CHAPTER 10

THE AMERICAN CONSTITUTION AND THE AIR WAR*

The bombing in North and South Vietnam, Laos and Cambodia described in previous chapters has taken place under the orders not of Congress but of the President of the United States. The President has stated that he acts as "Commander in Chief" of the armed forces in ordering the bombing. Currently, the main rationale for continuing the bombing is that it "protects the lives of American servicemen" whom the Chief Executive had previously sent to fight the undeclared war in Indochina.

Clearly, the constitutionality of the air war in Indochina is a part of the broader question whether the President had the power to involve this nation's armed forces in a war that had not been declared by Congress--though air warfare is presently in many ways a more dangerous and destabilizing aspect of power politics than the use of ground forces. Every bombardment could result in attacks on the perceived vital interests of other major powers. The threat of nuclear escalation in bombing missions is always present. Moreover, air warfare--by its very nature, as demonstrated in Indochina--tends to expand across boundaries more readily than ground warfare.

There is, indeed, a substantial question whether this air warfare, as conducted by the United States in Indochina, is in violation of international law--an issue which will be discussed in the next chapter. In any event, it is clear that the Executive's use of air warfare, on a scale that has already exceeded the total tonnage of bombs dropped in the Second World War and Korean War, raises an issue of profound importance under the United States constitution.

To examine this question of constitutionality, we should look at the words of the Constitution, the meaning that the Framers intended that the words should have, and the development of constitutional interpretation since 1789. But before examining the document itself, let us first consider the argument that apart from whatever the Framers intended, the Constitution has necessarily been changed and modified to meet the exigencies of the modern age. This argument is an interesting one in light of recent Supreme Court cases in the areas of civil rights, where the Court has often justified the expression of Constitutional protection in light of progressive societal demands and needs. One is tempted to say that in the modern world the President is the only efficient controller of foreign policy. Whatever his con-

*This chapter was contributed at our invitation by Anthony D'Amato, Associate Professor of Law, Northwestern University. He did not otherwise participate in the Study Group [Editors].
stitutional powers, he should be given the tools to deal with other nations flexibly and efficiently in the light of national interest as defined by him. An example that readily comes to mind is President Roosevelt's handling of preparations for the Second World War in the face of unenlightened Congressional demands for neutrality.

The problem with allowing one branch of the government to expand its Constitutional powers at the expense of another branch is not the same as the Courts' expansion of its judicial powers in the areas of civil rights and criminal justice. To say that we have a "living Constitution" may be perfectly satisfactory for the expansion of national powers at the expense of states in a Federal system—which is what has occurred in the civil rights and criminal area. But it is not sound with respect to the separation of powers and the equilibrium of checks and balances among the branches of the national government. If, for example, the courts were to allow the President to encroach upon Congressional powers by appeals through the mass media, we pretty soon would have a one-man government. The courts have indicated the precise opposite. In the famous Steel Seizure Case, the Supreme Court held during the undeclared Korean War that the President could not resort to "Emergency Powers" or to "Commander-in-Chief Powers" to validate executive seizure of the steel mills when the Congress had not explicitly granted its own legislative powers of seizure to the President.\(^1\) In the course of that case the Justice Department contended, on behalf of President Truman, that a number of prior instances of "executive seizures" and other decisive "executive actions" during national emergencies had not been struck down by the courts; these prior acts thus amounted to precedents for Truman's seizures. The Justice Department argued that the Constitution had been, and was being, expanded by these assertions of Presidential powers and that by 1950 such actions were clearly constitutional. The Supreme Court, however, did not agree with this argument. Instead the Court indicated that no amount of "precedents" of this sort could amend the Constitution. In other words, a history of gradually increasing encroachments by one branch of the government upon another could not result in a permanent reallocation of constitutional powers. A case that challenged any of these encroachments, such as the Steel Seizure case, if upheld by the courts, would result in judicial restoration of the Constitution's balance among the branches of government.

Turning then to the question of the constitutionality of the undeclared war in Vietnam, let us ask first what argument can be made to support total Presidential authority to decide upon, and then to conduct, such a war.

The best case that can be made for the President is that he is Commander

\(^1\)Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
in Chief, and can also (with Senate concurrence) make treaties and appoint ambassadors. Do these powers mean that the President can decide upon war? Alexander Hamilton, that staunch proponent of Executive power, wrote in *The Federalist* that the commander-in-chief role meant simply that the President was to be the top general of the army and the chief admiral of the navy.  

And Abraham Lincoln, surely one of the outstanding proponents of the expansion of Presidential powers, wrote that

> Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our Constitution understood to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.

A study of the debates of the Constitutional Convention bears out these viewpoints. The Framers, it must be remembered, modified but did not overthrow the setup that had obtained under the Articles of Confederation. Unlike the Articles, the Constitution gave more powers to the central government, particularly in the areas of commerce and national defense. But the pervading principle was one of representative, legislative government, for the Framers had been through a revolution against non-representation and "kingly" oppression: Congress was given vast powers over commerce and national defense. The new Constitution added a President as chief executive, but the powers of the President were carefully limited. The decision whether to go to war was given solely to the new Congress in the power "to declare war," a phrase taken from the Articles of Confederation which, too, had given to "the United States in Congress Assembled" the power to declare war.

That the intention of the Framers was to give only Congress the power to decide upon war—and not the President, who was only to be the top general and chief admiral—follows also from the various state constitutions at the time of the adoption of the national Constitution. A reading of the constitutions of the thirteen states reveals a consistent pattern of legislative determination of matters of military duty. Citizens of the pre-1789 sovereign states could volunteer for military duty, but if they were to be called in for such duty (as members of the state militia) an act of the legislature

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3 See R. Basler, *The Collected Works of Abraham Lincoln* (1953), pp. 451-452. (It is noted at the same time that Lincoln as President set some of the precedents for Executive war-making powers which could be invoked in support of present Executive claims.) See generally L. Velvel, *Undeclared War and Civil Disobedience* (New York: Dunellen, 1970), pp. 11-89.

was the necessary prerequisite. Again, one gets the sense of a pervading philosophy that the most important questions of life and death were to be handled by a representative, legislative government. The Framers, and with them all of the people, were not about to entrust matters of war and peace to a single governor or president but instead insisted that the legislature alone could make such decisions.

The Constitution as finally adopted clearly reflects this opinion. We have already seen how few foreign-affairs powers were actually given to the President. In contrast, Congress was given the power in Section 8 of Article I to tax to provide for the common defense, to define offenses against the law of nations, to declare war, to make rules concerning captures on land and water, to raise and support armies and provide a navy, and to call forth the militia when needed.

Clearly, if it were not for Korea and Vietnam, no reasonable man looking at the Constitution and at the intent of its Framers could conclude that the President, and not Congress, could lead this nation on his own initiative into a protracted foreign war, including bombing of the sort carried out in Indochina. At the very most, a President might order his troops to act in an emergency of brief duration, such as immediate self-defense, but only until Congress might have a chance to act. This "emergency" exception can easily be read into the Constitution without covering the cases of Korea and Vietnam, which were long wars with ample time for Congressional action. Indeed, the war in Indochina is the longest war in American history.

Some observers, however, insist upon focusing solely upon the Congressional power to "declare war." They argue as if this were the only power that Congress had in the war area—when, as we have just seen, there are many powers authorized—and they then proceed to give this one power an emasculated meaning. For example, some attorneys in the Department of Justice have claimed that the Congressional power to declare war means only that if a war is going on, Congress may or may not decide to declare that it really is a war. They argue further that this is not an entirely meaningless gesture. Various insurance contracts that people may have on their lives or property might have escape clauses depending on whether a war is going on. Moreover, certain international treaty obligations that the United States may have, or other commitments under customary international law, may depend upon whether the U.S. is an official "belligerent" in an actual war.

7 It may be noted that there have been many wars involving many nations since World War II
This argument gives to the term "declare war" such a trivial meaning as to rob it of the substance intended by the Framers in a way which no one would do to the terms "regulate commerce" or "coin money" (which are also found in the same section of the Constitution as the declaration-of-war clause). In its own terms, however, the argument is never actually supported. Which insurance policies depend upon a declaration of war by Congress? Insurance policies typically define "war" in terms other than whether or not Congress has declared it, and we even have some Federal cases arising after the Korean War that held it was a "war" for the purposes of insurance policies even though Congress had not declared it to be a war. Also, what treaties and what rules of international law depend upon a Congressional declaration of war? No treaties have been cited; and as for customary international law, such law has never depended upon what a nation unilaterally decides are facts, such as a Congressional decision that a given situation is a "war."  

A different argument denigrating the effect of the declaration-of-war clause is that in this modern age, the President needs great flexibility to engage this nation in limited wars and other forms of limited military engagements. For Congress to come along and "declare war" would be to escalate the situation and perhaps make a total war out of a delicate limited war. According to this line of argument, the declaration-of-war clause is irrelevant to the needs of the modern age.  

It is interesting to look at the implications of this argument. Apparently if the United States is to engage in limited wars--of whatever duration and involving whatever number of casualties--Congress' power to declare war is anachronistic. On the other hand, if the United States were to engage in a total war of nuclear annihilation, then and only then would it be appropriate for Congress to declare war. No one explains in this argument how and under what conditions Congress could be called upon to deliberate and act in a total-war situation which, as we are told, could involve the destruction of

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the human race in a nuclear exchange that might last a couple of hours. The war itself could be irrevocably set off in fifteen minutes. Perhaps it is comforting to know that in the opinion of some learned jurists, Congress would truly have full power to declare total war, even if the circumstances make it unlikely that anyone at the time would be paying attention to what Congress might or might not be doing.

In this view, the Korean and Indochina wars are examples of limited, "Presidential" wars—the modern sort of wars that are irrelevant to Congress.\textsuperscript{11} The Congressional role is thus reserved for World Wars I, II, and lastly, III. Is it reasonable to believe, knowing what we know about the background and language of the Constitution, that its Framers had only these total wars in mind when they gave Congress the power to declare war? Merely to state the question suggests its absurdity. To the Framers of our Constitution, limited wars were natural, plentiful, easily contemplated, and totally forseeable. In those days we engaged in a limited war against France, and soon later in a limited war against England. Moreover, the European countries were constantly involved in limited wars against each other. Total fight-to-the-death wars were rare, and of course the twentieth century's versions had not yet happened. Thus, contrary to the view propounded above, the Framers of the Constitution were dealing precisely with limited wars (such as those in Korea and Vietnam) when they gave Congress the power to declare war.

Finally, even in those days Congress did not always "declare war" in such terms. A limited war was "authorized" against France, for example.\textsuperscript{12} The declaration-of-war clause does not require Congress to "declare" war as an all-out effort, but, sensibly, to "authorize" it in whatever language Congress deems appropriate. This is a point which the apologists for Presidential power conveniently overlook in their insistence that Congress can only "declare" war.

Some lawyers for the government are still heard to claim that Congress in fact declared war when it passed the Tonkin Gulf Resolution in 1964.\textsuperscript{13}

\textsuperscript{11}The question of responsibility is clouded by the fact that some Congressmen take a public position opposing such wars but vote for war appropriations, saying the war is the President's responsibility once it has been started. This permits them to stand politically with the "doves" and practically with the "hawks," vitiating their representative function vis-a-vis their constituencies. This is good reason why Congressmen should have to stand and be counted on the initial authorization of war—as the Framers intended they should.

\textsuperscript{12}Act of July 7, 1798, 1 Stat. 578 (1798); "That the President of the United States shall be, and is hereby authorized to instruct the commanders of the public vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdiction limits of the United States, or elsewhere, on the high seas...." See also the authorization of the Civil War, Act of Aug. 6, 1861, Ch. 63, Para. 3, 12 Stat. 326 (1861).

But as a Congressional investigating committee later reported, that Resolution was obtained on the basis of Executive misrepresentations to Congress. Additionally, the language of the Resolution is too broad and vague to be construed as a declaration of war. In any case, the Gulf of Tonkin Resolution was repealed by both houses of Congress in 1971.

What we have in Indochina is an undeclared war, a war initiated by the President (successive incumbents, actually) acting under his own authority under color of law. But nevertheless one might ask: has not Congress, by passing military appropriations and by renewing the Selective Service, in fact consented to the war? Declarations of war aside, this is in effect, according to such reasoning, as much a Congressional war as a Presidential war and hence it is indeed constitutional. If Congress does not like what is going on over Laos, it can cut off the funds and force the President to stop the bombing of that country. By its power of the purse, one might argue, Congress in fact controls the war-making power.

This line of reasoning has been upheld by the Federal court of appeals in New York in the case of Orlando v. Laird (1971). The Supreme Court declined to review the Orlando case in October 1971, and hence it stands as an affirmation of the "appropriations" argument, which would bypass the declaration-of-war clause. In another case which is moving slowly through the Federal courts, thirteen United States Congressmen have challenged the appropriations argument, filing affidavits that the expenditure of monies for the war in Indochina is not at all equivalent to the power to decide upon war. This case of Mitchell v. Laird is unique in that it is the first time in history that Congressmen have sued the executive branch of the government directly over an issue of Constitutional separation of powers and the rights of the legislative branch.

Attorneys for the Congressmen argue first of all that the decision to initiate war is far more important than any subsequent decision to consent to the war or to ratify it. Once the President gets the country into a war,
the momentum changes; supporting the war becomes, for many legislators, a matter of national responsibility. In the first year or two of any war there is vast public support, however unreasoning, based simply on a conviction that the President must know what he is doing. It is vastly more difficult by cutting off funds to stop a war that has been started than to decline to go to war in the first place. There is little on the public record to suggest that a President could have gotten Congress to authorize war in Indochina; that is why the executive branch backed into the war or sneaked into it, depending upon how one interprets the Pentagon Papers.

Congressmen will appropriate funds for a war for reasons other than a sense of national responsibility. For humanitarian reasons they do not want to cut off support for troops in the field. Moreover, they will renew the Selective Service Act so that troops can be rotated out of combat. Many Congressmen, in voting for defense appropriations, have stated on the floor of Congress that they were opposed to the war but felt that they could not cut off funds for a war that had already been started. Other Congressmen have stated that it is inappropriate, under Congressional procedures, to make substantive decisions in the debate to appropriate money. In other words, if the "power of the purse" were pushed to its limit, there would be no need for any committee in Congress other than the Finance and Appropriations Committees. Instead, long tradition has it that the appropriations process should be confined to questioning the dollar amount of appropriations and not the substantive policies for which the appropriations are allocated.

Another fault with the "appropriations" argument is that military defense expenditures--due to the power of conservative leadership of appropriations committees--come in a lump sum. It is difficult, and in some cases impossible, to separate out those appropriations that are related to Indochina from the nongeographical categories that are used in the defense bills. Of course it is possible to put a rider on an appropriations bill cutting off the funds for Indochina--possible but not likely, since amendments are given very short shrift by the tight rules of the House of Representatives. But then the President could veto the entire bill and send it back, and one may be sure that Congress would not fail to appropriate the overall funds needed for national defense (missiles, submarines, troops all around the world, military pay, etc.). Thus the President effectively has a veto over any attempted fund cutoff, whereas he could have no veto over the failure of Congress to declare war in the first instance.

As for renewals of the Selective Service Act, one of the Congressmen who is a plaintiff in Mitchell v. Laird points out in his affidavit that the Selective Service Act has been renewed continuously since 1940, in time of peace as well as war.21

But when all is said and done, the fact remains that Congress has certainly been implicated in the support of the war in Indochina. There may be many Congressmen now who are joining in the opposition to the war, as it has become unpopular with the public, but their public position four, six and eight years ago was one of acquiescence or even endorsement of the war. Even now, while many Congressmen are advocating "bringing the boys home," they are not talking about bringing the pilots home or halting the planes and helicopters flown continuously over Indochina. Should we conclude, therefore, that Congress "really" consented to the war even if Congress did not initiate it, and that it is therefore absurd to say that the war is unconstitutional?

On the contrary, the constitutional argument is fundamentally one of procedure. The Constitution requires that Congress declare or authorize a war. This requirement was built in because the Framers wanted to make sure that such a grave question would be decided in the glare of national debate by legislators who would have to stand up and be counted on the issue, justifying their position on the question to their constituents. The Framers specifically tried to avoid the kind of subterfuge that has in fact happened with respect to Vietnam, where a President takes the initiative and Congressmen "reluctantly" go along. The Framers were well aware of the British experience where kings got their nations into unwanted wars and Parliament came along after the fact and paid the bills. A mere copying of the appropriations "power of the purse" from Parliament to Congress surely would not correct the unenviable British experience. Thus the Framers put in a separate clause—that Congress must declare war.22

This was different from the unwritten British constitution and for good reason. It is historically, and constitutionally, unsound to argue that we can read the declaration-of-war clause out of the Constitution because Congress has the power of the purse. Rather, the Constitution as written forced

21Ibid., at ¶4355: "This country has had a draft since 1940, in both times of war and times of peace. It obviously needs an army in peacetime, and this is aside from the fact that troops are fighting in Vietnam. Unless and until there is a volunteer army, the army must be raised by conscription. Thus, Congressmen felt it necessary to vote to extend Selective Service even though they would not have voted to authorize the war and were opposed to using American troops in the Indo-China war."

Congress either to authorize war or to suffer the consequences of not going to war. In the words of a leading commentator on the Constitution, the Framers intended to make it difficult for this nation to get into war but easy to get out of war.\(^23\) In the past two decades, for whatever reasons, this nation's government has effectively reversed the clear intent of the Framers and the manifest meaning of the Constitution. The characteristics of air war have reinforced this trend, since they make it easier to get into such a war than into one limited to ground forces.

One may then ask, if all this is so, why have not the courts declared the war to be unconstitutional? The simple answer is that the courts have been as reticent as Congress. Indeed, despite President Nixon's pronounced preference for "strict construction" of the Constitution, he has sought out appointees to the Supreme Court who would not consider reversing his war. In fact, before Chief Justice Burger was nominated, he joined in an opinion in the Federal court of appeals, where he was sitting as a judge, to the effect it was a "waste of judicial time" to hear arguments on the unconstitutionality of the Vietnam war.\(^24\) In that opinion, the Court summarily dismissed a case of draft resisters challenging the war without even pausing to examine their arguments on the merits.

In fact, except for two lower-court cases, the courts have thrown out all cases involving the constitutionality of the war without going into the arguments--some observers believe, because the arguments are pretty much irrefutable. One exception has been mentioned--the court of appeals in New York, which held the war constitutional because of Congressional appropriations.\(^25\) The other exception was a case tried by District Judge Sweigert on the West Coast, who actually held that the plaintiffs--three law students in the reserves--had made out a prima facie case that the war in fact was unconstitutional.\(^26\) His decision, however, was immediately appealed by the Department of Justice, which then filed several motions in the court of appeals to delay the hearing of the case, with the result that only after a year had passed did the court of appeals hear oral arguments; apparently it is taking considerable time in studying the matter prior to announcing a decision.

Many years from now, historians will surely look back upon this war and note the great failure of the courts to uphold the plain meaning of the Constitution. They will also note the failure of Congress to assert its own

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\(^{23}\) Joseph Story, 2 Commentaries on the Constitution of the United States 89-90 (2nd ed. 1851).

\(^{24}\) Luftig v. McNamara, 373 F. 2d 664 (1967), cert. den. 387 U.S. 945 (1967).

\(^{25}\) See note 17 above.

powers in the face of Presidential monopolization of authority in foreign affairs. But this is of little significance at the present. What is important is that the courts' failure to rule upon the question of the constitutionality of the war not be taken to mean that the issue is a trivial one or that the war is ipso facto constitutional.

The question of constitutionality is a fundamental one, and the more Americans conclude for themselves that the war violates our Constitution, the less support there will be for its continuation. Even if the courts will not declare the war unconstitutional, the American people can do this in effect through political channels, giving a vote of confidence to the Constitution as written and not as amended de facto by the executive branch with the tacit consent of a diffident legislature\textsuperscript{27} and an indifferent judiciary.\textsuperscript{28}

\textsuperscript{27} The Senate Foreign Relations Committee recently gave unanimous approval to legislation which would restrict the war-making powers of the Presidency, thereby acknowledging what it sees as an imbalance of powers in this area. The bill provides that the President can use armed force to forestall an attack on the U.S. or its armed forces or to protect U.S. citizens while being evacuated from a foreign country, but requires Congressional approval for continuing hostilities more than 30 days. Also, unless Congress authorized it, the President would be prohibited from sending military advisors to a country engaged in hostilities. Sponsors of the bill range from Senator Jacob Javits (R-N.Y.), a Senate liberal, to Senator John Stennis (D-Miss.), a Senate conservative and chairman of the Armed Services Committee. Passage of some version of this bill by the full Senate seems assured. See \textit{New York Times}, December 8, 1971, p. 14.

\textsuperscript{28} The analysis of this chapter has not dealt explicitly with the doctrine of "political questions" which students of law recognize as a means whereby the Supreme Court has on numerous occasions declined to deal with certain types of cases because they involve questions of a highly delicate political nature best resolved by other branches of the government. Some people have argued that the Supreme Court has simply and impliedly applied the "political question" doctrine in ducking cases involving the Vietnam War. However, a study of this doctrine in constitutional law indicates its inapplicability to the Vietnam situation. In the first place, at issue in the various cases is the constitutionality of the President's actions. As the Supreme Court held in the recent case of \textit{Powell v. McCormack}, 395 U.S. 486, 549 (1969), a constitutional determination by its very nature involves judicially manageable standards which a court can handle. Secondly, the question involves the President's powers vis-a-vis Congress, and thus for the courts to say that such an issue is non-justiciable would simply amount to saying that there is no "umpire" in such a conflict of powers. But the Supreme Court role is traditionally that of "umpire" in a case involving executive-legislative conflicts, as the Supreme Court pointed out in the Steel Seizure Case [\textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579 (1952)]. No Supreme Court case has ever been cited applying the "political question" exception to matters of the division of power between Congress and the President. To the contrary, there are numerous cases throughout history, even involving "war" powers and coming up when the nation was at war, where the Supreme Court has handled the substantive issues and has not even seen fit to mention the "political question" doctrine. For a listing of many of these cases, see D'Amato \textit{et al.}, \textit{op. cit.} footnote 4 above, pp. 115-116.