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AUG 19 1976

THE WHITE HOUSE
WASHINGTON

August 18, 1976

MEMORANDUM FOR:

JACK MARSH

FROM:

PHIL BUCHEN P.

SUBJECT:

War Powers Resolution

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

BACKGROUND

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

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

* * *

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

* * *



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

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

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

DISCUSSION

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

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

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

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

HOUSE OF REPRESENTATIVES CONTACT LIST

<u>MEMBER</u>	<u>TIME</u>	<u>PLACE</u>	<u>COMMENT</u>
The Speaker			
Tip O'Neill			
John McFall			
John Rhodes			
Bob Michel			
Al Cederberg			
George Mahon			
"Doc" Morgan			
Bill Broomfield			
Mel Price			
Bob Wilson			

UNITED STATES SENATE CONTACT LIST

<u>MEMBER</u>	<u>TIME</u>	<u>PLACE</u>	<u>COMMENT</u>
Eastland			
Mansfield			
Byrd, R.			
Scott, H.			
Griffin			
Stennis			
Thurmond			
Sparkman			
Case			
McClellan			
Young			

August 3, 1976

MEMORANDUM FOR:

PHIL BUCHEN

FROM:

JACK MARSH

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

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

I would appreciate your views.

Many thanks.

cc: Dick Cheney

JOM/dl



BARRY GOLDWATER
ARIZONA

RECEIVED
WM. G. WHYTE

JUL 27 1976

VICE PRESIDENT
WASHINGTON

United States Senate

WASHINGTON, D.C. 20510

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

July 21, 1976

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

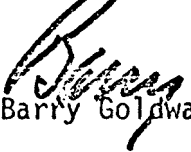
Dear Bill:

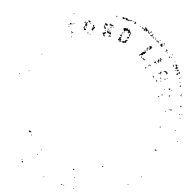
Ever since the Congress foolishly passed the War Powers Act about two years ago, I had been discussing the desirability and possibility of bringing a suit so that an ultimate decision could be made by the Supreme Court testing the constitutionality of this measure.

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

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

Sincerely,


Barry Goldwater



THE WHITE HOUSE

WASHINGTON

May 24, 1975

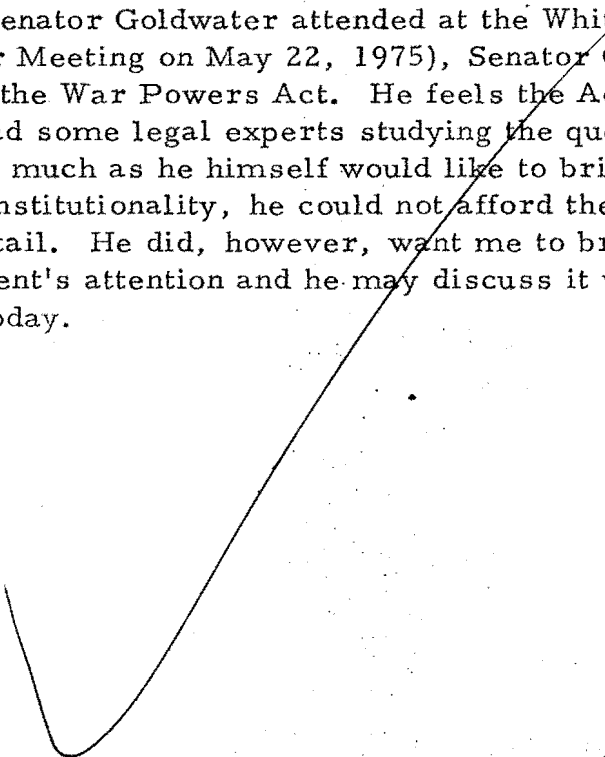
MEMORANDUM FOR THE PRESIDENT

THRU: JOHN O. MARSH

FROM: BILL KENDALL *BK*

SUBJECT: A Message from Senator Goldwater regarding
the War Powers Act.

At the last meeting Senator Goldwater attended at the White House (The Science Advisor Meeting on May 22, 1975), Senator Goldwater spoke with me about the War Powers Act. He feels the Act is unconstitutional and has had some legal experts studying the question. The Senator confided that much as he himself would like to bring suit on the Act to test its constitutionality, he could not afford the heavy costs such action would entail. He did, however, want me to bring this matter to the President's attention and he may discuss it when he sees the President today.



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Sparkman			
Case			
McClellan			
Young			



Public Law 93-148
93rd Congress, H. J. Res. 542
November 7, 1973

ARMY LIBRARY
LAW SECTION

Joint Resolution

Concerning the war powers of Congress and the President.

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

War Powers
Resolution.

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. usc prec. title 1.

(c) 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.

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;

87 STAT. 555

(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

87 STAT. 556

(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 adjourned 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 otherwise determine by yeas and 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 provision 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.

59 Stat. 1031.

"Introduction
of United
States Armed
Forces."

THE WHITE HOUSE

WASHINGTON

April 30, 1975

Dear Mr. Speaker:

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

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

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

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

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

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

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

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

Sincerely,

GERALD R. FORD

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