

## The Nixon Administration and War Powers Legislation

### 382. Excerpt From President Nixon's News Conference<sup>1</sup>

Washington, June 19, 1969, 7 p.m.

#### Presidential Powers

Q. Mr. President, what do you think of the Fulbright [Senator J. William Fulbright of Arkansas, Chairman of the Senate Foreign Relations Committee]<sup>2</sup> proposal that would limit the Presidential power to act militarily in an emergency?

The President. Well, I understand the sentiment behind the proposal. When I was a Member of the Senate and a Member of the House, I will have to admit that I felt that there should be more consultation with the Senate, and that Presidents should not have unlimited power to commit this Nation, militarily as well as politically.

On the other hand, as I now assume the responsibilities of power, I, of course, see it from a different vantage point. And for a President of the United States to have his hands tied in a crisis in the fast-moving world in which we live would not be in the best interests of the United States.

As President, I intend to consult with the Senate, with Senator Fulbright and with his colleagues on the Foreign Relations Committee and the Armed Services Committee before taking any action whenever I can.

But look, for example, at President Eisenhower in 1958. He had to move very fast in order to save the situation in Lebanon.<sup>3</sup> There was no time to consult, and also it would have tipped off the enemy.

Look at President Johnson when he sent in airplanes to save the missionaries in the Congo in 1964.<sup>4</sup> He had to move fast. He had no time to consult.

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<sup>1</sup> Source: *Public Papers: Nixon, 1969*, p. 478. The news conference was held in the East Room at the White House and was broadcast on radio and television.

<sup>2</sup> Brackets in the source text.

<sup>3</sup> See "Public Papers of the Presidents, Dwight D. Eisenhower, 1958," Items 172, 173, and 176. [Footnote in the source text.]

<sup>4</sup> See "Public Papers of the Presidents, Lyndon B. Johnson, 1963–64," Book II, Item 780 [2, 10, 16]. [Footnote in the source text.]

I don't think a President of the United States should be tied down by a commitment which will not allow him to take the action that needs to be taken to defend American interests and to defend American lives where there is no time to consult.

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**383. Memorandum From the Assistant Secretary of State for Congressional Relations (Abshire) to the President's Assistant for Congressional Relations (Timmons)<sup>1</sup>**

Washington, undated.

SUBJECT

Zablocki Resolution

The Zablocki Subcommittee of the House Committee on Foreign Affairs, on August 12 approved a resolution concerning the war powers of the Congress and the President.<sup>2</sup> In view of the extensive support for legislative action related to the war-making powers, we consider it virtually a certainty that this Congress will pass some legislation on this subject. Despite the fact that the Subcommittee has accepted only one of the three suggestions pertaining to the final draft, but forwarded by the Administration, we believe this resolution is the most balanced and moderate that one could anticipate going out of the 91st Congress and that an Administration position in support of this amendment would enhance our opportunities to further improve upon it when it is considered by the Committee.

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<sup>1</sup> Source: National Archives, Nixon Presidential Materials, NSC Files, Subject Files, Box 318, Cooper-Church Amendment. No classification marking. The memorandum was sent to Timmons after August 12, 1970, and before August 22. Written in hand at the top of page 1 is: "Bill T. is sending me the Rehnquist memo. I to call him after I have read."

<sup>2</sup> Prior to approving the resolution, Representative Clement Zablocki's (D-Wisconsin) Subcommittee on National Security Policy and Scientific Developments held hearings from June 18 to August 5, 1970, on the respective roles of Congress and the President in exercising the war-making powers of the national government. The hearings were printed for use of the House Committee on Foreign Affairs under the title *Congress, the President, and the War Powers: Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, House of Representatives, Ninety-First Congress, Second Session* (Washington: U.S. Government Printing Office, 1970). The text of the resolution approved by the subcommittee on August 12 (H.J. Res. 1355) is *ibid.*, p. vi.

We had earlier informally made three suggestions on the draft resolution to the Subcommittee:

1. We suggested that a requirement that the President convene Congress—if it were out of session—to receive his report should be deleted. This has been done.

2. We suggested that the resolution be made a concurrent rather than a joint resolution; if this were the case, the President would not be required either to sign or to veto the measure and it would not have the force of law. This suggestion was not adopted. We believe, however, that this should not in itself be considered sufficient reason to oppose the resolution, provided there are no strong objections to its substantive provisions.

3. We suggested that the section 1 enumeration of situations in which the President has authority to act without formal authorization of Congress should include defense of “vital interests” of the United States, as well as defense of “the United States and its citizens.” This suggestion was not adopted. A change was made in section 2, however, which helps ameliorate this difficulty. The earlier draft of section 2 of the resolution stated that the President “should seek appropriate consultation” with Congress “when extraordinary and emergency circumstances exist.” The resolution as reported out by the Subcommittee merely says that the President should seek appropriate consultation with the Congress “whenever feasible.” Thus, the consultation requirement is no longer tied to any definition of the kinds of situations in which the President may act.

Despite this improvement, we think another effort should be made—in the full Committee—to insert in section 1 a “vital interest” provision. If this is not possible, we could endeavor to place in the legislative history the interpretation that section 1 is not exhaustive of situations in which Presidential power to act without formal authorization exists. The present language would not bar such a construction.

In our view, this resolution imposes no unreasonable or burdensome requirements upon the President. Given the broad consensus, in both Parties and in both Houses, that this Congress should and will enact legislation bearing on the war-making powers and the numerous and far-reaching proposals which have been introduced into the Congress, we think it would be to the advantage of the Administration to take a position in favor of this moderate proposal. By supporting this measure the Administration would draw off support from more restrictive legislative proposals which are under consideration. Once the moderate Leadership in Congress is in a position to point out that the Congress has in fact dealt with the issues involved, some votes may be siphoned off of closely contested amendments currently under

consideration in the Senate and from some of the controversial amendments scheduled to be introduced in the weeks to come.

Assistant Attorney-General Rehnquist is of the opinion that two further amendments should be sought:

1. Following Paragraph (3) of section 3 the following should be inserted before the words "the President shall submit": "the President shall promptly report such action to the Speaker of the House of Representatives and to the President of the Senate. In any case in which the President deems the reported action to be of sufficient significance, or in any case in which Congress, by concurrent resolution requests additional information," . . .<sup>3</sup>

2. Section 3(B) should be modified by striking all the words after "such action."

The Department of State sees more merit in the second than in the first of these suggestions, although we do not believe either change is necessary.<sup>4</sup>

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<sup>3</sup> Ellipses in the source text.

<sup>4</sup> On November 16, 1970, the House passed H.J. Res. 1355 by a 288–39 roll-call vote. It stated that whenever feasible the President should seek appropriate consultation with the Congress before involving U.S. armed forces in armed conflict and that such consultation should continue periodically during the conflict. It required the President to report to the Congress in writing whenever, without prior authorization by Congress, he acted to commit U.S. forces to armed conflict or to send combat-equipped troops to another nation or to substantially enlarge forces already in another nation. The Senate took no action on the measure, and it died at the end of the session.

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#### **384. Memorandum From John Lehman of the National Security Council Staff to the President's Assistant for National Security Affairs (Kissinger)<sup>1</sup>**

Washington, February 4, 1971.

SUBJECT

Talker for Javits Breakfast<sup>2</sup>

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<sup>1</sup> Source: Library of Congress, Manuscript Division, Kissinger Papers, Box CL 269, Memoranda of Conversation. No classification marking. The memorandum is unsigned.

<sup>2</sup> Kissinger had breakfast with Senator Javits from 9:10 to 9:50 a.m. on February 5. (Ibid., Box 438, Miscellany, 1968–1976 Record of Schedule) No record of the conversation has been found.

Senator Javits is most exercised by the following matters—arranged in order of their probable concern to the Senator:

[Omitted here is discussion of Laos and Cambodia.]

*War Powers*

—You may recall Javits' *Foreign Affairs* article of January 1970 in which he proposed:

1. Make Secretaries of State and Defense answerable to the Senate a la British Cabinet.
2. Vastly expand the staff of the SFRC to compete on even terms with the NSC.

—This week Javits introduced measures to accomplish no. 2.

—If the opportunity presents itself, you might gently discourage him from adding to Fulbright's personal staff (the real result of Javits' proposal).

—Javits plans on reintroducing his war powers Resolution which limits by law the President's powers by:

- Allowing only four instances where the President could use U.S. forces without Congressional authorization.
- In those four circumstances the Congress must authorize within thirty days or the President must cease hostilities immediately.

—This resolution is absolutely unacceptable and I recommend that you be firm in clearly indicating that the Administration will actively oppose it.

—I recommend further that you suggest the Zablocki Resolution (passed by the House) (see Tab A)<sup>3</sup> as an acceptable alternative.

[Omitted here is discussion of the Middle East, China, Chile, trade bill, and NATO.]

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<sup>3</sup> Attached but not printed; see footnote 3, Document 383.

385. Memorandum From the President's Assistant for National Security Affairs (Kissinger) and the President's Counsel (Dean) to President Nixon<sup>1</sup>

Washington, June 2, 1971.

SUBJECT

War Powers Legislation

As you know there are numerous bills pending in the Committees of House and Senate on the War Powers issue (Javits, Eagleton and Stennis, etc.).<sup>2</sup> Last year we were able to defuse the issue by aiding the Zablocki bill which did pass the House. This year all of the active bills go far in restricting Presidential powers and are all unacceptable.

The Neustadts, MacGregor Burns' and Steele Commagers who glorified the Presidency and its inalienable and admirable right to primacy from 1932 through 1968 are found today infesting the Capitol halls testifying that shackles must be forged.

The Indochina situation has infused wide support for these measures especially in the Senate. Preliminary soundings indicate the Javits or Stennis bills could pass in the Senate. Preliminary inquiries also indicate that there does not seem to be a basis for acceptable compromise on any of the Senate bills.

Secretary Rogers testified on May 14th opposing the bills and making an appeal to defer action beyond the passions of Vietnam.<sup>3</sup> Stennis has also made this suggestion.

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<sup>1</sup> Source: National Archives, Nixon Presidential Materials, NSC Files, Subject Files, Box 315, Congressional, Vol. 3. No classification marking. Sent for action. A notation on the memorandum indicates the President saw it.

<sup>2</sup> On March 8, the Senate Foreign Relations Committee began hearings on S. 731 (later reintroduced as S. 2956), Senate Joint Resolution 18, and Senate Joint Resolution 59, concerning the division of war powers between Congress and the President. The hearings continued on March 9, 24, and 25, April 23 and 26, May 14, July 26 and 27, and October 6. During the course of the hearings the following legislation was introduced and referred to the Committee: S. 1880, introduced by Senator Bentson; Senate Joint Resolution 95, introduced by Senator Stennis; and House Joint Resolution 1, introduced by Representative Zablocki on January 22 and passed by the House by a voice vote on August 2. The hearings were printed for the use of the Foreign Relations Committee under the title *War Powers Legislation: Hearings Before the Committee on Foreign Relations, United States Senate, Ninety-Second Congress, First Session, on S. 731, S.J. Res. 18 and S.J. Res. 59* (Washington: U.S. Government Printing Office, 1972). Included was the text of each piece of proposed legislation referred to the committee.

<sup>3</sup> For text of Rogers' testimony, see *ibid.*, pp. 485-547.

We now face potential defeat on this issue which could have immediate unpleasant results, as well as forcing a fundamental shift in Constitutional power toward the Legislative Branch.

If we decide to battle, it could be long and bitter, and the results are uncertain.

An alternative strategy, however, may be available in the bill proposed by Senator Beall (Tab A)<sup>4</sup> which would establish a bipartisan commission composed of Senators, House Members, Executive Branch officials, and private members appointed by the President, the Speaker, and the President of the Senate. It would investigate, study, and issue a report and recommendations “not later than January 1973.” This approach would give our allies in the Senate something positive to champion, and if successful, it would defer the issue at least until the 1972 elections are over.

If this proposal is supported by the Administration, it is essential that *extreme* care be taken in selection of commission members and the commission staff.

List of options at Tab B.

*Recommendations*<sup>5</sup>

That the Administration support the Beall proposal and to that end Henry Kissinger, John Dean and Clark MacGregor be authorized to work with Beall to refine the draft bill.

That responsibility for selecting a list of nominees for your consideration for appointment to the commission and to the commission staff be given to Henry Kissinger, John Dean and Clark MacGregor.

## **Tab B**

Washington, undated.

### OPTIONS FOR ADMINISTRATION RESPONSE TO ATTEMPT OF CONGRESS TO DEFINE PRESIDENTIAL WAR POWERS

I. *Presidential Statement.* The President could send to Congress a message outlining his views on the nature of the war powers and the respective role of Congress and the President in their exercise. Such a statement could indicate the manner in which the President intends to

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<sup>4</sup> Tab A is attached but not printed.

<sup>5</sup> The President approved both recommendations.

respond to international situations involving the use or possible use of American armed forces.

A. *Advantages.*

1. Would enable the President to capture the initiative on the issue and strike a positive posture.

2. Would afford a highly publicized opportunity to restate the problem in realistic terms and draw attention to the vast complexity of the problems involved in seeking to define the war powers without reference to specific factual situations.

3. Would buy time during which efforts could be made to convince a Senate majority that legislation is unnecessary and/or inappropriate given the President's statement.

B. *Disadvantages.*

1. Would run the risk of locking the President in a position from which it would be embarrassing to extricate himself should it subsequently be necessary to do so.

2. The opposition could attempt to use the statement as a basis for drafting legislation freezing in law the "understanding" of the President regarding his own powers. Such a move would be difficult to thwart without creating the appearance of saying, "This is what I intend to do, but don't force me to do it."

3. The great difficulty with the war powers is that they are virtually incapable of definition and an attempt by Congress or the President to do so could generate unforeseen constitutional and practical problems of great magnitude.

II. *National Commission on the Transition to Peace.* The President could ask Congress to establish a national commission charged with studying the multitude of problems involved in readjusting to a peacetime situation including an examination of the procedures by which the United States should honor its national commitments in the future and a study of the existing emergency measures that can be repealed without jeopardizing national security. The commission could be modeled on the Marihuana Commission established by Congress. (A variation is found in the Beall proposal at Tab A.)

A. *Advantages*

1. Would convey Presidential interest in a serious study of these problems and suggest a posture of reasonableness.

2. Would buy time (at least a year) during which period the situation in Vietnam could improve to the point where pressure for Congressional action on the war powers would evaporate.

B. *Disadvantages.*

1. May be inadequate to stem the pressure for immediate action by Congress.



2. Would involve the risk of a report unfavorable to the position of the Administration. This would largely depend upon the type of individuals appointed to the Commission and their attitude toward the issues involved.

III. *Presidential Commission*. In order to expedite the process and to maximize Administration leverage, the President could establish by Executive Order a commission with duties identical to those outlined above.

A. *Advantages*.

1. Same as 2A above.
2. Greater control and speedier response.

B. *Disadvantages*.

1. Same as 2B above.
2. Appearance of whitewashing the problem and stalling action by Congress.

IV. *Open Battle*. The Administration could seek to line up sufficient votes in the House to defeat any war powers measure that may pass the Senate.

A. *Advantages*.

1. Would avoid the necessity for making any substantive concessions on the merits of the issue.
2. Could keep the issue in a political and/or partisan context if linked to an attempt on the part of the Democrats to embarrass the President and the doves to undermine the President's Vietnam policies.

B. *Disadvantages*.

1. Would run the risk that the issue might come to a vote prior to the demonstrated success of our Vietnam policy, a time not particularly opportune for the Administration.
2. Possibility of defeat in the House.

V. *Compromise*. The Administration could attempt to work out terms for a compromise resolution that defines the respective war powers in a manner that does not seriously jeopardize the ability of the Executive Branch to respond to threats to our national security.

A. *Advantages*.

1. Would defuse the issue and avoid a nasty struggle between Congress and the President.
2. A successful precedent exists in the Zablocki Resolution passed by the House last year.

B. *Disadvantages*.

1. Would pose a difficult task of definition.
2. Would run the risk of freezing Presidential powers in a contemporary context without regard to the constantly changing world situation.

3. Would raise a serious constitutional problem relating to the power of Congress to define by legislation powers of the President granted by the Constitution and not legitimately subject to restriction by Congress.

4. Recent attempts to elicit interest in the Senate for the Zablocki formula were unsuccessful.

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**386. Memorandum From the Assistant Secretary of State for Congressional Relations (Abshire) to the President's Counsel (Dean)<sup>1</sup>**

Washington, August 3, 1971.

SUBJECT

H.J.Res.1 Concerning the War Powers of the Congress and the President

The Zablocki Resolution (H.J. Res.1) has only one operative provision.<sup>2</sup> The Resolution would require the President to report promptly to the Congress whenever, without prior specific congressional authorization, he commits military forces to armed conflict; he commits military forces equipped for combat to the territory of a foreign nation, except for deployments which relate solely to "supply, repair, or training of United States forces, or for humanitarian or other peaceful purposes"; or he substantially enlarges military forces already located in a foreign nation.

While we believe that it is unnecessary to enact a reporting requirement into law since Congress is promptly informed whenever the President uses the armed forces, the Department does not oppose enactment of the Zablocki Resolution. The Zablocki reporting provision is geared to a standard of "prompt" reporting, rather than a specific number of hours and, therefore, would not impose an unreasonable burden upon the Executive.

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<sup>1</sup> Source: National Archives, RG 59, Central Files 1970-73, DEF 1 US. No classification marking. Drafted by Kristine Strachan (L) on July 30. Cleared by Deputy Legal Adviser Carl Salans and Deputy Assistant Secretary for Congressional Relations Harrison Symmes.

<sup>2</sup> For text of the resolution, passed by a voice vote on August 2, see Senate Committee on Foreign Relations, *War Powers Legislation*, p. 862.

The remaining provisions of the Zablocki Resolution are either declaratory or “sense of Congress.” For example, Section 2 states that it is the sense of Congress that the President should seek appropriate consultation with the Congress before involving the armed forces in armed conflict. On the basis of my communications with Mr. Lehman of the National Security Council, the Legal Adviser to the Department of State indicated in his testimony before the Zablocki Subcommittee on June 2, 1971 that the Administration had no objection to this provision.<sup>3</sup>

The Zablocki Resolution presents no constitutional problems because it avoids the pitfall of attempting in advance to define and allocate the respective war powers of the President and Congress. The Resolution is consistent with the statement of Secretary Rogers before the Senate Committee on Foreign Relations on May 14, 1971 in which he stated that the policy of this Administration is to support cooperative measures designed to improve coordination and consultation between Congress and the Executive in the area of the war powers.<sup>4</sup>

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<sup>3</sup> For text of John Stevenson’s testimony, see House Committee on Foreign Affairs, *War Powers Legislation: Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, House of Representatives, Ninety-Second Congress, First Session* (Washington: U.S. Government Printing Office, 1971), pp. 52–57.

<sup>4</sup> See footnote 3, Document 385.

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### 387. Memorandum of Conversation<sup>1</sup>

Washington, September 20, 1971, 12:07–2:30 p.m.

#### PARTICIPANTS

Dr. Henry A. Kissinger  
Senator J. Glenn Beall  
NSC Staff—John Lehman

Dr. Kissinger expressed his regret that Senator Beall’s illness and the requirements of the President had forced the cancellation of several previously scheduled visits. He expressed his great appreciation

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<sup>1</sup> Source: National Archives, Nixon Presidential Materials, NSC Files, Subject Files, Box 315, Congressional, Vol. 3. Marked Secret on p. 1 and For Official Use Only on pp. 2–3. Drafted by Lehman. The meeting was held in Kissinger’s office.

for Senator Beall's firm support on issues of national security in the Senate.

Senator Beall stated that he would very much like to have Dr. Kissinger's reaction to his proposed bill to create a joint Congressional-Presidential Commission to study the question of War Powers. He stated that the question had cooled somewhat since he first drew up the bill but that he expected it to hot-up once again in January. His purpose in drawing up the bill was two-fold:

1. It would be a useful study to have done for its own sake to clear the air on a number of issues.
2. It would be an effective measure to counter the strong and unacceptable Javits Bill.

At this point, Beall noted that he had been a co-sponsor of the Javits Bill when he was in the House but had since seen the error of his ways.

Dr. Kissinger replied that he saw much merit in the Beall approach but at the present time he wanted to delay the issue and thought it wiser to wait in introducing it.

Beall agreed.

Dr. Kissinger then briefly reviewed the bill itself and suggested that we had some reservations about the organization and the mandate of the commission but that these were technical rather than fundamental.

Senator Beall replied that he would be happy to work with us at the proper time to incorporate our suggestions in his bill.

Dr. Kissinger noted in particular the danger that failure to give close attention to the commission membership and the staffing held. He noted with dismay a great increase in irresponsibility in the groves of academe. He noted, that in his day intellectuals were all vigorously anti-Congress and pro-Executive branch, a natural proclivity since the intellectual establishment is at heart anti-democratic and elitist. Now, however, with a Republican President, and Senator Fulbright and the Foreign Relations Committee leading the pro-Congress wing, the intellectual community has changed its position 180 degrees. Dr. Kissinger further noted that an important source of the problem was to be found among the staff of individual senators and committees, many of whom are frustrated FSO's (FSO's being a difficult enough problem when they're not frustrated). Senator Beall fully agreed with Dr. Kissinger's comment that it is ironic that even the Republicans are having a difficult time in adjusting to a pro-Executive stance now that they have possession of the White House; Republican senators especially seem to have an ingrained instinct to have at the President.

Dr. Kissinger then stated that he agreed with some of Senator Javits' points and had discussed his bill at length with him. There is no

doubt, he stated, that this issue was a real problem, and that perhaps after '72 with a second term, the President himself might get behind a full reexamination of the question. Dr. Kissinger then noted that the Administration position and Senator Beall's were very close, and that after January, Senator Beall should work with Mr. Lehman to refine the proposed bill.

[Omitted here is discussion of Vietnam and other legislative issues.]

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### 388. Editorial Note

In a December 15, 1971, memorandum, John Lehman of the National Security Council staff briefed Henry Kissinger for his breakfast meeting the next day with Senator Jacob Javits, co-sponsor of the war powers bill introduced in the Senate on December 6 and unanimously voted out of the Senate Committee on Foreign Relations Committee on December 7. After noting that Javits had gained Senator John Stennis' co-sponsorship "for the small price of including a phrase permitting action to forestall imminent attack," Lehman commented that the bill was "wholly unacceptable" and was "almost identical to one which passed the Senate in 1956, but died in the House. We intend to fight and lose in the Senate, and kill it in the House or in extremis veto it." (National Archives, Nixon Presidential Materials, NSC Files, Subject Files, Box 315, Congressional, Vol. 3.) For text of the Javits–Stennis bill (S. 2956) as reported with amendments by the Senate Foreign Relations Committee, see Senate Committee on Foreign Relations, *War Powers Legislation*, pages iii–v.

The Javits–Stennis bill was a topic of discussion at a meeting on January 24, 1972, of the Legislative Interdepartmental Group, held at the White House and chaired by Alexander Haig. Assistant Secretary of State Abshire stated that "Zablocki thinks he can block this bill in the House and that we should work on the House Foreign Affairs Committee. Mr. Lehman added that the strategy is to block it in the Zablocki Subcommittee." (Summary of conclusions, January 24; Library of Congress, Manuscript Division, Kissinger Papers, Box CL 302, Legislative Interdepartmental Group)

The Legislative Interdepartmental Group again took up the Javits–Stennis bill at its meeting held at the White House on March 10, 1972. Charles Brower, Deputy Legal Adviser to the Department of State, "reported the outlook is grim. Senators Roth, Bennett, Childs and Ribicoff are prepared to co-sponsor and the bill is becoming a motherhood

issue. It may come to the floor within ten days. The leadership of the American Bar is opposed to it and Clark MacGregor has suggested trying to get it referred to the Judiciary Committee. The main problem is that no one wants to lead the fight against it. Scott won't do it and Allott won't lead the fight either. Goldwater and Tower are against it, but would not be helpful as leaders of the opposition." (Summary of conclusions, March 10; *ibid.*)

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**389. Memorandum From the President's Deputy Assistant for Congressional Relations (Korologos) to President Nixon<sup>1</sup>**

Washington, April 13, 1972.

SUBJECT

War Powers Legislation

The Senate today, after three weeks of debate, passed a strong War Powers bill by a 68–16 vote. 40 Democrats were joined by 28 Republicans voting for the bill. Three Democrats joined 13 Republicans against it.

*Background*

1. The bill was introduced December 6, 1971, by Senator Javits, Senator Bentsen, Senator Eagleton, Senator Everett Jordan, Senator Spong, Senator Stennis and Senator Taft. (Tab A is a short analysis of the bill).<sup>2</sup>

2. Chief Administration allies against it were Senator Goldwater, Senator Dominick, Senator McGee, Senator Gurney and Senator Beall. (Democrats put great pressure on McGee to back off, but he stood fast.)

3. Our chief arguments against the bill were:

A. It raises serious constitutional questions.

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<sup>1</sup> Source: National Archives, Nixon Presidential Materials, NSC Files, Subject Files, Box 315, Congressional, Vol. 4. No classification marking. Marked "Red Tag." A notation on the memorandum indicates the President saw it. Sent through MacGregor.

<sup>2</sup> Tab A is attached but not printed; see Document 392 for a summary of the bill's provisions.

B. It would limit the President's ability to respond flexibly and quickly to emergencies, and create dangerous confusion at home and abroad in the event of attack.

C. It creates a serious erosion of credibility of the U.S. as a collective security partner in eyes of all allies, especially NATO.

D. We also conveyed a strong veto possibility.

### *Strategy*

Since the Senate was bound and determined to pass "something" in the War Powers area to "vindicate" itself for allowing Vietnam to happen, there was little or no chance of beating the measure or of getting any pro-Administration amendments adopted.

Our strategy, therefore, amounted mainly to delay and to stimulate Senate debate (at the request of Doc Morgan of House Foreign Affairs), to show that there *was* controversy, that there *were* amendments to be offered, and that there was no unanimous approval of the ultimate Senate action.

The basic problem working against us was Stennis. He had become a co-sponsor and once Senators saw this, they began to follow him, saying that if Stennis was for it, it couldn't be that bad.

MacGregor and Korologos talked with Stennis (3/30/72) at great length about getting him to back off the bill and go for one of our options. However, he told us he was in too deep to back away, even though he was admittedly uncomfortable siding with Javits.

Nonetheless, we offered a series of amendments as follows:

1. Hruska/Ervin proposal to refer bill to Judiciary for 45 days of further study. Rejected, 26–60. (4/11/72)

2. Beall Amendment creating a commission to study the whole issue. Rejected, 23–56. (4/12/72)

3. Dominick Amendment substituting Zablocki bill (which would call on the President only to *report* troop commitments). Rejected, 22–56. (4/12/72)

4. Dominick Amendment providing that nothing in the bill would restrict the President's authority to conduct intelligence operations he deemed necessary to national security. Rejected, 29–49. (4/12/72)

5. Dominick Amendment providing that nothing in the act shall be construed to limit Presidential authority in implementation of U.N. Charter or any treaty ratified by the United States. Rejected, 24–53. (4/12/72)

6. McGee Amendment adding a new section to the bill calling for a National Commission on U.S. Foreign Policy, National Commitments and War Powers. Rejected, 19–57. (4/12/72)

7. Dominick Amendment permitting the President to retaliate with respect to armed attack on U.S. forces overseas in addition to being able to repel such attack. Rejected, 37–45. (4/13/72)

8. Buckley Amendment amending the U.N. participation act requiring Congressional approval before the President could permit U.N. to use U.S. Armed Forces for enforcement purposes. Rejected, 27–55. (4/13/72)

The Opposition also offered some interesting amendments:

1. Gravel Amendment to make the bill applicable to Vietnam (the proposal specifically excludes the Vietnam War). Rejected, 11–74. (4/11/72)

2. Gravel Amendment calling for immediate declaration of war against North Vietnam. Tabled, 78–7. (4/11/72)

3. Fulbright Amendment designed to avoid implication that Congress is giving negative or implicit sanction to continuing Vietnam War. Rejected, 28–56. (4/11/72)

4. Fulbright Amendment banning first use of nuclear weapons without Congressional approval. Rejected, 10–68. (4/12/72)

### *Summary*

Our best chance of beating the bill is in the House, where Morgan has expressed strong opposition. The long debate, amendments, and parliamentary maneuvering in Senate should show the House that there is controversy and hopefully the bill will die in Committee.

MacGregor and Cook of Congressional Relations will begin immediately to work on House Foreign Affairs Committee.

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### **390. Editorial Note**

During a conversation in the Oval Office on April 18, 1972, between President Nixon and Clark MacGregor, President's Counsel for Congressional Relations, the following exchange took place.

President: "You'd never know that the Senate could be so goddamned irresponsible. Look at that war powers debate. What they came up with, that monstrosity, why that can't become law. You know that."

MacGregor: "They know it too."

President: "It's terrible. And Republicans voted for the goddamned thing as well as Democrats. Where the hell is the responsibility in this country, Clark?" (National Archives, Nixon Presidential Materials, White House Tapes, Recording of Conversation Between Nixon and MacGregor, April 18, 1972, Oval Office, Conversation No. 712–6) The editor transcribed the portion of the conversation printed here specifically for this volume.



**391. Memorandum From Secretary of State Rogers to President Nixon<sup>1</sup>**

Washington, April 28, 1972.

SUBJECT

War Powers Legislation

A conference committee soon will consider two very different war powers bills:

(1) The Zablocki bill, a moderate sense of the Congress resolution which you have previously approved and which has passed the House twice, in 1970 by a vote of 288 to 39 and in 1971 by unanimous voice vote; and

(2) The Javits–Stennis bill, which recently passed the Senate 69 to 16 and which we have strongly opposed as being both unconstitutional and unwise.

The position of Congressman Zablocki is critical to the outcome of the conference and the further course of the legislation, since he has been its very ardent principal supporter in the House and is accorded deference on this issue by Chairman Morgan. Congressman Zablocki has indicated to us that he will fight for his own bill in the conference, but he believes that since the two bills are so far apart there is no hope that his bill will prevail. While Congressman Zablocki is proud of his particular bill, his fundamental interest is in seeing war powers legislation enacted. From discussions with him it seems apparent that in the absence of some indication of Administration willingness to accept something other than his bill he may well lead the House conferees to acceptance of a compromise version of the Javits–Stennis bill, including a legal definition of the President’s war powers which would not be acceptable. If this were to occur, it is possible that the combined support of Senator Stennis and Congressmen Morgan and Zablocki for the conference report could generate enough votes in the House to override a veto (a vote to override would be a foregone conclusion in the Senate). Our best estimate is that this would come in September.

In order to avoid the possibility of such a significant adverse development, I strongly urge that we propose to Congressman Zablocki, strictly as a final fallback position, that the Administration could accept a resolution which expresses the sense of Congress, and therefore is not legally binding, and which incorporates some but not all of the

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<sup>1</sup> Source: National Archives, Nixon Presidential Materials, NSC Files, Subject Files, Box 316, Congressional, Vol. 6. No classification marking. A notation on the memorandum indicates the President saw it.

language of the Javits–Stennis bill. After reviewing this possibility in detail with the Legal Adviser, I am satisfied that a resolution can be devised along these lines which should be acceptable, particularly as it would be only a sense of the Congress resolution.

It is far from certain, of course, that the Senate conferees will accept such a compromise. If they do not, however, the result would be a deadlocked conference and no war powers legislation, with the Administration in a very strong position with respect to this issue.

I believe it unlikely that Congressman Zablocki would be willing to extend himself as much as would be required to achieve the proposed compromise without an understanding that the resolution, if passed, would be accepted by the Administration. I therefore request your approval for this approach.

**William P. Rogers**

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**392. Memorandum From the President's Assistant for National Security Affairs (Kissinger) to President Nixon<sup>1</sup>**

Washington, June 22, 1972.

SUBJECT

War Powers Legislation

The Javits–Stennis bill on war powers passed the Senate 68 to 16 despite our strong opposition on grounds of its being unconstitutional and unwise (Text at Tab A).<sup>2</sup> It provides:

1. The President can deploy U.S. forces in areas where hostilities are taking place or are threatened only under the following conditions:

a. To repel attack on U.S. territory; to retaliate for such an attack; or to forestall direct and imminent threat of such an attack.

b. To repel armed attack on U.S. forces outside the U.S.; or to forestall the direct and imminent threat of such an attack.

c. To protect U.S. citizens while evacuating from a foreign country.

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<sup>1</sup> Source: National Archives, Nixon Presidential Materials, NSC Files, Subject Files, Box 316, Congressional, Vol. 6. No classification marking. Sent for action. A notation on the memorandum indicates that the President saw it. Haig signed the memorandum for Kissinger. A notation on the memorandum indicates Kissinger saw it.

<sup>2</sup> Tabs A, B, and D are attached but not printed.

2. Congress may terminate all such Presidential actions by Act or Joint Resolution.

3. All such actions will be terminated after 30 days unless Congress takes positive action to extend such authority.

The Zablocki bill (Tab B) has twice passed the House with our tacit support. It is a moderate sense of the Congress resolution that provides that the President should consult with Congress before acting—if circumstances permit. If that is not possible then the President must report to Congress promptly. Justice, State and NSC agree that this bill presents no problem.

A conference committee will soon meet to reconcile the two bills. The Senate Conferees, Fulbright, Javits and Symington, backed by their wide vote margin will almost certainly not yield enough to make the bill acceptable. While Doc Morgan and Zablocki oppose the Senate version they do want a bill, and there is real danger that they will accept a compromise that you would still have to veto. Apart from the political disadvantages of vetoing a war-powers bill, it is quite possible that the Senate might override, and an outside possibility that the House might do the same.

#### *Decision*

We must now give the House conferees some clear signals and the options seem to be the following:

##### Option 1.

The Secretary of State recommends (Tab C)<sup>3</sup> that you approve telling Zablocki that you could accept the compromise resolution at Tab D as a final fallback position. It includes a specification of presidential war-powers and endorses a thirty-day cutoff, both from the Javits bill; but both merely sense of Congress and non-binding. It includes the requirement to report in writing taken from the Zablocki bill.

##### *Pro*

—Zablocki is critical to the outcome in the House. He is accorded deference on the issue by Morgan. He has said that he wants a bill of some kind. Whatever bill he brings back to the House will pass, and he could possibly muster enough to override a veto. He believes that the two bills are so far apart that there is no hope that his will prevail. If we show willingness to compromise he will be more likely to hold firm against the absolutely unacceptable elements of Javits.

—The Senate Conferees will be unlikely to accept any compromise that is only sense of Congress, thus hanging up the conference and precluding any bill—the best possible outcome.

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<sup>3</sup> Document 391.

—If it is finally passed, the reporting requirement presents no real problem, and the remainder is sense of Congress and not binding.

*Con*

—Although not binding the President would be giving approval to a constitutional position that Justice and State agree is not valid and seeks on its face to curtail the powers of the Presidency.

—Final passage of such a bill would have the same adverse diplomatic impact abroad as the Javits bill.

—Although not legally binding, passage would erect formidable political constraints to observe the letter of the restrictive measures.

—Signalling compromise now weakens the Executive position of strong opposition and makes an ultimate veto a less credible threat.

Option 2.

Inform Zablocki that no compromise is acceptable if it includes a specification of the President's War Powers or a time limitation on their exercise.

*Pro*

—Will demonstrate that the Administration is determined and should stiffen the House Conferees.

—Makes veto threat credible and agreement in conference most unlikely.

—Does not compromise the President's constitutional prerogatives or the reliability of U.S. commitments to allies.

*Con*

—If Zablocki is told that there will be no compromise on those points, he may feel he is being used to prevent any bill from emerging and he *wants* a bill. He may therefore agree to the Javits formula as a last resort and work in the House for a 2/3 majority to override.

*Recommendation*

That you approve Option 2. Clark MacGregor and John Dean concur. Colson concurs also.<sup>4</sup>

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<sup>4</sup> The President initialed Option 2. At a meeting of the Legislative Interdepartmental Group on July 7 Brower "asked about the Presidential decision not to support Congressman Zablocki's fallback position on War Powers." The group agreed that "State doesn't have to tell Zablocki of the President's decision immediately and may await a more opportune moment. A meeting of the President with Zablocki may eventually be necessary." (Summary of conclusions, July 7; Library of Congress, Manuscript Division, Kissinger Papers, Box CL 302, Legislative Interdepartmental Group)

**393. Memorandum From the President's Assistant for National Security Affairs (Kissinger) to Secretary of State Rogers<sup>1</sup>**

Washington, July 29, 1972.

SUBJECT

War Powers Legislation

The President has considered various approaches to the War Powers legislation now under consideration in the Congress and has decided that Congressman Clement Zablocki should be informed that any compromise on this legislation that includes a specification of the President's war powers or a time limitation on their exercise would be unacceptable. Would you please arrange to have Congressman Zablocki so informed.

**Henry A. Kissinger**

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<sup>1</sup> Source: National Archives, Nixon Presidential Materials, NSC Files, Subject Files, Box 316, Congressional, Vol. 6. No classification marking.

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**394. Letter From Secretary of State Rogers to the Chairman of House Committee on Foreign Affairs (Morgan)<sup>1</sup>**

Washington, September 13, 1972.

Dear Doc:

I know that the House–Senate conference on the war powers bills will be meeting today and I want to take this opportunity to express to you my views on this important matter.

The House bill passed twice as H.J. Res. 1 and more recently as S. 2956<sup>2</sup> is fully consistent with our constitutional system of war

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<sup>1</sup> Source: National Archives, RG 59, Central Files 1970–73, DEF 1 US. No classification marking. Drafted by Isabelle Mellenberg (L) and concurred in by Abshire and Stevenson.

<sup>2</sup> On August 14 the House, by a 344–13 roll-call vote, had passed a version of S. 2956 (the Javits–Stennis bill) that, following amendment by the House Foreign Affairs Subcommittee, closely resembled H.J. Res. 1, passed on August 2, 1971, and H.J. Res. 1355, passed on November 16, 1970. For the provisions of the latter, see footnote 3, Document 383.

powers shared between the Congress and the President and could strengthen the cooperation between the two branches in the exercise of these powers.

It would be a mistake, however, for the Congress to go beyond the House bill to accept a concept which seeks to define the President's war powers or place a time limit on the emergency exercise of those powers. My own view on the Senate bill which embodies these concepts is that it is unconstitutional and unwise. I so expressed myself in testimony before the Senate's Committee on Foreign Relations on May 17, 1971,<sup>3</sup> and subsequent attempts to perfect this legislation have not answered my basic objections.

The Senate bill, for example, provides that the President may not sustain any military action including defense of the territory of the United States itself beyond a period of thirty days unless Congress expressly acts to authorize a continuation beyond that period or in certain other circumstances. Yet there is no doubt that under the Constitution the President has the authority to defend the territory of the United States for whatever period is required. The Senate bill is clearly unconstitutional.

The Senate bill attempts to spell out in detail all of those circumstances in which the President, in the absence of express congressional authorization, would be permitted to use our armed forces. But our system of checks and balances already allocates the war powers between the President and Congress. This allocation of powers is inherent in our constitutional system and has survived the test of time for nearly two centuries. I believe that any legislative attempt to alter our historic constitutional system, particularly in such a critical area, should be cast as an amendment to the Constitution rather than as a simple statute.

I strongly oppose any legislation which goes beyond the House bill.<sup>4</sup>

Sincerely,

**William P. Rogers**

<sup>3</sup> Presumably a reference to Rogers' testimony on May 14; see footnote 3, Document 385.

<sup>4</sup> The legislation died in conference.