

Presidential War Powers in Vietnam

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A Matter of Inheritance, A Matter of Escalation, A Matter for Congress: Presidential War Powers in Vietnam

Beginning with the presidency of Harry S. Truman, the Indochina wars became a matter of inheritance for the President of the United States. Particularly for Truman and then Dwight Eisenhower, the presidential office seemed to come with an obligation to provide substantial economic and military assistance to aid the French in Indochina.[1] Upon inheriting the presidency itself with the assassination of President John F. Kennedy, Lyndon B. Johnson made this Indochina inheritance fully-known and felt across the country with the 1964 Tonkin Gulf Resolution. It was there that this matter of inheritance became the Vietnam War. In turn, with the subsequent public reaction to Nixon's bombing operations in Cambodia and Laos, soon the escalation of the Vietnam War became a matter for Congress with the 1973 War Powers Resolution. With Johnson's executive mandate for war and Nixon's justification of executive authority, the Vietnam War set a dangerous precedent for presidential war powers, as it placed constitutional misinterpretations to the forefront, and exemplified the limitations of modern congressional war powers.

On 22 November 1963, at the time of John F. Kennedy's assassination, there were roughly 16, 000 American advisers in South Vietnam. Since 1962, US military destroyers conducted signal intelligence missions (SIGINT) in the Gulf under the code-name DESOTO and gathered data on North Vietnamese radar installations. Although on August 2 the North Vietnamese hit the US destroyer *USS Maddox* by a single machine gun bullet, this one shell triggered an outcry in Washington.[2] While there remains speculation over whether *Maddox* was in international waters and whether it was intentionally provoking North Vietnam, the Administration "condemned" the attack supposedly on the high seas.[3] Two days later, there was supposedly a larger second attack against two destroyers, *Maddox* and *C. Turner Joy*, which prompted the Johnson Administration to immediately draft a Joint Resolution on Southeast Asia in the National Security Council's 538th meeting.

However, the same National Security Agency (NSA) concluded in 2002 that there were no attacks on 4 August 1964. Although information is limited, according to the *Maddox's* commander, the enemy's use of torpedoes appeared "doubtful" and it was likely a product of "freak weather effects" on radar and that "over-eager sonarmen may have accounted for many reports." [4] As the 2002 NSA report states:

"SIGINT information was presented in a manner as to preclude responsible decision makers in the Johnson Administration from having a complete and objective narrative of events of 4 August 1964...the handful of SIGINT reports which suggested an attack had occurred contained severe analytic errors, unexplained translation changes, and the conjunction of the two unrelated messages into one translation. This latter product would become one of the Johnson's Administration's main proof of the 4 August attack." [5]

Nonetheless, with Secretary of State Robert McNamara testifying before Congress verifying the validity of an August fourth attack, and remaining to do so in his 1995 memoir *In Retrospect*, the Southeast Asia Resolution, also known as the Tonkin Gulf Resolution, went through Congress on 10 August.[6] With no dissenting votes in the House and only two in the Senate, the Resolution gave Johnson the authorization "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." [7]

Presidential War Powers in Vietnam

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In signing the Tonkin Gulf Resolution, while Johnson's explanation that the military decision "was mine—mine alone" neutralized attacks from Barry Goldwater that he was "soft" on communism, as the war progressed and elongated, it soon became the constitutional debate of the Johnson's administration.[8] To be sure, although the Tonkin Gulf Resolution was not the sole legal basis for the Vietnam War, it exemplified the questionable constitutionality of the war. In other words, it was not a congressional declaration of war, and such expanded executive war powers became the shadow of Johnson's presidency.

By 1967, with many senators including William J. Fulbright beginning to regret their decision to vote for the Tonkin Gulf Resolution, the Senate Committee on Foreign Relations called upon Undersecretary of State Nicholas Katzenbach to testify on the constitutionality of the Resolution.[9] In his testimony, he stated that before the adoption of the U.N. Charter, declarations of war meant a military action for the purpose of territorial conquest. With the adoption of the Charter, according to Katzenbach, such declarations of war became obsolete, as it was now a matter of international law. Thereby, with respect to the Tonkin Gulf Resolution, it was "the functional equivalent of the constitutional obligation expressed in the provision of the Constitution with respect to declaring war." [10]

Such a testimony was broadly consistent with the advice he gave to Johnson in June 1965. In light of the increased troop numbers and change in mission to assist South Vietnam, Johnson asked Katzenbach if he needed further congressional approval. Katzenbach utilized the President's Commander-in-Chief clause to demonstrate that there was no need for further congressional approval, as the clause gave the President the power to "act in war." In turn he clarified Congress' power to "declare war" in relation to World War Two-style conflicts, using Truman's "police action" in Korea as a precedent for Vietnam. Additionally, given the limited "size of force committed," and "the nature of the mission" with Operation Rolling Thunder, Katzenbach believed the likelihood of an "all-out war" was slim to none.[11]

Naturally, scholars have argued over Katzenbach's notion of constitutional equivalency with the Gulf Tonkin Resolution. As described in Arthur Schlesinger's *The Imperial Presidency*, Johnson and later Nixon both believed that the President had the ultimate authority in foreign affairs. By rejecting basic assumptions about the original Constitution, according to Schlesinger, Johnson thought congressional war powers were "not to sanction but to support the war" and that "in the consciousness of the executive branch, the legislative branch existed as an irrational force." [12] Legal scholars Steven G. Calabresi and Christopher Yoo echo Schlesinger's opinion, citing Lyndon Johnson's opposition to legislative vetoes, his objection to any congressional efforts to encroach his authority, and his assertion of control over all parts of the executive branch.[13] Moreover, to expand on these scholars, if Katzenbach's 1965 advice to Johnson was to be applied, then there should have been a U.N. Resolution on America's role in Vietnam, similar to the case with the Korean War. Under this logic, since there was no U.N. Resolution granting American authority to intervene, the escalation of the war was constitutionally illegitimate.[14]

Legal scholar John Yoo disagrees with these academics, however, as he cites the consistent Congressional support given to Johnson's 1965 escalation with Operation Rolling Thunder. More importantly to Yoo, without a broad interpretation of the presidential war powers, the United States would not have been "the guardian of the free world" and thereby could not have prevailed in the Cold War.[15] Although both of Yoo's arguments are problematic, with his equation of informal congressional support to constitutionality and his ignorance regarding the Soviet Union's internal struggles and its contributed to the end of the Cold War, it is nonetheless clear: Congress was slow to react against the escalation of the Vietnam War. As Geoffrey Perret points out, even after the 1968 Tet Offensive and subsequent criticism by anchorman Walter Cronkite, the majority of Americans still supported the war. Although Perret asserts that Americans were mainly providing moral support for the troops and re-election was now improbable, "the country was simply not turning away from LBJ—it was turning hostile." [16] Indeed, it was not until Nixon's bombing operations in Cambodia that such public hostility turned fiercely against the White House and Congress started to exercise its constitutional authority.

As the anti-war movement gained momentum, on November 3, 1969, President Nixon made an appeal to the "silent majority" of Americans. Akin to his 1968 campaign promise, "peace with honor," he reiterated the need to uphold the world's confidence, one that could only be served by continued Vietnamization and remaining in firm negotiation with Hanoi for a just peace. However, while he spoke of the need for Americans to be "united for peace" and "united

Presidential War Powers in Vietnam

Written by Haley O'Shaughnessy

against defeat," bombing operations in Cambodia and Laos were well underway.[17] With the intention to keep the bombing secret, Nixon's bombing operation soon became fourteen-month long campaign. With an estimated 108 823 tons bombs dropped, the operation only ceased with when news leaked of ground invasion at the end of April 1970.[18]

While he pledged in the 1968 campaign to end the Vietnam War, he truly thought that he would be able to end the war quickly. As written in his memoirs:

"During the first months of administration, despite the Communist offensive in February, and the stalemate at the Paris talks, I remained convinced that the combined effect of the military pressure from the secret bombing, and the public pressure from my repeated invitations to negotiate would force the Communists to respond...I expected the war to be over in a year." [19]

In the beginning, Nixon rationalized the secret bombing as a means to destroy supply lines and North Vietnamese sanctuaries in neutral Cambodia. Moreover, he believed it was necessary to end the peace stalemate and force Hanoi to act respective to the United States' interests, while remaining secretive to avoid domestic perceptions that he was expanding the war, and to protect Prince Norodom Sihanouk who consented to the secret bombings against communist insurgents.[20] However, as several scholars have noted, the bombings in Cambodia, along with an incursion in Laos, and continued bombing in the North, were overall ineffective in receding Hanoi to America's interests. When the Nixon administration announced an executive mandated invasion in April 1970 after the news leaked, American public and Congress reacted.[21] As noted by Schlesinger:

The Nixon theory of presidential war, had effectively liquidated the constitutional command that the power to authorize war belonged to the Congress...He had aimed to establish as normal presidential power what previous Presidents had regarded as power justified only by extreme emergencies and employable only at their own peril.[22]

As Universities shut down in protest and several of Kissinger's aides resigned in fall of 1969, Nixon inevitably lost most of the support he had from the Democratic-controlled Congress. Indeed, the invasion was a turning point in Congressional efforts to curb executive war powers. Nevertheless, such actions remained mainly political as long as troops remained in Vietnam. Moreover, similar to Johnson, Nixon believed communists were sponsoring the antiwar protests, which prevented him from directly responding to the antiwar backlash. As Griffin contends, such a mentality demonstrated Nixon's isolation from rational voices in the antiwar movement, and disabled him from a meaningful dialogue.[23] In order to combat backlash for themselves, the Senate passed a The National Commitments Resolution in June 1969, a precursor to the 1973 War Powers Resolution, challenging Presidential authority in war without congressional action.

In reporting the resolution, the Senate Foreign Relations Committee took some blame in the expansion of presidential power because of its past acquiescence and inaction. As stated in the report, this submission was "probably the most important single fact accounting for the speed and virtual completeness of the transfer" of war powers to the executive branch.[24] Further to this point concerning the Gulf Tonkin Resolution:

"In adopting a resolution with such sweeping language, however, Congress committed the error of making a *personal* judgment...when it had a responsibility to make an *institutional* judgment, first, as to what *any* President would do with so great an acknowledgement of power, and second, as to whether, under the Constitution, Congress had a right to grant or concede the authority in question." [25]

By the spring of 1970, Congress revoked the now infamous Tokin Gulf Resolution and attached the Mansfield Amendment in November 1971, demanding the President to set a date for the total withdrawal of American troops. Moreover, the Cooper-Church amendment to the 1970 foreign military sales bill ended funds for U.S. Forces in Cambodia. However, it was not until the summer of 1973 with the Case-Cooper Amendment that all funding was cut off from combat operation in the Southeast Asia, representing the power and limits of Congress' purse: at this point, all American troops were withdrawn. The reasoning behind the gradual cutting of funds rather an abrupt end to the Vietnam War was because there still was debate over whether appropriations bills were instruments of congressional

Presidential War Powers in Vietnam

Written by Haley O'Shaughnessy

policy.[26] Nonetheless, in November of 1973, Congress overrode Nixon's veto and passed the War Powers Resolution, which demanded congressional consultation before a President committed troops to combat and congressional authorization for war after a sixty-day period.[27]

Nixon denounced such resolutions, as he maintained the Constitution gave him the right to initiate war. Indeed, his signing statement declared the Mansfield Amendment was "without binding force or effect," and did not reflect the opinion of the administration.[28] Akin to Johnson, he incorrectly cited Commander-in-Chief clause as a grant for war authority. Indeed, as Assistant Attorney General, and later Chief Justice, William Rehnquist on May 4, 1970 stated, "The President's determination to authorize incursion into these Cambodian border areas is precisely the sort of tactical decision confided to the Commander-in-Chief in armed conflict." [29] In the end, such claims were to delegitimize congressional attempts in order to affirm presidential war powers.

Concerning the judicial branch, they remained largely ambivalent on presidential executive power in Cambodia, as it was determined in *Luftig vs. McNamara* in 1966. As stated in case:

"The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive." [30]

While the Supreme Court did not render in favour of unilateral presidential war power, the Court continually renounced its judicial authority to place a check on presidential war powers.

Despite judicial ambivalence, there remains a scholarly debate on the constitutionality and effectiveness of the 1973 War Powers Resolution (WPR). Yoo contends that WPR "weakened the presidency to the point where Congress changed the balance of power in its favor," and notes that the WPR was simply within the context of Watergate and the Vietnam War.[31] In turn, Griffin calls for the need to analyze WPR in the post-1945 constitutional order, emphasizing the anathematic realities of a sixty-day clock and the tools other than "war" that protect the national security interests of the United States.[32] In contrast, Louis Fisher argues that WPR was rather a decades-long accumulation of debates surrounding separation of powers and international struggles. Further to his point, although WPR has not worked precisely as intended, the overall effect has been consistent with its expectations.[33] With this later argument, Geoffrey Perret disagrees with the effectiveness of WPR, as he cites several Administrations, from Reagan in the Panama Canal, to H.W. Bush in the Gulf War, to Clinton in Kosovo, to Bush Jr. in the Iraq War, who did not follow the WPR protocols.[34]

Upon evaluation of the scholarship, akin to Griffin, it is certainly imperative to view presidential war powers as the Constitution evolves and international circumstances change, particularly when methods of national security no longer abridge to war making. Nonetheless, as cited by Perret, efforts such as WPR that try to ensure the President remains accountable in foreign affairs has had little effect. As Schlesinger wrote in *Imperial Presidency*: "the War Powers Resolution, the most publicized shackle of all, turned out to be a toy handcuff." [35]

When Nixon claimed his "peace with honour" at the signing of the Agreement on Ending the War and Restoring Peace in Vietnam with the North, the failures of his policies were just beginning to fully unfold. Two years after the signing of the Paris Accords, the Saigon government fell to the communists, in spite of Nixon's promise to President Thieu to "respond with full force" if the North violated the agreements.[36] By 1975, communist leaders ruled South Vietnam, Laos, and Cambodia. While arguably the fate of Vietnam may have been set before his presidency, Nixon's expanded executive powers created further geostrategic consequences and his initiatives in Cambodia were his own. In turn, such actions incentivized communist insurgents to move deeper into the country, and soon the Khmer Rouge began to take control in Cambodia.[37]

The concept of presidential war powers in Vietnam is one that remains an active scholarly and constitutional debate. It is a concept that has evolved along with the Constitution, and has enabled presidential war powers to work effectively in twenty-first century foreign affairs. Such evolution has allowed necessity and circumstance to come to the forefront in the decision to go war. However, the Constitution remains its justification. In the end, Johnson's

Presidential War Powers in Vietnam

Written by Haley O'Shaughnessy

executive mandate for war and Nixon's constitutional arguments for a strong Commander-in-Chief set dangerous precedents, as an unaccountable presidential office remains the principal concern for the future of presidential prerogative.

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[1] In fact, under Truman, the United States covered between one-third to half the cost of the First Indochina War and Eisenhower increased it to seventy-five percent of the cost, along with two hundred military personnel to assist the French. See Louis Fisher, *Presidential War Power*, (Lawrence: University Press of Kansas, 2004), 114.

[2] Jonathan Colman, *The Foreign Policy of Lyndon Johnson: The United States and the World, 1963-1969*, (Edinburgh: Edinburgh University Press, 2010), 25.

[3] Geoffrey Perret, *Commander in Chief: How Truman, Johnson, and Bush Turned a Presidential Power into a Threat to America's Future*, (New York: Farrar, Straus and Giroux, 2007), 227. For a perspective supporting the Administration's claim that it was in international waters, see John Yoo, *Crisis and Command*, (New York: Kaplan Publications, 2009), 351.

[4] *Foreign Relations of the United States, 1964-1968, Volume I, Vietnam, 1964, Document 276, 609*. For the summary notes of 538th meeting of the NSC, see *Foreign Relations of the United States, 1964-1968, Volume I, Vietnam, 1964, Document 278, 611*.

Presidential War Powers in Vietnam

Written by Haley O'Shaughnessy

[5] Robert J. Hanyok, "Spartans in Darkness: American SIGINT and the Indochina War, 1945-1975" in *Cryptologic Quarterly*, (Center for Cryptologic History, National Security Agency, 2002), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB132/relea00012.pdf>, 2.

[6] Robert S. McNamara, *In Retrospect: The Tragedy and Lessons of Vietnam*, (New York: Times Books, 1995), 139-140.

[7] Quoted in Colman, *The Foreign Policy of Lyndon Johnson*, 26.

[8] Fisher, *Presidential War Power*, 117.

[9] Since he was Deputy Attorney General in 1964, he advised Johnson on the required congressional approval needed to attack North Vietnam.

[10] Quoted in Stephen M. Griffin, *Long Wars and the Constitution*, (Cambridge: Harvard University Press, 2013), 124.

[11] *Foreign Relations of the United States*, 1964-1968, Volume II, Vietnam, January-June 1965, Document 345, 751-753.

[12] Arthur M. Schlesinger, *The Imperial Presidency*, (Boston: Houghton Muffin, 1973), 181-182.

[13] Steven G. Calabresi and Christopher Yoo, *The Unitary Executive: Presidential Power from Washington to Bush*, (New Haven: Yale University Press, 2008), 345.

[14] To be fair, by 1965, there was the "Free World Force" consisting of the Philippines, South Korea, Taiwan, New Zealand, Australia, Spain, and Thailand, however this was not a UN coalition and 1969-1970 hearings revealed the United States gave them sizable subsidies. See Fisher, *Presidential War Power*, 119.

[15] Yoo, *Crisis and Command*, 351, 330.

[16] Perret, *Commander in Chief*, 281-282. Nevertheless, there were some fierce critics within Congress by 1964-1965: Senate Majority Leader Mike Mansfield, Senator Frank Church, then Senator Hubert Humphrey, and later Senator William J. Fulbright. Moreover, the Joint Chiefs of Staff took questions over troop increases and accumulating economic costs much more seriously after the 1968 Tet Offensive. See Griffin, *Long Wars and the Constitution*, 135.

[17] Astor, *Presidents at War*, 154.

[18] David Gray Adler and Michael A. Genovese, "Vietnam, Watergate, and the War Power: Presidential Aggrandizement and Congressional Abdication," in *Watergate Remembered: The Legacy For American Politics*, edited by Michael A. Genovese and Iwan W. Morgan, (New York: Palgrave Macmillan, 2012), 91.

[19] Ibid.

[20] Ibid. See Astor, *Presidents at War*, 148-149.

[21] Ibid. 89-90.

[22] Schlesinger, *The Imperial Presidency*, 198.

[23] Griffin, *Long Wars and the Constitution*, 140.

Presidential War Powers in Vietnam

Written by Haley O'Shaughnessy

[24] Quoted in Fisher, *Presidential War Powers*, 121.

[25] Ibid, 124.

[26] As quoted by Federal appeals Judge Charles E. Wyzanski: "This court cannot be mindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war...An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions placed and continued on them in that dangerous posture." This court order was later revoked. See *Mitchell v. Laird*, 488 F. 2d 611- Courts of Appeals, Dist. of Columbia Circuit 1973.

[27] Adler and Genovese, "Vietnam, Watergate, and the War Power," 95.

[28] Richard Nixon, "Statement on Signing the Military Appropriations Authorization Bill.," November 17, 1971, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=3222>

[29] Adler and Genovese, "Vietnam, Watergate, and the War Power," 97-98.

[30] See *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1966).

[31] Yoo, *Crisis and Command*, 352.

[32] Griffin, *Long Wars and the Constitution*, 170-171.

[33] Fisher, *Presidential War Power*, 131, 133.

[34] Perret, *Commander in Chief*, 310.

[35] Schlesinger, *The Imperial Presidency*, 433.

[36] Adler and Genovese, "Vietnam, Watergate, and the War Power," 94.

[37] Ibid. 95.

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