

agreement, effective without awaiting ratification.

(b) That there is Presidential power to transfer title and possession of the proposed considerations upon certification by appropriate staff officers.

(c) That the dispatch of the so-called mosquito boats would constitute a violation of the statute law of the United States, but with that exception there is no legal obstacle to the consummation of the transaction, in accordance, of course, with the applicable provisions of the Neutrality Act as to delivery.

Respectfully submitted.

ROBERT H. JACKSON,
Attorney General.

§ 4. War Powers Act

To ensure proper legislative branch participation in decisions to deploy American forces, legislation on war powers was introduced in the 91st and 92d Congresses.⁽¹⁴⁾

In 1973 the House approved House Joint Resolution 542. The Senate struck all after the enacting clause and inserted in lieu thereof the language of S. 440. Following a conference, a compromise between the House and Senate versions was agreed to.⁽¹⁾

14. See, for example, H.J. Res. 1355, 91st Cong. 2d Sess. (1970); S. 2956, 92d Cong. 1st Sess. (1971); H.J. Res. 1, 92d Cong. 1st Sess. (1971); S. 731, 92d Cong. 1st Sess. (1971).

1. See §4.2, *infra*, for the vote overriding the President's veto of the compromise, H.J. Res. 542.

The conferees resolved a major difference in the two measures which related to defining the authority of the Commander in Chief to deploy troops. S. 440, section 3, provided that in the absence of a congressional declaration of war armed forces could be introduced only in certain circumstances, including repulsion of an armed attack, protection of American citizens being evacuated in situations of danger abroad, and pursuant to specific statutory authorization. Sections of the Senate bill which related to reporting, period of commitment, termination dates, and congressional procedures were expressly tied to section 3. House Joint Resolution 542 did not contain a similar provision.

Section 2(c) in the "Purpose and Policy" provisions of the resolution agreed to by the conferees states:

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

Unlike the Senate bill, no subsequent section of the resolution re-

fers to section 2(c), the description of war powers of the Commander in Chief. Much of the debate on the conference report focused on whether the President could introduce troops only in the situations described in section 2(c) and in no other situation⁽²⁾ or whether that section merely stated his authority in a manner which did not limit his authority to deploy troops.⁽³⁾ The most revealing expression of the intent of the conferees on this controversy appears in two sentences in the conference report:⁽⁴⁾

Section 2(c) is a statement of the authority of the Commander in Chief respecting the introduction of United States Armed Forces into hostilities. . . . Subsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the

2. Section 2(a) of the act states that insuring the collective judgment of Congress and the President in the introduction of American forces into hostilities is a purpose of the act.

3. In his veto message the President, applying the restrictive interpretation of §2(c), stated that America's effective response in the Berlin crisis of 1961, Cuban missile crisis of 1962, Congo rescue operation of 1964, and the Jordanian crisis of 1970, would have been "vastly complicated or even made impossible." (See 119 CONG. REC. 34990, 34991, 93d Cong. 1st Sess., Oct. 25, 1973.)

4. H. REPT. No. 93-547, 2 U.S. Code legis. and Adm. News, p. 2364 (1973)

case with a similar provision of the Senate bill (section 3).

This statement supports an inference that section 2(c) does not exhaustively define all circumstances in which the President may deploy troops.

A nonrestrictive interpretation of the three situations described in section 2(c) avoids the question whether Congress may define the constitutional authority of the Commander in Chief by statute rather than constitutional amendment. The President in his veto message asserted that a constitutional amendment is the only way in which constitutional authorities of another branch of government may be altered. A statutory attempt to make such alterations is "clearly without force."⁽⁵⁾ The congressional view on this matter is expressed in section 2(b) of the act. Citing and interpreting article I, section 8, clause 11, of the Constitution, section 2(b) states the constitutional provision:

. . . [P]rovided that the Congress shall have power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof.

Section 3 of the resolution imposes on the President a duty "in

5. See §4.1, *infra*, for the veto message.

every possible instance" to consult with Congress before introducing troops and to consult regularly after such introduction until armed forces are no longer engaged in hostilities or have been removed from such situations. The conferees explained that this provision is not a limitation upon or substitute for other provisions of the resolution. The conferees intended that consultations take place even when advance consultation is not possible.⁽⁶⁾

Section 4 provides that in the absence of a declaration of war, in any case in which United States Armed Forces are introduced in certain circumstances, the President must submit within 48 hours to the Speaker and President pro tempore specified information as well as any other information Congress requests. The President must continue to make reports periodically as long as troops are engaged in hostilities but not less often than once every six months. The objective of this section, explained the conferees, is to insure that Congress by right and as a matter of law will be provided with all the information it needs to carry out its responsibilities.

Section 5 relates to referral of the report to committee and ap-

6. See H. REPT. No. 93-547, 2 U.S. Code Legis. and Adm. News, p. 2364 (1973).

propriate action by the Congress, and requires the President to terminate use of armed forces within 60 days after submission of the report, unless Congress (1) has declared war or enacted specific authorization, (2) has by law extended the 60-day period, or (3) is physically unable to meet. The 60-day period may be extended not more than 30 days. Notwithstanding the 60-day provision, forces engaged in hostilities outside the United States, its possessions, and territories must be removed by the President if Congress so directs by concurrent resolution.⁽⁷⁾

Section 6 mandates that a joint resolution or bill declaring war or

7. *Id.* Statutes have been adopted which authorize the use of concurrent resolutions to achieve congressional purposes and which apply procedures patterned after the War Powers Act. Thus, the statute implementing the United States proposal for an early warning system in Sinai empowers Congress by concurrent resolution to remove U.S. civilian personnel from Sinai if it determines that their safety is jeopardized or that continuation of their role is no longer necessary. 22 USC §2441 note, Pub. L. No. 94-110, 89 Stat. 572, Oct. 13, 1975. The National Emergencies Act authorizes Congress by concurrent resolution to terminate a national emergency. 50 USC §1622, Pub. L. No. 94-412, 90 Stat. 1255, Sept. 14, 1976.

authorizing use of armed forces introduced at least 30 days prior to the 60-day period specified in section 5 be referred in the House to the Committee on Foreign Affairs (renamed the Committee on International Relations on Mar. 19, 1975). When reported by the committee, the measure becomes the pending business and is voted on within three calendar days thereafter unless otherwise determined by the yeas and nays. After passage in one House, the measure is to be referred to the counterpart committee of the other House and reported out not later than 14 calendar days before the expiration of the 60-day period and then voted on. In the case of disagreement between the two Houses, conferees are appointed, and the conference committee must report on the measure no later than four calendar days before the expiration of the 60-day period. If conferees cannot agree within 48 hours, they report back to their respective Houses in disagreement. Notwithstanding any rule concerning printing or delay of consideration of conference reports, the report must be acted on by both Houses not later than the expiration of the 60-day period.

Section 7 provides that a concurrent resolution introduced pursuant to section 5 directing the

President to remove forces engaged in hostilities be referred to the House Committee on Foreign Affairs or to the Senate Committee on Foreign Relations, as the case may be. Such committee must report with recommendations within 15 calendar days unless otherwise determined by the yeas and nays. Such resolution becomes the pending business of the House in question. After passage in one House, the resolution is to be referred to the counterpart committee in the other House, and is to be reported out with recommendations within 15 calendar days, at which time it becomes the pending business of that House. In the case of disagreement between the two Houses, conferees must be promptly appointed. The conference committee must report on the measure within six calendar days after referral to the committee of conference. Such report must be acted on by both Houses not later than six calendar days after the report is filed.

Section 8, relating to interpretation of the joint resolution, states that authority to introduce troops shall not be inferred from any provision of law unless such provision specifically authorizes introduction of forces, or from any treaty unless it is implemented by legislation specifically authorizing in-

roduction of forces. The joint resolution does not necessitate further specific statutory authorization to permit American participation in headquarters operations with armed forces of one or more foreign countries. The term "introduction of United States Armed Forces" is clarified. The joint resolution does not alter constitutional authority of the President or Congress. It does not grant any authority to the President which he would not have had in the absence of the joint resolution.

Sections 9 and 10 relate to separability of provisions and the effective date, respectively.

Collateral References ⁽⁸⁾

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8. See also the collateral references in § 3, *supra*, and § 10, *infra*, relating to war powers generally and Vietnam era restrictions on military activity.

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Veto of War Powers Resolution

§ 4.1 The War Powers Resolution was vetoed by the President.

On Oct. 25, 1973,⁽⁹⁾ the President's veto message outlining his

9. 119 CONG. REC. 34990, 34991, 93d Cong. 1st Sess.

objections to the War Powers Resolution was laid before the House.

The Speaker⁽¹⁰⁾ laid before the House the following veto message from the President of the United States:

To the House of Representatives:

I hereby return without my approval House Joint Resolution 542—the War Powers Resolution. While I am in accord with the desire of the Congress to assert its proper role in the conduct of our foreign affairs the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation.

The proper roles of the Congress and the Executive in the conduct of foreign affairs have been debated since the founding of our country. Only recently, however, has there been a serious challenge to the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches.

The Founding Fathers understood the impossibility of foreseeing every contingency that might arise in this complex area. They acknowledged the need for flexibility in responding to changing circumstances. They recognized that foreign policy decisions must be made through close cooperation between the two branches and not through rigidly codified procedures. . . .

House Joint Resolution 542 would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. One of its provisions would automatically cut off certain authorities after sixty days unless the Congress extended them. An-

10. Carl Albert (Okla.).

other would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.

I believe that both these provisions are unconstitutional. The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force.

While I firmly believe that a veto of House Joint Resolution 542 is warranted solely on constitutional grounds, I am also deeply disturbed by the practical consequences of this resolution. For it would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis. . . .

I am particularly disturbed by the fact that certain of the President's constitutional powers as Commander in Chief of the Armed Forces would terminate automatically under this resolution 60 days after they were invoked. No overt Congressional action would be required to cut off these powers—they would disappear automatically unless the Congress extended them. . . .

This Administration is dedicated to strengthening cooperation between the Congress and the President in the conduct of foreign affairs and to preserving the constitutional prerogatives of both branches of our Government. I know that the Congress shares that goal. A commission on the constitutional roles of the Congress and the President would provide a useful opportunity for both branches to work together toward that common objective.

RICHARD NIXON,
THE WHITE HOUSE,
October 24, 1973.

Passage of War Powers Resolution**§ 4.2 By a two-thirds vote in each body, the House and Senate overrode the President's veto of the War Powers Resolution.**

On Nov. 7, 1973, the House by a vote of yeas 284, nays 135, not voting 14,⁽¹¹⁾ and the Senate by a vote of yeas 75, nays 18,⁽¹²⁾ two-thirds in each body voting in the

11. 119 CONG. REC. 36202, 36221, 36222, 93d Cong. 1st Sess. See also 119 CONG. REC. 24707, 24708, 93d Cong. 1st Sess., July 18, 1973, for initial House approval of this joint resolution (H. Rept. No. 93-287, 93d Cong. 1st Sess. [1973]); and 119 CONG. REC. 33858, 33873, 33874, 93d Cong. 1st Sess., Oct. 12, 1973, for consideration and approval of the conference report (H. Rept. No. 93-547) by a vote of yeas 238, nays 123, not voting 73.
12. 119 CONG. REC. 36175, 36197, 36198, 93d Cong. 1st Sess. See also 119 CONG. REC. 25120, 93d Cong. 1st Sess., July 20, 1973, for unanimous-consent agreement to strike from H.J. Res. 542 all after the resolving clause and substitute therefor the text of the Senate version of the War Powers Resolution, S. 440, which the Senate had just approved (p. 25119) by a vote of yeas 72, nays 18 (S. Rept. No. 220, 93d Cong. 1st Sess. [1973]); and 119 CONG. REC. 33569, 93d Cong. 1st Sess., Oct. 10, 1973, for Senate approval of the conference report by a vote of yeas 75, nays 20.

affirmative, agreed to override the President's veto of House Joint Resolution 542, the War Powers Resolution, which became law on Nov. 7, 1973, in the following form:⁽¹³⁾

SHORT TITLE

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

PURPOSE AND POLICY

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

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

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces

13. This excerpt is taken from 87 Stat. 555, 93d Cong. 1st Sess. (Pub. L. No. 93-148). It is codified at 50 USC §§ 1541 et seq.

into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

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

REPORTING

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

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

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

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

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President

pro tempore of the Senate a report in writing, setting forth—

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

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

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

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

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

CONGRESSIONAL ACTION

Sec. 5. (a) Each report submitted pursuant to section 4(a) (1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has ad-

journed for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

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

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

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

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

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

(d) In the case of any disagreement between the two Houses of Congress

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

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

Sec. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

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

(c) Such a concurrent resolution passed by one House shall be referred

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

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

INTERPRETATION OF JOINT RESOLUTION

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

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provi-

sion specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

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

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

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

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress

or of the President, or the provisions of existing treaties; or

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

SEPARABILITY CLAUSE

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

EFFECTIVE DATE

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

§ 5. Declarations of War

Article I, section 8, clause 11 of the Constitution authorizes Congress to declare war. Granting Congress this authority and making the President the Commander in Chief of the Army and Navy represents a compromise between the views of delegates to the Constitutional Convention who wanted to grant Congress authority to "make" war and delegates who wanted to grant such authority to the President alone, the Senate