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Washington, D.C. 20530

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MEMORANDUM FOR EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL

Re: War Powers Resolution: Detailing of Military Personnel to the CIA

We have had discussions recently regarding whether a Central Intelligence Agency (CIA) operation (in foreign territory while equipped for combat) utilizing military equipment and military personnel detailed to the CIA would require compliance with the War Powers Resolution. In responding to this issue this Office has found it necessary to re-examine and revise a broad conclusion expressed by this Office in its February 12, 1980 memorandum, the "Harmon Memorandum," 1/ that "military personnel detailed to and under the control of the CIA . . ." would not be covered by the War Powers Resolution were they to be deployed into hostilities or a situation otherwise triggering that Resolution.

The heart of the argument in the February 12, 1980 Harmon Memorandum is the essentially negative inference drawn from the Senate's rejection of the so-called "Eagleton amendment," 2/

1/ Memorandum for the Attorney General entitled "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization" from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Feb. 12, 1980. The occasion for this memorandum was planning relative to the holding by Iran of American hostages and a range of potential American responses to that situation including a possible rescue attempt. The memorandum was general, however, and did not focus on a specific factual situation. Particularly, the Harmon Memorandum's comments concerning a CIA operation involving detailed military personnel was a part of a general discussion and was not in response to a precise fact-specific question.

2/ Senator Eagleton introduced several amendments to the War Powers Resolution. Some were adopted. This particular amendment was enumerated as amendment No. 366, and is set out in 119 Cong. Rec. 25079 (July 20, 1973).

which is reprinted on page 8 of that memorandum. The Eagleton amendment would have supplemented section 8(c) (15 U.S.C. § 1547(c)) of the War Powers Resolution regarding the definition of the term "introduction of United States Armed Forces." As enacted, this subsection now provides:

> "For purposes of this chapter, the term 'introduction of United States Armed Forces' includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."

Senator Eagleton urged adding the following sentence:

> "Any person employed by, under contract to, or under the direction of any department or agency of the United States Government who is either (a) actively engaged in hostilities in any foreign country; or (b) advising any regular or irregular military forces engaged in hostilities in any foreign country shall be deemed to be a member of the Armed Forces of the United States for the purposes of this Act."

We observe at the outset that the Eagleton amendment on its face does not suggest that it deals with a situation in which uniformed personnel would be detailed to the CIA; indeed, what it would have done on its face was to provide that all government employees under the direction of any department or agency either engaged in hostilities in any foreign country or advising any regular or irregular military forces engaged in hostilities would be deemed to be a member of the Armed Forces for purposes of the War Powers Resolution. In other words, military or paramilitary activities by the CIA would have triggered the War Powers Resolution irrespective of whether the activities were performed by military personnel, civilian employees or persons under contract to or under the control of the CIA.

The sentences in the February 12 Harmon memorandum that follow the quotation of the Eagleton Amendment read as follows:

> "He [Senator Eagleton] explained that it [his amendment] was intended to cover CIA paramilitary operations involving persons who might be military officers under contract to the CIA. 119 Cong. Rec. 25079-83 (1973). He recognized that without this amendment the Resolution as drafted would not cover the activities of such personnel, and argued that it should, citing CIA activities in Laos as leading to America's Indo-China involvement."

We have carefully reviewed not only the remarks of Senator Eagleton contained in the cited pages of the Congressional Record, but also the full Senate debate on the Eagleton amendment. We have been unable to find a single remark made by Senator Eagleton or any other senator that reasonably could be read to support the assertion contained in the sentences quoted above from the February 12 Harmon Memorandum. In fact, Senator Eagleton and the other senators who spoke at length for or against the Eagleton amendment manifested an understanding that the debate revolved around the CIA's potential use of civilian personnel to conduct combat operations rather than situations in which the conduct of the same operations by United States Armed Forces might occur. Senator Eagleton and his principal ally in the floor debate, Senator Fulbright, repeatedly expressed the view that failing to include activities which the CIA might conduct with civilian personnel was a major "loophole" which would allow presidents to evade the War Powers Resolution. The whole point of the Eagleton amendment, which emerges with considerable clarity once the legislative history is examined closely, is that Senator Eagleton intended that civilian forces were to be treated the same as U.S. Armed Forces for purposes of application of the War Powers Resolution:

> "My amendment would circumscribe the President's use of American civilian combatants in the same manner uniformed Armed Forces are circumscribed by S. 440 as presently drafted. It would, in other words, prevent a President from engaging American civilians, either

directly or as advisers, in a hostile situation without the express consent of Congress." (emphasis added).

Thus, Senator Eagleton spoke at considerable length about his concern that wars or lengthy and costly military engagements could be caused by CIA covert civilian operations. The discussion did not relate to covering, by this amendment, the detailing of military personnel to the CIA.

Furthermore, the record implies, albeit less strongly on this point, that CIA activities which actually used military personnel would be covered by the War Powers Resolution irrespective of the Eagleton amendment.

The closest point that Senator Eagleton himself comes to saying something similar to that attributed to him by the February 12 Harmon Memorandum is found at 119 Cong. Rec. at 25083 in a paragraph that reads as follows:

> "So military activities will be carried on by civilian employees of the Pentagon, because under the War Powers bill nothing prevents the Pentagon from hiring or contracting with civilian employees, ex-military people perhaps, but people that are called civilians." (emphasis added).

Senator Eagleton's statements do not support the argument that the Eagleton amendment was an attempt to expand the War Powers Resolution to embrace CIA activities using military personnel. When examined in their full context, it was concern over any American involvement in a military context which the Eagleton amendment was intended to address. He also said:

> "unless we treat all Americans alike, whether they are wearing a green uniform, red-white-and-blue or a seersucker suit with arms -- what payroll you get on is secondary; whether you get it from the Pentagon or whether you become a member of the Armed Forces, the end result is the same: Americans are exposed to the risk of war. And as they are exposed to the risk of war, the country, then makes a commitment to war."

Id. at 25080 (July 20, 1973).

In this same debate, Senator Javits, speaking in opposition to the Eagleton amendment, stated his understanding of the applicability of the War Powers Resolution to paramilitary activities conducted by the CIA as follows:

> "Another important consideration is that there [is] outside the Armed Forces . . . no agency of the United States which has any appreciable armed forces power, not even the CIA. They [the CIA] might have some clandestine agents with rifles and pistols engaging in dirty tricks, but there is no capability of appreciable military action that would amount to war. Even in the Laotian war, the regular U.S. Armed Forces had to be called in to give air support. The minute combat air support is required you have the Armed Forces, and the [War Powers Resolution] becomes operative." (emphasis added).

Id. at 25082.

This debate over the Eagleton amendment stands rather clearly for the proposition that CIA civilian operations (at least most of them) were not embraced by the War Powers Resolution as ultimately passed by the Congress unadorned with the Eagleton amendment. We do not believe the negative inference to be drawn from the defeat of the Eagleton Amendment can be stretched further than to confirm that CIA civilian operations are not embraced by the War Powers Resolution.

In summary, we believe the legislative history relied on in the February 12 Harmon memorandum supports the proposition that Congress assumed that the CIA's use of civilian or ex-military personnel would not trigger the War Powers Resolution. We do not believe that that legislative history may be relied upon for the conclusion that the involvement of military personnel, if temporarily detailed to the CIA and under civilian control, would remain outside the War Powers Resolution.

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