

DOCUMENT WITHDRAWAL RECORD [NIXON PROJECT]

DOCUMENT NUMBER	DOCUMENT TYPE	SUBJECT/TITLE OR CORRESPONDENTS	DATE	RESTRICTION
N-1	Memo	Kissinger & Dean to President, re: War Powers Legislation [Draft] Reintegrated from Contested Files on October 26, 2006	n.d.	(Nixon)

FILE GROUP TITLE

JOHN DEAN

BOX NUMBER

73

FOLDER TITLE

War Powers of the President [Folder 1 of 2]

RESTRICTION CODES

- A. Release would violate a Federal statute or Agency Policy.
- B. National security classified information.
- C. Pending or approved claim that release would violate an individual's rights.
- D. Release would constitute a clearly unwarranted invasion of privacy or a libel of a living person.

- E. Release would disclose trade secrets or confidential commercial or financial information.
- F. Release would disclose investigatory information compiled for law enforcement purposes.
- G. Withdrawn and return private and personal material.
- H. Withdrawn and returned non-historical material.

Presidential Materials Review Board

Review on Contested Documents

Collection: John W. Dean III
Box Number: 73

Folder: War Powers of the President [Folder 1 of 2]

<u>Document</u>	<u>Disposition</u>
14	Retain Open

July 26, 1971

MEMORANDUM FOR: DON HUGHES
FROM: JOHN DEAN
SUBJECT: Memoranda to Judge Advocates General

Would you please forward the three attached memoranda to the appropriate individuals.

Thank you.

MEMORANDUM FOR: HENRY KISSINGER

FROM: JOHN DEAN

SUBJECT: Request for Information re
War Crimes Cases

Attached for your signature is a memorandum to Melvin Laird requesting certain information from the Defense Department in regard to war crimes cases. Our study group on this problem, consisting of John Ehrlichman, Al Haig, Bud Krogh and myself, has decided that it needs such data in order to keep the President prepared for any eventuality. Al Haig, however, suggested that a memorandum from yourself to Laird might be the most appropriate means of obtaining the information. Your assistance to us in this matter would be greatly appreciated.

Thank you.

ADMINISTRATIVELY CONFIDENTIAL/EYES ONLY

MEMORANDUM FOR: MELVIN R. LAIRD
SECRETARY OF DEFENSE

FROM: DR. HENRY A. KISSINGER
ASSISTANT TO THE PRESIDENT
FOR NATIONAL SECURITY AFFAIRS

SUBJECT: War Crimes Cases

John Dean, Counsel to the President, in order to be better informed in regard to war crimes cases and any new developments which may occur, would like to be provided with certain information from the Judge Advocates General of the Army, Navy and Air Force. The data requested is not intended to involve the White House in the actual investigation and prosecution of any of these cases, but solely to give us the capability to deal effectively with this entire problem as it continues to unfold and attract public interest. The information sought falls into two categories:

A. In regard to the Navy, Marine Corps and Air Force, the following is requested:

1. A statistical breakdown of the number of war crimes cases investigated and the final disposition of these cases. Please also list separately these cases as they relate to officers and enlisted men.
2. An individual case breakdown of persons convicted by court-martial; a description of the charges brought against these individuals and the charges for which defendants were convicted; the sentences imposed upon these defendants and the time actually served in prison.
3. A listing and description of the cases in which commissioned officers were acquitted.

4. A status report on the investigations now in progress relating to alleged war crimes. Please list separately and in greater detail any cases involving senior officers or multiple atrocities which might attract public attention if the allegations have received significant substantiation so as to make the filing of charges a likely consequence.

5. Please also keep John informed of any new investigations of senior officers or particularly heinous crimes as they arise if the case appears likely to result in charges being filed.

B. John has already received most of the information requested in paragraph A from the Judge Advocate General of the Army in response to his memorandum of 10 May 1971. Attached is Enclosure 5 of the Judge Advocate General's reply of 21 May 1971 which lists the status of pending investigations of war crimes in Vietnam. Case numbers 22, 32, 58 and 85 appear to have potential for considerable public interest if the allegations are substantiated. John would appreciate being informed of any future developments in these cases which might result in charges being filed against the individuals involved. Please also notify him of any future investigations of cases involving senior officers or multiple atrocities if the allegations have received significant substantiation so as to make the filing of charges a likely consequence.

Your response to John Dean would be appreciated no later than August 18.

Thank you.

July 29, 1971

MEMORANDUM FOR: JOHN EHRLICHMAN
AL HAIG
BUD KROGH

FROM: JOHN DEAN

SUBJECT: War Crimes Cases

Attached are three memoranda to the Judge Advocates General of the Army, Navy and Air Force requesting information in regard to war crimes cases and asking them to keep us abreast of any new developments as they occur. Please note that the Army has already supplied us with most of the information desired. The memorandum directed to them is intended as a follow up to their first response.

The data has been requested as part of a comprehensive memorandum which I am preparing for you outlining the chronology of all the major war crimes cases, pending investigations, and the points at which the President might become involved. I would appreciate hearing any reservations or comments you might have in regard to our becoming this deeply involved in this matter before I release the memoranda.

Thank you.

July 26, 1971

MEMORANDUM FOR: MAJOR GENERAL GEORGE S. PRUGH
THE JUDGE ADVOCATE GENERAL
DEPARTMENT OF THE ARMY
DEPARTMENT OF DEFENSE

FROM: JOHN W. DEAN, III
COUNSEL TO THE PRESIDENT

SUBJECT: Pending Investigations of War Crimes

At the attached Enclosure 5 of your response of 21 May 1971 to my memorandum of 10 May 1971, you have listed the status of pending investigations of war crimes in Vietnam. Case numbers 22, 32, 58 and 85 appear to have potential for considerable public interest if the allegations are substantiated. I would appreciate being informed of any future developments in these cases which might result in charges being filed against the individuals involved. I would also like to be notified of any future investigations of cases involving senior officers or multiple atrocities if the allegations have received significant substantiation so as to make the filing of charges a likely consequence.

Thank you.

THROUGH BRIGADIER GENERAL JAMES D. HUGHES
MILITARY ASSISTANT TO THE PRESIDENT

July 26, 1971

MEMORANDUM FOR: REAR ADMIRAL JOSEPH B. McDEVITT
JUDGE ADVOCATE GENERAL OF THE NAVY
DEPARTMENT OF THE NAVY
DEPARTMENT OF DEFENSE

FROM: JOHN W. DEAN, III
COUNSEL TO THE PRESIDENT

SUBJECT: Allegations of War Crimes

As a result of the widespread public interest in the issue of war crimes arising out of the war in Vietnam and the notoriety that several of these cases have achieved, I would like to be better informed on the subject. Specifically, I wish to request the following information in regard to the Navy and the Marine Corps:

1. A statistical breakdown of the number of war crimes cases investigated and the final disposition of these cases. Please also list separately these cases as they relate to officers and enlisted men.
2. An individual case breakdown of persons convicted by court-martial; a description of the charges brought against these individuals and the charges for which defendants were convicted; the sentences imposed upon these defendants and the time actually served in prison.
3. A listing and description of the cases in which commissioned officers were acquitted.
4. A status report on the investigations now in progress relating to alleged war crimes. Please list separately and in greater detail any cases involving senior officers or multiple atrocities which might attract public attention if the allegations have received significant substantiation so as to make the filing of charges a likely consequence.

I would appreciate this information no later than the close of business August 4, and would also like to be informed of any new investigations of senior officers or particularly heinous crimes as they arise if the case appears likely to result in charges being filed.

Thank you.

THROUGH BRIGADIER GENERAL JAMES D. HUGHES
MILITARY ASSISTANT TO THE PRESIDENT

July 26, 1971

MEMORANDUM FOR: MAJOR GENERAL JAMES S. CHENEY
THE JUDGE ADVOCATE GENERAL
DEPARTMENT OF THE AIR FORCE
DEPARTMENT OF DEFENSE

FROM: JOHN W. DEAN, III
COUNSEL TO THE PRESIDENT

SUBJECT: Allegations of War Crimes

As a result of the widespread public interest in the issue of war crimes arising out of the war in Vietnam and the notoriety that several of these cases have achieved, I would like to be better informed on the subject. Specifically, I wish to request the following information in regard to the Air Force:

1. A statistical breakdown of the number of war crimes cases investigated and the final disposition of these cases. Please also list separately these cases as they relate to officers and enlisted men.
2. An individual case breakdown of persons convicted by court-martial; a description of the charges brought against these individuals and the charges for which defendants were convicted; the sentences imposed upon these defendants and the time actually served in prison.
3. A listing and description of the cases in which commissioned officers were acquitted.
4. A status report on the investigations now in progress relating to alleged war crimes. Please list separately and in greater detail any cases involving senior officers or multiple atrocities which might attract public attention if the allegations have received significant substantiation so as to make the filing of charges a likely consequence.

I would appreciate this information no later than the close of business August 4, and would also like to be informed of any new investigations of senior officers or particularly heinous crimes as they arise if the case appears likely to result in charges being filed.

Thank you.

THROUGH BRIGADIER GENERAL JAMES D. HUGHES
MILITARY ASSISTANT TO THE PRESIDENT

July 26, 1971

MEMORANDUM FOR: DON HUGHES
FROM: JOHN DEAN
SUBJECT: Memoranda to Judge Advocates General

Would you please forward the three attached memoranda to the appropriate individuals.

Thank you.

July 26, 1971

MEMORANDUM FOR: JOHN DEAN
FROM: DAVID WILSON
SUBJECT: War Crimes Cases

Attached at Tab A are three memoranda to the Judge Advocates General of the Army, Navy and Air Force requesting further information in regard to war crimes cases. A memorandum to General Hughes requesting his assistance in forwarding these memoranda is also attached at Tab B. I believe that the information requested is necessary for the comprehensive memorandum in regard to war crimes cases which you wish written for John Ehrlichman. As you will note, I have also asked the Judge Advocates General to keep us abreast of any new developments as they occur.

Further attached at Tab C is an outline for the comprehensive memorandum to John Ehrlichman. I have tried to make it consist basically of a chronological look at developments in war crimes with emphasis on points in time when the President could become involved. The responses obtained from the three services would be used as an appendix to the paper. If you concur with this approach, I shall start on the substance of the memorandum.

AGREE _____

DISAGREE _____

COMMENT _____

MEMORANDUM FOR: HENRY KISSINGER

FROM: JOHN DEAN

SUBJECT: Request for Information re
War Crimes Cases

Attached for your signature is a memorandum to Melvin Laird requesting certain information from the Defense Department in regard to war crimes cases. Our study group on this problem, consisting of John Ehrlichman, Al Haig, Bud Krogh and myself, has decided that it needs such data in order to keep the President prepared for any eventuality. Al Haig, however, suggested that a memorandum from yourself to Laird might be the most appropriate means of obtaining the information. Your assistance to us in this matter would be greatly appreciated.

Thank you.

ADMINISTRATIVELY CONFIDENTIAL/EYES ONLY

MEMORANDUM FOR: MELVIN R. LAIRD
SECRETARY OF DEFENSE

FROM: DR. HENRY A. KISSINGER
ASSISTANT TO THE PRESIDENT
FOR NATIONAL SECURITY AFFAIRS

SUBJECT: War Crimes Cases

John Dean, Counsel to the President, in order to be better informed in regard to war crimes cases and any new developments which may occur, would like to be provided with certain information from the Judge Advocates General of the Army, Navy and Air Force. The data requested is not intended to involve the White House in the actual investigation and prosecution of any of these cases, but solely to give us the capability to deal effectively with this entire problem as it continues to unfold and attract public interest. The information sought falls into two categories:

A. In regard to the Navy, Marine Corps and Air Force, the following is requested:

1. A statistical breakdown of the number of war crimes cases investigated and the final disposition of these cases. Please also list separately these cases as they relate to officers and enlisted men.
2. An individual case breakdown of persons convicted by court-martial; a description of the charges brought against these individuals and the charges for which defendants were convicted; the sentences imposed upon these defendants and the time actually served in prison.
3. A listing and description of the cases in which commissioned officers were acquitted.

4. A status report on the investigations now in progress relating to alleged war crimes. Please list separately and in greater detail any cases involving senior officers or multiple atrocities which might attract public attention if the allegations have received significant substantiation so as to make the filing of charges a likely consequence.

5. Please also keep John informed of any new investigations of senior officers or particularly heinous crimes as they arise if the case appears likely to result in charges being filed.

B. John has already received most of the information requested in paragraph A from the Judge Advocate General of the Army in response to his memorandum of 10 May 1971. Attached is Enclosure 5 of the Judge Advocate General's reply of 21 May 1971 which lists the status of pending investigations of war crimes in Vietnam. Case numbers 22, 32, 58 and 85 appear to have potential for considerable public interest if the allegations are substantiated. John would appreciate being informed of any future developments in these cases which might result in charges being filed against the individuals involved. Please also notify him of any future investigations of cases involving senior officers or multiple atrocities if the allegations have received significant substantiation so as to make the filing of charges a likely consequence.

Your response to John Dean would be appreciated no later than August 18.

Thank you.

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY

EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

JDPJr:es
File No.
720639

January 19, 1969

The Honorable John N. Dean
Counsel to the President
The White House
Washington, D. C. 20500

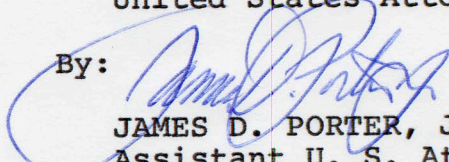
Re: DaCosta v. Laird, et al.
United States Court of Appeals
for the Second Circuit
Docket No. 72-1743

Dear Mr. Dean:

In view of our telephone conversation on September 27, 1972 and my letter to you of October 6, 1972, relating to this case, you may be interested in seeing the Opinion of the Court of Appeals, a copy of which is enclosed for your information.

Very truly yours,

ROBERT A. MORSE
United States Attorney

By: 

JAMES D. PORTER, JR.
Assistant U. S. Attorney
Chief, Civil Division

Encl.
a/s

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 216—September Term, 1972.

(Argued December 15, 1972 Decided January 17, 1973.)

Docket No. 72-1743

ERNEST DaCOSTA,

Appellant,

v.

MELVIN LAIRD, individually and as Secretary of Defense;
ROBERT FROEHLKE, individually and as Secretary of the
Army; JOHN W. WARNER, individually and as Secretary
of the Navy; ROBERT C. SEAMANS, JR., individually and
as Secretary of the Air Force; and GEN. CREIGHTON
ABRAMS, U.S.M.C., individually and as Commander of
American Military Personnel stationed in the Republic
of Vietnam,

Appellees.

Before:

KAUFMAN, ANDERSON, OAKES,

Circuit Judges.

Appeal from an order of the United States District Court
for the Eastern District of New York, John F. Dooling, Jr.,
Judge, denying plaintiff's motion for summary judgment
declaring the President's decision, announced on May 8,
1972, to mine the harbors of North Vietnam, unlawful as
unauthorized by the Congress and contrary to public policy

enunciated in the Mansfield Amendment, § 601, Pub. Law 92-156, 85 Stat. 423, and for injunctive relief.

Remanded with instructions that the complaint be dismissed.

BURT NEUBORNE, New York, N.Y. (Leon Friedman, New York Civil Liberties Union, New York, N.Y., on the brief), *for Appellant*.

JAMES D. PORTER, JR., Assistant United States Attorney for the Eastern District of New York (Robert A. Morse, United States Attorney, L. Kevin Sheridan and Cyril Hyman, Assistant United States Attorneys for the Eastern District of New York, on the brief), *for Appellee*.

KAUFMAN, *Circuit Judge*:

We are called upon to decide the very specific question whether the Secretary of Defense, the Secretaries of the Army, Navy and Air Force, and the Commander of American military forces in Vietnam,¹ may implement the directive of the President of the United States, announced on May 8, 1972, ordering the mining of the ports and harbors of North Vietnam and the continuation of air and naval strikes against military targets located in that battle-scarred land. The appellant seeks a declaratory judgment²

¹ The President of the United States was initially named as a defendant in this action. The district court dismissed as against the President, seemingly without objection from the appellant. In any event, DaCosta here does not argue the propriety of dismissal with regard to the President and we do not address that question.

² 28 U.S.C. § 2201 provides:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States,

that the military operations undertaken pursuant to that directive are unlawful in the absence of explicit Congressional authorization, and asks for what he terms "appropriate equitable relief." Like any American with the most rudimentary knowledge of the political history of this Nation, we are aware of the familiar adage that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."³ We fear, however, that DeTocqueville's apothegm loses some of its force with age and over-use and, like all generalizations, is of interest as much for the situations it fails to describe as for those it accurately characterizes. Unless deTocqueville believed that "judicial resolution" embraced a determination by the courts that they lack the power to resolve a political question, we are of the view that this case would prove an exception to his observation.

On another occasion, this Court acting within its powers and duties under the Constitution, has been obliged to rule on the legality of the war in Vietnam, *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), cert. denied 404 U.S. 869 (1971). Here, however, the appellant⁴ invites us to extend the reach of judicial inquiry with respect to the Vietnam war into the domain of tactical and strategic military decisions ordered by the President in his capacity as Commander-in-Chief of the Armed Services. The district court denied

upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

³ DeTocqueville, 1 *Democracy in America* 280 (1945).

⁴ DaCosta is no stranger to our Court, see *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), cert. denied 405 U.S. 979 (1972); and *DaCosta v. Laird*, unpublished Memorandum and Order, Docket No. 72 C. 207 (E.D. N.Y. February 16, 1972), aff'd without opinion, *DaCosta v. Laird*, 2d Cir. Docket No. 72-1175 (February 24, 1972).

DaCosta's motion for summary judgment and for injunctive relief under Rules 56 and 65, F.R.Civ.P. In our view, the matter pressed by DaCosta in this case is a non-justiciable political question. Accordingly, we remand to the district court with instructions that the complaint be dismissed.

I.

Ordinarily, we preface our discussion of the legal issues in a case with a recitation of the underlying facts. Even that threshold task is made difficult in a matter such as this, where the "facts" concerning the methods employed in waging war are difficult to sift, *sui generis* in nature and not of a kind ordinarily involved in framing a question for judicial resolution. Indeed, the difficulty encountered by a domestic judicial tribunal in ascertaining the "facts" of military decisions exercised thousands of miles from the forum, lies at the heart of the determination whether the question is a "political" one, *see United States v. Sisson*, 294 F.Supp. 515 (D. Mass. 1968); where there are serious doubts concerning a court's power or fitness to decide the question raised, the political question doctrine may come into play.

The following, however, may be stated with relative certainty. The appellant, Ernest DaCosta, is a United States citizen, and was, at the time he commenced his action on May 11, 1972, a Specialist Fourth Class in the United States Army, stationed in Vietnam as a machine gunner, and assigned to combat duty.⁵ His complaint focuses upon

⁵ We were informed by counsel, in their briefs and during argument, that subsequent to commencing this action DaCosta was returned to the United States for treatment of an infected cyst and, pursuant to Army Regulations, was reassigned to duty in the United States. DaCosta has since been separated from active duty in the Army, and is now assigned to the United States Army Reserve Control Group (annual training). It appears that DaCosta could be called to involuntary active duty only in the event of Special Congressional or Executive action.

military operations undertaken by the United States government pursuant to an executive directive announced to the public by the President in a television and radio address on May 8, 1972. The "record" in this case, to the extent it provides us with a factual context in which to set the dispute presently before us, consists of DaCosta's complaint, the government's answer, supporting affidavits submitted by each side, and the text of two addresses delivered by the President in the spring of 1972. From this skimpy fare, although the events were matters of great public moment, and hence wide-spread coverage, we have attempted to reconstruct the following narrative.

In early April, 1972, apparently at the start of a new "spring offensive," three North Vietnamese divisions crossed the demilitarized zone into South Vietnam. Shortly thereafter, three additional divisions of communist troops crossed the South Vietnamese border at points further south. On April 25, it was announced that an agreement had been reached to resume plenary sessions of the Paris "peace talks," with the first meeting of the negotiations scheduled to be held on April 27, 1972. The evening before these negotiating sessions were to resume, President Nixon addressed the Nation over radio and television from his office in the White House. The President's stated purpose was to give "a firsthand report on the military situation in Vietnam, the decisions I have made with regard to the role of the United States in the conflict and the efforts we are making to bring peace at the negotiating table." The President began by noting that American troop strength, numbering 549,000 men in January 1969, had been sharply reduced over a period of three and one-half years to 69,000 men and that casualty rates had been cut by 95%. He noted what he described as the administration's most recent proposals for a negotiated peace—including a cease fire, exchange of prisoners of war, withdrawal of forces

and internationally supervised elections in South Vietnam—terms he said he believed were “generous.” The President then commented on the presence of more than 120,000 North Vietnamese troops in South Vietnam; that presence, he said, marked “a clear case of naked and unprovoked aggression across an international border.” The President reviewed an evaluation of the military situation in Indochina submitted by General Creighton Abrams, commander of American Troops in South Vietnam, which predicted that the enemy offensive would ultimately prove unsuccessful. Based upon his assessment of the military situation, President Nixon announced that the policy of “Vietnamization” was proceeding according to schedule and that an additional 20,000 American troops would be recalled within two months, lowering the troop ceiling to 49,000 men by July 1. Among other announcements, the President noted that air and naval attacks against military installations in the North would be continued. He stated:

We are not trying to conquer North Vietnam or any other country in this world. We want no territory. We seek no bases. We have offered the most generous peace terms—peace with honor for both sides—with South Vietnam and North Vietnam each respecting the other’s independence.

The President said he could see the day when no more Americans would be involved in Vietnam, and urged the Nation to remain “steadfast” as “we come to the end of this long and difficult struggle.”

Less than two weeks later, on May 8, 1972, the President again addressed the Nation in a television and radio broadcast. He began by discussing the “massive invasion” launched by the North Vietnamese in early April, “an invasion,” he said “that was made possible by tanks, artil-

lery and other advanced offensive weapons supplied to Hanoi by the Soviet Union and other Communist nations." The President commented on the mounting number of casualties, and noted that America's response had nonetheless been restrained. He pointed out that the United States had resumed negotiations at Paris, and that Dr. Henry Kissinger, in meetings with Soviet leaders for four days beginning on April 20, 1972, had learned of a new Russian interest in bringing the war to a speedy close. The President outlined the content of peace offers made to the North Vietnamese, and stated that "North Vietnam has met each of these offers with insolence and insult. They have flatly and arrogantly refused to negotiate an end to the war and bring peace. Their answer to every peace offer we have made has been to escalate the war." The President then said:

There are only two issues left for us in this war. First, in the face of a massive invasion do we stand by, jeopardize the lives of 60,000 Americans, and leave the South Vietnamese to a long night of terror? This will not happen. We shall do whatever is required to safeguard American lives and American honor.

Second, in the face of complete intransigence at the conference table do we join with our enemy to install a communist government in South Vietnam. We will not cross the line from generosity to treachery.

We have now a clear, hard choice among three courses of action: Immediate withdrawal of all American forces, continued attempts at negotiation, or decisive military action to end the war.

The President rejected the first alternative—immediate withdrawal—because in his view it would leave world peace in "grave jeopardy." He stated that the second course—

negotiations—was preferred, and that America would continue to seek a negotiated settlement; but he claimed that North Vietnam's "arrogant" refusal to negotiate in good faith made this course unavailing. In addition, sole reliance on negotiations, he said, would give the enemy "the time he needs to press his aggression on the battlefield." Therefore, the President concluded that the only way "to stop the killing" was to interdict the supply of weapons flowing into the hands of the North Vietnamese. He went on to say:

In these circumstances, with 60,000 Americans threatened, any President who failed to act decisively would have betrayed the trust of his country and betrayed the cause of world peace.

I therefore concluded Hanoi must be denied the weapons and supplies it needs to continue the aggression. In full coordination with the Republic of Vietnam I have ordered the following measures which are being implemented as I am speaking to you.

All entrances to North Vietnamese ports will be mined to prevent access to these ports and North Vietnamese naval operations from these ports. United States forces have been directed to take appropriate measures within the internal and claimed territorial waters of North Vietnam to interdict the delivery of any supplies. Rail and all other communications will be cut off to the maximum extent possible. Air and naval strikes against military targets in North Vietnam will continue.

The President said that all neutral nations had been given notice and that the military operations just announced would cease upon release of American prisoners of war and upon commencement of an internationally supervised

cease-fire. He gave notice to the world that the military operations on which the United States was embarking were aimed solely at North Vietnam, and no other nation. He stated:

Their sole purpose is to protect the lives of 60,000 Americans who would be gravely endangered in the event the Communist offensive continues to roll forward and to prevent the imposition of a Communist government by brutal aggression upon 17 million people.

II.

A preliminary dispute concerning DaCosta's standing to sue has been raised in this case, and since the Government asks us to dismiss this appeal and the underlying action for lack of subject-matter jurisdiction, we believe it appropriate to address that question at the threshold.

Judge Dooling concluded that DaCosta met the necessary standing conditions required by Article III, Section 2 of the Constitution, which provides that the judicial power shall extend only to "cases" and "controversies." The district judge was of the view that DaCosta's standing did not depend on his military status but rather that "plaintiff, any member of the military, *and any citizen*, all alike exposed to the mortal risk in war, has standing to challenge the validity of action by which large scale international combat or a new departure in belligerency is initiated." (emphasis supplied). Wholly apart from the difficulty, if not the impossibility, of reaching agreement as to the meaning of phrases such as "large scale international combat" or "new departure in belligerency," we believe that the general rule announced below is without support in law. In *Pietsch v. President of the United States*, 434 F.2d 861 (2d Cir. 1970), *cert. denied* 403 U.S.

920 (1971), we held that a citizen-taxpayer was without standing to challenge the constitutionality of the Vietnam war and that the necessary nexus announced as the test for standing in *Flast v. Cohen*, 392 U.S. 83 (1968), a case relied upon by the district judge in this action, had not been established.⁶ The Tenth Circuit, in *Velvel v. Nixon*, 415 F.2d 236 (10 Cir. 1969), *cert. denied* 396 U.S. 1042 (1970), reached a similar result with respect to an attack upon the validity of the war raised by a professor of constitutional law in his capacity as a citizen and taxpayer. *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971), also relied upon by the district court, is, in our view, inconclusive. There the Court noted that in addition to the Commonwealth of Massachusetts, "[t]he individual plaintiffs are residents of Massachusetts and members of the United States forces who are either serving in Southeast Asia or are subject to such service." 451 F.2d at 28. After noting its own doubt whether the Commonwealth of Mas-

6 In *Flast*, Chief Justice Warren, speaking for the Court, noted:

"[T]he nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction."

392 U.S. at 102-103.

sachusetts had standing to sue,⁷ the court declined to decide that question, since it believed in any event, that "some of the plaintiffs are properly before us." *Id.*, at 29. Exactly which plaintiffs were "properly before the Court," was not clarified, but the panel did shed some light when it found no merit "in the claim that the individual plaintiffs, particularly those serving in Southeast Asia, lack standing." To the extent the standing issue in *Massachusetts v. Laird*, *supra*, may have been resolved on the ground that persons ordered to duty in Vietnam may properly challenge the constitutionality of the war effort there, this Court is in full agreement, and has said so in the past, see *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970); *Orlando v. Laird*, *supra*.⁸ In any event, *Massachusetts v. Laird*, *supra*, like *Orlando v. Laird*, *supra*, hardly sustains the citizen-wide view of standing adopted by the district court. Those cases support the proposition that a soldier with orders to report for duty in a war-zone has standing to challenge the constitutionality of the war. But, that question is not now before the Court—as appellant concedes. DaCosta, instead, presses the more limited question whether within the context of a lawful war, the President's order to mine the harbors of North Vietnam was properly au-

⁷ The Court said: "We do not see, however, that Massachusetts achieves any special status as a protector of the rights of its citizens, solely as United States citizens, and not as a sovereign with unique interests. [citations omitted]. The traditional rationale is that the federal government is 'the ultimate parens patriae of every American citizen.' [citation omitted]. This admittedly seems inappropriate in a suit challenging the constitutionality of a war waged by the putative parens." 451 F.2d at 29.

⁸ We feel confident that the standing ruling in *Massachusetts v. Laird*, *supra*, is limited in the manner we have suggested, particularly in view of the Court's citation to our decision in *Berk v. Laird*, *supra*, precisely at that point in its opinion where it announced that some of the individual plaintiffs had standing. 451 F.2d at 29.

thorized. Since we have stated, in *Pietsch*, that a citizen-taxpayer does not have standing to challenge the constitutionality of the Vietnam war, it is difficult for us to understand how such a citizen-taxpayer would have standing to challenge specific military orders issued in furtherance of the war effort. It is true, as Judge Dooling indicated in his opinion in this case, that a California district court has upheld the standing of Army Reservists not stationed in Vietnam to challenge military operations associated with the Cambodian "incursion" of 1970, *Mottola v. Nixon*, 318 F.Supp. 538, 546-48 (N.D. Cal. 1971).⁹ But, that decision was reversed by the Ninth Circuit Court of Appeals, after Judge Dooling's reliance on the district court opinion, on the precise issue of standing. *Mottola v. Nixon*, — F.2d —, 9th Cir., Appeal No. 26,662, Slip Opinion, July 13, 1972.

We are left then without any authority that either directly or inferentially substantiates the district judge's conclusion that any citizen has standing to challenge the legality of military decisions ordered by the President in his capacity as Commander-in-Chief. We are, on the con-

⁹ We believe the district court opinion in *Mottola* undermines rather than bolsters the argument advanced by the district court in this case, for it appears that the district judge in *Mottola* believed he was adjudicating the constitutionality of the war rather than the legitimacy of tactical military decisions made by the President as Commander-in-Chief. The judge's view was:

Although the complaint is directed in terms only at the Cambodian military operation, that issue necessarily involves the constitutionality of the whole Vietnam war. This is so because, if our South Vietnam presence and operation are lawful, then, certainly, any necessary incidental, tactical incursion ordered by the Commander in Chief against dangerous, threatening enemy strongholds across the Cambodian border to protect our South Vietnam forces from attack would likewise be lawful; if, on the other hand, the Vietnam operation, itself, is unlawful then all its actions, including its Cambodian operation, would be unlawful.

318 F.Supp. at 540.

trary, confronted with a number of cases that have decided that even where the challenge is to the legality of a war, rather than specific tactical military decisions, something other than taxpayer status must be alleged.

Yet, although the district court may have erred in its broad statement of the law on standing, since at the time this action was commenced DaCosta was actually in combat duty in Vietnam, it is argued that the narrower principles of standing announced in our decisions in *Berk v. Laird*, *supra*, and *Orlando v. Laird*, *supra*, might be applicable. But since we are of the view that the substantive issue presented to us is a non-justiciable political question, we need not address any further the issue of this plaintiff's standing to present the question. The Supreme Court instructed us recently in *Sierra Club v. Morton*, 405 U.S. 727 (1972) that what has been traditionally referred to as the question of standing, necessarily involves analysis of "whether a party has a sufficient stake in an *otherwise justiciable controversy* to obtain judicial resolution of that controversy . . ." 405 U.S. at 731-32 (emphasis supplied). In sum, the standing of a party need not come into question if a court determines that for other reasons the issue raised before the bench is non-justiciable. The district court, it appears, believed that the issue raised by *DaCosta* was a justiciable question. Accordingly, it felt compelled to resolve the question of standing. We, however, are of the view that the issue raised in these proceedings is a political question which the court is without power to hear. Thus, the non-justiciable nature of the dispute not merely obviates, but logically precludes, resolution of the question of plaintiff's standing to sue, and we must decline the government's request that we both address and decide that issue.¹⁰

¹⁰ Standing is an aspect of justiciability, see *Flast v. Cohen*, *supra*, 392 U.S. at 98. Unlike the political question doctrine, which focuses on the nature of the *issue* presented to the court, questions of standing focus

III.

Scholars have written extensively about the political question doctrine.¹¹ Those who have explored and analyzed the doctrine divide themselves into a variety of schools of thought on the subject.¹² One student comment has

on the nature of the *party* seeking a judgment. The two doctrines are thus, at once, analytically separable and, in certain circumstances, closely linked. Thus, "a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question." *Id.* at 100. Such occasion might arise if the dismissal on the political question grounds is discretionary. But if, for example, no judicially discoverable and manageable standards exist for resolution of the question presented to the court, it may very well be that no one has standing to sue. In such a case, the non-justiciability of the question requires dismissal of the action wholly apart from any consideration of the question of standing.

11 See, e.g., Tigar, *Judicial Power, the "Political Question Doctrine" and Foreign Relations*, 17 U.C.L.A. L.Rev. 1135 (1970); Note, *The Supreme Court, 1968 Term*, 83 Harv. L.Rev. 7, 62-77 (1969). An interesting debate over different interpretations of the doctrine may be traced in Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L.Rev. 1 (1959); Bickel, *THE LEAST DANGEROUS BRANCH* (1962); and Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517 (1966).

12 Some are of the view that the Court must decide all cases which are properly before it, and that discretion in the exercise of jurisdiction is forbidden by the Constitution. The only circumstance in which a court may decline to hear a matter is when constitutional jurisdictional requisites have not been met, or when the "Constitution has committed to another agency of government the autonomous determination of the issue raised" Wechsler, *supra* n. 10, at 8. Others view application of the political question doctrine as a matter of judicial discretion, not of constitutional compulsion, and argue that there are matters so controversial and inappropriate for judicial resolution that courts follow a wiser course by abstaining, see Bickel, *supra*, n. 10. This approach, as *Baker v. Carr*, 369 U.S. 186 (1962) and *Powell v. McCormack*, 395 U.S. 486 (1969) attest, has not been favored by the Supreme Court. Still others, see Scharpf, *supra*, note 10, seek to establish categories of cases or concerns which have previously invoked application of the political question doctrine, and indicate that when the objective achieved by a court in refraining from deciding a case is important, the political question doctrine will be a means of achieving that objective.

boldly stated that "the [political question] doctrine has defied formulation despite numerous attempts to systematize it." Note, The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 63 (1969). We receive our guidance, nevertheless, from the Supreme Court. Although each case clearly must turn on its own facts, certain general principles emerge from the relevant cases, *see, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Powell v. McCormack*, 395 U.S. 486 (1969). Of primary significance is the principle that "[t]he non-justiciability of a political question is primarily a function of the separation of powers." *Baker v. Carr, supra*, 369 U.S. at 210. Thus, "in political question cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Ibid.* In *Baker v. Carr, supra*, after reviewing previous cases involving consideration of the political question doctrine the Court synthesized its decisions in the following language:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

[5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217.

Clearly, some of the principles enumerated call for discretionary judgments that will not always require a court to refrain from action. Nevertheless, we are at a loss to understand how a court may decide a question when there are no judicially discoverable or manageable standards for resolving it. While in certain instances there may be a dispute among judges whether such standards exist, where all agree that standards are presently unavailable, the court has no alternative but to dismiss for lack of jurisdiction. This conclusion is not reached by the exercise of discretion, but rather of necessity.

We have set forth the legal framework of the issue *in extenso* in order that the problem presented to us may be viewed in the proper perspective. We inquire at the outset, therefore: what is the question we are asked to decide? On the one hand, DaCosta concedes that "this appeal does not—and should not—question the wisdom, propriety or morality of Executive acts of war against North Vietnam. Such questions must be resolved, not by the courts, but by the political branch of government entrusted by the Constitution with the awful responsibility to act upon such matters." Furthermore, we are told that the appeal does not challenge the constitutionality of the war as it was prosecuted prior to the mining of North Vietnam's harbors. Indeed, such a claim would clearly prove fruitless in light of the Court's earlier decision in *Orlando v. Laird, supra*, holding that there has been participation by Congress sufficient to authorize and ratify American military activity in Vietnam, 443 F.2d at 1042-44, and our decision in the

first *DaCosta* case, 448 F.2d 1368 (2d Cir. 1971), *cert. denied* 405 U.S. 979 (1972), which held that repeal of the Tonkin Gulf Resolution did not nullify Congressional support for the war. The gravamen of this appeal must be, therefore, that the President's conduct has so altered the course of hostilities in Vietnam as to make the war as it is currently pursued different from the war which we held in *Orlando* and *DaCosta* to have been constitutionally ratified and authorized by the Congress, or that Congressional ratification and authorization has terminated.

Appellant argues that the President's unilateral order to mine the harbors of North Vietnam lacked the "mutual participation" of which we spoke in *Orlando*. We do not understand appellant to argue that every tactical decision made by the President is subject to challenge under the theory advanced in this case. Any such contention would necessarily be unpersuasive in light of the Constitution's specific textual commitment of decision-making responsibility in the area of military operations in a theatre of war to the President, in his capacity as Commander in Chief.¹³ What is unique about the President's action presently under consideration, according to *DaCosta*, is the "unilateral escalation" involved in the decision. With this characterization in hand, the appellant draws on language

13 Article II, § 2, of the Constitution provides, in part:

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States . . ."

The clause, at least with respect to the President's function as Commander-in-Chief of the Army and Navy, seemed self-explanatory to the Framers and required little discussion at the Convention. What little debate there was, centered on the question whether the President would have the authority to take personal command of troops in the field, a question that was answered in the affirmative. See, Luther Martin, *The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention, Held at*

in *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), where we said, "[i]f the Executive were now escalating the prolonged struggle instead of decreasing it, additional supporting action by the Legislative Branch over what is presently afforded, might well be required," *Id.* at 1370, and argues that the "escalation" represented by the order to mine North Vietnam's harbors is illegal because unsupported by additional Congressional authorization.

The district court approached this problem by asking whether the actions taken by the President were "an expectable part of the continued waging of the Vietnamese war," assuming the facts as asserted by the President in his May 8th address were true. If so, no further Congressional authorization would have been necessary. Thus the court was of the belief that judicial review of the President's order was proper but that inquiry into whether or not the facts as found by the President were based upon errors of judgment or lacked the support of adequate evidence, was impermissible. In our view, even the district court's limited inquiry was improper. As a general rule, we see no reason why Executive fact-finding must be totally insulated from judicial review. We have always demanded that there be, at the very least, some reasonable or rational basis for a finding of fact, whether made by an administrative agency, the Congress, or the Executive.¹⁴

Philadelphia, in 1787 (1787), printed in 3 Farrand, *The Records of the Federal Convention of 1787* at 172, 217-18. ("Objections were made to that part of this article, by which the President is appointed Commander-in-Chief of the army and navy of the United States and the militia of the several states, and it was wished to be so far restrained, that he should not command in person; but this could not be obtained.") See also, 1 Farrand, *supra*, at 244.

- 14 Even when Congressional findings concerning as serious a matter as the scope of Communist Party activities in America came before the Court in *Communist Party v. Control Board*, 367 U.S. 1 (1961)—after "extensive investigation by Committees of Congress over more than a

There are occasions, however, as the district court sensed, when judicial review of the Executive fact-finding process on even this limited basis is inappropriate. The proper response in such situations is not to "assume" the truth of the facts, but candidly to recognize that the court is incapable of assessing the facts and that the issue presented is therefore non-justiciable. Such a course has the advantage of avoiding the appearance that courts act as rubber-stamps for policies developed by a coordinate branch of government which fall without the realm of judicial consideration.

The difficulty we face in attempting to decide this case is compounded by a lack of discoverable and manageable judicial standards. Judge Dooling believed that the case could be resolved by simply inquiring whether the actions taken by the President were a foreseeable part of the continued prosecution of the war. That test, it seems to us, is superficially appealing but overly simplistic. Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an "escalation" of the war or is merely a new tactical approach within a continuing strategic plan. What if, for example, the war "de-escalates" so that it is waged as it was prior to the mining of North Vietnam's harbors, and then "escalates"

decade and a half", *Id.* at 94—Mr. Justice Frankfurter's majority opinion indicated that these findings, while entitled to great respect, were not entirely immune from review. In that case, the findings were accepted because "[w]e certainly cannot dismiss them as unfounded or irrational imaginings." *Id.* at 95. There, of course, the record of public hearings and Congressional proceedings from which the Congress had drawn in making specific legislative findings of fact were matters of public record. Nothing of a comparable nature, in the way of fact-finding proceedings, is presented in the instant case.

again? Are the courts required to oversee the conduct of the war on a daily basis, away from the scene of action? In this instance, it was the President's view that the mining of North Vietnam's harbors was necessary to preserve the lives of American soldiers in South Vietnam and to bring the war to a close. History will tell whether or not that assessment was correct, but without the benefit of such extended hindsight we are powerless to know.

When we said in *DaCosta v. Laird, supra*, that "[i]f the Executive were now escalating the prolonged struggle instead of decreasing it, additional supporting action by the Legislative Branch over what is presently afforded, might well be required," we implied, of course, that litigants raising such a claim had a responsibility to present to the court a manageable standard which would allow for proper judicial resolution of the issue. No such standards have been forthcoming from the appellant in this case. In so stating, however, we specifically do not pass on the point urged by appellant whether a radical change in the character of war operations—as by an intentional policy of indiscriminate bombing of civilians without any military objective—might be sufficiently measurable judicially to warrant a court's consideration, i.e., might contain a standard which we seek in this record and do not find. Appellant does suggest that a blockade such as the one imposed by the President is an "unambiguous" act of war under the canons of international law. We fail to understand what this argument proves. None would deny that the United States, like its North Vietnamese enemy, has engaged in acts of war in Indochina. Yet it is the thrust of this Court's decisions in *Orlando* and *DaCosta I*, that the war in Vietnam is a constitutional war. Thus appellant's argument that a blockade is an act of war takes us no further than to state the obvious fact that the Nation is at war: it says nothing of any moment about escalation,

or whether one course of conduct is "expectable" within the framework of the war as previously prosecuted.

Appellant invokes the so-called "Mansfield Amendment", P.L. 92-156, 85 Stat. 423, Section 601 (a) which provides:

Sec. 601. (a) It is hereby declared to be the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date certain, subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces. The Congress hereby urges and requests the President to implement the above-expressed policy by initiating immediately the following actions:

(1) Establishing a final date for the withdrawal from Indochina of all military forces of the United States contingent upon the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces.

(2) Negotiate with the Government of North Vietnam for an immediate cease-fire by all parties to the hostilities in Indochina.

(3) Negotiate with the Government of North Vietnam for an agreement which would provide for a series of phased and rapid withdrawals of United States military forces from Indochina in exchange for a corresponding series of phased releases of

American prisoners of war, and for the release of any remaining American prisoners of war, and for the release of any remaining American prisoners of war concurrently with the withdrawal of all remaining military forces of the United States by not later than the date established by the President pursuant to paragraph (1) hereof or by such earlier date as may be agreed upon by the negotiating parties.

Judge Dooling held that the first sentence of Sec. 601 was binding on the President, but that the second sentence and sections (1), (2) and (3) were merely precatory. Although we neither address nor decide the question, we note that weighty constitutional considerations which support the President in his duties as Commander-in-Chief preclude too hasty an adoption of the view taken by the district court. Furthermore, it is arguable whether the legislative history of the Mansfield Amendment supports the position of the district judge.¹⁵ In any event, even assuming, *arguendo*,

15 Debate in the Congress over an earlier version of the Mansfield Amendment, which contained provision for withdrawal of American troops within six months, and indicated that the proposed bill would express the "sense of the Congress," reveals:

"Mr. McClellan: Mr. President, I would like to address two questions, at least, to the distinguished majority leader, the author of the amendment. I ask the distinguished Senator if subsection (a) of section 606 [sic] is mandatory on the President, or does it, in a way, express a hope for a national policy? Sometimes we cannot carry out national policies. Sometimes they cannot be achieved. So I take it, it expresses a hope and is not mandatory; that it is not a law such as would be compelling.

Mr. Mansfield. That is correct. The amendment does not have the force of law. It is a little stronger than a sense of Congress resolution; it declares it to be the policy of the Congress and the executive branch, the Government of the United States, and in that sense, it is a very strong expression of hope, but it certainly does not tie the President's hands."

117 Cong. Rec., September 30, 1971
S. 15569

that the first sentence of Sec. 601 is binding national policy, we see nothing in the language of the amendment which in any way prohibits the President's action challenged here. We have no way of knowing whether the military operations in question further or hinder the goals expressed in the Mansfield Amendment, or whether they have any bearing on those goals at all.

Thus it is our judgment that this Court is without power to resolve the issue narrowly presented in this case. Having previously determined, in accordance with our duty, that the Vietnamese war has been constitutionally authorized by the mutual participation of Congress and the President, we must recognize that those two coordinate branches of government—the Executive by military action and the Congress, by not cutting off the appropriations that are the wherewithal for such action—have taken a position that is not within our power, even if it were our wish, to alter by judicial decree.

Remanded with instructions that the complaint be dismissed.¹⁶

16 In view of our decision today, we need not consider whether Congressional action subsequent to the President's order, announced on May 8, 1972, by appropriating funds for the Armed Forces for fiscal year 1973, provided the necessary "authorization" of the military operations involved in this case.

Mem 24, 72
Rys -> Plot

THE WHITE HOUSE
WASHINGTON

file
war powers

June 1, 1971

MEMORANDUM FOR: THE FILE
FROM: FRED F. FIELDING
SUBJECT: Zablocki Resolution

This date John Lehman, NSC, advised that John R. Stevenson, Department of State, was expected to be questioned tomorrow regarding the Zablocki resolution on War Powers, and Lehman requested our review and comments in that regard.

The Zablocki resolution was cleared by Dr. Kissinger in November, 1970, and Ron Ziegler also responded to press inquiry with a general statement in support of it. Lehman does not feel that it adds credence to any of the present War Power proposals pending on the hill, and further advised that no sections of the resolution were given any added interpretations when it was initially passed. It seems that any lack of support of the resolution at this date would appear to be a withdrawal from the former position and that such action might realistically engender more support for the pending proposals.

After reviewing the resolution and related documents, I advised Lehman that we had no objection to Stevenson's proposed testimony, but suggested that he supply to Stevenson the Q & A prepared for Ziegler in November, and advise Stevenson to limit his remarks accordingly.

Department of Justice
Washington, D.C. 20530

MAR 7 1972

MEMORANDUM FOR THE HONORABLE JOHN W. DEAN, III
Counsel to the President

Re: Proposal for Commission on
Laws of War

This is in response to your request for comments on a letter to the President from the President of the Association of the Bar of the City of New York, Bernard Botein. The Association proposes the creation of a commission which would conduct an inquiry and make a public report of its findings and conclusions concerning observance of the laws of war and their adequacy as illustrated by the war in Indochina.

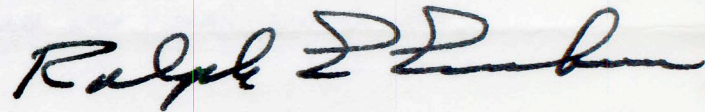
This Department of course has no direct jurisdiction or competence concerning the matter involved. We see no legal problems as to the authority of the President to establish the proposed commission, apart from the question of funding it, as to which the Office of Management and Budget can advise you.

The proposal reflects perhaps a growing body of belief among lawyers that many questions remain to be answered about the role of the United States in Indochina. To use an illustration cited in the letter, the imposition of the so called "free-fire zone" has raised questions as to what instructions are given to American forces in battle.

We live, of course, in an open society and these questions are being examined in the media. The net result is that the American people are learning about alleged violations of the laws of war while at the same time even the informed person has no clear idea as to how prevalent the problem is and what the government is doing to cope with it. Indeed, according to the Defense Department the rules of engagement for American forces are classified.

Establishing a commission to look into this matter may be a difficult experience but it may also be something which could, in the long run, provide the benefit of an organized body of information on the subject.

We are aware of the fact that the Department of Defense has prepared a draft response for the Vice President to Mr. Botein's letter stressing the point that such a commission could divide the American public. This is a consideration which undoubtedly must be balanced against any advantages which may accrue.

A handwritten signature in dark ink, appearing to read "Ralph E. Erickson". The signature is fluid and cursive, with the first name "Ralph" being more prominent and the last name "Erickson" written in a more compact, flowing style.

Ralph E. Erickson
Assistant Attorney General
Office of Legal Counsel

MAR 7 1972

MEMORANDUM FOR THE HONORABLE JOHN W. DEAN, III
Counsel to the President

Re: Proposal for Commission on
Laws of War

This is in response to your request for comments on a letter to the President from the President of the Association of the Bar of the City of New York, Bernard Botein. The Association proposes the creation of a commission which would conduct an inquiry and make a public report of its findings and conclusions concerning observance of the laws of war and their adequacy as illustrated by the war in Indochina.

This Department of course has no direct jurisdiction or competence concerning the matter involved. We see no legal problems as to the authority of the President to establish the proposed commission, apart from the question of funding it, as to which the Office of Management and Budget can advise you.

The proposal reflects perhaps a growing body of belief among lawyers that many questions remain to be answered about the role of the United States in Indochina. To use an illustration cited in the letter, the imposition of the so called "free-fire zone" has raised questions as to what instructions are given to American forces in battle.

We live, of course, in an open society and these questions are being examined in the media. The net result is that the American people are learning about alleged violations of the laws of war while at the same time even the informed person has no clear idea as to how prevalent the problem is and what the government is doing to cope with it. Indeed, according to the Defense Department the rules of engagement for American forces are classified.

Establishing a commission to look into this matter may be a difficult experience but it may also be something which could, in the long run, provide the benefit of an organized body of information on the subject.

We are aware of the fact that the Department of Defense has prepared a draft response for the Vice President to Mr. Botein's letter stressing the point that such a commission could divide the American public. This is a consideration which undoubtedly must be balanced against any advantages which may accrue.

Ralph E. Erickson
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE OFFICE

REFERRAL

To: Hon. Ralph E. Erickson
Assistant Attorney General
Office of Legal Counsel
Department of Justice

Date: January 27, 1972

RECEIVED
FEB 2 9 40 AM '72
OFFICE OF LEGAL COUNSEL

ACTION REQUESTED

- ☐ Draft reply for:
☐ President's signature.
☐ Undersigned's signature.
- ☐ Memorandum for use as enclosure to reply.
- ☐ Direct reply.
☐ Furnish information copy.
- ☐ Suitable acknowledgment or other appropriate handling.
☐ Furnish copy of reply, if any.
- ☐ For your information.
- ☒ For comments and recommendations.

NOTE

Prompt action is essential.

If more than 72 hours' delay is encountered, please telephone the undersigned immediately, Code 1450.

Basic correspondence should be returned when draft reply, memorandum, or comment is requested.

Prof. Baxter

25922-10
Ref

REMARKS:

Description:

☒ Letter: ☐ Telegram: ☐ Other:

To: The Honorable Richard M. Nixon
From: Bernard Botein, President, Assoc. of the Bar of the City of New York
Date: January 12, 1972
Subject: Letter contains a proposal that the President establish a Commission to inquire into the observance of the laws of war in the conduct of the war in Indochina and the adequacy of existing standards governing the laws of war.

By direction of the President:

John W. Dean, III
Counsel to the President

jet

(Copy to remain with correspondence)

OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO Mr. Fred Fielding-White House

106 OEOB

Take necessary action ☐

Approval or signature ☐

Comment ☐

Prepare reply ☐

Discuss with me ☐

For your information ☐

See remarks below ☐

FROM Janis Humphrey-LRD

DATE 8/2/72

REMARKS

Per your conversation with Jim Hyde, State's report on S.Con.Res. 76 -- "To stop the bombing of North Vietnam."



DEPARTMENT OF STATE

Washington, D.C. 20520

file - war power

Honorable J. W. Fulbright
Chairman, Committee on Foreign Relations
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

The Secretary of State has asked me to reply to your letter of April 19, 1972, in which you requested Executive Branch comments on S. Con. Res. 76 "To stop the bombing of North Viet-Nam."

The Executive Branch recommends that S. Con. Res. 76 not be reported favorably by the Committee. In our view, the declaration in paragraph (1) that it is the sense of Congress that American military activity against North Vietnamese territory should be terminated is not in the best interests of the United States. American military activity against North Vietnamese forces, as well as our overall support for South Viet-Nam are for the purpose of helping the people of South Viet-Nam survive with a political system of their own choice, and ensuring the safety of U.S. forces as they withdraw from Viet-Nam. The latter are there as part of the U.S. Government's program of assisting the armed forces of the Republic of Viet-Nam to assume the full burden of the defense of their country. These American forces are being steadily withdrawn.

Neither American forces nor the South Vietnamese forces pose a threat to the territory or people of North Viet-Nam. But so long as North Viet-Nam persists in its attack, the United States and the Republic of Viet-Nam are fully entitled to take measures of self-defense.

With respect to paragraphs (2) and (3) the Committee will be aware of the continuing efforts to achieve a negotiated end to the war, and that there is, in fact, no interruption to the withdrawal of American military forces in Indochina.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely,

Marshall Wright
Acting Assistant Secretary
for Congressional Relations