AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 8: The New Deal and Great Society Era – Separation of Powers

*Nicholas Katzenbach*, **Memorandum on Presidential Authority in Vietnam** (1965)[[1]](#footnote-1)

*The United States first sent military advisors to South Vietnam in the 1950s, and increased that commitment over time while also patrolling the area with naval vessels. In 1964, American ships reported an attack on them by North Vietnamese forces in the Gulf of Tonkin. In response, Congress passed the Gulf of Tonkin Resolution which authorized the president “to take all necessary steps, including the use of armed force” to “repel any armed attack against the forces of the United States and to prevent further aggression” and to “assist any member . . . of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.” In the spring of 1965, the United States launched a bombing campaign against North Vietnam, but on June 5th the American ambassador in Vietnam informed Washington that the South Vietnamese government was likely to fall unless the United States committed ground troops and a few days later General William Westmoreland requested tens of thousands of American soldiers be sent to South Vietnam. The same day, Attorney General Nicholas Katzenbach wrote a memo to the president concluding that the contemplated military build-up in South Vietnam would not require congressional approval. At the end of the month, President Lyndon Johnson announced an immediate escalation of the American military presence in Vietnam and an expansion of the American military draft. No further congressional authorization was sought for the use of military force in Southeast Asia.*

You have asked for my views as to whether further Congressional approval should be sought in connection with the proposed deployment and use of troops in South Vietnam. . . .

The use of troops being contemplated would involve some departure from the functions generally served by U.S. ground forces previously, i.e., as “advisers” accompanying South Vietnamese forces, or as guards engaged in protecting U.S. installations and forces against attack. The operations being contemplated would involve attacks on “targets of opportunity” located as much as 150 miles distant from U.S. installations. . . . All of the activities being contemplated would be undertaken with the consent of the government of South Vietnam and would be limited to the territory of that country.

It is my view that, as a matter of law, further Congressional approval at this time is not necessary.

Under the Constitution the President has authority, as Commander-in-Chief of the armed forces (Article II, section 2), and as the sole organ of the United States in the field of foreign relations (*United States v. Curtiss-Wright Corp*. (1936)), to deploy and use the armed forces abroad. This authority has generally been broadly interpreted, and the armed forces have been used without legislative authority on scores of occasions including those involving “acts of war.”

In the absence of some action by Congress, the only legal limitation on the power of the President to commit the armed forces arises by implication from Article I, section 8 of the Constitution, under which only Congress is authorized to “declare war.” I believe it is a fair, although not uncontroversial, summary of nearly two centuries of history to say that the 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. Unless such unlimited authority is exercised by the President, his legal position in using the armed forces is sustainable. It has been argued that the President may, without Congressional approval, take only urgent defensive measures, or that he may take only minor police measures that are not likely to commit the United States to full scale war. However, the action taken by President Truman in Korea, which is not widely regarded as having been illegal, shows how extensive the powers of the President may be. The same illustration also shows how inextricably tied together the legal and policy issues involved in such a situation necessarily are.

On many occasions the President has asked for Congressional approval of his action. When Congress responds to such a request the strictly legal effects of its action, if short of a declaration of war, are likely to be to limit rather than extend his authority. In the absence of Congressional action, the President's legal position is sustainable so long as it is consistent with the Constitution, i.e., so long as his action does not amount to an infringement of the power of Congress to declare all-out war. There is authority, however, indicating that in areas where both Executive and Congressional powers are operative, the Executive must observe the limits of any Congressional authorization that may be enacted even though, in the absence of any authorization, his Executive powers under the Constitution would clearly go beyond the Congressional grant. . . . The Congressional authorization obviously can serve indispensable political purposes and it may serve to allay the legal doubts of narrow constructionists. These advantages must be weighed, however, against the legal limitations that may be effectively imposed by a Congressional authorization and its legislative history.

It is my view that as President you would have the authority, in the absence of any action by Congress, to use the armed forces in the manner now proposed. The commitment involved is certainly far less than all-out war. . . . It should be noted also that none of the acts proposed is an act of war against a foreign nation; that is to say, the activity involved would take place solely within the territory of South Vietnam and at the invitation of its government, and would be directed against forces claiming to be insurgents rather than the forces of a foreign nation.

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1. Excerpt taken from Lyndon B. Johnson Presidential Library, National Security File, Country File, Vietnam, 7B Legality Considerations. [↑](#footnote-ref-1)