

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

Monroe Leigh – Clement Zablocki correspondence

(excerpt, War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident)

May 9 & June 3, 1975

[*37] COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES,
Washington, D.C. May 9, 1975

Hon. MONROE LEIGH,¹
Legal, Adviser, Department of State,
Washington, D.C.

DEAR MR. LEIGH: Your testimony before the Subcommittee on International Security and Scientific Affairs Wednesday was most enlightening and helpful to the Subcommittee's purposes. Please accept my thanks for your cooperation.

As indicated at the close of the hearing, I would appreciate your answers to the following additional questions for inclusion in the hearing record:

(1) As you know, only those reports filed pursuant to Section 4(a)(1) trigger the balance of the Act, involving Congressional action. The obvious key word in section 4(a)(1) is "HOSTILITIES."

Can you tell us what your working definition of that word is as it related to each of the 3 reports which have been filed? Also, can you tell us what your working definition of "imminent" hostilities is?

[NOTE. – See p. 23 of Committee print regarding House Foreign Affairs Committee report definition of "hostilities"]

(2) Again in terms of relating the report of April 30 to your working definition of "hostilities," how precisely did the four U.S.

¹ Same letter sent to Hon. Martin R. Hoffmann.

casualties noted in that report figure in to make it a Section 4 – and only a Section 4 – report?

REGARDING PRESIDENT'S AUTHORITY TO EVACUATE
AMERICANS AND NON-AMERICANS:

(3) The three War Powers reports use essentially the same language in describing the President's authority for the action he took in committing troops. Basically, they all say the operations were ordered "pursuant to the President's Constitutional executive power and authority as Commander-in-Chief of United States Armed Forces." There is a great deal of dispute over what that term "Commander-in-Chief" means – especially within the context of the War Powers Resolution.

Would you give us briefly your legal interpretation of what precisely the President's authority is as Commander-in-Chief? [*38]

REGARDING REPORT OF APRIL 12 –
EVACUATION OF PHNOM PENH:

(4) The President's report of April 12 said that "the last elements of the force to leave received hostile recoilless rifle fire." Was that "hostilities" and if not, why not?

REGARDING REPORT OF APRIL 30 –
EVACUATION OF SAIGON:

(5) The report of April 30 also indicates that U.S. fighter aircraft "suppressed North Vietnamese anti-aircraft artillery firing on evacuation helicopters." It also notes that ground security forces "returned fire during the course of the evacuation operation." Did not those two incidents clearly constitute hostilities thereby necessitating a Section 4(a)(1) report?

(6) Did you or did you not consider the two Marines who were killed at Tan Son Nhut airport a part of the evacuation force? Were they not actually assisting directly in the evacuation operation?

(7) What were the detailed circumstances surrounding the loss of a Navy helicopter in which two crew members lost their lives? Were they directly assisting or participating in the evacuation operation?

(8) Does the phrase “taking note of . . .” appearing in each of the 3 reports suggest anything other than a full binding legal responsibility upon the President?

Sincerely,

CLEMENT J. ZABLOCKI,
*Chairman, Subcommittee on International
Security and Scientific Affairs.*

DEPARTMENT OF STATE,
Washington, D.C., June 3[,] 1975.

Hon. CLEMENT J. ZABLOCKI,
*Chairman, Subcommittee on International Security and Scientific Affairs,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: We are writing in response to your letters to us of May 9, 1975, requesting amplification of our testimony before your Subcommittee on May 7.

Enclosed is a memorandum² which responds to questions asked by members of the Subcommittee during our testimony. Although this memorandum may also answer a few of the questions raised in your recent letter, we shall also address each of your questions individually.

1. Your first question inquires as to our working definition of the word “hostilities” in section 4(a)(1) of the War Powers Resolution. We are, of course aware of the comments made by the Committee on page 7 of H. Report 93-287, wherein the Committee attempted a general definition of that word, which had its origin in the Senate version of the Resolution. Even as so defined, however, there is of necessity a large measure of judgement [sic] which is required. We note in this connection that even when measured against certain past events, differing views as to when hostilities commence were expressed during the Hearings before the Committee in 1973. See for example the colloquies between Representatives Bingham and Du Pont and Senator Javits on pages 16-17 and 21-22 of the Hearings. You will also recall Professor Bickel’s response to Mr. Du Pont with

² Memorandum appears on p. 29.

respect to the definition of "hostilities" that:

"There is no way in which one can define that term other than a good faith understanding of it and the assumption that in the future Presidents will act in good faith to discharge their duty to execute the law." (Hearings, at 185)

Whether "imminent involvement in hostilities" is clearly indicated by the circumstances is similarly, in our view, definable in a meaningful way only in the context of an actual set of facts. To speculate about hypothetical situations is possible but would not seem desirable. Reasonable men might well differ as to the implications to be drawn from any such hypothetical situation. In this connection, you will no doubt recall the uncertainty of some members of the Congress as to whether the military alert of October 24, 1973 triggered the reporting provisions of the War Powers Resolution, and the conclusion expressed by you on the Floor on April 9, 1974 (Congressional Record, at H. 2726) that hostilities had not been imminent and that a report had not been required.

Subject to the foregoing caveats, we turn to our working definitions of these terms. As applied in the first three war powers reports, "hostilities" was used to [page 39] mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and "imminent hostilities" was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.

You also ask which of the first three war powers reports referred to situations involving hostilities. In our view, the April 30, 1975 report refers to a situation where at least one incident of hostilities existed (see point 5 below); and in the Cambodia evacuation referred to in the April 12, 1975 report, an imminent involvement in hostilities may have existed (as to the factors that would enable one to reach a conclusion on whether hostilities did in fact exist see point 4 below). The April 4, 1975 report concerning the Danang evacuation, however, does not refer to a situation where hostilities existed.

2. Your letter uses the term, “a Section 4 report.” As we read the War Powers Resolution, section 4 does not call for different types of reports depending on whether U.S. armed forces are introduced under subparagraphs (1), (2) or (3) of section 4(a). Instead, section 4 seems to require only that “a report” be filed in any of the subparagraphs (1), (2) or (3) situations, and that such report merely contain the information specified in subparagraphs (A), (B) and (C).

It seems that the real thrust of the question is why the President in his April 30, 1975 report referred to section 4 in general, and not to any particular subparagraphs in that section. We presume that the President did so because the events giving rise to that report did not seem to be limited to just one of the three subparagraphs in section 4(a).

Thus, although the events as known at that time indicated that hostilities may have existed between U.S. and communist forces, U.S. forces “equipped for combat” were also introduced in the “territory, airspace or waters” of South Vietnam – the situation apparently provided for in section 4(a)(2).

Furthermore, since the operation had terminated by the time the report was prepared, the question of possible congressional action under section 5 of the Resolution was moot; thus, a specific reference to 4(a)(1) was not needed to call attention to possible action under section 5.

3. Your letter refers to the President’s authority as Commander-in-Chief. The three war powers reports you referred to all cite two sources of authority: Article II, Section 1 of the Constitution which provides that the “executive Power shall be vested” in the President, and the Commander-in-Chief clause (Article II, Section 2).

With respect to the Commander-in-Chief clause, we do not believe that any single definitional sentence could clearly encompass every aspect of the Commander-in-Chief authority. This authority would include such diverse things as the power to make armistices, to negotiate and conclude cease-fires, to effect deployments of the armed forces, to order the occupation of surrendered territory in time of war, to protect U.S. embassies and legations, to defend the United States against attack, to suppress civil insurrection, and the

like.

With respect to the specific question of protecting and rescuing U.S. citizens, the enclosed memorandum contains a discussion of both court opinions and historical precedents on this subject.

4. You refer to a portion of the April 12, 1975 report on the Cambodia evacuation which notes that the "last elements of the force to leave received hostile recoilless rifle fire." Whether or not this rifle fire constituted hostilities would seem to us to depend upon the nature of the source of this rifle fire – i.e., whether it came from a single individual or from a battalion of troops, the intensity of the fire, the proximity of hostile weapons and troops to the helicopter landing zone, and other evidence that might indicate an intent and ability to confront U.S. forces in armed combat. Our information concerning the source of this rifle fire is not sufficiently detailed to enable one to draw a conclusion as to whether this clearly amounted to "hostilities."

5. Your letter notes that the April 30, 1975 report relating to the Saigon evacuation indicates (a) that U.S. fighter aircraft "suppressed North Vietnamese anti-aircraft artillery firing on evacuation helicopters," and (b) that U.S. ground forces returned fire during the course of the evacuation. The first situation on its face constituted "hostilities." The evidence concerning the second situation is inconclusive as to whether the fire was of sufficient intensity so as to be part of a purposeful confrontation by opposing military forces; but in view of the actions of the U.S. fighter aircraft, a characterization of the second situation [page 40] may be academic. In any event, as discussed under point number 2 above, there were other circumstances present in the evacuation operation which precluded a conclusion that section 4(a)(1) alone, and no other provision of section 4, pertained to the operation.

6. The two marines who were killed at Tan Son Nhut airport that day before U.S. forces entered South Vietnamese airspace were not a part of the evacuation force. They were members of the marine guard at the American Embassy and were, at the time of their death, on regular duty in the compound of the Defense Attaché Office which was located at the airport. As you know, an evacuation

effort not involving our combat troops had been conducted for some time prior to the introduction of the evacuation forces. The fact that these marines, rather than civilian members of the Embassy, were killed was fortuitous and not a consequence of the introduction of the evacuation force.

7. The loss of the Navy helicopter was not directly related to the evacuation operation. Our understanding is that the helicopter was at the time, in accordance with standard operating procedures, involved in an ordinary search and rescue holding pattern near its home aircraft carrier. The purpose of its mission was to provide assistance to aircraft and helicopters that were participating in the evacuation operation, should such assistance become necessary. The helicopter crashed in the immediate vicinity of the carrier. The cause of the crash is not known, and the bodies of the crew were not recovered.

8. Your letter notes that the first three war powers reports contain the phrase “taking note of” You inquire whether this suggests anything other than a full binding legal responsibility upon the President. This phrase connotes an acknowledgement that the report is being filed in accordance with section 4 of the War Powers Resolution. No constitutional challenge to the appropriateness of the report called for by section 4 was intended. As you are aware, President Nixon in his veto message of October 24, 1973 indicated that portions of the War Powers Resolution, including sections 5(b) and 5(c), are unconstitutional. No such position was expressed as to section 4.

We hope we have covered each of the points raised not only in your letter, but also during our testimony before the Subcommittee on May 7. Please accept again our appreciation for the Subcommittee’s careful inquiry into these very complex legal and constitutional questions.

Sincerely,

MONROE LEIGH,
Legal Adviser, Department of State.

MARTIN R. HOFFMAN,
General Counsel, Department of Defense.