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Vietnam and Its Constitutional Aftermath

Two centuries after the nation's Founding, the United States lost its first major war. The Vietnam War is usually cast as the product of expansive presidential powers to use force and expand conflicts, but lawmakers also played a major role. Congress sanctioned the war with an excessively broad resolution and yielded to political pressures to fund and extend U.S. involvement long after doubts about the conflict had set in. This chapter adds to that standard story by showing how specific constitutional arrangements reinforced executive branch strategies of gradual escalation in Vietnam and secretly extending the war into neighboring countries.

Later in the conflict, however, constitutional processes and arguments also constrained strategies to pressure North Vietnam toward a negotiated settlement. The Vietnam War showed that determined legislators can shape the politics of war, close off military options, and ultimately curtail a war. For their part, federal courts largely turned away challenges to the President's authority to continue it, though they left open the possibility of intervening in future cases.

Many critics believed by war's end that the Constitution had malfunctioned. In response, Congress enacted the War Powers Resolution, a reform designed to curb presidential war-making without legislative assent. By focusing narrowly on the start of wars, the act set a model that has skewed war powers debates ever since. Meanwhile, Congress also began to regulate covert warfare and worked with the Executive to reconfigure who fights America's wars. Crucially, these reforms occurred during a period of restrained U.S. foreign policy, raising questions about how these checks might hold up if – as would later happen – the country returned to a more assertive global role.

GOING TO WAR IN VIETNAM

On the night of August 4, 1964, sailors aboard the destroyer USS *Maddox* were on high alert. Two days earlier, North Vietnamese patrol boats had attacked it in the Gulf of Tonkin, off Vietnam's coast. Now, crews aboard the *Maddox* and another American destroyer reported fast-moving objects, perhaps torpedoes, coming at them,

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and they fired back at hostile vessels nearby. Within days, in a near-unanimous vote, Congress authorized what would become one of America's longest and costliest wars.

The United States had been embroiled in Vietnam for years, though the war's exact start is hard to pinpoint.[1] After World War II, France tried to reassert colonial control over Indochina – which includes modern-day Vietnam, Cambodia, and Laos – but was defeated by local forces in 1954. The Geneva Accords split Vietnam at the 17th Parallel and called for reunification elections. North Vietnam, led by nationalist Ho Chi Minh and aligned with the Communist bloc, opposed the U.S.-backed South, and American political leaders feared a domino effect if one Indochinese country fell under Soviet or Chinese influence.

Instead of holding elections, Vietnam plunged into war. South Vietnam's political and religious repression fueled an insurgency by Northern-backed Viet Cong guerrillas. During the Kennedy Administration, the United States expanded its military aid and advisory presence in the unstable South while covertly supporting operations against the North, but it stopped short of sending large-scale combat forces. Soon after taking the oath of office upon Kennedy's assassination, Lyndon Johnson vowed to the cabinet, "I will not lose Vietnam."[2] By mid-1964, most of Johnson's key advisors were urging direct military action to counter Northern aggression. The August 1964 Gulf of Tonkin incident, during an election campaign against the hawkish Republican Barry Goldwater, tested Johnson's pledge.[3]

The President called the attacks on the *Maddox* an unprovoked act of aggression on international waters, but that characterization obscured a key fact: the United States had been conducting operations, including intelligence gathering, within North Vietnam's territorial seas. Doubts quickly surfaced about the initial reports, too, with one of the destroyer's officers questioning whether they were actually under fire.[4]

Johnson ordered airstrikes on North Vietnamese targets the next day and addressed the American people: "Aggression by terror against the peaceful villagers of South Vietnam has now been joined by open aggression on the high seas against the United States of America." Yet he insisted that the U.S. response "will be limited and fitting. … We still seek no wider war."[5] Eighty-five percent of Americans supported his retaliatory actions.[6]

The Johnson Administration maintained that the President had constitutional power, even before the attack on the *Maddox*, to take military action against North Vietnam without Congress's approval. But Johnson would later say that Truman erred by going to war in Korea without congressional support, and he wanted to avoid that mistake.[7] Only one day after the events in the Gulf of Tonkin, Johnson sent to the Senate a draft resolution modeled closely on the Formosa force resolution of a decade prior.[8] The White House had drafted the resolution months earlier and was awaiting the right moment to unveil it.[9]

Senator Fulbright was key to Johnson's efforts to secure a strong force authorization. Relying on Johnson's assurances, Fulbright persuaded his Senate colleagues

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that the Administration would avoid escalation.[10] On August 6, the resolution cleared the Foreign Relations and Armed Services committees after less than two hours of debate and passed the Senate the following day with just two dissenters. The House passed it unanimously on August 7, 1964, without any hearings.

The Gulf of Tonkin Resolution was sweeping. First, it read, "Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." Second, "The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia." Therefore, consistent with the Constitution, the UN Charter, and the Southeast Asia Collective Defense Treaty (SEATO), the United States is "prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member" of that treaty organization – not just Vietnam – that requested such aid. And, finally, the force authorization would expire when either the President determined that peace and security were restored or when Congress terminated it through resolutions in both houses.[11] After signing the resolution, Johnson quipped that it was "like a grandma's nightshirt – it covers everything."[12] Senator Fulbright later regretfully called it a "blank check."[13]

This pattern was hardly new. More than a century earlier, President Polk had maneuvered U.S. troops into disputed territory along the Rio Grande, provoking a Mexican response that he then presented to Congress as an act of aggression (see Chapter 3). In both episodes, presidential initiative created, in Hamilton's words, an "antecedent state of things" that set the nation on the path to war. Confronted with fighting already underway, lawmakers ratified hostilities by passing the Executive's pre-drafted resolution. Each case revealed a constitutional sequence that recurs throughout American history: executive action followed by thinly informed legislative consent.

The following sections show that the Resolution, supposedly meant to avert wider war, instead fortified the legal basis for expanding the war's intensity and geography. A decade later, the United States would retreat from what had become one of its worst military adventures, having lost more than 58,000 U.S. servicemembers and leaving dead millions of Vietnamese civilians and combatants.

WAR POWERS AND GRADUAL ESCALATION

The Johnson Administration modeled the Gulf of Tonkin Resolution on Eisenhower's Formosa Resolution, but they served very different purposes. Eisenhower's resolution was designed to reinforce a strategy of deterrence through the threat of major war – and, as intended, it was never used. Johnson's was designed – and activated – to support a strategy of incremental and limited conflict, which he expected to avoid a large conflict. Thus, Congress was at ease with the latter resolution's familiar terms but unprepared for how expansively the Executive would construe them.

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The Vietnam War became a vivid demonstration of how a president could widen a conflict under a broad force authorization – and of the political pressures that make lawmakers reluctant, though ultimately able, to retract support once operations are underway.

The logic of Johnson's early Vietnam strategy was straightforward: North Vietnam and the United States were essentially negotiating over South Vietnam's political future, and to win that negotiation, Washington needed to use military force to prove its resolve. Each step on the stairs of escalation was meant to communicate determination to Hanoi and its allies, making the war's gradual enlargement itself a form of diplomacy. The President's commander-in-chief authority thus became a tool of international bargaining as much as of battlefield command. In Vietnam, military orders doubled as diplomatic signals. The theory held that North Vietnam would quickly relent once it recognized America's willingness to keep escalating.

That theory proved wrong. It rested on layers of faulty assumptions: misreading the conflict as Communist expansion rather than a tangled civil and nationalist struggle; underestimating North Vietnamese endurance; and overestimating America's ability to convey credible commitment. Yet a key point, from the perspective of war powers, is that constitutional law enabled the strategy. The Administration's theory of victory depended on the President's complete freedom – whether drawn from Article II or from Congress's open-ended authorization – to raise or lower the war's intensity through graduated and measured steps.[14]

On March 8, 1965, a contingent of 3,500 Marines, now deployed as combat forces rather than as military advisors, waded ashore on South Vietnam's beaches – a move that would prove fateful for Johnson's presidency.[15] These new deployments were small at first, but soon Johnson was adding troops in increments of tens of thousands while obscuring that growth from the public. By year's end, U.S. troops in Vietnam numbered more than 180,000 – a figure that would peak, three years later, at nearly 550,000. To fill those ranks, by the end of 1965, Johnson was already ordering the highest draft rate since the Korean War under the Selective Service System.[16] More than two and a half million Americans would eventually serve in the Vietnam War, about a third of them draftees (and that share rose dramatically as the ground war escalated).[17]

As fighting intensified in spring 1965, Attorney General Nicholas deB. Katzenbach advised that the President already held sufficient authority – under both the Constitution and the Gulf of Tonkin Resolution – to widen America's war effort. "[I]t is a fair, although not uncontroversial summary of nearly two centuries of history," he wrote to Johnson on June 10, "that [Congress's] power to 'declare war' is the power to confer substantially *unlimited* authority to use the armed forces to conquer and, if necessary, subdue a foreign nation." At the same time, he reasoned, the President had constitutional power to escalate "so long as his action does not amount to an infringement of the power of Congress to declare *all-out* war," as in World War II.[18] Katzenbach concluded that Johnson's planned expansion – adding

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tens of thousands of troops to the roughly 50,000 already deployed and using them to attack Viet Cong forces – remained within those limits. The Gulf of Tonkin Resolution, he added, independently authorized such moves. Because Johnson's strategy of gradualism never envisioned an "all-out" war, Katzenbach saw no need to return to Capitol Hill for additional approval.

In 1966, the Johnson Administration sent Congress its fullest defense of presidential authority to wage the Vietnam War, a document signed by the State Department's chief legal adviser, Leonard Meeker.[19] The memo legally codified a Cold War strategic worldview. Emphasizing the President's constitutional powers, Meeker's analysis echoed arguments from the Korean War (see Chapter 8) and cited numerous precedents since the Founding in which presidents had unilaterally deployed U.S. forces abroad. Beyond that record of practice, though, Meeker argued that constitutional interpretation must adapt to modern security conditions the Framers could not have imagined: "In 1787 the world was a far larger place, and the Framers probably had in mind attacks upon the United States. In the 20th Century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security." The President's implied power to repel invasions of U.S. territory, he reasoned, thus extended to defending allies whose defeat could endanger the nation itself. A new theory of national defense and what it meant for the United States to be *attacked* – one that would have seemed baffling at the Founding – drove a new and expansive interpretation of executive self-defense power.

To bolster that constitutional claim, Meeker invoked SEATO, the regional pact that the United States had ratified in the Eisenhower years. The treaty provided for the collective defense of Vietnam, among other states. The Meeker memo eschewed the argument that the treaty directly delegated Congress's power to declare or take the nation to war, likely because executive branch officials had disclaimed that argument to win Senate support. Rather, it made a more nuanced, but arguably bolder, argument: that the treaty codified the Senate's and Executive's common view equating an attack on Vietnam with an attack on the United States, which would trigger the President's inherent authority to repel the invaders. In other words, it argued that the Executive's expansive conception of self-defense was not simply a unilateral one but a joint one.

Only after arguing that the President had constitutional power to make war in Vietnam did Meeker's memo point to the Gulf of Tonkin Resolution to argue that Congress authorized the defense of South Vietnam. The memo went on to claim that subsequent appropriations and draft extensions amounted to congressional ratification of presidential policy. By that time (the memo came out in 1966), Vietnam had already become a large, costly, and grinding war with no clear end in sight. Many lawmakers, now eager to disown their earlier votes, insisted that they had been misled and had never intended to authorize a major war – claims that may have been true – or that their funding votes merely expressed support for American

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troops rather than for Johnson's escalation. Yet the resolution they had passed was sweeping, and they continued to approve the President's requests for war funding.[20]

Congress's protractible force resolution, meant to contain the war, instead abetted a flawed strategy that expanded it. Soon, the President, drawing on similar legal assertions, would not only escalate the war's intensity but stretch its territorial range beyond Vietnam's borders – both covertly and overtly.

POWERS TO WIDEN AND CONCEAL WAR: LAOS AND CAMBODIA

The Ho Chi Minh Trail was a network of roads and paths running through more than 12,000 miles of dense jungle and mountain terrain, connecting Communist North Vietnam to Viet Cong guerrillas and their allies in the South. From 1959 to 1975, Communist forces and sympathizers used it daily to transport military supplies and a steady stream of troops.[21]

The United States conducted large-scale operations along the trail to disrupt that supply artery. A hitch was that much of the path ran through the eastern parts of neighboring Laos and Cambodia – both formally neutral under international agreements, though Laos also lay within SEATO's protective scope. American military interventions in those countries therefore raised constitutional and statutory questions about the President's power to extend the war beyond Vietnam's boundaries – and to do so secretly. In practice, presidents claimed broad constitutional authority to define a war's territorial scope unless Congress affirmatively limited it. Yet Congress could not restrain actions it did not know about. In Laos, covert bombing and support for proxy forces gradually widened into a full-fledged shadow war. In Cambodia, after 1970, the President brought the military campaign into the open. By the time these campaigns came into public view, the power to wage war covertly had already enabled presidents to vastly expand the battlefield.

Laos is the most heavily bombarded country per capita in history.[22] By the late 1950s, several years before Johnson's escalation of the Vietnam War, the U.S. government had viewed Laos as one of the shakiest dominoes in the Cold War struggle for influence in Southeast Asia. At that time, the Central Intelligence Agency (CIA) began conducting covert paramilitary operations in Laos to fortify its anti-Communist government. Initially, the CIA provided training, logistical support, and limited combat assistance to an anti-Communist coalition of Royal Lao Government forces, ethnic Hmong fighters, and later Thai volunteer units, who fought against the North Vietnamese Army and Soviet-backed guerrillas. When the United States started to ramp up combat operations in Vietnam, secret U.S. Air Force bombing campaigns targeted supply routes passing through southeastern Laos, while CIA-supported paramilitary operations tied down North Vietnamese forces on the ground. Although the campaign grew into America's largest covert war, it ultimately failed, and the Laotian government fell to Communist rebels in 1975.[23]

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Throughout the so-called Secret War in Laos, officials claimed that its covertness – hidden from foreign audiences, the American public, and even much of Congress – was important to preserving Laotian government support and preventing international neutrality agreements from unraveling.[24] By 1970, however, the war in Laos was "covert" only in the sense that the U.S. government refused to acknowledge it. Legislators and journalists uncovered reports of U.S. operations, and a bombing campaign of that size was impossible to hide. As the veneer of deniability peeled off, lawmakers demanded answers.[25]

Chapter 9 explained that in the early Cold War, covert paramilitary campaigns had begun to operate on a connected but separate constitutional track from overt military ones. The Secret War in Laos, which included CIA-led civilians and large-scale U.S. military air forces, ran on the rougher and more improvised covert track. In part because the Executive Branch concealed the Secret War and withheld information about it from Congress (even though many members still knew about it), the conflict lacked the sort of formal legal rationale that is typically made public for major American conflicts, at least after the fact. Unlike the Truman and Johnson administrations' respective legal statements to Congress and the public for the Korean War and Vietnam War, even decades later, no detailed recitals have emerged for the Secret War in Laos, though some likely blocks of the Executive Branch's justification can be assembled.

Evidence suggests that the CIA paid little attention to the formal legal basis of its clandestine paramilitary operations in Laos – including its use of borrowed U.S. military personnel – until powerful senators began to probe.[26] When pressed, the agency apparently relied for the Secret War on the same general rationales the Kennedy Administration had invoked for Cuba, discussed in the previous chapter: that the President possessed vast constitutional powers to conduct global, secret intelligence operations, including violent ones; that informed members of Congress had tacitly accepted this exercise of presidential power; and that Congress had pre-authorized covert action in very wide terms.[27] Agency officials also insisted that some congressional leaders were aware of the secret Laos war, though how much they knew – or chose not to know – remains uncertain.[28]

In practical terms, the Executive Branch had a point. The need for secrecy makes case-by-case congressional authorization impractical, and if covert warfare poses less risk of major escalation compared to overt warfare, then unilateral presidential power is perhaps more justifiable. In hearings after the Indochina wars, a senior CIA lawyer made essentially that claim, that the greater power must include the lesser power: "If the President has the power to dispatch troops to foreign countries to use military force short of war … then it would logically follow that he has the power to send civilian personnel to foreign countries to engage in covert action, since such action is rarely, if ever, as drastic as the use of military force."[29]

In other respects, however, that constitutional logic is upside down: Covertness spares the President public accountability, making congressional checks more

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essential. John Hart Ely later argued in his influential book, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, that secret wars like the one in Laos "are prima facie unconstitutional, since they haven't been authorized by Congress, let alone exposed to the scrutiny of the American public."[30] The practical justification for very broad presidential power to wage covert warfare also assumes that the Executive Branch seeks secrecy in good faith. After the war, Henry Kissinger, Nixon's former National Security Advisor and Secretary of State, acknowledged to Congress that using the CIA to fight the Secret War served two purposes: "one, to avoid a formal avowal of American participation there for diplomatic reasons, and the second, I suspect, because it was less accountable."[31]

While waging the Secret War in Laos, the United States was also conducting a war – first covertly, then overtly – in Cambodia. As largely a cross-border spillover of the war in Vietnam, the campaigns in Cambodia again raised questions about the President's power to widen a war territorially.

Starting in 1965, the United States secretly bombed North Vietnamese targets and sections of the Ho Chi Minh trail in Cambodia, with top American officials going to extraordinary lengths, including falsifying records, to conceal these operations from the public, most of Congress, and even senior Defense Department officials. After the *New York Times* first reported in 1969 on the U.S. strikes, President Nixon dramatically escalated the secret bombing. In April 1970, he crossed another line, figuratively and geographically, by launching a major ground offensive in Cambodia – sending 30,000 American troops (with the Cambodian government's tacit approval) to root out North Vietnamese and Viet Cong sanctuaries in the country. But the strategy backfired, destabilizing Cambodia and paving the way for its fall to Communist rule.

The Nixon Administration insisted that the operation was just a new front in the Vietnam War. But to public and congressional critics, the Cambodia incursion was a new war entirely. Indeed, the operation was the tipping point that led to major domestic anti-war protests, including at Kent State University, where Ohio National Guardsmen opened fire on a rally and left four students dead.

Around the time of the major April 1970 ground operation, future Chief Justice William H. Rehnquist, then head of the Justice Department's Office of Legal Counsel, wrote the key executive branch memo asserting that the President could order the use of force in Cambodia without further congressional authorization.[32] His reasoning alternated between zealous advocacy and willingness to yield. Rehnquist began by noting that the Framers tried to balance risks of kingly bellicosity with the needs for quick and agile government responses to international events. In doing so, they defined executive and legislative war powers only "painting with a broad brush on a constitutional fabric, and not endeavoring to accomplish a detailed allocation of authority." Two centuries of constitutional practice, he wrote, "has given rise to a number of precedents and usages, although it cannot be confidently said that any sharp line of demarcation exists as a result of this history." Still, he worked to draw some clearer lines.

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His first major argument was that as commander in chief, the President has complete latitude to make strategic and tactical military decisions in the absence of congressional restrictions. Alongside this claim was an important concession: "[I]f the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale." Rehnquist did not say where he would set that bar, how he would measure "scale," or what congressional action would meet it. Yet he acknowledged that the President alone lacked constitutional power to wage war beyond a certain magnitude. He hedged on whether the Korean War would have been constitutional without Congress's implicit approval as that conflict unfolded, and he hinted that without some legislative backing the Vietnam War might have surpassed that level.

Rehnquist's second major claim was that Nixon's order to invade Cambodia was the sort of tactical decision traditionally entrusted to the Commander in Chief in the conduct of war. The aim was to protect U.S. troops by destroying enemy sanctuaries, a decision "as to how [the] conflict shall be conducted, rather than a determination that some new and previously unauthorized military venture shall be undertaken." Constitutionally speaking, Rehnquist framed the sending of ground forces eastward in an authorized war as a quintessential commander-in-chief decision, even if that military thrust crossed national borders. These were bold claims because expanding a war into another country – even if (as was the case here) that country consents – can have such significant diplomatic repercussions.

But then Rehnquist caveated these claims with a third argument: "[A]s Commander in Chief," the President's "authority exercised in conformity with congressional authority or ratification of his acts is obviously broader than if it stood alone." Though Rehnquist did not directly cite Justice Robert Jackson's framework from the Korean War *Steel Seizure Case* (see Chapter 8), this formula mirrors Jackson's three-category scheme of presidential power that varied with congressional support, silence, or restriction. In this case, Rehnquist concluded, Congress had put the President's military command powers in the first and strongest category, by passing the Gulf of Tonkin Resolution – which did not restrict the use of force to Vietnam – and through continued funding for the war. Rehnquist argued that Congress had at least implicitly approved presidential military action beyond Vietnam's borders to wage war successfully inside them.

Rehnquist left open, however, the possibility that Congress could place at least some restrictions on how the President waged war. The legislature "undoubtedly has the power in certain situations to restrict the President's power as Commander in Chief to a narrower scope than it would have had in the absence of legislation," he wrote, so long as Congress does not dictate "detailed instructions as to the use of American forces already in the field." To use Jackson's formulation, this would push presidential authority into Jackson's "lowest ebb." Congress would soon take up that challenge: to restrict where and how the President could wage these conflicts.

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CONGRESS AND CONTRACTING WAR

What began as congressional acquiescence became skepticism, then constraint. By the early 1970s, Capitol Hill became an arena not only for protesting the war but for limiting it.

Despite near-unanimous support for the Gulf of Tonkin Resolution, bipartisan congressional criticism of U.S. involvement in Southeast Asia grew over the years, coming to a head in the early 1970s. Some members echoed public antiwar sentiment, and some opposed the Executive's unilateralism, while others criticized Johnson's limited war strategy as incoherent. They registered their objections through statements, symbolic resolutions, and, eventually, proposals to cut off war funding. Though Congress would set a final end date for the war only after U.S. troops were scheduled to return home anyway, legislative forums, processes, and actions in the interim played a growing role in steering the war's course. By the war's end, Congress had emerged as an arena not just for criticizing policy but for defining the conflict's limits.

By 1966, Fulbright, feeling misled by the President's repeated escalations without consulting Congress, emerged as a leading critic of Johnson's Vietnam policy. Starting that year, he used his committee gavel to publicly grill top Administration officials over American involvement in Indochina and to elevate prominent critics of the war.[33] Former Lieutenant General James Gavin testified to the administration's faulty strategy, while George Kennan, an architect of Cold War containment strategy, argued that Vietnam lacked strategic importance and that the war's objectives could not be won. Meanwhile, Republican hawks rebuked the President for being too restrained. In closed-door Armed Services Subcommittee hearings, Chairman John C. Stennis challenged Johnson's restrictions on bombing targets, arguing that a more forceful campaign would have prevented North Vietnam from rebuilding its defenses.[34]

The widely watched Fulbright hearings drew front-page coverage and legitimized dissent, later contributing to a decline in public support for Johnson's handling of the war.[35] Even still, U.S. troop levels in South Vietnam tripled between 1965 and 1968. Meanwhile, draftees made up a growing share of American combat deaths during that time period, rising from about a quarter of those killed in action in 1965 to more than half in the war's later years.[36]

Although early opposition to the war failed to produce any legislation restricting it, several events later boosted congressional critics' resolve to act. The 1968 "Tet Offensive," a set of coordinated attacks by North Vietnamese forces throughout South Vietnam, contradicted the Administration's claims that the United States was nearing victory. Richard Nixon's 1968 election gave Democrats greater freedom to distance themselves from President Johnson's policy on Vietnam. Nixon's promise to exit the war by training and equipping Saigon's forces to take the lead also allowed the war's detractors to align their objections with the President's stated goals.

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Nixon's 1970 invasion of Cambodia became the strongest catalyst for congressional efforts to rein in the war, as it triggered nationwide campus protests that further intensified after the Kent State tragedy. Many in Congress were also furious that Nixon took this major decision without consulting them.[37]

In 1969, the Senate had passed Fulbright's nonbinding National Commitments Resolution, which stated that dispatching American troops to protect foreign partners should require affirmative legislative approval – part of a broader congressional reassertion in foreign affairs.[38] In January 1971, Congress repealed the Gulf of Tonkin Resolution, though the Nixon Administration still maintained that the war remained lawful under the President's constitutional powers and continuing appropriations. Later in 1971, Congress reauthorized the draft with an amendment calling for withdrawal from Vietnam at "the earliest practicable date."[39] Though largely symbolic, these measures underscored that the war was now the President's responsibility.

Yet higher-stakes bids to cut war funding faced resistance in Congress, even from war opponents, who feared they would endanger U.S. troops by depriving them of vital equipment.[40] A December 1969 measure blocked only funding for the deployment of American ground troops to Laos or Thailand – deployments that Nixon claimed he had no intention of making.[41] In 1971, responding to Nixon's Cambodia invasion, Congress cut off funding for land forces and military advisors, but not air campaigns, in that country. By then, Nixon had already withdrawn U.S. ground troops.[42]

Although neither measure directly barred Nixon's intended war plans, the prospect of their passage almost certainly swayed or hastened his major decisions. Capitol Hill, not just the White House, had slowly become a venue for hashing out Vietnam War strategy. An administration loath to cede any control over the war to Congress – for pragmatic reasons and on constitutional principle – had to negotiate and accept some limits.[43] According to John Lehman, one of Nixon's point-people on the Hill, "Congress had succeeded in imposing de facto restrictions of both scope and duration on the executive's policy in Cambodia, all before any legislation was even passed."[44] Nixon's aides recognized that the President had, in effect, yielded ground.[45]

By 1972, growing public and congressional support for defunding the war prompted White House fear that time was running out. Wanting to end the war before Congress stepped in, Nixon dramatically escalated bombing and harbor-mining of North Vietnam in 1972, aiming to force North Vietnam to the bargaining table.[46] In January 1973, the United States, South Vietnam, and North Vietnam signed the Paris Peace Accords, ending (for a time) the fighting. Congress and the President then negotiated a final legislative restriction: After August 15, 1973, no funds could be spent on combat activities anywhere in the region. Though American forces were withdrawn by then, the law would prevent the President from reintroducing troops or restarting bombing, even if the Paris cease-fire agreement collapsed.

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A focus only on binding measures, particularly on those contrary to the President's stated plans, obscures Congress's immense influence on the war's course. Senate hearings prompted by Johnson's escalations helped expose the conduct of the war and shape the parameters of debate, restricting presidential control both through legislation and the looming prospect of more. With a range of tools, Congress had turned scrutiny into constraint. The judiciary, on the other hand, was a different story.

LITIGATING WAR

Aside from increasingly strong congressional pushback, and amid the era's broader surge in lawsuits over civil rights and government overreach, the Vietnam War produced the first sustained litigation campaign challenging the constitutionality of an American war. The Supreme Court and lower courts often sidestepped the issue entirely. In most cases, courts ruled that as long as Congress and the Executive were jointly involved in some way, they would not interfere, but they left open the possibility of judicial intervention if a President engaged in large-scale war without any congressional role at all.

Early in the war, courts swiftly rejected these constitutional challenges on justiciability grounds. Some ruled that petitioners, often draftees, lacked standing because they had not yet been inducted and ordered to Vietnam. Other courts deemed the war's legality a political question beyond judicial reach. However, as the conflict dragged on, anti-war and civil rights groups sought ways to overcome these legal obstacles.

Army Private Malcolm Berk seemed like an ideal plaintiff. Ordered to Vietnam in 1970, he argued, with support from the New York affiliate of the American Civil Liberties Union (ACLU), that the government could not compel him to fight in an unconstitutional war, one that Congress had never validly authorized. A federal appeals court agreed that Berk could raise that claim, but ultimately declined to decide it.[47] While the judges allowed that courts might determine whether there had been "*some* mutual participation by Congress," they would not second-guess the form that participation took. With the Gulf of Tonkin Resolution still in force and Congress continuing to fund the war, the court concluded that there was sufficient congressional involvement to leave questions of the war's legality to the political branches. The Supreme Court declined review.

Berk's case did not quite slam shut the courtroom doors, and some opponents of the war celebrated the case as a win.[48] While previous rulings suggested that challenging the war's legality was hopeless, the appeals court in *Berk* was careful to note that its ruling was only about Berk's "particular claim about this war at this time," leaving room for courts to intervene if Congress's blessing of the war was less certain. Subsequent litigation, however, would soon erase hope for such challenges.

Each time that Congress took steps to limit the war – such as repealing the Gulf of Tonkin Resolution, enacting measures calling for withdrawal from Vietnam, and

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passing funding restrictions – the ACLU was back in court to argue that there was no longer "mutual participation" of both political branches. When the President intensified military operations, litigants argued that these escalations exceeded whatever congressional sanction the war had. Even still, most courts ducked the issue or found that there was still mutual participation.[49] Time after time, the Supreme Court would decline to take the cases.

One possible explanation for the courts' rebuffs is the difficulty in crafting a remedy. What would come next if a court were to rule that the Vietnam War was unconstitutional? Would the government be required to stop sending soldiers to Vietnam and recall all the troops who had already been sent? And if a court ordered this, would the government obey? During litigation, the government had argued that such directives are beyond the power of the courts and would endanger not only American soldiers but also the U.S. position in South Vietnam and various treaty obligations, the credibility of which depended on allies' confidence that American promises could not be judicially undone. If courts were to decide the war was unconstitutional, they might have to craft some other remedy or concede that they were powerless.

One fleeting win for these legal campaigns came in July 1973, after combat troops had left Vietnam. The case challenged the Nixon Administration's bombing of Cambodia. Although Congress had voted to cut off funding for all combat activities in the region effective August 15, the Administration continued, and even expanded, its bombing campaign in the meantime. Acting on behalf of Representative Elizabeth Holtzman and several U.S. airmen, the ACLU sued for an injunction to halt what it called unconstitutional air strikes. Holtzman argued that, unlike the war in Vietnam, the Cambodian bombing campaign had never been authorized by Congress and was now actively opposed by it. The district court agreed, holding that the bombing lacked mutual participation by the political branches and ordering it to stop.[50] The government appealed, and the appellate court quickly stayed the order. With the Supreme Court in summer recess, the ACLU sought emergency relief from individual justices. Justice Thurgood Marshall declined to act alone, but Justice William O. Douglas (found camping in Washington State) heard arguments at a local post office and on August 3 reinstated the order halting the bombing.[51]

For Douglas, this was a matter of life or death for Cambodians.[52] Referencing the *Steel Seizure Case*, his order chided the way other courts had dodged ruling on the war's legality. "Property is important," he wrote, "but if President Truman could not seize it in violation of the Constitution, I do not see how any President can take 'life' in violation of the Constitution." His colleagues disagreed. Within hours, the full Court reconvened by telephone and reversed Douglas's order, allowing the bombing to continue while legal proceedings unfolded.[53] The bombing ceased a week later, just before the August 15 deadline set by Congress, allowing the Supreme Court to avoid ruling on the legality of the Vietnam War and the escalation in Cambodia for the last time.

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Despite litigants' best efforts, the courts remained reluctant to adjudicate the war's legality, a trend that would continue in subsequent conflicts. In the end, it would fall to Congress to impose stronger restraints on presidential war-making.

REFORMING WAR POWERS

Communist takeovers in South Vietnam, Cambodia, and Laos in 1975 left the United States confronting its first major military defeat abroad and a constitutional reckoning over how it had happened. Had Congress exercised too little oversight from the start? In the years that followed, reforms sought chiefly to curb presidential power. Yet the most consequential change began not in confrontation but in cooperation: ending the draft and creating an all-volunteer force, which would alter the democratic calculus of war-making.

Conscription, justified under Congress's Article I powers, had become politically and morally untenable. Draftees filled a growing share of Vietnam's ranks; in later years, they comprised more than half of annual combat deaths, and by the war's end, they accounted for about a third of the total 58,000 Americans killed in it.[54] Mounting opposition to both the war and the draft, including concerns about the system's fairness and effectiveness, pushed Congress and the Executive to phase out induction and raise military pay to sustain an all-volunteer force.[55] The Selective Service Act's 1971 amendments set a 1973 expiration date for draftee induction.[56] Restarting the draft would hereafter require an act of Congress. In terms of direct impact on American lives and society, this was arguably the most significant post-Vietnam War reform.

Other reform initiatives took a more adversarial turn. Soon after the signing of the 1973 Paris Peace Accords, the Watergate scandal erupted. Public trust in the presidency – not just in matters of war and peace, but across the board – had plummeted. That same year, Arthur Schlesinger published *The Imperial Presidency*, popularizing the term for an unchecked and untrustworthy executive.[57] In a wave of legislative efforts to restore checks on national security powers, Congress tightened arms-sales oversight, regulated domestic intelligence, and expanded access to government information. Yet no law more directly addressed Vietnam's constitutional legacy than the 1973 War Powers Resolution (or War Powers Act).[58]

The text opens by setting out Congress's goal "to fulfill the intent of the framers of the Constitution … and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities." The President's unilateral power to do so, it states, is limited to confronting attacks on the United States or its military forces – an exception to Congress's exclusive power to declare war that the Framers themselves likely would have agreed with. The opening statements of the War Powers Resolution are not binding, but they articulate a vision of restoring the war-powers system to something like its original form. If the expansion of Presidential war powers since the Founding rested on congressional acquiescence, the statements could also be read as withdrawing that assent.[59]

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The act's champions recognized that presidential decision-making had certain virtues of alacrity and secrecy, but they saw Congress's reciprocal trait – its cautious deliberation – as a needed counterweight. Law and strategy were entwined here. Vietnam, in their view, revealed that U.S. foreign policymaking had a hasty and activist bent; the War Powers Resolution was a necessary restraint, not just on presidential powers but on American interventionism.[60] Some congressionalist critics of the imperial presidency even argued that the act didn't go nearly far enough and still left the President with too much leeway.

With those aims in mind, the act installed procedural devices to enforce congressional war-making primacy.[61] It directs the President to consult Congress whenever possible before intervening militarily and to promptly and continuously report to Congress certain military deployments unless Congress has declared war or statutorily authorized the action. The most important trigger for these requirements is the introduction of military forces into actual or imminent "hostilities." But the term "hostilities" is left undefined – an ambiguity that, as Chapter 11 shows, would later give rise to many controversies.

Reflecting Congress's special concern about protracted conflicts, sending forces into a hostile situation starts a sixty-day clock. Unless Congress expressly approves operations within that time limit, the President must withdraw U.S. armed forces (with limited time extensions in certain cases to protect the safety of American forces). Congress also incorporated procedures to expedite its votes on wars and to make them easier to pass, though Chapter 11 also notes that some of these procedures would later be disabled.

These measures were less a return to the Framers' design – Congress initiating hostilities by formal act – than a negotiated modern substitute meant to correct what Vietnam had laid bare: an overactive presidency and an acquiescent Congress. The act's sponsors believed this structure would resist future presidential pressures to bend constitutional practices once again, and would compel Congress to confront, rather than evade, its own duty to authorize or deny military action.[62]

Many opponents – most prominently the Watergate-weakened Nixon Administration – argued that it was Congress, not the Executive, that was usurping constitutional powers. In their view, the act stripped the President of authority to use force, a power grounded in two centuries of historical practice. Its rigid procedures and time limits, they warned, would dangerously constrain the Commander in Chief. In a Cold War world, they insisted, the Executive's ability to act swiftly was essential to national security, and the President's capacity to commit U.S. forces decisively in response to aggression was vital to the credibility of American commitments abroad. Future administrations would continue to marshal these same arguments to weaken the act's restraints.

The War Powers Resolution was notable not only for what it contained but for what it omitted. It applied to "Armed Forces" in hostilities but deliberately excluded civilian personnel engaged in covert warfare. Senator Thomas Eagleton sought to

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close that gap with an amendment to "circumscribe the President's use of American civilian combatants in the same manner uniformed Armed Forces are circumscribed."[63] His proposal would have also required congressional approval before placing civilians in combat zones or using paramilitary forces for unapproved military aims – "an attempt," he said, "to make the language of legislation match the realities of war."[64] The amendment failed, revealing that senators preferred to leave clandestine operations outside the Resolution's framework.

Yet Congress did, in fact, begin to regulate secret CIA warfare in other ways, albeit well short of its constitutional reset for overt warfare. In doing so, Congress updated the covert war powers track.

In 1974, Congress passed the Hughes–Ryan Amendment to the Foreign Assistance Act – the first law to impose formal controls on the CIA since its creation. Though brief, it was momentous: the measure barred funding for any CIA operation other than intelligence collection unless the President signed a finding that the activity was "important to the national security of the United States" and reported its scope to the appropriate congressional committees.[65] The amendment may not have seemed a strong restraint, but it was bold for its time.[66] It required presidents to take personal responsibility for covert actions and ensured that Congress could no longer be wholly in the dark.

The Hughes–Ryan Amendment ushered in a new era of intelligence oversight. Within weeks of its passage, the Senate created a special committee chaired by Senator Frank Church to investigate U.S. intelligence activities, and the House soon launched a parallel inquiry. Both examined the performance and purpose of the intelligence agencies, but the Church Committee went further, probing their legal and ethical boundaries.[67] Its hearings uncovered extensive domestic surveillance, assassination plots, and misuses of authority. On covert warfare, the committee concluded that "there is little to support such an extravagant claim of Presidential power" as the Executive Branch had invoked to justify the Bay of Pigs and the Secret War in Laos.[68] Once such operations begin, it warned, "it may be impossible to stop them." Covert action, the report found, could be "inconsistent with our constitutional system and its principles of checks and balances."[69] It called for stronger executive controls and more systematic congressional oversight.

The Senate established an intelligence committee in 1976, as did the House in 1977, to oversee intelligence operations. Following the recommendations of the Church investigation, new congressional oversight aimed to ensure that intelligence activities aligned with American values, interests, and laws. In the coming years, Congress strengthened the Hughes–Ryan statute by imposing additional reporting requirements to these special intelligence committees. These reforms gave members of Congress greater knowledge and leverage to curb secret adventurism, though still far less than they exercised over open military interventions.

Although these measures checked the President's power to wage covert war, they also validated that power. These oversight measures did not expressly authorize

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covert activities, but their existence presumed that the President has some powers to direct such operations in the first place. It still remained unclear whether Congress saw that authority as deriving from the Constitution, earlier intelligence statutes, ongoing financial support, or some combination of these. In any event, these reforms added to the legal architecture for the post-Vietnam era's "shadow wars" – secret, deniable, and often continuous.

By the late 1970s, Congress had rebuilt a legal system for both open and secret war – though one whose strength would depend, as ever, on political will. Overt military action was now bound by the War Powers Resolution's procedural checks, while covert operations were monitored through reporting and review by intelligence committees. The next chapters explore how these dual constitutional tracks evolved, revealing both their enduring strengths and their structural vulnerabilities. They also show that, as in Laos, the two tracks sometimes run together, posing special problems of accountability.

CONCLUSION

In 1961, Senator Fulbright had asked whether readiness to intervene globally and decisively with armed force could fit with strong checks and balances. Then, his answer was no, and he warned that constitutional law might need to change. By 1971, he still felt that the Constitution and American strategy were incompatible, but suggested that it was the strategy that must yield:

> I used to puzzle over the question of how American democracy could be adapted to that kind of role we have come to play in the world. I think I now know the answer: it cannot be done. Congress can adopt palliative measures … [or] bills designed to regulate the President's use of the armed forces, and these are all to the good. But they will not of themselves either stop the war, restore the Constitutional authority of Congress, or arrest the long term trend toward authoritarian government.

That trend, Fulbright was now convinced, was irreversible so long as the United States stuck to a policy of "great power militarism." The better question, he continued, "is not whether we can adapt democracy to the kind of role we are now playing in the world – I am sure that we cannot – but whether we can devise a new foreign policy … which will give us security in our foreign relations without subverting democracy at home."[70]

The years that followed combined some of both answers: Congress answered the failings in Vietnam and beyond with new laws to restore checks in its favor, while the scars of defeat would give rise to "Vietnam Syndrome," making American policymakers and the public reluctant to commit military forces to a potentially protracted foreign war. Rebalancing constitutional power and rebalancing American military power went hand in hand.

That mutual rebalancing would prove fleeting. Three years after leaving the presidency, Gerald Ford wrote in 1980 that whereas "some people used to complain

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about what they called an 'imperial presidency' … now the pendulum has swung too far in the opposite direction. We have not an imperial presidency but an imperiled presidency."[71] In the 1980s, U.S. foreign policy would swing back toward global military activism against Soviet influence, and in the 1990s, it would turn toward policing the post-Cold War world. Each of those shifts pushed against congressional checks. The checks bent, but they never broke.

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