

Vietnam

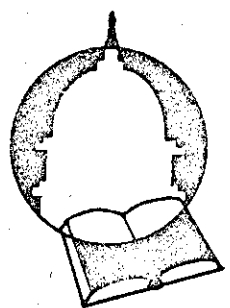
F-113

THE LIBRARY OF CONGRESS  
LEGISLATIVE REFERENCE SERVICE *of the*  
*Library of Congress*

Misc. publication II

THE PRESIDENT'S AUTHORITY TO CONDUCT THE WAR IN VIETNAM  
WITHOUT A DECLARATION OF WAR BY THE CONGRESS

A Survey of the Pros and Cons, 1965



Russell J. Leng  
Foreign Affairs Division  
October 29, 1965

Washington 25, D.C.

LIBRARY  
UNIVERSITY OF CALIFORNIA  
SANTA BARBARA  
FEB 11 1970  
GOVT. PUBLICATIONS DEPT.

THE PRESIDENT'S AUTHORITY TO CONDUCT THE WAR IN VIETNAM  
WITHOUT A DECLARATION OF WAR BY THE CONGRESS

A Survey of the Pros and Cons

1. The President's authority to conduct war under the Constitution

The President's Constitutional authority to employ the armed forces of the United States arises from his powers as Commander-in-Chief of the armed forces, his special responsibilities in the field of foreign affairs, and his duty to see that the laws be faithfully executed.<sup>1/</sup> As the "Executive Power" the President has additional powers in the field of foreign affairs derived from the position of the United States as a sovereign nation with rights and obligations under the law of nations.<sup>2/</sup>

Because treaties are the law of the land and it is the President's duty to take care that they be faithfully executed as laws, the President has the authority and duty to fulfill the treaties of the United States.<sup>3/</sup> This has been interpreted by some as permitting the dispatch of the armed forces in those instances which involve the implementation of security treaties. Such was the authority cited in the instance of the Korean conflict when the President acted to carry out recommendations made by the United Nations Security Council in accordance with the U.N. Charter--a treaty to which the United States is a party.<sup>4/</sup>

---

<sup>1/</sup> Article II, Section 2, Clause 1; Article II, Section 2, Clause 2; Article II, Section 3.

<sup>2/</sup> In fact, in one recent Supreme Court decision the President was referred to as the "sole organ of the nation" in foreign affairs. (U.S. v. Curtiss-Wright, 299, U.S. 304 318ff.)

<sup>3/</sup> See the Supreme Court discussion in Ware v. Hylton, 3 Dall. 199 (1796).

<sup>4/</sup> See: Powers of the President to send the Armed Forces outside the United States. Prepared for the use of the joint committee made up of the Committee on Foreign Relations and the Committee on Armed Services of the Senate, 82d. Congress, 1st Session. Committee print, February 28, 1951, p. 3.

Since the Constitution was adopted there have been a great many instances when the President, without Congressional authorization, and in the absence of a declaration of war, has ordered the armed forces to take action or maintain positions abroad. From President Jefferson's decision to order the American Navy to put down the Barbary pirates in the Mediterranean to President Roosevelt's occupation of Iceland in 1941, it is possible for the advocates of Presidential prerogative to cite dozens of examples of when the President has acted without previous Congressional approval--and in some cases has not consulted Congress at all.<sup>5/</sup>

On the other hand, the Constitutional power to declare war and raise and support the armed forces is vested in the Congress.<sup>6/</sup> While there is general agreement that the Congress' power to declare war does not restrict the President's power as Commander-in-Chief to employ the armed forces to repel invasion and repress insurrection in the case of a sudden emergency; the determination of the existence of such an emergency and the discretionary power of the President in such instances is still a matter of some debate among legislators and political scientists.<sup>7/</sup>

---

<sup>5/</sup> See: Commager, Henry Steele. Presidential power: the issue analyzed. The New York times magazine, January 14, 1951, p. 11, 23-24.

For a comprehensive list of instances when the United States has used its armed forces abroad see: U.S. report of the Committee on Foreign Affairs. Background information on the use of U.S. armed forces in foreign countries. House report no. 127. Washington, U.S. Govt. Print. Off., 1951. pp. 55-64

<sup>6/</sup> Article I, Section 8, Clause 11; Article I, Section 8, Clause 12.  
<sup>7/</sup> Nor is the Supreme Court entirely clear on this matter. The most often cited authority for both sides is the famous Prize Cases involving Lincoln's decision to blockade the Confederacy in April of 1861, which provides a split decision (5-4 in favor of Lincoln's authority) offering substantial arguments both for and against the President's prerogative.

Those who urge limitations on the President's use of his power as Commander-in-Chief cite several qualifying interpretations of the arguments cited by those favoring greater Presidential prerogative.

The opponents of Presidential prerogative point out that there is no Constitutional mention of the President in connection with the power to declare war and that this omission is significant.<sup>8/</sup> Thus, they believe it is evident that the power to make war is vested solely in the Congress.

Against those examples of when the President has acted on his own initiative to commit armed forces abroad they cite several examples of when the President has sought and obtained the approval of Congress for his punitive expeditions as well as those instances when, such as in the case of the American entrance into World War I and World War II, the President has asked Congress for a formal declaration of war. Those who favor strong Congressional control over the war-making powers argue that, although there are many instances of when the President has committed the armed forces with neither a formal declaration of war nor the approval of Congress, in the matter of the excessive use of Presidential powers one hundred wrongs do not destroy a correct Constitutional principle.<sup>9/</sup> Furthermore, they contend, the vast majority of those actions undertaken by

---

<sup>8/</sup> A recent statement of this position appears in a Memorandum of Law: American policy in Vietnam, in light of our Constitution, the United Nations Charter, the 1954 Geneva Accords, and the Southeast Asia Collective Defense Treaty. Lawyers Committee on American Policy Toward Vietnam. Congressional record. September 23, 1965. pp. 24016-17.

<sup>9/</sup> See: Corwin, Edward S. The President's power. New republic, January 29, 1951, p. 16; Memorandum of Law, op. cit.; p. 24017.

Presidents without the approval of Congress were on a rather small scale and of a short duration. The Korean conflict is excepted, in the case of those who accept its legality, because it is considered a direct response to an obligation which the United States assumed as a member of the United Nations Charter.<sup>10/</sup>

Even if the Presidents' vigorous exercise of their authority as Commanders-in-Chief has tended to erode the war-making power of the Congress, Congress still retains a considerable amount of authority when it wishes to pass specific legislation in this area. The limitations placed on the use of American troops under the North Atlantic Treaty are one demonstration of the power of Congress to pass specific restrictions on the employment of American armed forces when it so wishes. If it wishes, Congress can refuse to raise any armed forces at all or provide for the appropriations necessary to the conduct of war. Furthermore, with the refusal of implementation it could in effect abrogate a treaty to which the United States was a party.

Some scholars are of the opinion that a final and precise solution to the Constitutional question of where the President's power ends and that of Congress begins may well be impossible to achieve. They offer a plea for a moderate recognition by each branch of the particular authority and responsibility of the other. Such a solution to the problem, in one view, would require Congress to recognize that the President's power as Commander-in-Chief must be

---

<sup>10/</sup> Discussed in more detail on page 14 below.

"unqualified, unrestricted, and untrammelled by impossible restrictions," and the President, for his part, to respect the powers possessed by Congress in the declaration of war clause of the Constitution. Such respect would include the right to advise the President of the sense of Congress with regard to his actions through such means as the concurrent resolution.<sup>11/</sup>

2. The authority of the President to conduct the war in Vietnam

a. Under the Constitution

Whether or not the President has the Constitutional authority to conduct the war in Vietnam without a declaration of war by Congress depends on one's interpretation of the President's power as Commander-in-Chief of the armed forces of the United States and his duty to see that the laws are faithfully executed.

According to the Administration, the President's authority and duty to conduct military operations in Vietnam stem from the following: our commitments under the Southeast Asia Treaty, the pledges to the Republic of South Vietnam made by Presidents Eisenhower, Kennedy and Johnson, assistance programs annually approved by Congress since 1955, declarations issued at the SEATO Ministerial Council Meetings of 1964 and 1965, the joint Congressional resolution of August 6-7, 1964, and the supplemental defense appropriations for Vietnam operations of May 7, and September 17, 1965.<sup>12/</sup>

As a treaty-in-force the Southeast Asia Treaty is a law of the land to which the United States is bound as a sovereign nation with rights and

---

<sup>11/</sup> See: Rossiter, Clinton. The Constitution and troops to Europe. The New leader, March 26, 1951, pp. 12-13.

<sup>12/</sup> See: Secretary Rusk. The tasks of diplomacy. Why Vietnam. Washington, U.S. Govt. Print. Off., 1965, pp. 10-12; New York times, June 19, 1965, p. 10.

duties under the law of nations.<sup>13/</sup> The Treaty is designed to protect its members, and any of the three non-Communist states growing out of former French Indo-China which asks for protection, against "Communist aggression." Those arguing the case for Presidential prerogative point out that Congress has passed no specific restrictions on the President's execution of American responsibilities under the Treaty other than that the "aggression" referred to under Article IV of the Treaty be "Communist aggression." They further point out that economic and military aid to South Vietnam began in 1954 under President Eisenhower, and that since 1955 Congress has annually approved overall economic and military assistance programs in which the continuation of major aid to South Vietnam has been specifically considered.<sup>14/</sup>

The Council of the Southeast Asia Treaty Organization issued communiques on April 15, 1964 and May 5, 1965 concluding that "the defeat of this Communist campaign is essential not only to the security of the Republic of Viet-Nam but to that of Southeast Asia" and in 1965, that--

...the Council welcomed and expressed warm support for the policy of the United States Government as outlined by President Johnson on April 7, 1965, when he affirmed the determination of the United States to provide assistance to South Viet-Nam to defend its independence, stated the readiness of the United States for unconditional discussion with the governments concerned in search for a peaceful settlement, and offered the prospect of enriching the hopes and existence of more than 100 million people by a program of economic and social assistance in Southeast Asia.<sup>15/</sup>

---

<sup>13/</sup> Approved by the U.S. Senate by a vote of 82-1, entered into force by the United States, February 19, 1955.

<sup>14/</sup> Secretary Rusk, *op. cit.*, p. 10.

<sup>15/</sup> U.S. Department of State bulletin, May 4, 1964, p. 692; June 7, 1965, p. 924.

The advocates of Presidential prerogative in Vietnam point out that Congress has in no way attempted to restrict the President's actions to carry out such policies in support of SEATO and American pledges to South Vietnam. The annual assistance programs, which have been passed by bi-partisan majorities since 1955, are offered as just one indication of the support which the President has received from Congress. Another example is the Southeast Asia Resolution of August 1964, passed concurrently by the House and Senate by a combined vote of 502 to 2, which concludes in part:

...the United States is therefore prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom. 16/

In addition to the Southeast Asia Resolution the Congress has overwhelmingly approved two recent supplemental appropriations to support the conduct of the war in Vietnam, including the 1.7 billion Southeast Asia Emergency Fund passed on September 17th after the President had announced his intention to substantially increase American military participation in Vietnam. 17/

Supporters of the Administration point out that Congress' willingness to use its strongest weapon in foreign affairs, that is, the control of appropriations, to support the President's policy, is a firm indication of its recognition and support of the President's authority to conduct the war in Vietnam without a formal declaration of war by the Congress.

---

16/ Public Law 88-408, August 10, 1964.

17/ H.J. Res. 447; H.R. 9221; for the President's speech see: Congressional record, July 28, 1965, p. 18111.



Those who reject the authority of the President to conduct the war in Vietnam contend that the President does not have the authority to conduct the war under either the Constitution or the Southeast Asia Treaty and, in fact, the American participation in the Vietnam war is a violation of the United Nations Charter and the Geneva Accords of 1954.

Those who contest the Constitutionality of the President's course in Vietnam generally present the case for strict Congressional authority over the power to make war presented above. Some also contend that there is no Constitutional authority for the United States Government to conduct a war without a formal declaration of war whether it has the support of Congress or not. They hold that Congress cannot delegate its exclusive power to declare war to the President regardless of its wishes.<sup>18/</sup> Thus, they hold that the Southeast Asia Resolution, since it is not a formal declaration of war, does not present the President with any authority to conduct an American war in Vietnam. As for the Congressional resolutions voting supplemental appropriations for the increased American military commitment in Vietnam, critics of the President's authority hold that Congress was confronted with a fait accompli and had little choice in the matter.

b. Under the U.N. Charter

Several critics of the President's conduct of the war in Vietnam contend that the American operations in Vietnam are a violation

---

<sup>18/</sup> See: Statements of Senator Wayne Morse. Congressional record, August 10, 1965, p. 19108; also, Memorandum of Law, op. cit., p. 24017.

of the United Nations Charter and, because the U.N. Charter is a treaty-in-force and thus the law of the land, a violation of the U.S. Constitution. As a member of the United Nations, the United States has pledged to refrain "from the threat or use of force," and recognizes that only the "Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression" and decide upon what measures shall be taken.<sup>19/</sup> Under Article 33 of the Charter members are bound to first seek a solution to their problems by peaceful means, and if that fails, Article 37 requires them to submit the dispute to the Security Council. Administration critics hold that the United States has not fulfilled its obligations under Articles 2, 33, and 37 of the Charter and is thus violating the U.S. Charter.<sup>20/</sup>

There are two exceptions to the above articles, one is Article 51 of the Charter which states in part:

Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations.

The other exception occurs in Article 53 which refers to the right of regional organizations to take measures against the enemy states of World War II.

Critics of the Administration's actions in Vietnam contend that:

Article 51 cannot be properly invoked for (1) South Vietnam does not have the political status of a state; (2) even if South Vietnam were deemed a de facto state, the infiltrations do not constitute an "armed attack"

---

<sup>19/</sup> Chapter I, Article 2 (4); Chapter VII, Article 39.

<sup>20/</sup> See: Statements of Senator Ernest Gruening. Congressional record, June 15, 1965, pp. 13122-27; also Memorandum of Law, op. cit., pp. 24012-14; Senator Morse, op. cit., pp. 19107-19114.

within the purview of article 51; and (3) the United States cannot claim the right of "collective self-defense" in respect of a regional system involving southeast Asia. <sup>21/</sup>

The position of the Administration on this matter is that the United States is properly responding to armed aggression under Article 51 of the Charter. Secretary Rusk contends that because the infiltration began slowly and grew gradually to its present scope over a period of several years does not disguise the fact that it is indeed "armed aggression" from North Vietnam. <sup>22/</sup> Furthermore, Secretary Rusk contends that Vietnam became a Republic in 1955 when it was recognized by thirty-six nations; moreover, it is recognized by more than fifty today. <sup>23/</sup> Thus the United States, he contends, is participating in the collective self-defense of the Republic of Vietnam against armed aggression from the North under the authority of Article 51 of the United Nations Charter and through its commitments as a member of the Southeast Asia Treaty Organization.

Supporters of the Administration contend that the President has done everything possible within reason to settle the Vietnam conflict peacefully through the United Nations. The issue was publically placed before the United Nations in the President's address at San Francisco last spring and the Administration continues to work both publicly

---

<sup>21/</sup> Law Memorandum, ibid., pp. 24012-13. The first assumption, i.e., that South Vietnam does not have state status is based on the Geneva Accords of 1954; the second on a restrictive interpretation of Article 51 based on the words "armed attack"; the third on an interpretation of "collective security" as referring only to regional organizations where the member states all are located within the same region, thus ruling out the U.S. as a state existing outside of the Southeast Asia land area.

<sup>22/</sup> The tasks of diplomacy, op. cit., p. 10.

<sup>23/</sup> Ibid., p. 10.

and privately through the Secretary-General of the United Nations to find a means of settlement.<sup>24/</sup> Administration supporters hold, however, that action in the Security Council is inadvisable due to the fact that three members to the dispute are not United Nations members and there is strong opposition to considering the matter among some Security Council members.<sup>25/</sup> Furthermore, the Hanoi and Peking governments have thus far "pushed aside and rejected participation by the United Nations."<sup>26/</sup>

Critics of the Administration's policy vis-à-vis the United Nations, in pointing out the Charter obligations in Article 37, (for the parties to a dispute to bring the matter before the Security Council) contend that whatever embarrassment would result from debate in the Security Council or failure due to a Soviet veto to implement a workable solution through the United Nations would be a great deal less harmful than "being an outlaw nation under the charter."<sup>27/</sup>

c. As a member of SEATO and the UN

Opponents of the Administration's policies in Vietnam also point to Article 103 of the United Nations Charter which states that the obligations assumed by members under the Charter will take

---

<sup>24/</sup> See: Address by President Johnson. U.S. Department of State bulletin, July 19, 1965, pp. 98-101; Goldberg offers appeal to Thant. New York times, July 29, 1965, pp. 1, 10.

<sup>25/</sup> See: Reston, James. United Nations: The frustrations of the U.N. New York times, February 19, 1965, p. 24; Rosenfeld, Stephen S. Russia hits any Viet role by U.N. Washington Post, August 12, 1965, p. A22.

<sup>26/</sup> Secretary Rusk. C.B.S. TV Special Report--Vietnam perspective: winning the peace. Congressional record, August 25, 1965, p. 20870<sup>4</sup>

<sup>27/</sup> Senator Morse, op. cit., p. 19109. See also his statements in Congressional record, September 22, 1965, pp. 23910-23912.

precedence over any other international agreement when the two may conflict. Pointing to the provisions of Article 1 of the SEATO Treaty, which pledges the members to refrain from the threat or use of force in "any manner inconsistent with the purposes of the United Nations," they hold that any military action taken under SEATO in lieu of bringing the matter before the United Nations Security Council is a clear violation of the U.N. Charter.<sup>28/</sup> In addition to the responsibilities of member nations under Article 37 to bring disputes before the Security Council, such critics point to Article 53 which states in part:

But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.

Those defending the Administration's policy feel that the key word in Article 53 is "enforcement." They would point out that there is no enforcement action being taken in Vietnam but only the defense of the Republic of Vietnam from armed attack directed from the North. Hence they hold that action taken through SEATO by the United States is being accomplished under Article 51 of the Charter,<sup>29/</sup> which provides for collective defense against armed attack, and under paragraph 1 of Article IV of the SEATO Treaty, which provides for the use of force by one or more member states in the case of "aggression by armed attack."

Many critics of the Administration do not accept the view that the conflict in South Vietnam involves "aggression by armed attack" from the North; therefore they feel that the American action in Vietnam is authorized neither under the U.N. Charter nor the SEATO Treaty.

---

<sup>28/</sup> Memorandum of Law, op. cit., p. 24015.

<sup>29/</sup> See pages 9 and 10 above.

Indeed, a good deal of the question over whether or not the United States is acting within its rights as a member of the United Nations in responding as it is to the Vietnam Crisis depends on one's opinion of whether or not there has been an "armed attack" from the North. Unfortunately, this is not a matter which is possible to fully explore in this short report.

d. The Geneva Accords of 1954

The United States is not a signatory party to the Geneva Accords of 1954. It did, however, participate in the discussions which led to them and issued a unilateral declaration on July 21, 1954 which stated that the United States would "refrain from the threat or the use of force to disturb them, in accordance with Article 2(4) of the Charter of the United Nations."<sup>30/</sup>

Critics of American policy contend that the United States thus recognized that any violation of this declaration would be a violation of its obligations under the Charter of the United Nations and, therefore, indirectly, a violation of the U.S. Constitution since the former's treaty status makes it the law of the land. \*

Once again whether or not the United States has violated the United Nations Charter would appear to depend on whether or not an

---

<sup>30/</sup> U.S. Committee on Foreign Relations. Senate. Background information relating to Southeast Asia and Vietnam. (rev. ed.) Washington, U.S. Govt. Print. Off., 1965, p. 61. It has been suggested that the U.S. declaration to abide by the Geneva Accords stated as "provided" that other states did likewise; (Trager, Frank N. Back to Geneva '54? An act of folly! Vietnam perspectives. New York, American Friends of Vietnam, Inc., 1965, p. 2), however, there is no such qualifying statement in the declaration itself.

"armed attack" has occurred from the North. Supporters of the Administration claim it has and that the United States is acting within its rights to defend the independence of South Vietnam in accordance with Article 51 of the United Nations Charter and the Geneva Accords.<sup>21/</sup> Opponents of the Administration's policy claim the opposite.

This report makes no attempt to reach any final conclusions on the question of the constitutionality of the American commitment in Vietnam. Nevertheless, it seems clear that whereas a declaration of war by Congress would end any question of whether the President is authorized to conduct the war under the Constitution, such a declaration would in no way affect the status of United States actions in Vietnam, in regard to the United Nations Charter, SEATO, or the Geneva Accords.

3. The authority of the President to conduct operations in Korea and Vietnam: a brief comparison

Those who supported President Truman's authority to take action in Korea held that the President, by virtue of his authority as Commander-in-Chief and his duty to see that the laws are faithfully executed, acted properly to carry out recommendations made by the U.S. Security Council in accordance with the United Nations Charter.

Article 39 of the U.N. Charter provides for a determination of the existence of any "threat to the peace, breach of the peace, or

---

<sup>21/</sup> No mention is made here of the complex and still unclear issues involving the holding of elections under the Geneva Accords scheduled for 1956 since it does not directly involve the questions considered in this report.

act of aggression" by the Security Council and the Council's determination of what measures shall be taken to restore the peace. The Security Council resolution of June 27, 1950 called upon member nations to assist the Republic of Korea in repelling the armed attack from the North and to aid in restoring international peace and security in the area.

Those who challenged the authority of the President in Korea held that the Security Council resolution of June 27, 1950 was purely of a recommendatory nature; hence the United States was not legally obligated to act.<sup>32/</sup> Furthermore, they claimed that although there were some precedents for the President to exercise his powers as Commander-in-Chief independently of Congress such actions usually involved only small forces, nothing approaching the scope of the commitment in Korea.

Some of those who have questioned the authority of the President to commit American troops in Vietnam have been willing to accept the commitment in Korea on the basis of the United Nations Security Council resolutions urging such action. Others would accept neither on the basis of the Constitutional interpretations opposing the use of Presidential prerogative mentioned in part one above. Still others would contend that the use of American troops in Vietnam represents a more legitimate use of Presidential authority than in the Korean instance. They contrast the swift and decisive commitment of a vast number of American forces to Korea in 1950, without prior consultation of

---

<sup>32/</sup> Other arguments were also presented which centered around an interpretation of Article 6 of the Charter; however, they are not directly relevant to the question of action in Vietnam considered here.



GOVT PUB

JUN 8 1970