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MEMORANDUM FOR THE VICE PRESIDENT  
THE SECRETARY OF STATE  
THE SECRETARY OF DEFENSE  
THE ATTORNEY GENERAL  
THE COUNSEL TO THE PRESIDENT  
THE DIRECTOR OF CENTRAL INTELLIGENCE  
THE ASSISTANT TO THE PRESIDENT FOR  
LEGISLATIVE AFFAIRS  
THE CHAIRMAN, JOINT CHIEFS OF STAFF  
THE UNITED STATES PERMANENT REPRESENTATIVE TO  
THE UNITED NATIONS

SUBJECT: War Powers Issues (U)

The President has called for a review of the War Powers Resolution and related issues, in consultation with relevant agencies of the Executive branch and Members of Congress. In so doing, he has underscored that it is in the national interest that Executive-Congressional relations on this issue minimize unnecessary tensions while maximizing those constructive discussions dictated by the Constitution and the public good.  
(U)

The Administration needs to determine its position on the War Powers Resolution, and decide whether it should respond differently than past Administrations to congressional efforts to authorize uses of U.S. military forces overseas. If the Administration decides to break with the status quo, it needs to determine whether to pursue legislative or non-legislative avenues to address use of force issues with the Congress. (S)

The non-legislative route could entail a presidential statement of policy and follow-on discussions with the Congress to reach a new understanding. The legislative alternative could include an effort to amend the War Powers Resolution to accommodate principal Congressional and Executive Branch concerns; or to seek agreement with the Congress on a new mechanism to deal with use of force issues. (S)

In preparation for a Deputies Committee meeting and a possible Principals meeting, three papers should be prepared as listed below. Agencies should endeavor to identify and assess alternative options and no presumptions should be made about policy. Possible conflicts among different policy options should be made explicit in the analysis. While a lead agency is

designated for preparation of the papers, the views of each agency should be indicated on each major issue. Differences of view should be explained and not reconciled. The lead agency should provide its paper to the other agencies for comments. Papers are requested by close of business May 7. (U)

I. LEGAL ASSESSMENT OF WAR POWERS RESOLUTION (Justice)

The paper should address the following issues:

1. In brief, what is the historical background of the War Powers Resolution? What were the main reasons Congress enacted it? Why was it vetoed? What are its major provisions, in summary form? (U)

2. What are the agencies' views on the constitutionality of the major provisions of the War Powers Resolution, including, in particular, sections 2(c), 5(b), and 8(a)? (U)

-- To what extent do these views differ from legal positions of past Administrations? (U)

-- When past Administrations have questioned the constitutionality of the War Powers Resolution, what general policy statements have they made regarding compliance with the resolution? (U)

-- To what extent are these views shared or challenged by leading constitutional scholars? What are the contrary viewpoints? (U)

3. In what situations is the President constitutionally required to obtain Congressional authorization prior to using U.S. armed forces overseas? (U)

-- What has been the legal view and practice on this issue of past Presidents? What has been the legal view of leading constitutional scholars? (U)

4. Can Congress, by joint resolution, constitutionally require the removal of U.S. forces from deployments overseas? (U)

-- Can Congress, by joint resolution, constitutionally compel the withdrawal of U.S. forces by terminating funding for a particular deployment? (U)

5. Under what circumstances, if any, would the Courts find justiciable questions of Executive branch compliance with the War Powers Resolution? (U)

-- Can Congress, by joint resolution, constitutionally confer justiciability on the courts or create standing for members of Congress concerning Executive branch compliance with the War Powers Resolution? (U)

II. OPERATIONAL ASSESSMENT OF THE WAR POWERS RESOLUTION (DoD)

The paper should address the following issues:

A. Deployments of U.S. Forces

1. To what extent has the existence of the War Powers Resolution affected U.S. decision-making about the deployment of U.S. forces? (Provide specific examples). ~~(S)~~

2. To what extent has the War Powers Resolution influenced foreign perceptions about U.S. willingness to deploy or our ability to maintain the deployment of forces? (Provide specific examples). ~~(S)~~

-- CIA should review major foreign press reports on the War Powers Resolution and past congressional-executive conflicts regarding it. ~~(S)~~

3. Has the War Powers Resolution adversely affected the conduct of foreign policy? How have any difficulties manifested themselves? ~~(S)~~

4. What problems have arisen in applying the War Powers Resolution to special deployments for counterterrorism, covert paramilitary actions, law enforcement or other operations? ~~(S)~~

-- How have past Administrations handled such operations with respect to the War Powers Resolution? ~~(S)~~

5. In the past, how has the War Powers Resolution affected Executive branch decisions on U.S. participation in U.N. peacekeeping operations? ~~(S)~~

B. Reporting Under the War Powers Resolution

1. What reports have prior Administrations made to Congress in connection with the War Powers Resolution? [List] (U)

2. Has Congress expressed dissatisfaction with the substance of the reports provided by the Executive branch under the War Powers Resolution? If so, what corrective steps were taken? (U)

3. What legal approaches have prior Administrations developed to avoid conceding the constitutionality of the resolution in their reporting to Congress on U.S. uses of force? What was the congressional reaction to these approaches? (U)

C. Consultations Under the War Powers Resolution

1. What has been the practice of past Administrations concerning consultations with Congress? With whom were they carried out, in what time frame and on what kind of deployments? Are there examples where Congress was "consulted" to solicit their views rather than to "inform" them of a decision? (U)

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2. What bureaucratic process has been established to bring potential war powers situations to the attention of senior officials? Does this process bring the situations to their attention in time for them to make decisions about how to consult? (S)

3. What concerns, if any, have limited consultations in the past (e.g. operational security)? How valid are these concerns? Does CIA's reporting experience with its oversight committees confirm or contradict these concerns? (S)

4. What have been the primary congressional criticisms of the consultation process? (U)

5. How have past Administrations interpreted the phrase "imminent involvement in hostilities"? (U)

III. POLICY OPTIONS (State)

This paper should address three overall issues:

1. The areas where executive-congressional cooperation can be improved. (U)

2. The merits of pursuing any proposed changes in policy through legislative versus non-legislative approaches. (S)

3. The implications of increased U.S. involvement in U.N. peacekeeping operations for the Administration's position on war powers issues. (S)

The paper should analyze the following specific issues:

A. Reporting

1. What changes can be made in the timing, content or method of supplying reports to Congress on U.S. uses of force? (U)

2. What are the advantages and drawbacks of providing more substantive information in the reports? (U)

3. What are the advantages and disadvantages of sharing more intelligence information with the Congress in classified annexes to these reports? (S)

B. Consultations

1. What are the advantages and disadvantages of bringing Congress into the decision-making process earlier on U.S. uses of force? (U)

2. What are the advantages and disadvantages of major proposals to improve consultations with Congress? Do these proposals require legislative action or can they be carried out solely by

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the Executive branch? In answering these questions, discuss the merits of proposals that: (U)

- Define the purpose of consultation (e.g. to inform in a timely manner, discuss and seek advice). (U)
- Specify the Members of Congress who will be consulted. (U)
- Broaden the consultation requirement beyond situations of imminent hostilities to reach all significant deployments of U.S. armed forces. (U)
- Establish a new consultative mechanism (such as in the Nunn-Byrd-Warner-Mitchell proposal) for periodic executive-congressional consultations on areas of potential military deployment. (U)

3. What are the advantages and disadvantages of sharing more intelligence information with Congress in an improved consultation process? (C)

C. Congressional Authorization of Use of the Armed Forces

1. What are the advantages and disadvantages of seeking congressional authorization before using U.S. military forces overseas? Identify and assess major congressional proposals regarding such authorizations. (C)

2. What are alternative policy statements, with their advantages and disadvantages, that the President might make concerning his intention to seek or welcome congressional authorization for uses of U.S. military forces in specific circumstances (e.g. when time permits and the decision is to commit substantial numbers of U.S. forces to combat; in support of U.N. peacekeeping operations)? (C)

3. Would conclusion of Article 43 agreements under the UN Charter respond to or exacerbate Congressional War Powers concerns? What are the legal and policy advantages and disadvantages of such agreements? (C)

4. What changes might be required in the U.N. Participation Act to provide for more extensive and regular participation of U.S. forces in U.N. peacekeeping operations? (C)

5. What are the advantages and disadvantages of the Nunn-Byrd-Warner-Mitchell proposal, which would remove the 60-day automatic withdrawal provision in exchange for an improved consultation mechanism and/or expedited procedures for consideration of a joint resolution to require withdrawal of U.S. armed forces? How would these proposals affect the ability of the Executive branch to formulate and carry out foreign policy? (C)

D. Legislative Versus Non-Legislative Approaches

1. If the Administration were to seek amendment of the War Powers Resolution, what elements should the Executive branch seek to have removed from the current Resolution? Why? (U)

-- What provisions should the Executive branch seek to add (such as advance authorization of U.N. peacekeeping operations) or be prepared to accept being added by Congress to the War Powers Resolution? Why? (U)

2. If the Administration does not seek repeal or amendment of the War Powers Resolution, what policy statement could the Administration offer about compliance with it? Identify alternatives, with advantages and disadvantages. (U)

3. Would foreign countries' perception of the U.S. ability or desire to use military forces be affected by an Administration decision to 1) maintain the status quo on its views of the War Powers Resolution; 2) seek non-legislative changes in dealing with Congress on War Powers questions; or 3) seek legislative changes in the existing War Powers Resolution? (S)



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