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Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

April 24, 1990

MEMORANDUM TO DAN LEVIN
Deputy Legal Adviser
National Security Council

Re: Denial of Entry to United States
Ports to the M/V Greenpeace

Attached is a new version of our opinion, which is intended to replace the April 4, 1990 opinion. Please destroy all copies of the April 4 version. At the request of the Navy, we have declassified this opinion.

As you will see, the new version addresses more fully the authority under the statute and the Executive Order to bar the M/V Greenpeace based only on threats against U.S. vessels and operations on the high seas. We have concluded that such authority exists under both the statute and the Executive Order. As we noted before, however, there is a somewhat greater litigating risk if only the Executive Order is relied upon. Nevertheless, we believe a court would uphold action taken under the Order.

If we can be of further assistance, please let us know.

William P. Barr
Assistant Attorney General
Office of Legal Counsel



U.S. Department of Justice

Office of Legal Counsel

[Nagle]NSC.Greenpeace

Office of the
Assistant Attorney General

Washington, D.C. 20530

April 23, 1990

MEMORANDUM FOR C. NICHOLAS ROSTOW
Legal Adviser
National Security Council

Re: Denial of Entry to United States
Ports to the M/V Greenpeace

This responds to your request for our advice concerning the domestic legal authority pursuant to which the United States may prevent the M/V Greenpeace from entering United States territorial waters and ports. For the reasons discussed below, we conclude that the Constitution, a federal statute, and an existing presidential executive order each provide authority to deny the M/V Greenpeace entry to United States ports.

The M/V Greenpeace, registered in the Netherlands, is one of several ships operated by Greenpeace, an international organization that advocates a variety of environmental and anti-nuclear causes. Some factions of Greenpeace make efforts to disrupt military exercises to promote their objectives. According to the Navy, the M/V Greenpeace has been the most prominent vessel in this respect, with a record of interfering with United States naval operations in violation of United States and international law. In 1989, for example, the M/V Greenpeace twice sailed into prohibited areas during scheduled Trident missile launches, causing the cancellation of one launch and the disruption of another, and it violated a Coast Guard security zone in an attempt to block a nuclear submarine from entering the submarine's port. In each instance the M/V Greenpeace entered the restricted area despite acknowledging warnings not to do so. Also, in each instance the M/V Greenpeace relied on its access to United States waters: it sailed from a United States port to disrupt the missile launches and it was in United States territorial waters when it attempted to block the submarine. We are informed that before it sailed for Europe in December, the vessel promised to return and commit similar disruptive activities this spring.

The Navy is concerned that the activities of the M/V Greenpeace endanger ships and personnel and cause costly delays in scheduled operations. Accordingly, the Navy proposes to bar the M/V Greenpeace from United States ports until the vessel

promises to discontinue its illegal activities.¹ Currently, the M/V Greenpeace is traveling between European ports, but according to the Navy, the vessel intends to sail to the United States soon. The Navy would like to take legal action barring the M/V Greenpeace from any United States port before it sails from Europe. The Coast Guard, which would have responsibility for denying entry to the vessel, has no objection to doing so if such authority exists.

You have requested our opinion as to the legal basis for an order barring the M/V Greenpeace from our ports and the likely success of such an order if challenged in court. We have considered three independent bases of authority for an exclusion order: (1) the President's constitutional authority as Commander-in-Chief and as the nation's representative in foreign affairs; (2) the Magnuson Act, 50 U.S.C. § 191; and (3) Executive Order 10,173, which authorizes the Coast Guard to regulate entry to United States waters and ports. We discuss each in turn.

1. Constitutional Authority

We believe that the President's constitutional powers authorize him to exclude the M/V Greenpeace from United States territorial waters and ports.

First, the President, as Commander-in-Chief of the military forces of the United States, U.S. Const. Art. II, § 1, may take measures to protect the Navy from interference by foreign vessels. The President's role as Commander-in-Chief affords him "the supreme command and direction of the military and naval forces." The Federalist No. 69, at 418 (A. Hamilton) (C. Rossiter ed. 1961). The Constitution thus provides the President with wide discretion to supervise our military forces. See Youngstown Sheet & Tube Co., v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."). The President's exclusive power over the armed forces and the judicial reluctance to question the exercise of that power, especially in cases involving security of the United States and its property, support the conclusion that the President may employ necessary measures, including denial of entry to a foreign vessel, to assure that the Navy can exercise

¹ The Navy has carefully distinguished between disruptive activities and peaceful demonstrations. Other Greenpeace vessels promote their causes by distributing pamphlets and engaging in similar activities that do not disrupt naval operations. The Navy objects only to illegal acts that interfere with the lawful performance of its responsibilities.

its functions without interference. The M/V Greenpeace has engaged in a purposeful effort to interfere with the activities of the Navy and to prevent the testing of weapons important to our national security. In that circumstance, the President may exercise his power as Commander-in-Chief to deny entry to a vessel in order to prevent the disruption of lawful military exercises.

The President may also exclude the M/V Greenpeace pursuant to his broad constitutional powers over foreign affairs. The Supreme Court has recognized "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). Two aspects of this power support presidential action to exclude a foreign vessel from United States waters. First, the Court has said that the President's authority as the constitutional representative of the United States in foreign relations includes the power to determine the extent of the territorial waters of the United States. See United States v. Louisiana, 363 U.S. 1, 35 (1960). Presidents have thus taken numerous actions regulating activities in waters subject to United States jurisdiction. See, e.g., Proclamation No. 5928, 54 Fed. Reg. 777 (1989) (extending the territorial sea of the United States from three to twelve miles); Proclamation No. 5030, 3 C.F.R. 22 (1984 Comp.) (establishing an exclusive economic zone). Second, the Court has said that the exclusion of aliens from the United States "is inherent in the executive power to control the foreign affairs of the nation." Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (plurality opinion). We see no constitutional difference between presidential power to exclude foreign citizens, acknowledged by the Supreme Court, and the power to exclude foreign vessels. We therefore conclude that the President's constitutional powers over foreign affairs include the power to deny entry to a foreign vessel, such as the M/V Greenpeace, that has engaged in violations of United States and international law.

Finally, the Constitution directs the President to take care that the laws are faithfully executed. U.S. Const., Art. II, § 3. In re Neagle, 135 U.S. 1, 64-67 (1890), the Supreme Court confirmed that the President has the duty to enforce "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." The Court thus upheld the President's constitutional power, independent of statutory authorization, to assign a federal officer to protect a Supreme Court Justice. Similarly, we believe that the President may exclude a foreign vessel from United States territorial waters when that vessel has violated federal and international law, has refused to provide assurances that it will obey such law in the future, and can be expected illegally to interfere with the Navy's lawful conduct of its duties.

While we believe that the President's constitutional authority is ample to support action barring the M/V Greenpeace, there are other, more specific sources of authority for the proposed action, so that reliance on the constitutional ground alone is unnecessary.

2. The Magnuson Act

The Magnuson Act, Pub. L. No. 81-679, 64 Stat. 427 (1950), gives the President broad powers to regulate the movement of vessels when a threat to national security exists. Whenever the President finds that "the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States," the Act authorizes the President to "institute such measures and issue such rules and regulations" as are necessary to (i) control the anchorage and movement of foreign-flag vessels in United States territorial waters or (ii) to protect vessels and facilities in United States ports or waters. 50 U.S.C. § 191.

We believe that a presidential order barring the M/V Greenpeace would be a permissible "measure" under the Act.² Although we are unaware of any previous action based upon the Act directed at a particular vessel, nothing in the Act precludes the President from finding that a single vessel poses a threat to national security and acting to prevent that vessel from entering our waters. Congress clearly intended that the Magnuson Act would give the President the power to exclude all vessels, or vessels from a certain country. See 96 Cong. Rec. 9557 (1950) (statement of Sen. Magnuson). This broad power surely includes the lesser power to exclude one vessel that poses a special threat. The Act gives the President broad authority to regulate entry to United States waters and ports whenever the President finds a threat to our national security, and an order denying entry to a vessel with a record of illegal and dangerous activity lies well within the scope of the President's authority under the Act.³

² Alternately, an exclusion order could be characterized as a "rule or regulation" under the Act. Either way, the Act contemplates a range of presidential actions once the President makes the requisite finding that the security of the United States is endangered.

³ The emphasis upon the demonstrated illegal actions of the M/V Greenpeace should foreclose any claimed denial of First Amendment rights. In Schneider v. Smith, 390 U.S. 17, 26-27 (continued...)

An order directed specifically at the M/V Greenpeace under the statute must be based on a presidential finding that the vessel endangers the security of the United States. Although the danger can be a threat of war or violent activity, especially sabotage, see, e.g., S. Rep. No. 2118, 81st Cong., 2d Sess. 1, reprinted in 1950 U.S. Code Cong. Serv. 2954, any threat to national security will suffice. See, e.g., Skibs A/S Gylfe v. Hyman-Michaels Co., 304 F. Supp. 1204, 1222 (E.D. Mich. 1969) ("The operation of a port and the safety of shipping in it are endangered by fire resulting from spontaneous combustion as well as by the saboteur."), aff'd, 438 F.2d 803, 806-07 (6th Cir.), cert. denied, 404 U.S. 831 (1971). Moreover, the President's power to bar a vessel is not contingent on a finding of danger to U.S. property in the United States. Subsection (a) of section 191 permits the President to control the access of foreign-flag vessels to U.S. territorial waters whenever a threat to national security exists. We think it clear, therefore, that the

3 (...continued)

(1968), the Court observed that the words of the Act "refer to actions, not to ideas or beliefs." The Court thus held that the Act did not support the denial of a merchant marine's validation for membership in subversive organizations. Here, by contrast, the basis for action is the performance of specific illegal activities and the promise to engage in similar activities this spring. That other Greenpeace vessels or other anti-nuclear protesters who do not have a similar record would not be subject to similar action shows that action against the M/V Greenpeace would be unrelated to its political message. Indeed, the Navy has indicated that a promise by the M/V Greenpeace to cease its disruptive activities in favor of peaceful demonstrations would be sufficient for it to decide not to seek a bar. As Judge Friendly wrote in rejecting a first amendment argument raised by protesters convicted for entering a restricted zone:

[T]he same Charter that adjures Congress to 'make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,' empowers it "To provide and maintain a Navy", Art. I, § 8, as a means of securing one of the objectives of the preamble, to "provide for the common defence." . . . This seems a not unreasonable reconciliation of a minority's right to protest against Polaris submarines with the right of the majority to give the nation the protection of naval vessels which their representatives in the legislative and executive branches of the Government deem required "for the common defence."

United States v. Aarons, 310 F.2d 341, 345 (2d Cir. 1962).

President may bar the M/V Greenpeace from U.S. ports, even if it has threatened to interfere only with Naval exercises on the high seas.

It appears that the President would have a legally sufficient basis for finding that the M/V Greenpeace endangers the security of the United States. We understand that the Navy has thoroughly documented both the costs and risks caused by previous interference with its Trident tests and other maneuvers. We understand that the Navy also has documented the expressions of intent by the vessel to engage in similar disruptive activity this spring. Moreover, we have been told that the government of the Netherlands, while sympathetic to our complaints against the M/V Greenpeace, has indicated that Dutch law makes it difficult for the Netherlands to impose sanctions against the vessel, such as retracting permission to fly under the Dutch flag.

Any finding by the President that the vessel endangers the security of the United States will be final. See 96 Cong. Rec. 11220 (1950) (statement of Rep. Celler) (the President's "opinion as to danger to our security suffices"). Thus, in United States v. Aarons, 310 F.2d 341 (2d Cir. 1962), the court upheld the conviction under the Magnuson Act of two protesters who rowed a canoe into a restricted area during a nuclear submarine launching. The protesters challenged the designation of the restricted area, but Judge Friendly responded that "[c]ourts should not second-guess the executive in such matters when there is no indication that the action taken was anything but a good faith effort to protect property deemed essential to the interests of the United States." Id. at 344-45.

We therefore believe that the Magnuson Act provides a sound legal basis for barring the vessel that would likely be upheld in litigation. The principle disadvantage of relying on the statute is that it requires personal action by the President. The President -- not the Navy, the Coast Guard, or any other officials -- must make the necessary factual determination of danger to national security. The statute demands presidential involvement whenever its authority is invoked. By contrast, as will be discussed below, the executive order permits the Coast Guard to act without obtaining higher approval in each case.

3. Executive Order

President Truman issued an executive order invoking his authority under the Magnuson Act less than three months after the Act was passed. Exec. Order No. 10,173, 3 C.F.R. 356 (1949-1953). That order and subsequent amendments, based on the President's determination that "the security of the United States is endangered by reason of subversive activity," id., provides the Coast Guard with broad power to regulate vessels in United

States waters and ports. In particular, the commander of a port is authorized to

supervise and control the movement of any vessel and . . . take full or partial possession or control of any vessel or any part thereof, within the territorial waters of the United States under his jurisdiction, whenever it appears to him that such action is necessary in order to secure such vessel from damage or injury, or to prevent damage or injury to any vessel or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States.

33 C.F.R. § 6.04-8. This language gives the Coast Guard the authority to bar the M/V Greenpeace from U.S. ports based on previous damage to U.S. vessels and interference with U.S. Naval operations, and the documented threats of future disruptive action.

The preamble to the Executive Order is phrased in slightly different terms. It states that the President is authorizing regulations

relating to the safeguarding against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, of vessels, harbors, ports, and waterfront facilities in the United States, and all territory and water, continental or insular, subject to the jurisdiction of the United States

Exec. Order 10,173, supra. The Coast Guard is concerned that this language imposes the further requirement, not found in the regulations themselves or in the statute, that the subversive acts be conducted against U.S. property while it is in the United States. Although the language could be read in this manner, we do not believe that it should be construed as a limitation on the Coast Guard's power to bar a vessel from U.S. ports based on the threat of actions against U.S. property on the high seas. The language of the regulations clearly permits the Coast Guard to take action "whenever . . . necessary . . . to prevent damage or injury to any vessel . . . of the United States." 33 C.F.R. § 6.04-8 (emphasis added). This is fully consistent with the powers of the President outlined in the Magnuson Act, which the regulations were intended to implement. Given this history, we think that it would be contrary to the purpose of the Executive Order and the regulations to conclude that the Coast Guard lacks the power to prevent a vessel from using U.S. ports as a haven and base for interfering with U.S. vessels on the high seas.

Thus, we believe that the Executive Order provides a firm basis for the Coast Guard to take action against the M/V

Greenpeace. We caution, however, that because of the variance in language between the Executive Order and the regulations, action under the order is more susceptible to legal challenge than a measure the President takes under the statute itself. In addition, the original basis of the order as intended to prevent subversive activities is not as directly related to the threat presented by the M/V Greenpeace as would be an order specifically designed to confront that threat. Nevertheless, we believe that a court would uphold action based on the existing order because of the history of the order and the statute it was intended to implement.

Please let me know if we can be of further assistance.



William P. Barr
Assistant Attorney General
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