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Authority E.O. 12958  
By SP NARA Date 8-16-02

THE WHITE HOUSE  
WASHINGTON

October 19, 1973

MEMORANDUM FOR: ROY ASH  
JOHN BENNETT  
DOLF BRIDGEWATER  
GENERAL HAIG  
BRYCE HARLOW  
MELVIN LAIRD  
✓ GENERAL SCOWCROFT  
BILL TIMMONS  
JERRY WARREN  
RON ZIEGLER

FROM: DAVID GERGEN

SUBJECT: WAR POWERS BILL

Drawing upon the assistance of NSC (Lehman), OMB, State and Justice, Lee Huebner has tried to marshal all of the arguments against the war powers bill in this statement.

The probable day for action is Tuesday, but because of the difficulty of coordination on Monday, we would like to complete as much of the work as possible today.

Would you please return your comments on this draft by 5 p.m. Friday?

Thanks.

cc: Bruce Kehrli  
John Carlson

DDPS

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(State/Lehman/Huebner) DG

October 19, 1973  
Second Draft

TO THE HOUSE OF REPRESENTATIVES:

I hereby return House Joint Resolution 542 without my approval. While I am in full accord with the understandable desire to assure the Congress its proper role in national decisions of war and peace, the severe restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the national security interests of the United States.

The proper roles of the Congress and the President in the conduct of foreign affairs have been debated since the founding of the Nation. Until very recently, however, few have seriously questioned the wisdom of the Founding Fathers in choosing not to spell out a precise and detailed line of demarcation between the war powers of the Executive and those of Congress.

The Founding Fathers recognized the impossibility of foreseeing every contingency that might arise in the future. They acknowledged the necessity of being able to respond flexibly to changing circumstances. They recognized that decisions of war and peace must be made through close cooperation between the

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two branches and not through rigidly codified procedures.

The principles remain as valid today as they were when our Constitution was written. Yet House Joint Resolution 542 would violate those principles by enacting a highly specific definition of the war powers.

#### Patently Unconstitutional

The specific definition which would be imposed by the Joint Resolution is also objectionable on Constitutional grounds. For it would actually take away, by a mere legislative act, authorities which the President has exercised under the Constitution for almost 200 years. One of its provisions would cut off certain Presidential authorities after sixty days; another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution.

I believe these provisions are patently unconstitutional. The only way in which Constitutional arrangements can be altered is by amending the Constitution -- and any attempt to make such alterations by legislation alone is clearly without force.

#### Undermining Our Foreign Policy

I firmly believe that a veto of House Joint Resolution 542 is warranted solely on Constitutional grounds. But I am also

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deeply disturbed by the practical consequences which this Resolution would have if it ever became effective.

House Joint Resolution 542 would seriously undermine our country's ability to act decisively and convincingly in times of international crisis. As a result, our allies would lose confidence in our ability to assist them and our adversaries would lose respect for our deterrent posture. A permanent and substantial element of unpredictability would be injected into the world's assessment of American behavior, further increasing the likelihood of miscalculation and war.

By compelling a vote of the Congress at the peak of a crisis, the resolution could even precipitate a reaction far more vigorous than the response the President might choose. Moreover, the resolution would strike from the President's hand a wide range of peacekeeping tools by eliminating his ability to exercise quiet diplomacy backed by subtle shifts in our military deployments.

If this resolution had been in force, America's effective response to a variety of challenges in recent years would have been vastly complicated or even made impossible. We could not

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have responded in the way we did to the Berlin crisis of 1961, nor to the Cuban missile crisis of 1962, the Congo rescue operation in 1964, and the Jordanian crisis of 1970. In addition, our current actions to contribute to a peaceful settlement of the hostilities in the Middle East would be impossible if this resolution were now in force. Such actions would instead require specific approaches to the Congress entailing much debate and uncertainty, and these approaches would in and of themselves produce substantial and unwanted diplomatic repercussions.

#### Other Adverse Consequences

Under this resolution, many of the powers of the President as Commander-in-Chief of the Armed Forces would automatically terminate 60 days after they were invoked. No overt Congressional action would be required to cut off this authority -- it would disappear automatically unless the Congress extended it. In effect, the Congress here attempts to increase its policy-making role through a provision which requires it to take absolutely no action.

More than that, the 60-day rule could prolong or intensify a crisis. For one thing, it could destroy the incentive for early

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negotiations during a crisis situation. Until the Congress extended the deadline, there would be at least a chance of United States withdrawal and only after the Congress acted would there be a strong incentive for our adversary to negotiate. In addition, the very existence of the deadline could lead to an escalation of hostilities in order to achieve certain objectives before the 60 days expired.

This ill-conceived measure would have a number of additional adverse consequences. For example, it would eliminate authorities which have been used to protect seized fishing boats and hijacked ships or aircraft, to undertake humanitarian relief missions, and to respond to threats which are not "immediate," such as the emplacement of missiles in Cuba in 1962. Not the least of such consequences would be the prohibition contained in Sections 8(b) and 8(c) against fulfilling our obligations under the NATO Treaty as ratified by the Senate.

The responsible and effective exercise of the war powers requires the fullest cooperation between the Congress and the

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Executive and the prudent fulfillment by each branch of its constitutional responsibilities. House Joint Resolution 542 includes certain constructive measures which would foster this process by enhancing the flow of information from the Executive Branch to the Congress. Section 3, for example, calls for consultations with the Congress before and during the involvement of United States forces in hostilities abroad. This measure is consistent with the desire of this Administration, as described by Secretary Kissinger before the Senate Foreign Relations Committee last month, for regularized consultations with the Congress in a wider range of circumstances.

Strengthening Cooperation Between the Congress and the Executive Branches

I believe that full cooperation and active participation in foreign policy questions by both the executive and the legislative branches can be enhanced by a full and careful study of their constitutional roles. The questions in this area are complex and their answers are of enduring significance for the Nation. Such a study should be carefully conducted in an atmosphere which is free of partisan political pressures. Senator Beall and Congressman Murphy have already made helpful proposals on this subject.

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To facilitate such a study, I will submit to the Congress a draft bill to establish a non-partisan Presidential-Congressional Commission on the Constitutional Roles of Congress and the President in the Conduct of Foreign Affairs. This Commission would make a thorough review of the principal constitutional issues in Executive-Congressional relations, including the war powers, the international agreement powers, and the question of Executive privilege. It would then submit to the President and the Congress its recommendations for action.

Under the draft bill I submit to the Congress, one half of the members of the Commission would be appointed by the President and one half by the Congress, thus assuring a fair representation of the two perspectives. To assure a non-partisan Commission, no more than one half of each category of appointments could come from any one political party. Finally, the bill would provide for a balance between governmental and non-governmental experts.

This Administration is dedicated to strengthening the cooperation between Congress and the President in the conduct



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of foreign affairs and to preserving the constitutional prerogatives of both branches of our government. I am sure that Congress shares that goal. A joint Presidential-Congressional Commission on the Constitutional roles of Congress and the President would provide an opportunity for both branches to work together toward that common objective.

Richard Nixon