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EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

September 4, 1973

LEGISLATIVE REFERRAL MEMORANDUM

To: Legislative Liaison Officer  
National Security Council  
Department of Defense  
Department of Justice

Subject: State Department's proposed report on S. 440  
and H.J.Res. 542 on War Powers.

The Office of Management and Budget would appreciate receiving the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

( ) To permit expeditious handling, it is requested that your reply be made within 30 days.

(XXX) Special circumstances require priority treatment and accordingly your views are requested by C.O.B. SEPT. 5, 1973. IF TIME DOESN'T PERMIT WRITTEN RESPONSE, PLEASE PHONE INFORMAL COMMENTS AND SEND FORMAL VIEWS LATER.

Questions should be referred to Jim Barie (103x4580 ) or to George R. Gilbert (103x4710 ), the legislative analyst in this office.

W. H. Rommel  
Wilfred H. Rommel  
Assistant Director for  
Legislative Reference

Enclosures

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DEPARTMENT OF STATE

Washington, D.C. 20520

Honorable Clement J. Zablocki  
Chairman, Subcommittee on National  
Security Policy and Scientific  
Developments  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Pursuant to my letter to you of August 9, 1973, on War Powers legislation, and your request for comments of the Executive Branch thereon, please find attached a memorandum of the Department of State on War Powers that is responsive to your request.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this memorandum.

Sincerely yours,

Marshall Wright  
Assistant Secretary for  
Congressional Relations

Enclosure:  
As stated





## DEPARTMENT OF STATE

Washington, D.C. 20520

### WAR POWERS

The Department of State believes that both the House Joint Resolution (H.J. Res. 542) and the Senate Bill (S. 440) on the war powers present extremely serious constitutional and political difficulties. At the same time, the reporting requirements contained in both of those proposals appear to constitute constructive efforts to enhance coordination between the Congress and the Executive in the exercise of the war powers. It is believed that legislation comprising appropriate reporting requirements could do much to facilitate a profounder cooperation between the Executive and the Congress as well as wider public understanding and support of such measures as it may prove necessary to take in this sphere. However, other provisions of these proposals purport to limit or terminate Presidential authority in what are believed to be potentially dangerous, unnecessary, and, in some cases, unconstitutional, ways.

Among the most objectionable provisions is that contained in Section 3 of S. 440. That section contains an exclusive listing of the instances in which the President may introduce the armed forces into hostilities or situations in which imminent involvement in hostilities is clearly indicated by the circumstances. Section 3 would thus legislate strict limitations upon Presidential reactions to future unknown and, in some measure, unknowable situations. The practical impossibility of anticipating today every future exigency in which the nation's safety and vital interests would compel such use of the armed forces must be apparent to anyone who reflects on the varied character of the emergencies which have arisen in the eventful history of this nation. The drafters of our Constitution were wise enough to recognize the impossibility of foreseeing the variety of those events, and, for that reason among others, they framed and allocated the war powers in general and broad terms. We can be no more certain than they were of anticipating every kind of future emergency. Accordingly, it is submitted that we would be most ill-advised to adopt legislation which purports to do so.



Support for the flexible scheme of the Constitution does not equate with support for unlimited Presidential war-making powers; it does, however, entail support for the maintenance of a readily adaptable governmental system in which all branches can respond appropriately to any crisis that might arise, whether long foreseen or not. Although it presents its own crucial difficulties, H.J. Res. 542 does avoid the hazards of attempting to make an exclusive and comprehensive list of the ways in which the President may exercise his war powers.

A major area of difficulty raised by both the Senate bill and the House resolution involves the provision for an automatic termination of Presidential authority to employ the armed forces in certain situations after a designated period of time, a period which, in the context of a particular case, necessarily would be arbitrary. Such termination would not require any congressional action at the time. Neither the Senate deadline of thirty days nor the House proposal of 120 days adds any new capability to that which the Congress already has to review the reports this legislation requires whenever the Congress desires to do so. An arbitrary deadline could, however, seriously diminish the deterrent value of our armed forces and could effectively destroy any incentive on the part of an adversary to reach an early settlement of a crisis. Instead, an adversary's efforts might well be concentrated on persevering through a proclaimed deadline in hopes of congressional inaction, thereby effecting a unilateral United States disengagement. Indeed, the result of such provisions might well be an intensification of a crisis rather than a diminution as the cutoff date approached. To create such risks to the national security without enhancing any present capacity for effective decision-making seems unnecessary and unwise.

Moreover, profound legal as well as policy problems are raised by the categorical requirement in both proposals that the specified Presidential authority automatically terminates after the passage of an arbitrary period of time. In fact and law, it is clear that, on the contrary, even affirmative action by the Congress could not terminate all Presidential



authority to employ the armed forces in hostilities. For example, the President clearly has both the constitutional authority and responsibility to protect the United States and its armed forces from armed attack regardless of how long it takes to do so. Any legislative attempt to restrict that authority would be unconstitutional.

Section 4(c) of H.J. Res. 542 poses an additional problem in that it purports to allow Congress at any time to compel the President to withdraw the armed forces from hostilities by the passage of a concurrent resolution. Although the Congress has in the past granted Presidents certain powers subject to their being withdrawn by concurrent resolution, this is clearly not a comparable case. H.J. Res. 542 does not purport to be a conditional legislative grant to the Executive of additional power; it rather purports to terminate any otherwise established Presidential authority by a simple concurrent resolution. Under this theory the Congress could tomorrow decide that henceforth it could negate any legislation it has ever passed simply by adopting a concurrent resolution in the future. The role of Presidential approval and veto in the legislative process could thus be effectively avoided. Such a procedure is clearly not acceptable as a matter of law or public policy.

Responsible, intelligent and effective exercise of the war powers requires the fullest participation of and cooperation between both the Congress and the Executive, not the undermining of the powers of one Branch by the other as, it is believed, would be the effect of elements of S. 440 and H.J. Res. 542. It is accordingly submitted that significant changes must be made to this proposed legislation before it can make a constitutional and constructive contribution to the operation of the Government and serve the interests of the nation.





DEPARTMENT OF STATE

Washington, D.C. 20520

EXECUTIVE BRANCH COMMENTS ON H.J. RES. 542

Section 1: Short Title

Section 2: Consultations

Acceptable.

Section 3: Reporting

Acceptable.

Section 4: Congressional Action

4(a): Acceptable.

4(b): This subsection raises profound constitutional and policy problems. For example, the sweeping language of this provision would preclude the President from sustaining for more than 120 days without congressional consent employment of our armed forces stationed abroad in hostilities even in their own self-defense. The present language does not cover only offensive operations unrelated to self-defense. Even though one might assume that the Congress would always support efforts of self-defense, as a matter of constitutional authority that right and that responsibility belong to the Commander-in-Chief, not to the Congress. Legislation cannot alter that basic fact, and legislation which attempts to do so is unconstitutional.

The authority and ability of the Congress to bind or inhibit many other actions of the President by passing a legally compelling bill or joint resolution is unquestioned. However, very serious questions do arise about both the wisdom and the legality of a categorical requirement that any Presidential authority, whether constitutional or legislative, to sustain certain actions with the armed forces will automatically terminate if the Congress simply fails to act by some arbitrary date. The Congress now has the power to amend or withdraw at any time authority it has conferred on the President. Such amendment or withdrawal must, however, be effected in a legally compelling manner, which constitutionally does not include congressional inaction.



Because the Congress already has the authority to review at any time the reports required by Section 3, this deadline really adds nothing new to the power of Congress in the war powers area. On the other hand, an arbitrary deadline surely could destroy any incentive to a future adversary to reach an early settlement of a crisis; instead, an adversary would quite likely try to continue a confrontation until that fixed date in hopes that Congress might fail to act and hence compel the unilateral disengagement of U.S. forces. To create such a risk to the national security without enhancing any present capacity for effective decision-making seems unnecessary and unwise.

4(c): Section 4(c) presents the fundamental problem that if the President has lawfully, but absent a declaration of war or specific congressional authorization, engaged the armed forces in hostilities outside the territory of the United States whether for self-defense or other reason, the Congress by simple concurrent resolution, which does not have the force of law, could compel their disengagement at any time. Even in those situations in which the Congress could clearly terminate Presidential activities, such as through the use of its appropriations power, the Congress would of course have to do so in a legally compelling fashion, not through a concurrent resolution which is an expression of the sense of the Congress rather than binding legislation.

The Congress has in the past granted Presidents certain powers subject to their being withdrawn by concurrent resolution, but this is clearly not a comparable case. This resolution does not purport to be a conditional grant to the executive of additional power; it purports only to terminate any already established Presidential authority by a simple concurrent resolution. Under this theory the Congress could tomorrow decide that henceforth it could negate any legislation it has ever passed simply by adopting a concurrent resolution in the future. Such a procedure is clearly not acceptable as a matter of law or public policy.

#### Sections 5 and 6: Congressional Priority Procedure

These sections are generally acceptable in that some priority procedure is essential in this context.

#### Section 7: Termination of Congress

No objection.



Section 8: Interpretation of Act

No objection.

Section 9: Effective Date

No objection.

August 28, 1973





## DEPARTMENT OF STATE

Washington, D.C. 20520

### EXECUTIVE BRANCH COMMENTS ON S. 440

#### Section 1: Short Title

#### Section 2: Purpose and Policy

The desire to ensure the cooperation of the Congress and the Executive in decisions involving the use of armed force in the manner envisaged in the Constitution is of course fully acceptable to the Executive Branch. The particular description contained in this Section of the respective Constitutional powers of the Congress and of the President cannot, however, be considered a comprehensive or in some cases accurate definition of those powers. For example, the President clearly has the authority and the responsibility to ensure the self-defense of the United States whether or not a threat may fit within the particular formula of this Section. On the other hand, the interpretation of the "necessary and proper" clause of the Constitution would construe Congressional power as much broader than that intended by the Constitution. That clause was intended primarily to guard against an excessively narrow construction of the authority of the Federal Government vis-a-vis that of State Governments. That clause has never been interpreted to empower the Congress to change the balance and yet that is precisely what is being attempted here. That type of change would require amendment of the Constitution.

#### Section 3: Emergency Use of the Armed Forces

Section 3 is one of the most objectionable provisions in the entire bill, ~~and it should be deleted.~~ It purports to set forth an exclusive listing of the instances in which the President may introduce the armed forces into hostilities or situations where imminent involvement in hostilities is clearly indicated. The Congress would thus legislate strict limitations on Presidential reactions to future unknown and perhaps unknowable situations.



The practical impossibility of anticipating today every future exigency in which the nation's safety and vital interests would compel such use of the armed forces must be apparent to anyone who reflects on the varied character of the emergencies which have arisen in the eventful history of this nation. The drafters of our Constitution were wise enough to recognize the impossibility of foreseeing the variety of those events, and, for that reason among others, they framed and allocated the war powers in general and broad terms. We can be no more certain than they were of anticipating every kind of future emergency. Accordingly, we would certainly be most ill-advised to adopt legislation which purports to do so.

#### Section 4: Reports

Acceptable. This approach, unlike that contained in Section 3, can be viewed as a constructive effort to enhance coordination and cooperation between the Congress and the Executive in the exercise of the war powers.

#### Section 5: Thirty-Day Authorization Period

Section 5 presents a major area of difficulty by providing for an automatic termination of Presidential authority to employ the armed forces in certain situations after 30 days from their introduction into that situation. This period, in the context of a particular case, would necessarily be arbitrary. Such termination would not require any congressional action at the time. It would not, however, add any new capability to that which the Congress already has to review the reports this legislation requires whenever the Congress desires to do so. An arbitrary deadline could, on the other hand, seriously diminish the deterrent value of our armed forces and could effectively destroy any incentive on the part of an adversary to reach an early settlement of a crisis. Instead, an adversary's efforts might well be concentrated on persevering through a proclaimed deadline in hopes of congressional inaction, thereby effecting a unilateral United States disengagement. Indeed, the result of such provisions might well be an intensification of a crisis rather than a diminution as the cutoff date approached. To create such risks to the national security seems unnecessary and unwise.



Moreover, profound legal as well as policy problems are raised by the categorical requirement in both proposals that the specified Presidential authority automatically terminates after the passage of an arbitrary period of time. In fact and law, it is clear that, on the contrary, even affirmative action by the Congress could not terminate all Presidential authority to employ the armed forces in hostilities. For example, the President clearly has both the constitutional authority and responsibility to protect the United States and its armed forces from armed attack regardless of how long it takes to do so. Any legislative attempt to restrict that authority would be unconstitutional.

Section 6: Termination Within Thirty-Day Period

Section 6 appears to be consistent with our Constitutional procedures for adopting legislation, and hence no objection is raised. However, it is unclear why the armed forces engaged pursuant to section 3(3) of this act should not be subject to the same protection and safeguards as those acting under section 3(1) or 3(2). It would appear that section 3(3) should be added to this list.

Section 7: Congressional Priority Provisions

No objection. Some form of priority status is certainly required for bills submitted under the scheme envisaged by this bill.

Section 8: Separability Clause

No objection.

Section 9: Effective Date and Applicability

No objection.



## NSC CORRESPONDENCE PROFILE

DOC	RECD	LOG NBR	INITIAL ACTION O
MO DA	MO DA HR	4910	Lehman
9 04	9 05 17		

SOURCE / CLASS / DESCRIPTION

TO: PRES \_\_\_\_\_ FROM: ROGERS \_\_\_\_\_ UNCLAS \_\_\_\_\_  
 KISSINGER \_\_\_\_\_ RICHARDSON \_\_\_\_\_ LOU \_\_\_\_\_  
 SCOWCROFT \_\_\_\_\_ SCHLESINGER \_\_\_\_\_ C \_\_\_\_\_  
 ELIOT \_\_\_\_\_ S \_\_\_\_\_  
 TS \_\_\_\_\_

SUBJECT: Leg's refer re State proposed report on 5440 +  
 HJ Res 542 on war powers

REFERENCE: S/S \_\_\_\_\_ OTHER \_\_\_\_\_ NOT XEROXED \_\_\_\_\_

DISTRIBUTION / INITIAL ACTION ASGMT

## INTERNAL ROUTING AND DISTRIBUTION

	ACTION	INFO
ADVANCE CYS TO HAK/SCOWCROFT		
STAFF SECRETARY		
FAR EAST		
SUB-SAHARAN AFRICA		
MID EAST / NO. AFRICA / SO. ASIA		
EUROPE / CANADA		
LATIN AMERICA		
UNITED NATIONS		
ECONOMIC		
SCIENTIFIC		
NET ASSESSMENT GROUP		
PROGRAM ANALYSIS		
NSC PLANNING		
CONGRESSIONAL	✓	
OCEANS POLICY		

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## ACTION REQUIRED

MEMO FOR HAK..... ( )  
 MEMO FOR PRES. .... ( )  
 REPLY FOR ..... ( )  
 APPROPRIATE ACTION ..... ( )  
 MEMO \_\_\_\_\_ TO \_\_\_\_\_ ( )  
 RECOMMENDATIONS ..... ( )  
 JOINT MEMO..... ( )  
 REFER TO \_\_\_\_\_ FOR: \_\_\_\_\_ ( )  
 ANY ACTION NECESSARY? ..... ( )  
 CONCURRENCE ..... via phone (✓)  
 DUE DATE: (9/05)

COMMENTS: (INCLUDING SPECIAL INSTRUCTIONS)

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SUBSEQUENT ROUTING / ACTIONS

DATE	FROM	TO	S	SUBSEQUENT ACTION REQUIRED (OR TAKEN):	CY TO
9/5/73	Lehman	Nse/s	@	cleared by telecon w/ change on pg. 1 of Exec. Branch comments	

NSC / S DISP INSTR

DISPATCH \_\_\_\_\_ NOTIFY \_\_\_\_\_ & DATE \_\_\_\_\_  
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 OR RECORD COMMENT:) \_\_\_\_\_  
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 SEE # \_\_\_\_\_ FOR FINAL ACTION & FILING.  
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