrd-Nunn-Warner bill would properly delete three of these sections, but contains other provisions which the Administration could not accept.

In the last analysis, we cannot solve the problems which the Resolution seeks to remedy merely by adopting new, more detailed statutes or restating general principles. The only effective solution for these problems is for the two political branches to work together in pursuit of common national interests, to communicate more effectively with one another on their particular concerns and ideas, and to utilize their proper powers to influence events rather than attempting to modify a constitutional framework that has served us too well to jeopardize.

Wang 6014L

Q. 1. In what circumstances, if any, other than those listed in section 2(c), does the Administration believe that the President has the constitutional authority to introduce the armed forces into hostilities without prior statutory authorization?

A. Section 2(c) is not a complete list of the circumstances under which the President may act in the manner indicated. The Administration believes that it is neither possible nor wise to attempt an exhaustive listing of all situations that might arise in which the President's independent power as commander-in-chief to commit U.S. forces would be applicable. Furthermore, the phrase "without prior statutory authorization" is unclear. Statutory authority can be found from a variety of legislative actions short of the type of specific and explicit requirements of Section 8 of the War Powers Resolution. Keeping these caveats in mind, the Administration is convinced that Section 2(c) fails to list all the circumstances in which the President is able to used the armed forces.

Among the circumstances not listed in Section 2(c) under which the President may act in the manner indicated are the protection or rescue from attack of U.S. nationals, including terrorist attacks; protection of ships and aircraft of U.S. registry from unlawful attack; responses to attacks on allied countries with whom we may be participating in collective military security arrangements or activities, even where such attacks may threaten the security of the United States or its

armed forces; and responses by U.S. forces to unlawful attacks on friendly vessels or aircraft in their vicinity.

Q. 2. Under the circumstances extant on the date of this letter, does the Administration believe that the President would have the constitutional authority to introduce the armed forces into hostilities to overthrow the Government of Nicaragua without prior statutory authorization?

A. The President has made clear that he has no intention under present circumstances to introduce United States armed forces into hostilities in Nicaragua for any purpose whatsoever. It would be neither constructive nor responsible to address whether the President would have the constitutional authority to do so, given the extreme sensitivity that an answer to this hypothetical question might have with respect to the situation in Central America.

Q. 3. Does the Administration believe that the reporting requirement of section 4(a)(1) is constitutional?

A. We have generally accepted the constitutionality of the reporting requirements of the War Powers Resolution, and have in fact gone to great lengths through briefings, testimony, reports and so forth to ensure that Congress is fully informed of our policies and of the actions that we have undertaken in the pursuit of our policies. Extreme situations could possibly arise in which the President might, in the interests of protecting national security, personally invoke the principle of executive privilege and decline to report within the 48-hour period, but I know of no such situation that has arisen in the past.

Q. 4. Does the Administration believe that any situation has arisen during its term of office in which that requirement [i.e., the reporting requirement], as applied, would have been unconstitutional?

A. No.

Q. 5. Does the Administration believe that any event that has occurred in the Persian Gulf has required a report under section 4(a)(1) of the Resolution?

Q.6. Have any of the Administration's communications to Congress concerning the Persian Gulf constituted reports under section 4(a)(1) of the Resolution?

Q.7. Have any such reports constituted reports under sections 4(a)(2) or 4(a)(3) of the Resolution?

A. The Administration has taken no position regarding whether events in the Gulf require a report under specific subsections of section 4(a) of the Resolution. This has facilitated the President's ability to proceed in a spirit of-mutual cooperation with Congress and to ensure that Congress continues to be fully informed, despite the historical differences between the Legislative and Executive branches of government with respect to the constitutionality of certain of the Resolution's provisions.

Indeed, as the Department of Justice stated in the recent case of Lowry v. Reagan, the "President has provided Congress with written communications following each use of U.S. military force in the Gulf, which in their totality contain information that far exceeds the requirements of Section 4(a)(1) of the War Powers Resolution." Further information has been provided through extensive briefings, testimony, letters and so forth regarding our activities in the Gulf.

The absence of a designation that a report has been filed under a particular subsection of Section 4(a) is consistent with the general practice of previous administrations. The Resolution does not require the President to specify which subsection applies. In the event, however, that circumstances at any time existed that would have triggered any specific subsection of Section 4(a), the reports submitted by the President in every instance satisfied the requirements of those subsections.

Q. 8. Does the Administration believe that section 5(b) is constitutional?

Q. 9. Does the Administration believe that section 5(c) is constitutional?

A. No. The reasons for the Administration's view that these sections are unconstitutional are contained in the State Department Legal Adviser's statement to the Committee.

Q. 10. Does the Administration believe that section 8(a)(1) is constitutional?

Q. 11. Does the Administration believe that section 8(a)(2) is constitutional?

The Administration does not necessarily regard Section 8 as unconstitutional, but as ineffective to the extent it attempts to bind future Congresses as to the manner in which they would approve military actions, and to the extent it attempts to bind future courts as to the manner in which construe whether military actions have been approved.

Q. 12. If the Administration believes that any provision of the Resolution is unconstitutional, does it believe that the President possesses the constitutional authority to disregard that provision prior to the ruling of a court that such provision is invalid?

A. Each branch of our government has an independent responsibility to uphold the Constitution of the United States. The President is sworn to uphold both the Constitution and the laws. Certainly, in our system, where the courts have ruled on the rights of two parties properly before it, the parties have an obligation to comply with the court's ruling. That is of course true whether it is an executive official or a legislative official or any other party whose rights the courts have adjudicated.

In the absence of final judicial resolution, however, the President has not only the right but the duty to consider whether a refusal to abide by a particular statutory provision is required to fulfill his constitutional responsibilities. Not every disagreement with Congress should lead a President to disregard a law that the President believes is unconstitutional. The normal practice, in fact, is to comply until the courts decide otherwise. But in certain areas -- especially where the President has independent responsibilities that relate to protecting the national security -- the President will be held responsible by the people for failing to fulfill his duties under the Constitution. In the specific

context of war powers, the President typically could not wait for a resolution of the issue by the courts, particularly in view of the fact that the Constitution entrusts war powers issues to the two political branches and not to the courts.

Q. 13. Does the Administration believe that a statutorily-imposed time limit on the use of the armed forces in hostilities, such as the 18-month limit set forth in the "Lebanon War Powers Resolution" is constitutional?

A. There is nothing improper or unconstitutional in the President's accepting such a time limit, if he finds it consistent with U.S. national security interests. However, Congress cannot impose such a limit where it would constrain the President's constitutional authority as Commander-in-Chief. The constitutionality of such a time limit would depend on the particular circumstances surrounding a proposed use of U.S. armed forces when the period expired. Thus, in signing the Multinational Force in Lebanon Resolution, the President stated that he did:

> not and cannot cede any of the authority vested in me under the Constitution as Commander in Chief of United States Armed Forces. Nor should my signing be viewed as any acknowledgment that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States Armed Forces.

Q. 14. Does the Administration believe that section 7 of H.J. Res. 462, introduced by Rep. Peter Fazio, is constitutional?

A. Section 7 of H.J. Res. 462 gives "[a]ny Member of Congress" standing to challenge alleged violations of any joint resolution adopted under the War Powers Resolution, and orders the courts not to rely on the political question doctrine or any other principle of nonjusticiability in refusing to resolve the merits of such a lawsuit.

Limits on standing and justiciability have a prudential component and a constitutionally-required component. Congress has the power to eliminate the former although, for reasons set forth at greater length in the testimony of the State Department Legal Adviser, it would be extremely unwise for Congress to do this. The prudential limits on standing and justiciability protect the Constitution's separation of powers. Elimination of these restraints would serve neither Congress nor the country, but would force the courts into the center of political crises that they have long and wisely left to the political branches.

Congress lacks power, moreover, to affect the constitutionally-required aspects of the law of standing and justiciability (including the political question doctrine).

Q. 15. Does the Administration believe that S.J. Res. 323, introduced by Sen. Robert Byrd, is constitutional?

A. Constitutional aspects of S.J. Res. 323 are addressed in the testimony of the State Department Legal Adviser.

Q. 16. Does the Administration favor the repeal of the War Powers Resolution?

Q. 17. Does the Administration suggest any amendment to the Resolution.

A. The Administration favors the repeal of the Resolution. At a minimum, the Resolution should be amended to repeal Sections 2(c), 5(b), 5(c), and 8(a).

2 pages

United States Senate

COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

MJM
L/PM-EC
TB

September 7, 1988

The Honorable Abraham Sofaer
Legal Adviser
Department of State
Washington, D.C. 20520

Dear Mr. Sofaer:

In your testimony before the Special Subcommittee on War Powers on September 14, I would appreciate it if you would address a number of specific questions concerning the War Powers Resolution, as follows:

1. In what circumstances, if any, other than those listed in section 2(c) does the Administration believe that the President has the constitutional authority to introduce the armed forces into hostilities without prior statutory authorization?

2. Under the circumstances extant on the date of this letter, does the Administration believe that the President would have the constitutional authority to introduce the armed forces into hostilities to overthrow the government of Nicaragua without prior statutory authorization?

3. Does the Administration believe that the reporting requirement of section 4(a)(1) is constitutional?

4. Does the Administration believe that any situation has arisen during its term of office in which that requirement, as applied, would have been unconstitutional?

5. Does the Administration believe that any event that has occurred in the Persian Gulf has required a report under section 4(a)(1) of the Resolution?

6. Have any of the Administration's communications to Congress concerning the Persian Gulf constituted reports under section 4(a)(1) of the Resolution?

7. Have any such reports constituted reports under sections 4(a)(2) or 4(a)(3) of the Resolution?

8. Does the Administration believe that section 5(b) is constitutional?

9. Does the Administration believe that section 5(c) is constitutional?

10. Does the Administration believe that section 8(a)(1) is constitutional?

11. Does the Administration believe that section 8(a)(2) is constitutional?

12. If the Administration believes that any provision of the Resolution is unconstitutional, does it believe that the President possesses the constitutional authority to disregard that provision prior to the ruling of a court that such provision is invalid?

13. Does the Administration believe that a statutorily-imposed time limit on the use of the armed forces in hostilities, such as the 18-month limit set forth in the "Lebanon War Powers Resolution," is constitutional?

14. Does the Administration believe that section 7 of H.J.Res. 462, introduced by Rep. Peter DeFazio, is constitutional?

15. Does the Administration believe that S.J.Res. 323, introduced by Sen. Robert Byrd, is constitutional?

16. Does the Administration favor the ~~repeal of the War~~ Powers Resolution?

17. Does the Administration suggest any amendment to the Resolution?

Sincerely,

Joseph R. Biden, Jr.
Chairman, Special Subcommittee
on War Powers

9/2/88
Note: Original letter given to State Dept. messenger this morning at 10:40.