

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

Jonathan Bingham – Jacob Javits colloquy (excerpt)

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HEARINGS

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PRESIDENT'S POWERS TO MAKE WAR ON HIS OWN

Mr. BINGHAM. Thank you very much.

Senator, I would like to compliment you most profoundly for your leadership in this field and for the eloquent way you have stated again and again your conviction that Congress must act and act in such a way that the President's powers to make war on his own are restrained effectively.

Having said that, I must confess that I have great reservations about the approach of your bill and the principal reservation I have is the requirement for a rigid 30-day period within which Congress must act affirmatively.

If such a bill as this requires that Congress act affirmatively to approve Presidential action initiating hostilities, then a deadline must be imposed. You cannot leave that open.

I see a lot of trouble and grief in the 30-day provision. First of all, the question may well arise in many cases, when does the 30-day period start. May I ask you this question: Assuming that bill had been in effect during the period of the Vietnam hostilities, when did our hostilities in Vietnam begin so as to start the 30-day period running?

Senator JAVITS. In my judgment the hostilities in Vietnam began when President Johnson deployed our forces in the combat situation to bail out the South Vietnamese which my best recollection is March 1965.

Mr. BINGHAM. You don't think that when President Kennedy sent 20,000 advisers to take part in the operations that that was the commencement?

Senator JAVITS. No. My initial reaction is that if I were President I would not define that as committing us to hostilities or imminent danger of hostilities. What it might have committed us to was having Americans in the area who could become involved with the imminent threat of hostilities and we might have to come to their rescue. However, my mind is not closed on this evaluation. Perhaps the best bench-[*17]mark would be the days President Kennedy ordered U.S. advisers to accompany the ARVN units on combat patrols, with orders to shoot back if attacked.

WHEN DO HOSTILITIES BEGIN?

Mr. BINGHAM. What about President Johnson's ordering of American planes into action against North Vietnam. Was that not the beginning of hostilities?

Senator JAVITS. I don't remember now whether that preceded –
Mr. BINGHAM. That preceded.

Senator JAVITS. If it did precede, I would say yes. I think that you are making a very important point in that regard. I think that it is ascertainable when you are in hostilities or imminent danger of hostilities.

For example, take the Cuban crisis. I think when President Kennedy sent planes over Cuba to take pictures, we were not in hostilities or in imminent danger of hostilities, but when we insisted on

inspecting ships, we may have been in imminent danger of hostilities, although it turned out that way because the Soviet ships were not stopped by us but stopped of their own accord.

I think historically there is enough of a line so you can fix the time. As you say yourself, Congressman, you have done a lot of thinking about this. You have a very interesting war powers bill of your own, and I am very gratified you are involved in this issue. I compliment you for participating in such an activity.

We have tried very hard in respect of the 30-day provision to develop some standards. I would be the first to affirm that by no means are we stripping the President of his constitutional powers in S. 440. There still remains great authority in the Office of the Presidency. For example, he can still deploy our forces generally at his discretion. Some have argued against this bill saying, for example, "Well, when the 7-day war occurred he moved the Navy closer to the theater of action." So what? He has a right to deploy them in international waters and put them in a position where they would be better postured if they are to be put into hostilities.