

### States and the Government of Rumania.

On June 4, 1942,<sup>(6)</sup> the Senate by a vote of yeas 73 to nays 0, agreed to House Joint Resolution 321, declaring a formal state of war between the United States and the Government of Rumania. The House had approved the measure the previous day.<sup>(7)</sup>

The message also announced that the House had passed the following bills and joint resolutions, in which it requested the concurrence of the Senate: . . .

H.J. Res. 321. Joint resolution declaring that a state of war exists between the Government of Rumania and the Government and the people of the United States and making provisions to prosecute the same. . . .

THE VICE PRESIDENT:<sup>(8)</sup> The joint resolution having been read three times, the question is, Shall it pass?

MR. [TOM T.] CONNALLY [of Texas]: I ask for the yeas and nays.

The yeas and nays were ordered, and the Chief Clerk proceeded to call the roll. . . .

The result was announced—yeas 73, nays 0, as follows: . . .

So the resolution (H.J. Res. 321) was passed.

The preamble was agreed to.

6. 88 CONG. REC. 4851, 4852, 4855, 4856, 77th Cong. 2d Sess.
7. See §11.3, *infra*, for the President's request for a declaration of war, and §6.6, *supra*, for House approval of this joint resolution.
8. John N. Garner (Tex.).

### § 8. Legislation Authorizing Military Action Prior to War Powers Act

In several instances prior to the War Powers Act, Congress, usually in response to Presidential requests,<sup>(9)</sup> granted the Chief Executive express statutory authority to use force he deemed necessary in specific areas. These so-called "area resolutions" were short of formal declarations of war, but constituted either prior or subsequent acquiescence to Presidential use of force.

A question arose in such situations as to whether, if Congress could authorize the President to use force by approving a statute short of a declaration of war, it could divest the President of that authority merely by repealing the statute. The answer to that question depended on other congressional actions. Only one area resolution, the Gulf of Tonkin Resolution,<sup>(10)</sup> was repealed. Following repeal, the President continued to direct military operations and send troops to Vietnam, and Con-

9. The exception is the Cuba resolution which was not requested by the President. See §§8.7, 8.8, *infra*, for discussion of this resolution.
10. See §§8.1, 8.2, *infra*, for a discussion of approval and repeal of this resolution.

gress continued to approve legislation providing manpower and supplies for the war effort.

Groups of servicemen who had received orders to fight in Vietnam filed suit contending that repeal of the Gulf of Tonkin Resolution had divested the President and other executive branch officials of authority to prosecute the war. Ruling on this challenge, the Court of Appeals for the Second Circuit held that authorization could be inferred from congressional approval of authorizations and appropriations for war supplies and personnel.<sup>(11)</sup>

The following precedents comprise some examples of congressional action prior to the War Powers Act, taken in most instances in response to Presidential requests for such action.

11. *DaCosta v Laird*, 448 F2d 1368 (1971); see also *Orlando v Laird*, 443 F2d 1039 (2d Cir. 1971), cert. denied 404 U.S. 869. Contra, *Mottola v Nixon*, 318 F Supp 538 (N.D. Calif. 1970) which found no ratification [reversed on grounds of lack of standing, 464 F2d 26 (9th Cir. 1972)]. The Supreme Court summarily affirmed a three-judge district court opinion which dismissed a challenge to the constitutionality of the war on political question grounds. *Altee v Richardson*, 411 U.S. 911 (1973), affg. 347 F Supp 689 (E.D.Pa. 1972).

***Gulf of Tonkin Resolution***

**§ 8.1 The House by yeas and nays vote suspended the rules and agreed to a House joint resolution (known as the Gulf of Tonkin Resolution) supporting the President's actions to repel aggression by North Vietnam.**

On Aug. 7, 1964,<sup>(12)</sup> the House by a vote of yeas 416, nays 0, present 1, not voting 14, suspended the rules and agreed to House Joint Resolution 1145, known as the Gulf of Tonkin Resolution, supporting the President's action to repel aggression by North Vietnam. The resolution was approved by the President on Aug. 10, 1964, in the following form:<sup>(13)</sup>

JOINT RESOLUTION

To promote the maintenance of international peace and security in southeast Asia.

Whereas naval units of the Communist regime in Vietnam, in violation of the principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels

12. 110 CONG. REC. 18538-55, 88th Cong. 2d Sess.

13. This excerpt is taken from 78 Stat. 384, 88th Cong. 2d Sess. (Pub. L. No. 88-408).

See § 8.2, *infra*, for Senate approval of this measure.

lawfully present in international waters, and have thereby created a serious threat to international peace; and

Whereas these attacks are part of a deliberate and systematic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors and the nations joined with them in the collective defense of their freedom; and

Whereas the United States is assisting the peoples of southeast Asia to protect their freedom and has no territorial, military or political ambitions in that area, but desires only that these peoples should be left in peace to work out their own destinies in their own way: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.*

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

*Parliamentarian's Note:* After conferring with the congressional leadership and others with respect to attacks by North Vietnamese torpedo boats against U.S. destroyers, President Johnson ordered retaliation against the bases from which the torpedo boats operated. In an address to the nation on radio and TV, late on Monday, Aug. 3, he stated that he had requested the Congress to support his action by a resolution. On Aug. 5, the President transmitted to the Congress a message on the developing situation in Southeast Asia and a draft of a resolution. The Committee on Foreign Affairs, to which the message was referred (H. Doc. 333), asked for and was granted permission to sit during the session of the House on Aug. 6.

Authority granted by this resolution was repealed by approval, on Jan. 12, 1971, of section 12 of an act to amend the Foreign Military Sales Act.<sup>(14)</sup>

### **§ 8.2 The Senate by yea and nay vote agreed to a House**

14. 84 Stat. 2053, 2055, 91st Cong. 1st Sess. (Pub. L. No. 91-672).

**joint resolution known as the Gulf of Tonkin Resolution supporting the President's actions to repel aggression by North Vietnam.**

On Aug. 7, 1964,<sup>(15)</sup> the Senate by a vote of yeas 88, nays 2, agreed to House Joint Resolution 1145, known as the Gulf of Tonkin Resolution, supporting the President's actions to repel aggression by North Vietnam.<sup>(16)</sup>

Authority granted by this resolution was repealed by approval, on Jan. 12, 1971, of section 12 of an act to amend the Foreign Military Sales Act.<sup>(17)</sup>

***Resolution to Protect Formosa and Pescadores***

**§ 8.3 The House by yea and nay vote agreed to a House joint resolution authorizing the President to employ armed forces to protect the security of Formosa, the Pescadores, and related positions and territories of that area.**

On Jan. 25, 1955,<sup>(18)</sup> the House by a vote of yeas 410, nays 3, not

- 15. 110 CONG. REC. 18470, 18471, 88th Cong. 2d Sess.
- 16. See §8.1, supra, for the House vote and text of this measure.
- 17. 84 Stat. 2053, 2055 (Pub. L. No. 91672) H.R. 15628, 91st Cong. 1st Sess.
- 18. 101 CONG. REC. 659, 669, 680, 681, 84th Cong. 1st Sess.

voting 21, agreed to House Joint Resolution 159,<sup>(19)</sup> which was approved by the President on Jan. 29, 1955, in the following form:<sup>(20)</sup>

JOINT RESOLUTION

Authorizing the President to employ the Armed Forces of the United States for protecting the security of Formosa, the Pescadores and related positions and territories of that area.

Whereas the primary purpose of the United States, in its relations with all other nations, is to develop and sustain a just and enduring peace for all; and Whereas certain territories in the West Pacific under the jurisdiction of the Republic of China are now under armed attack, and threats and declarations have been and are being made by the Chinese Communists that such armed attack is in aid of and in preparation for armed attack on Formosa and the Pescadores. . . . Therefore be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be and he hereby is authorized to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, this authority to include the securing and protection of such related positions and territories of that area now in friendly hands and the taking of such other measures as he*

- 19. See §8.4, infra, for Senate approval of this measure.
- 20. This excerpt is taken from 69 Stat. 7, 84th Cong. 1st Sess., Ch. 4 (Pub. L. No. 84-4).

judges to be required or appropriate in assuring the defense of Formosa and the Pescadores.

This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, and shall so report to the Congress.

**§ 8.4 The Senate by yeas and nays vote agreed to a House joint resolution authorizing the President to employ armed forces to protect the security of Formosa, the Pescadores, and related positions.**

On Jan. 28, 1955,<sup>(1)</sup> the Senate by a vote of yeas 85, nays 3, agreed to House Joint Resolution 159, directing the President to employ armed forces to protect the security of Formosa, the Pescadores, and related positions in the area.<sup>(2)</sup>

***Resolution to Protect Middle Eastern Nations***

**§ 8.5 The House by yeas and nays vote agreed to a House joint resolution to promote peace and stability in the Middle East by authorizing**

1. 101 CONG. REC. 994, 995, 84th Cong. 1st Sess.
2. See §8.3, supra, for the text of and House vote on this measure.

**the President to cooperate with and assist any nation or group of nations in that area in the development of economic strength, and to undertake programs of military assistance; the resolution further stated congressional intent with respect to using armed forces of the United States to secure and protect the territorial integrity and political independence of any nation which requests aid from armed aggression by any nation controlled by communism.**

On Mar. 7, 1957,<sup>(3)</sup> the House by a vote of 350 yeas, 60 nays, not voting 23, agreed to House Resolution 188, to accept House Joint Resolution 117, authorizing the President to cooperate with nations of the Middle East in the development of economic strength, to undertake programs of military assistance, and to employ armed forces.<sup>(4)</sup>

The joint resolution was approved by the President in the following form on Mar. 9, 1957:<sup>(5)</sup>

3. 103 CONG. REC. 3250, 3265, 3266, 85th Cong. 1st Sess.
4. See §8.6, infra, for the Senate vote on the House joint resolution.
5. This language is taken from 71 Stat. 5, 85th Cong. 1st Sess. [Pub. L. No. 85-7] (footnotes omitted).

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

The President be and hereby is authorized to cooperate with and assist any nation or group of nations in the general area of the Middle East desiring such assistance in the development of economic strength dedicated to the maintenance of national independence.

Sec. 2. The President is authorized to undertake, in the general area of the Middle East, military assistance programs with any nation or group of nations of that area desiring such assistance. Furthermore, the United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East. To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism: *Provided*, That such employment shall be consonant with the treaty obligations of the United States and with the Constitution of the United States.

Sec. 3. The President is hereby authorized to use during the balance of fiscal year 1957 for economic and military assistance under this joint resolution not to exceed \$200,000,000 from any appropriation now available for carrying out the provisions of the Mutual Security Act of 1954, as amended, in accord with the provisions of such Act: *Provided*, That, whenever the President determines it to be important to the security of the United States, such use may be under the au-

thority of section 401(a) of the Mutual Security Act of 1954, as amended (except that the provisions of section 105(a) thereof shall not be waived), and without regard to the provisions of section 105 of the Mutual Security Appropriation Act, 1957. . . .

Sec. 5. The President shall within the months of January and July of each year report to the Congress his action hereunder.

Sec. 6. This joint resolution shall expire when the President shall determine that the peace and security of the nations in the general area of the Middle East are reasonably assured by international conditions created by action of the United Nations or otherwise except that it may be terminated earlier by a concurrent resolution of the two Houses of Congress.

**§ 8.6 The Senate agreed to a House joint resolution to promote peace and stability in the Middle East by authorizing the President to assist nations in that area in the development of economic strength, and to undertake programs of military assistance; the resolution also endorsed the concept of employing armed forces of the United States to secure and protect the territorial integrity and political independence of any nation which requests aid from armed aggression by any nation controlled by communism.**

On Mar. 5, 1957,<sup>(6)</sup> the Senate by a vote of 72 yeas to 19 nays, agreed to House Joint Resolution 117,<sup>(7)</sup> authorizing the President to cooperate with and assist any nation or group of nations in that area in the development of economic strength, to undertake programs of military assistance, and to employ American Armed Forces to resist aggression as stated above. This House joint resolution was approved in lieu of Senate Joint Resolution 19.

***Resolution Regarding Soviet Weapons in Cuba***

**§ 8.7 The Senate agreed to a Senate joint resolution expressing the position of the United States with respect to Soviet buildup of weapons in Cuba.**

On Sept. 20, 1962,<sup>(8)</sup> the Senate by a vote of 86 yeas, 1 nay, agreed to Senate Joint Resolution 230, expressing the position of the United States with respect to buildup of Soviet weapons in Cuba.<sup>(9)</sup>

6. 103 CONG. REC. 3127, 3129, 3130, 85th Cong. 1st Sess.

7. See §8.5, supra, for the text of and House vote on this measure.

8. 108 CONG. REC. 20024, 20058, 87th Cong. 2d Sess.

9. See §8.8, infra, for the text of and House vote on this measure.

**§ 8.8 After rejecting a motion to recommit the measure, the House by yeas and nays vote agreed to a Senate joint resolution expressing the position of the United States with respect to Soviet buildup of weapons in Cuba.**

On Sept. 26, 1962,<sup>(10)</sup> the House by a vote of yeas 384, nays 7, not voting 44, agreed to a Senate joint resolution which was approved by the President on Oct. 3, 1962, in the following form:<sup>(11)</sup>

Whereas President James Monroe, announcing the Monroe Doctrine in 1823, declared that the United States would consider any attempt on the part of European powers "to extend their system to any portion of this hemisphere as dangerous to our peace and safety"; and

Whereas in the Rio Treaty of 1947 the parties agreed that "an armed attack by any State against an American State shall be considered as an attack against all the American States . . . one of the said contracting parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self defense recognized by article 51 of the Charter of the United Nations"; and

Whereas the international Communist movement has increasingly ex-

10. 108 CONG. REC. 20859, 20909-11, 87th Cong. 2d Sess.

11. See §8.7, supra, for Senate approval of this measure. This excerpt is taken from 76 Stat. 697, 87th Cong. 2d Sess. (Pub. L. No. 87-733).

tended into Cuba its political, economic, and military sphere of influence; Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States is determined—*

(a) to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere;

(b) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States; and

(c) to work with the Organization of American States and with freedom-loving Cubans to support the aspirations of the Cuban people for self-determination.

Passage of the Senate joint resolution followed rejection by a vote of yeas 140, nays 251, not voting 46, of a motion to recommit with instructions which had been offered by Mr. William S. Broomfield, of Michigan.

*Parliamentarian's Note:* This resolution was approved prior to the Cuban missile crisis of 1962.

### ***Resolution to Protect Berlin***

**§ 8.9 The House and Senate agreed to a House concurrent resolution expressing the determination of Congress to prevent by whatever means, including the use of**

**arms, Soviet violation of American, British, and French rights to Berlin, including ingress and egress, and to fulfill the American commitment to the people of Berlin.**

On Oct. 5, 1962, the House by a vote of yeas 312, nays 0, not voting 123,<sup>(12)</sup> and on Oct. 10, 1962, the Senate by voice vote,<sup>(13)</sup> agreed to House Concurrent Resolution 570, expressing the sense of the Congress with respect to Berlin in the following language:

Whereas the primary purpose of the United States in its relations with all other nations is and has been to develop and sustain a just and enduring peace for all; and

Whereas it is the purpose of the United States to encourage and support the establishment of a free, unified, and democratic Germany; and

Whereas in connection with the termination of hostilities in World War II of the United States, the United Kingdom, France, and the Soviet Union freely entered into binding agreements under which the four powers have the right to remain in Berlin, with the right of ingress and egress, until the conclusion of a final settlement with the Government of Germany; and

Whereas no such final settlement has been concluded by the four powers and the aforementioned agreements continue in force: Now, therefore, be it

12. 108 CONG. REC. 22618-38, 87th Cong. 2d Sess.

13. *Id.* at pp. 22964-66.

*Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress—*

(a) that the continued exercise of United States, British, and French rights in Berlin constitutes a fundamental political and moral determination;

(b) that the United States would regard as intolerable any violation by the Soviet Union directly or through others of those rights in Berlin, including the right of ingress and egress;

(c) that the United States is determined to prevent by whatever means may be necessary, including the use of arms, any violation of those rights by the Soviet Union directly or through others, and to fulfill our commitment to the people of Berlin with respect to their resolve for freedom.

### ***Authorization to Activate Reserve Forces***

#### **§ 8.10 The House agreed to a Senate joint resolution authorizing the President to order units and members of the Ready Reserve to active duty for not more than 12 months.**

On July 31, 1961,<sup>(14)</sup> the House by a vote of yeas 403, nays 2, not voting 32, agreed to Senate Joint Resolution 120, authorizing the President to order units and members of the Ready Reserve into active military service. The joint

14. 107 CONG. REC. 14051, 14061, 14062, 87th Cong. 1st Sess.

resolution, passed by the Senate on a vote of yeas 75, nays 0, on July 28, 1961,<sup>(15)</sup> and approved by the President on Aug. 1, 1961,<sup>(16)</sup> reads as follows:<sup>(17)</sup>

#### JOINT RESOLUTION

To authorize the President to order units and members in the Ready Reserve to active duty for not more than twelve months, and for other purposes.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any other provision of law, until July 1, 1962, the President may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve of an armed force to active duty for not more than twelve consecutive months. However, not more than two hundred and fifty thousand members of the Ready Reserve may be on active duty (other than for training), without their consent, under this section at any one time.*

Sec. 2. Notwithstanding any other provision of law, until July 1, 1962, the President may authorize the Secretary of Defense to extend enlistments, appointments, periods of active duty, periods of active duty for training, peri-

15. *Id.* at pp. 13930, 13942.

16. See 107 CONG. REC. 14370, 87th Cong. 1st Sess., Aug. 2, 1961, for announcement in the Senate of Presidential approval.

17. This excerpt is taken from 75 Stat. 242, 87th Cong. 1st Sess. (Pub. L. No. 87-117).

ods of obligated service, or other military status, in any component of an armed force or in the National Guard that expire before July 1, 1962, for not more than twelve months.

*Parliamentarian's Note:* In an address to the Nation on July 25, 1961, President John F. Kennedy requested authority to call up the Ready Reserves to respond to the Berlin crisis.<sup>(18)</sup>

**§ 8.11 During the Cuban missile crisis, the Senate and House agreed to a Senate joint resolution authorizing the President to activate units and members of the Ready Reserve, for not more than 12 months.**

On Sept. 13, 1962, the Senate by a vote of 76 yeas, 0 nays,<sup>(19)</sup> and on Sept. 24, 1962, the House by a vote of 342 yeas, 13 nays, 80 not voting,<sup>(20)</sup> agreed to Senate Joint Resolution 224, authorizing the President to activate units and members of the Ready Reserve. The measure was approved on Oct. 3, 1962, in the following form: <sup>(1)</sup>

- 18. This address is reprinted at 107 CONG. REC. 13460-62, 87th Cong. 1st Sess., July 26, 1961.
- 19. 108 CONG. REC. 19349, 19365, 87th Cong. 2d Sess.
- 20. *Id.* at pp. 20489, 20521, 20522
- 1. This excerpt is taken from 76 Stat. 710, 87th Cong. 2d Sess. (Pub. L. No. 87-736).

JOINT RESOLUTION

To authorize the President to order units and members in the Ready Reserve to active duty for not more than twelve months, and for other purposes.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding any other provision of law, until February 28, 1963, the President may, without the consent of the persons concerned, order any unit, or any member, of the Ready Reserve of an armed force to active duty for not more than twelve consecutive months. However, not more than one hundred and fifty thousand members of the Ready Reserve may be on active duty (other than for training), without their consent, under this section at any one time.

Sec. 2. Notwithstanding any other provision of law until February 28, 1963, the President may authorize the Secretary of Defense to extend enlistments, appointments, periods of active duty, periods of active duty for training, periods of obligated service or other military status, in any component of an armed force or in the National Guard that expire before February 28, 1963, for not more than twelve months. However, if the enlistment of a member of the Ready Reserve who is ordered to active duty under the first section of this Act would expire after February 28, 1963, but before he has served the entire period for which he was so ordered to active duty, his enlistment may be extended until the last day of that period.

Sec. 3. No member of the Ready Reserve who was involuntarily ordered to

active duty or whose period of active duty was extended under the Act of August 1, 1961, Public Law 87-117 (75 Stat. 242), may be involuntarily ordered to active duty under this Act.

### § 9. Pre-World War II Legislative Restrictions on Military Activity

The German invasion of Poland in September of 1939 and the subsequent declarations of war on Germany by Britain and France intensified the public debate over United States involvement or support for its traditional allies in the conflict.

Shortly after the German invasion, the President by proclamation convened an extraordinary session of Congress to act on neutrality legislation.<sup>(2)</sup> Accepting the President's request,<sup>(3)</sup> Congress repealed provisions of the Neutrality Acts of 1935 and 1937 which prohibited shipments of arms and ammunition to belligerent nations.<sup>(4)</sup>

Congress later authorized the President to provide military sup-

2. See § 12.3, *infra*, for this proclamation.
3. See § 11.6, *infra*, for a discussion of the President's address to a joint session.
4. See § 9.1, *infra*, for the discussion of the Neutrality Act of 1939.

plies to American republics.<sup>(5)</sup> The concept of providing assistance to other nations which originated in the joint resolution making military assistance available to American republics was extended beyond the Western Hemisphere. The Lend-Lease Act authorized the President to direct the manufacture, lease, or loan of military and naval supplies to "the government of any country whose defense the President deems vital to the defense of the United States."<sup>(6)</sup> This act permitted the United States to supply Britain and other nations in their struggle against Germany.

At the request of the President, Congress approved the first peacetime draft in the nation's history, the Selective Service Act of 1940, but prohibited the employment of inducted land forces outside the Western Hemisphere.<sup>(7)</sup> An identical restriction had been imposed a month earlier in a joint resolution authorizing the President to activate reserve and retired military personnel.<sup>(8)</sup> Protecting the Western Hemisphere became sig-

5. See § 9.2, *infra*, for a discussion of this measure. The Neutrality Act of 1939 did not apply to American republics.
6. See § 9.3, *infra*, for a discussion of the Lend-Lease Act.
7. See § 9.5, *infra*, for this restriction.
8. See § 9.4, *infra*, for this resolution.