WAR POWERS: A TEST OF COMPLIANCE
Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident

HEARINGS
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL SECURITY AND SCIENTIFIC AFFAIRS
OF THE
COMMITTEE ON INTERNATIONAL RELATIONS
HOUSE OF REPRESENTATIVES
NINETY-FOURTH CONGRESS
FIRST SESSION
MAY 7 AND JUNE 4, 1975

Printed for the use of the Committee on International Relations

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975
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INTRODUCTION

The War Powers Resolution was enacted on November 7, 1973, by the overriding of a Presidential veto. That fact was perhaps appropriate—albeit no less regrettable—since the underlying basis of the legislation was a reassertion of Congress' constitutional authority regarding war powers. What had been usurped over the years by strong Presidencies was being reclaimed; it was therefore ultimately fitting that this reclamation was accomplished by the full force of congressional assertion in overriding a veto.

Aside from the legal aspects of placing that law on the statute books as Public Law 93-148, there were three frequent but largely unspoken considerations in the minds of the resolution's sponsors.

First, its effectiveness as law would depend as much on the good faith effort of the executive branch's adequacy of compliance as on the determined and vigilant oversight of the Congress;

Second, it would require a war to test the statute fully; and

Third, since it dealt essentially with the awesome and horrible scourge of war, there was the silent hope that it would, as such, never have to be tested.

As it turned out, the law was in force for nearly 17 months before it was implemented and then only partially. In fact, between April 4 and May 15, 1975—a span of only 41 days—the law was implemented on four different occasions, although in each instance the action was limited to the section 4 reporting provisions of the resolution.

Given the historic significance of the War Powers Resolution itself and the rapid fire record in which it came into play, it was not only desirable but necessary that a review of that record be undertaken. In fulfillment of its oversight responsibility for the resolution, that review was executed by the Subcommittee on International Security and Scientific Affairs. Thus, the hearings presented here were called to receive testimony from appropriate administration spokesmen and other interested witnesses.

In large measure the record presented here speaks for itself. Basically, the hearings succeeded in the objective of exploring—in a thorough, impartial, and dispassionate manner—all relevant circumstances surrounding the incidents covered in the four reports.

While the subcommittee's interest was broad, its specific and appropriate concern was to assure further effective implementation of the resolution. To that end the subcommittee concentrated on two key areas: first, the nature of the reporting, and second, the relative adequacy or inadequacy of the consultation effort provided for in section 3 of the resolution.

In attempting any evaluation of complex and challenging questions one is always well-advised to avoid rash judgments. Given the rather elementary and partial trial runs to which the resolution has been subjected, it would be unwise to crystalize opinions too soon. Addi-
tional time and study is required before reaching final conclusions or deciding on the need for any possible amendments.

Even with those qualifications, however, it is not too soon to say that those portions of the War Powers Resolution which have been exercised have worked reasonably well thus far. For example, the executive branch reports have provided Congress with a grasp on the incidents to which they referred—a focal point around which to center informed debate. It is also reasonable to assume that the potential for precipitous military action evidenced in the past has been mitigated. Those and other benefits accruing from the enactment of the War Powers Resolution are not to be taken lightly.

A preliminary analysis based on the partial evidence presented here gives the executive branch only mixed marks on the adequacy of its compliance effort. On the one hand, response was prompt and seemingly complete in fulfilling the reporting requirement. However, in evaluating the executive branch’s compliance with the congressional intent contained in the consultation provision, the record is considerably less adequate. In that area, there are many unanswered questions which require further review and clarification.

Any proper appraisal of the executive branch’s relative adequacy or inadequacy of compliance with the consultation provision of the War Powers Resolution must begin with a reaffirmation of congressional intent as measured against executive branch interpretation of that intent. Basically, the question centers on the issue of the timing and form of communication between the branches. In brief, Congress’ intent was that it be fully and accurately advised of all developing circumstances in any given situation requiring the possible commitment of U.S. Armed Forces sufficiently in time to have meaningful input into the formulation of such a decision. Clearly, it was not the intent of Congress to be merely informed of decisions already made. In the fullest meaning of partnership and shared responsibility in foreign affairs, it was the desire of Congress to have a participatory role in the process of decision making. To cite the language of the resolution itself (“Purpose and Policy,” section 2): “It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.” (Emphasis added)

In further elaborating on congressional intent relative to consultation, language from the House committee report on the War Powers Resolution perhaps also bears repeating. That report (House Report No. 93-287) made clear that consultation was not “synonymous with merely being informed.” Rather, the report stated, “consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions, and in appropriate circumstances their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate, and all information relevant to the situation must be made available.”

Measured against that clear directive of intent, it is apparent, as reflected by the testimony of executive branch witnesses in these hearings, that the executive branch proclivity is toward evasive and selective interpretation of the War Powers Resolution.
This is not to question motives. Indeed, honest men can and do differ, but one would hope that they do so honorably. In one sure and final analysis, we all—legislative and executive—have the collective responsibility to uphold and abide by the law. To that end these hearings were held. They are now offered to all Members of Congress and the public as a means of stimulating further careful and balanced review. In due time hopefully there will emerge a more effective joint effort of cooperation and full implementation of the War Power Resolution.

Clement J. Zablocki,
Chairman, Subcommittee on International Security and Scientific Affairs.

September 22, 1975.
WAR POWERS: A TEST OF COMPLIANCE

Wednesday, May 7, 1975

Committee on International Relations,
Subcommittee on International Security and Scientific Affairs.

The committee met at 2:06 p.m. in room H-286, the Capitol, Hon. Clement J. Zablocki (chairman of the subcommittee) presiding.

Mr. Zablocki. The subcommittee will please come to order.

This hearing has been convened in fulfillment of the subcommittee's oversight responsibility for the War Powers Resolution, Public Law 93-148. Our purpose is to explore all relevant circumstances surrounding the incidents covered in three recent war powers reports—the most recent one on April 30—made to Congress by the President.

The War Powers Resolution was enacted on November 7, 1973. It was unique legislation in the sense that we hoped it might never have to be implemented. In fact, the law was in force for almost 17 months before it was implemented and then on three different occasions within a span of only 26 days—April 4, 12, and 30.

Thus, our appropriate interest at this point is to assure the further effective implementation of the resolution. Here to assist us in that effort this afternoon are the Honorable Monroe Leigh, Legal Advisor to the Department of State, and the Honorable Martin R. Hoffmann, General Counsel to the Defense Department.

Messrs. Leigh and Hoffmann have been designated by their respective departments as responsible for implementation of the war powers reporting system.

Gentlemen, as I said, our interest is broad. Among other things, we would like to know how the overall reporting system works, how the determination is made as to whether a report will be filed pursuant to either section 4(a) (1), (2), or (3) or, as in the last instance, simply pursuant to section 4 period. That report came to Congress without specifically indicating the section to which it is responsive. We are pleased that you could be with us this afternoon and we look forward to your statements.

Mr. Leigh, if you will proceed, please.
STATEMENT OF HON. MONROE LEIGH, LEGAL ADVISER TO THE
DEPARTMENT OF STATE

Mr. Leigh. Thank you very much.

Mr. Chairman and members of the committee, I have a short statement which I would like to give and then Mr. Hoffmann and I are prepared to go into any particular points the committee wishes to pursue.

First of all, I am grateful, Mr. Chairman, for the opportunity to appear before this subcommittee to describe the procedures which have been established within the executive branch and recently implemented for reporting under section 4 of the War Powers Resolution (Public Law 93-148).

LETTERS DELEGATE RESPONSIBILITY TO DEFENSE AND STATE

By way of background, I would like to call attention to the letter which the Secretary of State sent to Chairman Morgan of the International Relations Committee on October 7, 1974. This letter informed Chairman Morgan that arrangements had been made between him and the Secretary of Defense so that the General Counselor of the Defense Department and the Legal Adviser of the State Department were charged with responsibility for bringing to the attention of their respective Secretaries cases where it would be appropriate for the two Secretaries to recommend to the President that a report be submitted to the Congress pursuant to section 4 of the War Powers Resolution.

[The letter follows:]

THE SECRETARY OF STATE,

HON. THOMAS E. MORGAN,
Chairman, Committee on Foreign Affairs,
House of Representatives.

DEAR MR. CHAIRMAN: On July 16 you wrote to me regarding the implementation of the War Powers Resolution. In particular, you asked what arrangements had been made within the Executive Branch to insure "full and timely compliance" with the reporting requirement of Section 4 of the Resolution. I am pleased to inform you that since my September 7 letter to you on this matter, Secretary Schlesinger and I have agreed that our respective legal counsels will be jointly responsible for bringing immediately to our attention cases where it would be appropriate for us to recommend to the President that a report be submitted to the Congress pursuant to Section 4 of the War Powers Resolution.

With regard to the question of access to information, I understand that several months ago the Office of the Secretary of Defense instituted an arrangement whereby the Legal Adviser to the Chairman of the Joint Chiefs of Staff informs the Department of Defense General Counsel of all troop deployment actions routed through the Chairman's office which could raise a question as to whether a report to the Congress is required. In implementation of that arrangement a written instruction was promulgated establishing a War Powers Reporting System within the Operations Directorate of the JCS. Arrangements have been made for this Department's Legal Adviser to receive the same information as is supplied to the DOD General Counsel. Consultations between the two departments' legal counsels will be arranged as needed.

George Aldrich, the Acting Legal Adviser, would be pleased to arrange for further discussions of this matter with you or with members of your staff if you so desire.

Best regards,
HENRY A. KISSINGER.

Mr. Leigh. A similar letter was sent to the chairman of the Senate Foreign Relations Committee thus indicating to both Houses of Con-
gress the procedure which would be used to inform the President when cases arise requiring his decision as to whether a report should be made under section 4 of the War Powers Resolution. I should add that the President has not delegated to the Secretary of State or to the Secretary of Defense the final decision as to whether or when a report should be made.

CLARIFICATION OF RELEVANT SECTIONS

By way of further background, I would like to call attention to paragraph 3 of the War Powers Resolution which calls upon the President "in every possible instance" to "consult with Congress before introducing U.S. Armed Forces into hostilities or into situations where imminent involvement in hostilities was clearly indicated by the circumstances."

Section 4(a) of the War Powers Resolution calls for reports in any case in which the U.S. Armed Forces are introduced:

1. Into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
2. Into territory, air space or waters of a foreign nation while equipped for combat (with certain exceptions not here relevant); and
3. In numbers which substantially enlarge the U.S. Armed Forces equipped for combat already located in the foreign nation.

It should be noted that the scope of the reporting requirement under section 4(a) is greater than the scope of the consultation contemplated under section 3. Thus, prior consultation with Congress is contemplated only in cases which would fall within section 4(a)(1) when Armed Forces have been introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. No such prior consultation is contemplated under section 3 when the action to be reported under section 4(a) fits within subparagraphs 2 and 3. This is a distinction which I made in my testimony before the full Committee on International Relations on April 16 as you, Mr. Chairman, will no doubt recall.

Despite this distinction, however, the President has directed prior consultation with Congress on each of the three occasions in which he has subsequently reported to Congress under section 4(a); namely, the Danang sealift; the Phnom Penh evacuation from Cambodia; and the Saigon evacuation which took place last week. It should be noted that the House was in recess from March 26 to April 7, 1974.

DANANG SEALIFT

Late on Saturday afternoon, March 30, 1975, after the Congress had recessed for the Easter break, the President by means of individual notifications advised the members of the Senate and House leadership that a severe emergency existed in the coastal communities of South Vietnam and that he was directing American naval transports and contract vessels to assist in the evacuation of refugees from coastal seaports. At the same time it was made clear that the naval vessels would not be sent to areas where there was danger of becoming involved in hostilities and that they would lie offshore so that refugees could be ferried out from the beaches. The President also made it clear
that the U.S. action was part of an international humanitarian relief effort and that other countries were participating in this effort.

PRESIDENT SUBMITS FIRST WAR POWERS REPORT

On Friday, April 4, 1975, the President made his first formal report to the Congress under the War Powers Resolution and it was with respect to the Danang sealift. In this report, after taking note of section 4(a)(2) of the War Powers Resolution, the President advised the Congress that the first vessel involved in the sealift had entered South Vietnam territorial waters at 4 a.m. e.d.t. on Thursday, April 3, 1975. He also reported that although the U.S. uniformed forces used for this mission were "equipped for combat within the meaning of section 4(a)(2), ** the sole mission is to assist in the evacuation including the maintenance of order on board the vessels engaged in that task." This report was dated Friday, April 4, 1975, and was submitted within the 48-hour period contemplated by the War Powers Resolution.

[The report follows:]

REPORT DATED APRIL 4, 1975, FROM PRESIDENT GERALD R. FORD TO HON. CARL ALBERT, SPEAKER OF THE HOUSE OF REPRESENTATIVES, IN COMPLIANCE WITH SECTION 4(a)(2) OF THE WAR POWERS RESOLUTION

HON. CARL ALBERT,
Speaker of the House of Representatives,
Ft. Knox, China.
(C/O Ambassador Bush.)

As you know, last Saturday I directed United States participation in an international humanitarian relief effort to transport refugees from Danang and other seaports to safer areas further south in Vietnam. The United States has been joined in this humanitarian effort by a number of other countries who are offering people, supplies and vessels to assist in this effort. This effort was undertaken in response to urgent appeals from the Government of the Republic of Vietnam because of the extremely grave nature of the circumstances involving the lives of hundreds of thousands of refugees. This situation has been brought about by large-scale violations of the Agreement Ending the War and Restoring the Peace in Vietnam by the North Vietnamese who have been conducting massive attacks on the northern and central provinces of South Vietnam.

In accordance with my desire to keep the Congress fully informed on this matter, and taking note of the provision of section 4(a)(2) of the War Powers Resolution (Public Law 93-143), I wish to report to you concerning one aspect of United States participation in the refugee evacuation effort. Because of the large number of refugees and the overwhelming dimensions of the task, I have ordered U.S. Naval vessels to assist in this effort, including Amphibious Task Group 76.8 with 12 embarked helicopters and approximately 700 Marines. These naval vessels have been authorized to approach the coast of South Vietnam to pick up refugees and U.S. nationals, and transport them to safety. Marines are being detailed to vessels participating in the rescue mission. The first vessel entered South Vietnam territorial waters at 0400 a.m. EDT on April 3, 1975.

Although these forces are equipped for combat within the meaning of section 4(a)(2) of Public Law 93-143, their sole mission is to assist in the evacuation including the maintenance of order on board the vessels engaged in that task.

As stated above, the purpose of the introduction of United States Naval vessels into Vietnamese waters is to assist in an international humanitarian effort involving vessels of several nations, including both military and civilian craft. The United States participation in this effort includes the charter of commercial vessels, the use of Military Sealift Command vessels with civilian crews, as well as United States Naval vessels with military crews. This effort is being undertaken pursuant to the President's constitutional authority as Commander-in-Chief and Chief Executive in the conduct of foreign relations and pursuant to the Foreign Assistance Act of 1961, as amended, which authorizes humanitarian assistance to
refugees, civilian war casualties and other persons disadvantaged by hostilities or conditions relating to hostilities in South Vietnam.

You will appreciate, I am sure, my difficulty in telling you precisely how long United States forces may be needed in this effort. Our present estimate, however, is that this operation may involve the presence of United States Naval vessels in Vietnamese waters for a period of at least several weeks.

Gerald R. Ford.

Mr. Leigh. During the course of this evacuation, American naval and contract vessels lifted approximately 65,000 refugees from points along the South Vietnam coast to the south of Danang and transported them to places further to the south.

This phase of the evacuation was completed on or about April 11, at which time all U.S. Armed Forces were withdrawn.

CAMBODIAN EVACUATION

Meanwhile, the situation in Cambodia had deteriorated to such a point that the President on April 3, 1975, authorized the Ambassador to begin to evacuate American staff as well as certain non-Americans from Phnom Penh. On the same day, the President directed that the leaders of the Senate and the House be advised of the general plan of evacuation. The President noted that the early phases of the evacuation would be carried out by fixed wing aircraft. He pointed out, however, that in extreme circumstances it might be necessary to use helicopters and a limited number of marine security forces to secure landing zones for the final phase of the evacuation.

On Friday, April 11, the President again directed that congressional leaders be notified regarding the progress of the evacuation and this further consultation was carried out either by personal contact or by telephone. The leaders were notified that the President had authorized the final phase of the Cambodian evacuation the use of helicopters, air cover and marine security forces to remove U.S. nationals and certain other nationals.

U.S. Armed Forces began the final phase of the evacuation at 8:34 p.m. e.d.t. on April 11 and concluded their mission at 12:20 A.m. on April 12, 1975.

On Saturday, April 12, 1975, the President advised that all personnel of the U.S. mission had left Phnom Penh and that "a number of Cambodians whose lives would have been jeopardized" if they had remained in Cambodia had also been evacuated. Altogether 82 Americans and 159 Cambodians and 35 third country nationals were removed from Phnom Penh without loss of life. On the same date, i.e., Saturday, April 12, 1975, the President made his second formal report under the War Powers Resolution.

[The report follows:]

REPORT DATED APRIL 12, 1975, FROM PRESIDENT GERALD R. FORD TO HON. CARL ALBRIGHT, SPEAKER OF THE HOUSE OF REPRESENTATIVES, IN COMPLIANCE WITH SECTION 4(b)(2) OF THE WAR POWERS RESOLUTION


HON. CARL ALBRIGHT, Speaker, U.S. House of Representatives, Washington, D.C.

Dear Mr. Speaker: As you and other members of Congress were advised, in view of circumstances in Cambodia, the United States had certain contingency plans to utilize United States Armed Forces to assure the safe evacuation of U.S. Nationals from that country. On Friday, 11 April 1975, the Khmer Commu-
nists' forces had ruptured Government of the Khmer Republic (GKR) defense lines to the north, northwest and east of Phnom Penh and were within mortar range of Pochentong Airfield and the outskirts of Phnom Penh. In view of this deteriorating military situation, and on the recommendations of the American Ambassador there, I ordered U.S. military forces to proceed with the planned evacuation out of consideration for the safety of U.S. citizens.

In accordance with my desire that the Congress be fully informed on this matter, and taking note of Section 4 of the War Powers Resolution (P.L. 93-148), I wish to report to you that the first elements of the U.S. forces entered Cambodian airspace at 8:34 P.M. EDT on 11 April. Military forces included 350 ground combat troops of the U.S. Marines, 36 helicopters, and supporting tactical air and command and control elements. The Marines were deployed from helicopters to assure the security of helicopter landing zone within the city of Phnom Penh. The first helicopter landed at approximately 10:00 P.M. EDT 11 April 1975, and the last evacuees and ground security force Marines departed the Cambodian landing zone at approximately 12:20 A.M. on 12 April 1975. The last elements of the force to leave received hostile recoilless rifle fire. There was no firing by U.S. forces at any time during the operation. No U.S. Armed Forces personnel were killed, wounded or missing, and there were no casualties among the American evacuees.

Although these forces were equipped for combat within the meaning of Section 4(a)(2) of Public Law 93-148, their mission was to effect the evacuation of U.S. Nationals. Present information indicates that a total of 82 U.S. citizens were evacuated and that the task force was also able to accommodate 35 third country nationals and 159 Cambodians including employees of the U.S. Government.

The operation was ordered and conducted pursuant to the President's Constitutional executive power and authority as Commander-in-Chief of U.S. Armed Forces. I am sure you share with me my pride in the Armed Forces of the United States and my thankfulness that the operation was conducted without incident. Sincerely,

GERALD R. FORD.

Mr. LEIGH. The military forces used to carry out this evacuation included 350 ground combat troops of the U.S. Marines, 36 helicopters and supporting tactical air command and control elements.

SAIGON EVACUATION

On April 28, following rocketing of Tan Son Nhut airfield in Saigon the President directed that congressional leaders be notified that the final phase of the evacuation of Saigon would be carried out by means of military forces within the next few hours.

At 11:30 a.m. on April 29, the President met with congressional leaders at the White House, at which time there was a further briefing on the situation in Saigon.

Beginning at 1 a.m. e.d.t., April 29, 1975, a force of 70 helicopters and 865 Marines evacuated, according to our count 1,373 U.S. citizens, together with approximately 5,595 South Vietnamese and 85 third country nationals. These evacuations took place from landing zones in the vicinity of the American Embassy at Saigon and the Defense Attaché's Office at Tan Son Nhut airfield. A total of 630 helicopter evacuation sorties was flown. The last elements of this force were withdrawn at 7:46 p.m. e.d.t., on the same day. Unfortunately, two crew members of a Navy Search and Rescue helicopter were lost at sea. On the previous day, two Marines assigned to permanent guard duty at the Defense Attaché's Office at the airfield were killed by rocket attacks into the refugee staging area. No other casualties are known to have occurred.
[The President's report dated April 30, 1975, follows:]

REPORT DATED APRIL 30, 1975, FROM PRESIDENT GERALD R. FORD TO HON. CARL ALBERT, SPEAKER OF THE HOUSE OF REPRESENTATIVES, IN COMPLIANCE WITH SECTION 4 OF WAR POWERS RESOLUTION

THE WHITE HOUSE,

The Honorable the Speaker,
U.S. House of Representatives,
Washington, D.C.

Dear Mr. Speaker: On April 4, 1975, I reported that U.S. naval vessels had been ordered to participate in an international humanitarian relief effort to transport refugees and the U.S. nationals to safety from Danang and other seaports in South Vietnam. This effort was undertaken in response to urgent appeals from the Government of South Vietnam and in recognition of the large-scale violations by the North Vietnamese of the Agreement Ending the War and Restoring Peace in Vietnam.

In the days and weeks that followed, the massive North Vietnamese attacks continued. As the forces of the Government of South Vietnam were pushed further back toward Saigon, we began a progressive withdrawal of U.S. citizens and their dependents in South Vietnam, together with foreign nationals whose lives were in jeopardy.

On April 28, the defensive lines to the northwest and south of Saigon were breached. Tan Son Nhut Airfield and Saigon came under increased rocket attack and for the first time received artillery fire. NVA forces were approaching within mortar and anti-aircraft missile range. The situation at Tan Son Nhut Airfield deteriorated to the extent that it became unusable. Crowd control on the airfield was breaking down and the collapse of the Government forces within Saigon appeared imminent. The situation presented a direct and imminent threat to the remaining U.S. citizens and their dependents in and around Saigon.

On the recommendation of the American Ambassador there, I ordered U.S. military forces to proceed by means of rotary wing aircraft with an emergency final evacuation out of consideration for the safety of U.S. citizens.

In accordance with my desire to keep the Congress fully informed on this matter, and taking note of the provision of section 4 of the War Powers Resolution (Public Law 93-148), I wish to report to you that at about 1:00 A.M. EDT, April 29, 1975, U.S. forces entered South Vietnam airspace. A force of 70 evacuation helicopters and 865 Marines evacuated about 1,400 U.S. citizens, together with approximately 5,500 third country nationals and South Vietnamese, from landing zones in the vicinity of the U.S. Embassy, Saigon, and the Defense Attaché Office at Tan Son Nhut Airfield. The last elements of the ground security force departed Saigon at 7:46 P.M. EDT April 29, 1975. Two crew members of a Navy search and rescue helicopter are missing at sea. There are no other known U.S. casualties from this operation, although two U.S. Marines on regular duty in the compound of the Defense Attaché Office at Tan Son Nhut Airfield had been killed on the afternoon (EDT) of April 28, 1975, by rocket attacks into a refugee staging area. U.S. fighter aircraft provided protective air cover for this operation, and for the withdrawal by water of a few Americans from Can Tho, and in one instance suppressed North Vietnamese anti-aircraft artillery firing upon evacuation helicopters as they departed. The ground security forces on occasion returned fire during the course of the evacuation operation.

The operation was ordered and conducted pursuant to the President's Constitutional executive power and his authority as Commander-in-Chief of U.S. Armed Forces.

The United States Armed Forces performed a very difficult mission most successfully. Their exemplary courage and discipline are deserving of the nation's highest gratitude.

Sincerely,

GERALD R. FORD.

Mr. LEHMAN, Mr. Chairman, in each of the three evacuations described above, the President acted pursuant to his constitutional authority as Commander in Chief and as Chief Executive. In each case the President directed that Congress be notified and informed prior to the actual commencement of the introduction of armed forces, although consultation was not technically called for in at least one of these cases.
Thank you very much.
Mr. Zablocki. There is a vote on the House floor. We will suspend for 5 minutes.

[A short recess was taken.]

Mr. Zablocki. The committee will resume.

Thank you, Mr. Leigh.

Mr. Hoffmann, do you have a statement?

STATEMENT OF HON. MARTIN R. HOFFMANN, GENERAL COUNSEL, DEFENSE DEPARTMENT

Mr. Hoffmann. I am prepared to answer questions.
Mr. Zablocki. Thank you.

LEIGH’S ABILITY AS LAWYER PRaised

Mr. Leigh, of course some of my colleagues have questioned your ability. I, for one, think you are one of the sharpest, brightest lawyers in Washington, and we are looking forward to some detailed and knowledgeable replies to the technical questions we may have.

Mr. Leigh, I feel somewhat set up, Mr. Chairman, by that characterization.

Mr. Zablocki. Well, I mean it sincerely having had an opportunity to observe you in various capacities in private life and now in the very important position you hold as legal adviser to the State Department.

In your statement you referred to Secretary Kissinger’s October 7 letter in reply to a letter from Chairman Morgan. You said the arrangement outlined in this letter was complied with; therefore, the war powers reporting system within the Operations Directorate of the Joint Chiefs of Staff has been published. In other words, arrangements have been made for the State Department’s legal adviser to receive the same information as is supplied to DOD General Counsel and that consultations between the two department’s legal counsels will be arranged as needed.

Therefore, is it proper for me to assume, Mr. Leigh or Mr. Hoffmann, that you were in consultation with the Joint Chiefs of Staff or the National Security Council in preparing these reports in response to the provisions of the War Powers Resolution?

CONSULTATION PROCEDURE WITH JOINT CHIEFS OF STAFF

Mr. Lausa. May I answer first, Mr. Chairman, by saying that Mr. Hoffmann and I have known one another for many years. We established contact with one another quite some time in advance of the time we actually worked on preparing the war powers reports and I received from him cooperation in every respect. He, however, had the direct contact with the appropriate elements of the Joint Chiefs of Staff and I received information from him. As this emergency unfolded it was reasonably clear, I think, even from the newspaper reporting as to what needed to be done. That, of course, was supplemented in detail from very careful files which were maintained in the JCS offices.
Mr. ZABLOCKI. Well, I am trying to establish whether you had direct input in the preparation of the wording of the reports of April 4, April 12, and April 30.

Mr. LEIGH. Yes, I participated.

Mr. ZABLOCKI. Could you tell us why in the first two reports the President refers to section 4(a)(2) specifically while in the April 30 report he merely refers to section 4, which could be implied to be in response to paragraph (b) or (c), not necessarily even (a)? Can you tell us how this happened and why?

CATEGORIZATION OF WAR POWERS REPORTS

Mr. LEIGH. Well, there was nothing ulterior about this in any sense. We were not trying to mislead anyone. I think the factual situation was different as between the first case, the Danang sealift, and the other two. In the Danang sealift we were confident that we were not going to be involved in a section 4(a)(1) situation of hostilities, and in fact the President's orders required that the force avoid any kind of hostilities. We felt certain that that was going to fall under 4(a)(2), so we specified it in that case.

Now the other distinction is that we didn't know at the time we were required to make the report, which has to be within 48 hours, when we would complete the task of picking up refugees, and as it turned out it went on longer than either of the other two.

Now with respect to both the Cambodian and the Saigon evacuations, by the time the President made his report the last Americans and the last armed forces had already been taken out so that as lawyers we did not see that the specification of which of the three subsections of 4(a) was involved, was crucial to the operation of the mechanism which is established in section 5 of the War Powers Resolution because there would be no occasion for the 60-day period to even begin running.

NO SUBSECTION SPECIFICATION FOR APRIL 30 REPORT

Mr. ZABLOCKI. May I interrupt at this point. I want to be certain that we understand correctly and exactly what you are saying here? In other words, as lawyers you determined that it was not crucial to specify the subsection under which the April 30 report was filed, and you took that view because the timing of the completed evacuation action had made moot the possibility of triggering the section 5 provision calling for "Congressional Action" procedure. Is that correct?

But let's compare that situation with the incident covered in the April 4 report. In that one you obviously had no doubt since it was specifically filed in compliance with section 4(a)(2). To put it another way, despite the fact that the action was off the coast of Danang, you had no reason to anticipate conflict or even any imminent conflict. Yet, in the case of the April 30 report you determined that it would not be a section 4(a)(2) report. Therefore, it would have to be either under section 4(a)(1) or section 4(a)(3)?

Mr. LEIGH. Or under all of them?

Mr. ZABLOCKI. All three.

Mr. LEIGH. Well, we also had in mind, I think it is fair to say, that...
Mr. Zablocki. I am trying to establish whether in your thinking the determination as to which subsection to file under was made with a view to the possibility of congressional action. In other words, did you as lawyers make your determination objectively under exactly what section of the law you should have responded?

Mr. Leigh. Well, I still believe, Mr. Chairman, that as careful lawyers and as lawyers who are attempting to cooperate with the Congress insofar as it is within their power, we did not feel that that was a critical point.

Mr. Zablocki. Shouldn't the Congress decide whether it was a critical point?

**SPECIFICATION CONSIDERED CRITICAL POINT IN EXECUTIVE?**

Mr. Leigh. May I answer in this way. I think that even in the Danang situation where we were sufficiently confident to specify a particular subparagraph of section 4, it was not beyond the range of possibility that our calculations might have been wrong and we might have had to modify the report and make an amended report to Congress later if contrary to all of our expectations some hostilities had occurred, and we would have done so.

Now with requests to the Saigon evacuation it seemed to me that it was clear that this was at least a 4(a) (1) situation. On the other hand, since we were reporting the completion of the evacuation at the same time we were reporting the introduction, it didn't seem to us that we were called upon to tell Congress exactly which subparagraph applied. Also, the evacuation at the same time involved a 4(a) (2) situation.

Now with respect to Cambodia, I am frank to say that we were not absolutely sure which way it would go. I don't know whether Mr. Hoffmann would agree with me but I as a lawyer was not absolutely sure. In any case when you are involved in these situations you can't tell when you are going to get some subsequent information which changes the assumptions on which you write your original report, so we simply decided to avoid that question because we thought it was moot.

**PRESIDENT'S CONSTITUTIONAL AUTHORITY**

Mr. Zablocki. In the April 30 report, the second to the last paragraph, I quote:

The operation was ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander in Chief of U.S. Armed Forces.

Presumably this refers to the evacuation of not only U.S. citizens but also third country nationals, including the South Vietnamese. If that is so, we would like to have you elaborate on it. Particularly I am concerned as to whether this interpretation of the President's constitutional Executive power squares with the War Powers Resolution, particularly section 2(c).

Mr. Leigh. Well, let me answer the last first. I don't think it quite does square with section 2(c). As a matter of fact, I think it is true that the Senate at the time of the conference on this wanted to include exactly the kind of situation which arose in Indochina among the specifications in section 2(c).
Now our view, as you suggested, is that this is a constitutional power of the President and so we would not agree as representatives of the executive branch that the specification of circumstances in which this power might be used would be limited by section 2(c). In other words, we do not think that the instances stated there are exhaustive and on this we had a slight difference with the Congress in the draftsmanship of this measure.

Funds Limitations in Foreign Assistance Act

I think in order to talk more generally about the constitutional problem you have to go back really to the various funds limitations in the statutes which you will recall I mentioned when I testified on April 16 before the full committee. Now I believe personally, I don’t believe the executive branch—at least this administration—has taken a particular position on it, but my own view is that the President absent any kind of funds limitation would clearly have had the power as Commander in Chief under his independent constitutional authority to evacuate not only U.S. nationals but also some foreign nationals. That is a power which has been exercised many times over the years.

Now I realize that in the debate which has occurred over the emergency Vietnam legislation not too much attention has been paid to that and most people have assumed—and this is the narrow ground on which we would support what has been done in this case—that where you have an intermixing of foreign nationals and U.S. nationals and where the practical tactical judgment is that the efficacious and in fact the safest way to remove the Americans is to remove some third country nationals as well as some local nationals, then the President has power to do that.

Impact of Funds Limitation on President’s Constitutional Authority

The difficulty in this situation has been that people lose sight of the effect of the funds limitations. Now the funds limitation statutes say, although expressed in various ways, that as to Indochina in general and as to the three countries in Indochina where we have been involved in hostilities in prior years, we are not authorized to spend U.S. funds in order to carry on hostilities in those three countries.

At the time these statutes were adopted, however, there was a legislative history which is quite precise that the statutes were not intended to limit and could not limit the President’s constitutional power to remove U.S. nationals from places of danger. Now in the discussion of that constitutional power it was always treated—and this was presumably the understanding of the Members of the Congress who participated in this discussion—as within the President’s constitutional power to remove Americans from danger.

So when the decision had to be made as to just how the emergency legislation requested by the President on April 10 should be shaped, the starting point was the feeling that although we had the power to remove Americans by virtue of the constitutional power of the President and that that was clearly understood as not curtailed by the funds limitation bills, we had not during the legislative history of those funds limitation bills talked about non-Americans being evacuated.
So we felt that what was required was something which would cover that point and that is the reason the President proposed the legislation in the form that he did. I am sorry to make it so technical, but I found, for example, in the Senate debates which I read the other night that practically no one took any notice whatsoever of the impact of the funds limitation bills on the President’s freedom of action. Now in the House, that was not true. I think this committee in particular, thoroughly understood this point and its report reflected that.

POINT OF CLARIFICATION ON PRESIDENT’S AUTHORITY

Mr. Zablocki. Mr. Findley.

Mr. Findley. On just this point, Mr. Chairman.

You have given us a very broad interpretation of the constitutional power of the President to evacuate American citizens and foreign nationals. I believe your view is that in the absence of a congressional restriction that the President had authority to evacuate from hostile circumstances not only American citizens but foreign nationals. If that is a fair summary of your position, could you cite the words of the Constitution from which you draw such an interpretation? I know you made reference to the fact that Presidents in the past have done so.

Mr. Lehman. That is right.

Mr. Findley. I would like to know the words of the Constitution from which you draw this interpretation. Second, I think it would also be helpful if you could place in the record at this point these instances in which Presidents in the past have acted.

Mr. Zablocki. Acted to evacuate foreign nationals?

Mr. Findley. Yes.

Mr. Zablocki. That would be very interesting.

Mr. Solarz. Would the gentleman yield for a minute on that question?

Mr. Zablocki. Yes.

FOREIGN NATIONALS: PREVIOUS EVACUATION INSTANCES CITED

Mr. Solarz. I was under the impression during the Boxer Rebellion in China there were evacuations of foreign nationals.

Mr. Lehman. You are right about the Boxer Rebellion; that is one of the instances. We have not exhaustively researched this. It was done again in 1965 in the evacuation of Americans and foreign nationals from the Congo and it was also done in the Dominican evacuation under President Lyndon Johnson. Now we are making a further study of that. Altogether there have been maybe 100 or more instances in which the President has used the Armed Forces abroad in ways which would have, if this statute had been in effect, I think required some reporting but we have not analyzed yet which ones of those involve foreign nationals and which ones only U.S. nationals.

For example, during the 1927 episode in Nanking, China, I am told that the local commander repeatedly asked authority to evacuate foreign nationals. Our preliminary review indicates that that authority was denied—whether for political reasons or because of their view that they did not have a constitutional power. I can’t answer at this time.
We will undertake to supply, Mr. Chairman, a list of as many examples as we can find in which foreign nationals were also evacuated.²

Mr. LAGOMARSINO. Would the gentleman yield?

Mr. ZABLOCKI. Yes.

Mr. LAGOMARSINO. One that you might look at would be the American mini-invasion of Vera Cruz, Mexico, 1914. I think some American nationals were evacuated. Whether there were any third country nationals evacuated at that time, I don't know.

Mr. LEIGH. This is in 1913?

Mr. LAGOMARSINO. I think it was 1914. President Wilson ordered the naval and marine force to invade Vera Cruz to protect our interests.

Mr. LEIGH. Yes.

CONSTITUTIONAL LANGUAGE RECITED

Mr. ZABLOCKI. I hope my colleagues don't think I am transgressing on their time but I think we have to pursue this point. I asked you to recite the words of the Constitution.

Mr. LEIGH. This is article II, section 2, clause 1. "The President shall be Commander in Chief of the Army and Navy of the United States and militia."

I think that is the principal section.

Mr. FINDLEY. Is there anything beyond that that you can recite?

Mr. LEIGH. Yes. I would argue that the foreign affairs power which is derived, I would say, jointly from his power as Chief Executive and also which is implicit in the power to receive ambassadors and other public ministers is another source of power for the kind of action that the President took.

PRESIDENT’S REQUEST TO CONGRESS FOR CLARIFICATION

Mr. ZABLOCKI. In view of your explanation or amplification of that paragraph from the President’s report, how do you explain the President’s request to Congress for a clarification of his authority regarding the then anticipated evacuation of Saigon? Legal counsel at his command must have given him the same advice or interpretation that you are giving to us. It was not this member’s understanding that the requested clarification was merely to those sections of statutes that placed limitations on the President and for which he wanted waivers. Since that has happened the President did act despite the five provisions of law prohibiting reintroduction of troops into Vietnam. There was a question, the only question, as to whether there should have been any legislative clarification of his authority to evacuate and use military troops. Further, he did use waiver authority under the section 614.

Mr. LEIGH. Well, section 614 was a waiver authority as to another statute, not as to the funds limitations statute as I understand it. I am told that an opinion was given to the full committee this morning by the General Counsel of the AID. I have not seen that so I

²A list of examples where U.S. Forces were used to protect foreign nationals as well as U.S. citizens may be found on pp. 29 and 31.
can't speak with knowledge on that subject. I thought that section 614 was a waiver section in the current AID legislation.

Mr. Zablocki. That is correct.

Mr. Leigh. And not grant authority to waive the funds limitations on the use of forces on hostilities in Indochina.

WAIVING THE FUNDS LIMITATIONS

Mr. Zablocki. We were told today that the waiver authority that he employed was for the purpose of getting funding——

Mr. Leigh. That is different.

Mr. Zablocki. Do you contend that under section 614 that he no longer needs the statutes which limited his use of funds for the purpose of evacuating by employing military armed forces?

Mr. Leigh. Perhaps they were relating that to the care and support and sustenance of the refugees once they have left Indochina.

Mr. Zablocki. A portion of the funds that are now requested were for the purpose of paying for the evacuation. It is my understanding that the legislation requested by the executive branch would have served two purposes.

Mr. Leigh. Yes; you are right.

Mr. Zablocki. One, waiving the limitations of the Foreign Assistance Act which denied the President use of certain funds, and two, to clarify and meet his authority as Commander in Chief as to whether he can use U.S. Armed Forces for the evacuation of foreign nationals, that is, third-party nationals from South Vietnam, despite the five provisions of law.

Are you now telling us he didn't need it in either case, certainly not in the latter case as it involves his authority as the Commander in Chief to evacuate foreign nationals? I thought this was clearly debated. I am not a lawyer much less a constitutional lawyer, but the debate on the floor was quite clear; though the President's authority to safeguard U.S. citizens abroad may be implied in the Constitution and by common historical practice—nowhere would he have the authority to evacuate foreign nationals using U.S. troops. I thought this was a clarification for the President.

PRESIDENT'S AUTHORITY AS COMMANDER IN CHIEF

Mr. Leigh. No doubt about it. The President can use it with respect to the more basic and less disputed constitutional authority. He asked for clarification as to that.

Mr. Zablocki. In the second last paragraph he does not spell that out. He simply says the operation was ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander in Chief of U.S. Armed Forces. I believe we must clarify this. I submit we must not let this interpretation of the executive branch go unchallenged.

Mr. Leigh. Let me see if I understand. I gather that it is accepted by you at any rate that the President has authority to evacuate American nationals under his constitutional authority as Commander in Chief.

Mr. Zablocki. Without including the evacuation at the same time any foreign nationals, I would assume he does have that authority.
Mr. Leigh. I believe he does have that authority.

Now take the other extreme--and assume that all he is doing is evacuating foreign nationals. That you clearly do not accept and it is not necessary for me to defend that, in order to defend what the President did in this case. It seemed to me in this case what you had was an intermingling of nearly panic foreign nationals with American nationals and some troops so that it was a matter of judgment as to whom you took out and who you tried to exclude. Above all, where you had the capacity in terms of military airlift to take out some foreign nationals and avoid ugly incidents and shooting and perhaps casualties, it was an appropriate decision for the President to make under his constitutional authority.

“PRESIDENT’S AUTHORITY” NEEDS CLEAR-CUT INTERPRETATION

Mr. Zablocki. Let me make it very clear, Mr. Leigh. I never have been opposed to the evacuation of the South Vietnamese. However, I do think there should be a clear-cut interpretation whether the President did or did not have the authority to do so. If it were the other way around, if the majority of the evacuees were U.S. nationals and a handful of Vietnamese, I would have no concern at all; but just the opposite was true—10 to 12 or 15 third-country nationals to 1 U.S. national.

Mr. LAGOMARINO. No; the early evacuation was not carried out under military forces, as I understand it.

Mr. Zablocki. By U.S. military planes. By the way, you have not addressed yourself to that, Mr. Leigh.

Mr. Leigh. You know, vast numbers were taken out in circumstances which required no reporting under the resolution. All the earlier evacuations from Cambodia, for example, required no such reporting because we were doing it by civilian airlift—we were not using armed forces for that.

Mr. Findley. Mr. Leigh, maybe we are incorrectly interpreting your position. Are you contending that the President, in the absence of contrary instructions from the Congress, can use U.S. military force to evacuate foreign nationals?

LEGISLATION NEEDED TO EVACUATE FOREIGN NATIONALS

Mr. Leigh. I said, Mr. Findley, that that is my personal belief as a constitutional matter. Now in this case, of course, we have the fund-limitations provision.

Mr. Findley. Commingling.

Mr. Leigh. That is right.

Mr. Findley. Is that the position of the State Department?

Mr. Leigh. The reason I considered it necessary to get legislation as to taking out foreign nationals was because we did not have any legislative history to support the proposition that the fund-limitations provisions were subject to an exception for evacuation of foreign nationals. We did have such an exception and understanding with respect to U.S. nationals.

Mr. Solarz. Will the gentleman yield for one question on this point, Mr. Chairman?
I want to go back and vote, too.

Mr. Ecken. Mr. Bingham has another meeting. Without objection the Chair will call on him now to ask his questions.

Mr. Solarz. Will the gentleman yield for one question on this point?

Mr. Bingham. Yes.

Mr. Solarz. As I understand, the President had the authority to evacuate American citizens from Vietnam regardless of any additional statutory authorization. He also had the authority, according to you, to evacuate not only American citizens but, incidentally to that evacuation, Vietnamese nationals for well but he needed statutory authorization to conduct an evacuation specifically of Vietnamese nationals by themselves.

Mr. Leigh. You needed that clause because of the fund limitation.

PRESIDENT'S POSITION ON HOUSE AND SENATE BILL

Mr. Solarz. If that is, in fact, the case, I am surprised by the curious position of the President and executive branch on the discrepancy between the bill that emerged from us and the Senate because the Senate bill, by limiting the use of troops only to the duration of time necessary to evacuate Americans and limiting the number only to the amount necessary to evacuate Americans, bestowed no authority on the President, which, according to your interpretation, he didn't already have; whereas the House bill, by specifically authorizing the use of troops solely for the use of Vietnamese nationals, did bestow upon the President precisely the kind of legislative authorization you were seeking.

The bill which emerged from the conference was, in essence, the Senate bill on this question. So, if your interpretation is correct, the very legislation which you supported for the purpose of clarifying the President's authority in this context not one bit of additional statutory authority on the President, because, according to your analysis, he already had the authority to do just that since the terms of the Senate bill and the conference bill limited the use of troops to the duration of time necessary to evacuate the Americans.

According to you, the President during the time necessary to take out Americans can also take out South Vietnamese. So why didn't you speak out against the Senate bill?

Mr. Leigh. I think there is no doubt on this point. I, as a lawyer, greatly preferred the House bill.

Mr. Solarz, I will yield back to the gentleman but I want to pursue this.

Thank you.

EVACUATION IN SPITE OF FUNDS LIMITATION STATUTE

Mr. Bingham. Let me just pursue this line of inquiry.

Do I understand that you feel that the President had the constitutional authority to evacuate Americans and to do whatever was incidentally necessary to accomplish that in spite of the funds limitations adopted?

Mr. Leigh. That is correct because there was, as I recall, a very substantial legislative history that it was not the intent of Congress
the funds limitation statutes to curtail that exercise of Presidential authority.

Mr. BINGHAM. Well, I would suggest to you that those provisions were put into the law to curtail what President Nixon at the time said was his authority as Commander in Chief to protect and safeguard the evacuation of American troops which was the reason he gave, for example, for going into Cambodia. If your interpretation is correct, then that statutory limitation had no effect.

Mr. LEIGH. Well, I think the explanation which I gave in response to the chairman’s earlier questions indicates that I think they did have an effect. We felt it was necessary to secure congressional confirmation that the fund limitation statutes did not apply to the evacuation of Vietnamese nationals whose rescue was deemed necessary to secure the rescue of Americans.

Mr. BINGHAM. Only with respect to the evacuation of the Vietnamese?

FINAL WAR POWERS REPORT

Mr. LEIGH. Vietnamese and other foreign nationals, in turn, raise a very complicated constitutional question as to what sort of restraints our Congress may constitutionally impose on Presidential action through an appropriation bill. I can think of some examples which I think would be unconstitutional.

Mr. BINGHAM. Just one last question on the War Powers Resolution: Do you concur that the final report was a report which was set in motion by the other provisions of the War Powers Resolution absent perhaps the fact that the military operation has come to an end?

Mr. LEIGH. Well, it was set in motion by provisions in section 4 (a) of the resolution, but the report was also a final report which indicated that the troops were out. If we had sent them back in, we would have had to make another report and that would have been the operative event insofar as the running of any time periods under the resolution were concerned.

Mr. BINGHAM. Thank you.

Mr. ZABLOCKI. Mr. Findley.

Mr. FINDLEY. Thank you, Mr. Chairman.

HEARINGS SEEN AS HISTORIC

Mr. Leigh and Mr. Hoffmann, I think this is a semihistoric afternoon. This is the first time to my knowledge, that a committee of Congress has held hearings on a report of the President in relation to the exercise of war powers.

In any event, for the House of Representatives it is certainly a historic moment. It was not very long ago that the House had before it the resolution itself and I will vividly recall it was Gerald Ford, then minority leader, who strongly opposed the resolution and sought to sustain the President’s veto of the resolution never dreaming that a short time after that he would become the first Chief Executive to make a report under the resolution.

I am grateful to the President for acting under the resolution and in making these three reports. Judging from your interpretation he might possibly have viewed it otherwise and felt that the report was not required at least in all three instances.
WAR POWERS RESOLUTION: MECHANISM FOR REPORTING AND ADVISING

Mr. Leigh. Well, not quite, sir. I was distinguishing between his authority to do something, to order the Armed Forces to conduct an evacuation and his undertaking to report pursuant to war powers. Now I have seen articles in the newspapers which say that the President got his power to do this under the War Powers Resolution and as you know, Mr. Chairman, I think that is a misconception. I don't see that the War Powers Resolution gives the President any authority, it simply is a mechanism for reporting, for advising the Congress, and this President has complied with the wishes of Congress in this respect.

Mr. Zablocki. But most importantly, the resolution also makes it possible for Congress to confirm the President's action?

Mr. Leigh. Yes.

Mr. Findley. It is my view, Mr. Chairman, that the War Powers Resolution establishes by statute for the first time in history a relationship between the executive branch and the legislative branch in the exercise of the war powers which our investigation clearly showed is a shared power in which the Congress has the authority and the responsibility as well as the executive branch. When this resolution was placed on the statute books, no precise relationship had been established, and therefore, I think, it is very much in the credit of the President that he has complied, despite his own misgivings earlier as a Member of Congress.

HEARINGS INTENDED TO EXAMINE ACTIONS AND INTERPRETATIONS

I think it is clearly in the national interest that Mr. Zablocki as chairman of the subcommittee has seen fit to call public hearings so that Members of Congress as well as other citizens may examine the actions and the interpretations that lead to these actions by the President. I think it should give every citizen some comfort to know that in the future this awesome power to make war will be exercised both by the Congress and by the President. So that is why I regard this at least as a semihistoric occasion.

Mr. Leigh. I think that is quite an appropriate comment if I may say so, and I think this is one of the reasons that the President on April 10 asked for clarification and asked for this action as to the funds limitation provisions. He wanted the political support of the Congress in what he saw was going to be necessary, and the fact that he asked for it should not, in my view, be interpreted as an indication of his belief that in the absence of congressional action he could not have done the things that he did. On the other hand, he obviously wished to have congressional support and there remains the question of the financing of this evacuation.

Mr. Findley. I don't think anyone questions that the President has the resources or the power to act in instances like this, but I believe the relationship established through this War Powers Resolution will provide comfort to people who fear that the President in the future might step beyond bounds, and perhaps one may; but at least if he complies with the resolution, makes a report and thus helps to provide a forum in which the action can be critically examined; I think the public interest will be adequately served. I hope the future leaders of the Committee on International Relations will follow the example of Mr.
Zablocki in scheduling prompt hearings when a report is made in consequence to the War Powers Resolution. Thank you.

Mr. ZABLOCKI. Mr. Lagomarsino.

Mr. LAGOMARsINO. Thank you, Mr. Chairman.

DID PRESIDENT’S ACTION CONFORM WITH BOTH HOUSES?

It would appear to me to be at least a very close question as to whether or not the President had the authority, not with respect to the War Powers Resolution, but with respect to funding limitations, for the final evacuation of Saigon. I think you can argue that on and on, and any lawyer can take any position he wants and make a good case for it.

I would be interested in hearing your reply to this question though, and that would be, would the actions that were taken have fallen within the structures of the bill that was passed by the House and the bill that was passed by the Senate prior to the action taking place? In other words, assuming for the moment that those had become law, either one or both, would the action that was taken have fallen within the restrictions that were placed on that legislation by either body?

Mr. LEIGH. I unfortunately don’t have the text of those two bills. As I recall, there was a requirement in the Senate bill that the President make a certification under the guise of making a report in paragraph 4(c) of the War Powers Resolution to the effect that he had attempted by diplomatic negotiation to bring the conflict to an end.

The President would also have had to certify that Americans had been evacuated as rapidly as possible.

Third, and one of the most difficult for the executive branch, was a certification to the effect that the President had not used or would not use more helicopter lifts or more military forces to evacuate third country nationals or local nationals than he would have used if only Americans had been evacuated.

CERTIFICATION SEEN AS UNDESIRABLE

Now aside from the fact that I do not like the precedent of creating what seems to me to be an extension of paragraph 4(c) of the War Powers Resolution in the guise of calling on the President to report under 4(c), the President would in effect have been called upon to make a prior certification before he could introduce U.S. troops and I as a lawyer thought that was an undesirable addition to the concept and the theory of the War Powers Resolution which fortunately we don’t now have to face. But aside from that I am inclined to think that if I had a text here before me the President probably could have ordered the evacuation within the limits of the Senate bill which was the more restrictive one as I recall.

Mr. LAGOMARsINO. I guess I didn’t phrase my question very accurately because in fact what happened was that the House passed a bill, the Senate passed a bill and then the Senate adopted the conference committee report.

Mr. LEIGH. Yes.

Mr. LAGOMARsINO. The conference report, as I remember, was much less limited with regard to restrictions than had been the Senate bill.
Mr. Leigh. That is true, sir.

Mr. Lagomarsino. So my question would have to be, would it fall within the House bill or the conference report? The conference report as I recall was not nearly as restricted.

Mr. Leigh. I had been under the impression that the conference report had really adopted the Senate version as to these aspects of the bill. But it was the way the facts turned out, the way the circumstances developed which enables me to answer your question the way I did. At the time the President was seeking the legislation, he of course was trying to anticipate situations that had occurred and the possibility of even an exclusive 100-percent evacuation of non-Americans.

Mr. Zablocki. Would the gentleman yield for just one question?

Mr. Lagomarsino. Yes.

clarification on section 4(c)

Mr. Zablocki. Just one clarification on section 4(c). My understanding is that you didn't think this particular reporting requirement under 4(c) was advisable. Are you questioning that?

Mr. Leigh. I am not questioning the resolution the way it is written now. It simply says that:

In the event U.S. Armed Forces are introduced into hostilities in the situation described in subsection (a), the President shall, so long as such forces continue to be engaged, report to Congress periodically and not less often than once every six months.

Now the Senate bill referring to that section in effect converted it into a requirement in the guise of a report. The requirement would have been for the President to issue a certification prior to the use of his authority to send U.S. troops to carry out an evacuation, so in a sense it was becoming a prior statutory restraint by virtue of the Senate bill on the President's constitutional power, and I thought that was undesirable.

Mr. Findley. Mr. Chairman.

Mr. Zablocki. Do you yield, Mr. Lagomarsino?

Mr. Lagomarsino. Yes.

constitutional basis for intervention of military force

Mr. Findley. One of the objectives that I certainly had, and I think others had, in drafting the War Powers Resolution was to cause the principals of the executive branch to give consideration to the legal aspects and the constitutional basis for the use of military force when they were pondering the political aspects; in other words, so that they would think about the constitutionality question or the legality question early in the process which led to a decision as to whether to use military force or not.

So my question is, Mr. Hoffmann and Mr. Leigh, to your knowledge how soon in each of these instances was the legal question raised or the constitutional question?

Mr. Hoffmann. Of the President's authority?

Mr. Findley. Yes.

Mr. Hoffmann. I could not pinpoint a precise time. I think it is obviously part of the process of preparing each report. Because of
the circumstances that we are discussing here, it was certainly part and parcel of the consideration.

Mr. FINDLEY. Can you be more precise, Mr. Leigh?

Mr. Leigh. I can only say in my Department we took this question to the Secretary. I was in touch with the President's counsel about this requirement. I think, as early as the middle of March if not before. So I think that the principals were aware of this requirement long before the time they actually had to give effect to it.

Mr. HOFFMANN. I would put it the early part of March as far as the Department of Defense is concerned. Since the passage of the restrictions on expenditures of funds, of course, the question has been raised because any military action contemplated would have to be based upon the same authorities that ultimately were used in Cambodia and Saigon. Those restrictions were rather extensively researched in these particular situations and it has just become, together with the War Powers Resolution, a way of life within the Department of Defense.

Mr. FINDLEY. Well, personally I find that gratifying because I had the impression that in some previous episodes to use military force the President decided to go in and then left the task of thinking up some legal or constitutional rational for a later date. I would like to pose the precise question and I imagine Mr. Leigh will want to respond to it.

RESOLVE OF FOREIGN NATIONALS ONLY

Does the President contend that he has the authority to use military force to effect the rescue of foreign nationals in a situation in which no American nationals need to be rescued?

Mr. Leigh. Well, I meant to cover that earlier by saying that there was such authority putting aside the funds limitation provisions which apply only with respect to countries in Indochina. That is my personal view and I do not know that the administration of President Ford has actually taken a position on it. In fact, it is not necessary for them to do so, so long as they seemed the kind of legislative action which he asked for in his speech on April 10.

Mr. FINDLEY. I find that gratifying, too.

Last night the President on television made reference to the rescue of foreign nationals as well as U.S. citizens stating that one factor leading to the decision to rescue the foreign nationals was the possibility of unrest at the airport making it difficult to get U.S. nationals out. Can you elaborate on that? Can you give any background for it?

Mr. Leigh. That was a major consideration.

Mr. FINDLEY. Was that a major consideration?

TAN SON NHUT AIRPORT: RESCUE OF FOREIGN NATIONALS

Mr. HOFFMANN. That was a major consideration at the time, yes, sir.

Now I might just give you a broad overview of the facts as they obtained at the airport on the 28th and I am going to use our local time here which as you know is 12 hours off the time in Saigon.

The one day's evacuation by fixed wing was complete. Forty planes had been flown in and flown out on May 27 and the events had proceeded with occasional rocket attacks. On the 28th, starting in the early afternoon, the intensity of the rocket firings increased and for
the first time artillery was hitting the airport. The feeling was that these were Soviet-made 130-millimeter artillery that had operated with a very good degree of accuracy. The judgment of the military people on the scene was that the North Vietnamese were in fact in position to bring a good amount of effective fire on the airfield.

The projected flights for the next day of fixed wing were 60—in other words, up from 40—and the process that was being undergone at the time of the increased attacks was to stage those flights. This is a somewhat complex logistical movement even under the best of conditions when you are moving people who have been identified as having priority from one place to the other and making security checks and the like.

DISTURBANCE AT AIRFIELD RECOUNTED

So as dawn broke in Saigon and the contemplated 60-plane airlift was to begin, the trouble started. As the first C-130 was over the airfield, a disturbance broke out on the field. Two South Vietnamese C-130s attempted to take off. They were blocked in one instance by an automobile. These were armed crowds of Vietnamese trying to get on those planes.

At about the same time a South Vietnamese, for reasons not clear, had been taxiing an F-5 type aircraft which he abandoned in the middle of another taxiway. The police chief was at the airport trying to restore order but there was a good number of civilians on the airfield in disorder at that point.

Prior to that time there had been sightings of SA-7 missiles being brought into the area. The day before Vietnamese planes had been shot down with these Russian missiles and the overall military situation deteriorated. It was at the end of the day at about 4 o’clock in the afternoon that the two marine Embassy guards who were at the DAO guard compound were killed, and of course it was subsequent to that that three Vietnamese planes were shot down. So you had some fluidity with respect for the prospect the next day.

When the decision was made to go to the rotary wing evacuation which was the fourth contingency in the evacuation plan for Saigon, the approximate number of South Vietnamese advanced in the DAO compound, for instance, was upwards of 2,000. These were being staged into loads; they had been told they would be leaving the next day—they had made arrangements, they had their papers and there were Americans intermingled with them.

NATIONALITY SEGREGATION COULD HAVE TRIGGERED SEVERE DISORDER

This was the function of commonality of the evacuation up to that time which had not proceeded under conditions which we would have considered hostile. The air crews that were flying the fixed wing evacuation were not armed for combat, there were no hostilities then threatening Tan Son Nhut airport. So up until that point we were not in a state of hostilities. But the feeling was that had we attempted at that time to separate out, the Vietnamese that were wrapped around the Americans as it were, there would have been a potential not only for rather severe disorder within the compound and within the actual
areas from which the evacuation was being staged, but it might have triggered a far different reaction outside the compound and outside the Embassy.

Now as the evacuation proceeded, of course Americans in Vietnam who were in the Saigon area were alerted that the final evacuation was to take place and they should go to their assembly point. These assembly points were not in either the DAO compound or the Embassy at this time and there was the necessity to send out and bring these Americans back to the compound.

In addition, as had been happening previously, a certain number of Americans were turning up every day of whose presence the Embassy had previously been unaware of—just walking in off the street, as a matter of fact—and it was felt that there would be a number of those who would come in signaled by the evacuation itself. As a practical matter they were coming into the DAO compound and the Embassy downtown.

**SOUTH VIETNAMESE FAMILIES ASSURED EVACUATION**

I point this out last. There had been a number of families of South Vietnamese military officers who had been evacuated previously and they had received a commitment that they would be evacuated in the final lift. From a military point of view, I doubt that had the South Vietnamese army turned on the evacuation at that point it would have been possible to bring these Americans out without casualties.

As it was, through the Ambassador's handling of the matter, in keeping the situation flowing and assuring that the evacuation zones were orderly, as it turned out he was able to get the entire American group out without a single casualty. I think a part of this was unquestionably due to the fact that he was able to maintain this flow and maintain the confidence of the South Vietnamese even to the end.

**VIETNAMESE EVACUATION PLAYED ESSENTIAL ROLE IN AMERICANS SAFETY**

Now one speculates, of course. The President mentioned Monday morning quarterbacks last evening. We would not propose to rely on the results of the evacuation for the conditions of its initiation which we could not predict. But I think here, as I indicated, had the situation changed, had a greater threat developed from the enemy, from the Viet Cong and the North Vietnamese, than did materialize, it is perhaps arguable that this concept of the operation with respect to the evacuation of South Vietnamese might have had to change. To continue to ward off the threat from that direction would have produced a greater danger and exposure to hostile action. The potential existed at the time according to the people on the ground. It was felt by the military individuals that the evacuation of South Vietnamese was an essential part of getting those Americans out of there, both from the point of view of extending the time to accommodate them all and keeping the evacuation flowing along.

Now I think when we talk about the President's constitutional power that one can have a series of arguments which Mr. Lagomarsino suggested on both the law and fact. What I have here is basically the
factual situation that you are dealing with as to whether or not it was reasonably necessary to take this number of evacuees out, and I think there is no question in our minds that that was the case.

Mr. Zablocki. There is another vote on the House floor. We will suspend for 5 minutes.

[A short recess was taken.]

Mr. Zablocki. The subcommittee will resume hearings.

Mr. Findley.

Mr. Lagomarsino.

Mr. Lagomarsino. Mr. Hoffmann, would you care to comment on the section of the report on the Vietnamese evacuation, third paragraph from the end, hostile antiaircraft fire.

**HOSTILE ANTIAR CRAFT FIRE**

Mr. Hoffmann. This was a single incident where there was observed firing from an antiaircraft artillery installation. There were reports during the operation of other firings. This was the only one that apparently was in a position either with respect to a rendezvous point in the helicopter pattern or really impinged upon the safety of the helicopters in a very direct way.

A single air-to-ground rocket was fired which produced secondary explosions on the ground and there were no further reports of fire from that area. There were no others taken under fire by our aircraft at any other time.

Mr. Zablocki. Would the gentleman yield?

Mr. Lagomarsino. Yes.

Mr. Zablocki. Your opinion is that the situation which required a report under the war powers section 4(a)(1)?

Mr. Hoffmann. Oh, I think very clearly the situation under which we were operating when the evacuation was ordered was at least a situation that portended imminent hostilities. Now whether or not there were actual hostilities, and there very well might have been, there were certainly imminent hostilities. That is the suggestion of my remarks, that we might have reported under any of the three subsections. The helicopter sorties were certainly ripe with probabilities for hostilities; I will state that very clearly.

Mr. Zablocki. The purpose of my question, Mr. Hoffmann, was to clearly establish that the report of April 30 should have been under section 4(a)(1).

Any questions?

Mr. Lagomarsino. No.

Mr. Zablocki. Mr. Solarz.

**HEARINGS SEEN AS ENORMOUSLY VALUABLE**

Mr. Solarz. Mr. Chairman, I want to thank you first of all for giving me an opportunity to ask some questions even though I am not a member of the subcommittee.

Mr. Zablocki. You are welcome.

Mr. Solarz. Second, I want to compliment you for holding these hearings which, I think, are enormously useful for both the country and the Congress in attempting to retroactively clarify what was
legitimately done in the course of this evacuation. I want to say at the outset that while I understand the desire to retroactively justify actions which were taken, perhaps more on the basis of moral and statutory considerations that in the course of attempting to do so, I think we still have an obligation because of the fact that it created precedents for the future not to throw consistency and rationality to the winds.

I must say, Mr. Leigh, with all due respect for your constitutional acumen and learning, that I am deeply disturbed by some of what, I think, are rather dangerous doctrines which you have advanced in the course of your testimony and I would like to explore the implications of several of them.

**DOCTRINES IN LEIGH’S TESTIMONY SEEN AS DISTURBING**

First of all, as I understand your testimony today, you said, in effect, that in your judgment the President has the authority, without advanced statutory action on the part of the Congress, for a declaration of war to use American troops not only to evacuate American citizens from other lands and not only to evacuate American citizens incidental to the evacuation of American citizens, but he can evacuate foreign nationals as well. Also, in your judgment you felt the President had the authority to use troops solely for the purpose of evacuating foreign nationals.

Now if, in fact, that is the case, I am not sure what the necessity was for the legislation specifically authorizing the President to evacuate not only American citizens but foreign nationals as well. Based on your testimony, I gather you were suggesting that this was requested largely for political rather than constitutional purposes because the President wanted, I gather, broad-based constitutional support for the action he was taking. Yet, if in fact, that was the underlying rationale for the request, I must tell you that as one member of the International Relations Committee I feel that I was misled because during the course of the testimony and debates before our committee and during the course of the debates on the floor of the House, the argument was made not simply that the President wanted political legitimation of his efforts but rather this authority was specifically needed. Did he or didn’t he need the authority, and if he didn’t need the authority, why were we told that he did need the authority?

**FURTHER EXPLANATION OF PRESIDENT’S CONSTITUTIONAL AUTHORITY**

Mr. Leigh. Well, it may be that you had stepped out of the room when I was explaining the difference between my personal opinion as a lawyer and my saying also that I do not know that this administration would go or has gone as far as I would go on this question of the President’s constitutional authority in the absence of any kind of fund limitation provision. I did explain at the beginning of my interrogation that I felt that the need for the legislation was caused by the fund limitation statutes and by the fact that the executive branch had not been sufficiently foresighted at the time the legislative history was made so as to accept from their application an evacuation of foreign nationals as well as of U.S. citizens. I don’t think you
ought to conclude from the fact that I state my own opinion that that is the opinion of the President.

Mr. SOLARZ. I appreciate your making the distinction, but could you tell the committee what, to your knowledge, is the position of the administration with respect to its inherent constitutional authority to evacuate American citizens on the one hand and foreign nationals on the other?

**ADMINISTRATION'S POSITION: ADEQUATE CONSTITUTIONAL POWER**

Mr. LEIGH. Well, my understanding is that the President thought that he had adequate constitutional power despite the funds limitation provisions to take out Americans and to take out those foreign nationals whose rescue was, in the words that he used in one of his early public statements on this, so interwoven with that of U.S. citizens that the two were impossible to segregate. I am not going to try to state a position for him beyond that which he has actually taken.

Mr. SOLARZ. To your knowledge has the President taken a position with respect to authority to use troops solely for the purpose of evacuating foreign nationals?

Mr. LEIGH. As far as I know, no.

Mr. SOLARZ. So he has no position on that?

Mr. LEIGH. I think not.

Mr. SOLARZ. Let me say if in fact it was the President's position that he lacked such authority—and I am not sure what his position is either—but if he felt he lacked such authority, then the bill that was reported out by the Senate and the bill that was reported out by the conference committee conferred no additional authority on him that he didn't already have because the language of that legislation specifically limited the duration for which such troops could be used to the amount of time necessary to evacuate the Americans. According to your statement it was the President's position all along that with respect at the very least to American citizens and those Vietnamese nationals that could be taken out at the same time that he already had the authority in the absence of such legislation. Consequently, I think the President perhaps should have taken it out.

**PRESIDENT'S INTENTION NOT TO REJECT FINAL LEGISLATION**

Mr. LEIGH. I think your observation loses sight of the fact that the President in addition wanted the political support which the kind of legislation originally proposed would have given him. The fact that Congress was not willing to give that kind of legislation to him did not mean that he was going to reject what they were offering after we had gotten as close to the time the authority was needed, as we obviously were.

Mr. SOLARZ. Let me make it clear that I supported the effort to evacuate not only American citizens but Vietnamese nationals and I would like to have a case made on the basis of the right grounds rather than misleading grounds.

Let me explore a little bit further.

Mr. LEIGH. Let me make one other observation. The President originally said that he did not wish to have the Senate version of the bill. One of the problems was just the one you are highlighting now.
Mr. Solarz. I was not aware of his statement and I am interested to hear it now.

Let me explore a little bit further the implication of the previously enacted prohibitions against funding military or paramilitary operations in Indochina and the three countries—in particular Laos, Vietnam, and Cambodia. As I understand those provisions they were meant to apply prospectively to any future military or paramilitary operations.

JUSTIFICATION FOR DEPLOYMENT IN ABSENCE OF LEGISLATION

Now to the extent that the use of American military forces in both Cambodia and in Vietnam constituted in effect a war powers military operation, I don't know precisely what the distinction between the two is, but surely it was one or the other. To the extent that this evacuation was a military or paramilitary operation in or off the shores of Indochina, how do you constitutionally justify the use of American forces for such purpose in the absence of congressional legislation authorizing a deployment for these purposes?

Mr. Leigh. Well, I stated earlier that our understanding has been that the funds limitation provisions were not intended by Congress to apply to this situation, and our view is supported by a colloquy between a representative of the executive branch and Senator Fulbright that these were not intended to foreclose certain Presidential powers.

Mr. Solarz. Where did this alleged colloquy take place?

Mr. Leigh. It took place on the Senate side but in addition there is a—

Mr. Solarz. The President participated in a colloquy with Senator Fulbright?

Mr. Leigh. No. No, of course the President didn't.

Mr. Solarz. Who was engaged in the colloquy?

Mr. Leigh. The Chairman of the Joint Chiefs of Staff, Admiral Moorer.

Mr. Solarz. This was during the course of one of the hearings?

Mr. Leigh. On the funds limitations.

Mr. Solarz. There were several funds limitations bills.

COLLOQUIES SUPPORT ADMINISTRATION'S VIEWPOINT

Mr. Leigh. That is true and that entire case was carried over as a matter of fact when Mr. Ford was a member of the House of Representatives. He engaged in a colloquy with Congressman Addabbo regarding the limitations in a continuing appropriations resolution, in which he secured a reply that these limitations were not intended to interfere with the President's rights as Commander in Chief under the Constitution to rescue Americans.

Mr. Solarz. Could you make these colloquies available to the members of the committee?

Mr. Leigh. Absolutely.

Mr. Solarz. I certainly would be very much interested in seeing them because this is a somewhat novel interpretation, as I understood it, of that legislation.¹

¹The colloquies concerning the intended scope of statutes limiting the expenditure of funds for military activities in Indochina appear on p. 81.
Mr. Leigh. Let me say that it was an interpretation which was necessary to the continuation of activities which Congress was thoroughly familiar with and which were going on long before we got to the stage of evacuation.

Mr. Solarz. Such as?

Mr. Leigh. We used the Armed Forces in order to resupply, by air, certain troops in Cambodia. That has been reported to the Congress.

Mr. Solarz. I guess one of the disadvantages of not being a lawyer, you tend to think language means what it appears to mean and so these interpretations are somewhat above me. Let me ask you this question.

Mr. Hoffmann. Could I interject at the moment that the scope of those airdrops were not the troops in the field, this was to accomplish normal nonhostile supply to depots in Cambodia.

Mr. Solarz. My understanding of these prohibitions was that they applied to military or paramilitary operations without regard to whether or not they would necessitate the introduction of American forces into hostilities and that military or paramilitary operations can take place outside of the range of hostilities as well as within the range of enemy fire so that I would have thought that would have been prohibited, too, but I guess there is a fundamental disagreement here.

Mr. Zablocki. Would you yield at that point?

I have been advised that the planes that brought food and other materials into Phnom Penh were totally unarmed and therefore they would not be subject to any interpretation of the War Powers Resolution nor would they be under the Cooper-Church or any of the other limitations that were placed by Congress. There was that opinion.

INTERPRETATION OF SECTION 2(c) OF WAR POWERS LEGISLATION

Mr. Solarz. I thank the Chairman for that clarification.

I would like to ask you a question about your interpretation of part 2(c) of the War Powers Resolution which I found somewhat disconcerting in the questions posed earlier by the chairman.

Now, as I understood your response, it was that the limitations in section 2(c) were not meant to be exhaustive of the situations under which the President as Commander in Chief could deploy the Armed Forces in the exercise of his constitutional authority. Yet as I read the language of section 2(c) it says the constitutional powers of the President as Commander in Chief to introduce the U.S. Armed Forces into hostilities or if the situations with hostilities are exercised only—and I want to underline that word, are “exercised” only—pursuant to either (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, et cetera.

Now this would appear to me to mean, if I read it correctly, that the President, as a result of the War Powers Resolution, cannot send American troops in to evacuate certainly not foreign nationals and possibly not even American citizens in the absence of specific congressional authority to do so which is why I thought the President requested this legislation.

Now I would like to know how you can justify the evacuation in both Cambodia and in Vietnam from a constitutional point of view—not from a moral point of view but from a constitutional point of view—