

THE VIETNAM WAR, IMPERIAL PRESIDENTS,
AND LIMITED DEMOCRACY

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ABSTRACT

During the Vietnam conflict presidents Lyndon Johnson and Richard Nixon wielded war powers without congressional declarations of war. The legislature and judiciary more or less deferred to these “Imperial Presidents” rather than check or balance their war policies. This deferment seriously compromised and, in some cases, even nullified representative democracy. Populist democracy, in the form of the Antiwar Movement, fared little better. Millions of citizens repeatedly expressed their opposition to the war in mass demonstrations, especially after 1967. And yet active American combat in Vietnam continued until 1973. The ineffectiveness of the Antiwar Movement is consistent with the Elite Theory of democracy wherein a small minority of powerful people in corporations (including media corporations) and government offset and counteract populism. Ironically, in this case, the Imperial Presidency also overwhelmed legislative and judicial elites. Thus, in the most dramatic subset of a greater post-World War II phenomenon, the Vietnam War featured a monarch-like executive using war powers that circumvented both direct (populist) and indirect (representative) aspects of democracy.

KEYWORDS

Vietnam war; antiwar movement, imperial presidency, war powers, elite theory (democracy)

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I. INTRODUCTION

Since World War II, changes in the executive exercise of war powers have made the American presidency resemble a monarchy far more than the Founding Fathers ever intended. The Founders deliberately created an executive office with far less power than the English monarchy they had recently rebelled against. In the United States Constitution the Framers explicitly vested Congress with war powers,¹ not the president. And yet, after World War II presidents of both major parties have engaged the United States in a number of foreign wars in Korea, Vietnam, and the Persian Gulf (among other places) without seeking or receiving congressional declarations of war. This *de facto* executive power became part of what Arthur Schlesinger referred to as the Imperial Presidency. Schlesinger was especially referring to the Vietnam War and how both presidents Lyndon Johnson and Richard Nixon conducted this conflict in great secrecy from the American citizenry and their representatives in Congress.²

Equally disturbing, both Congress and the judiciary were at least partially complicit in enabling the Imperial Presidency, whether consciously or inadvertently. This explains one reason why active combat in the Vietnam War continued for six years after 1967, when a significant portion of the American public began to doubt the probability of victory in the conflict, question its strategic necessity, and question the morality of American involvement in what was basically another nation's civil war. Without legislative and judicial help, massive populist opposition to the war proved ultimately ineffective. The mass demonstrations—unprecedented and since unparalleled in American history—certainly contributed to a mood of national unrest, but it is impossible to prove that they fundamentally changed war policies. In fact, presidents Johnson and Nixon continued the war in explicit defiance of the Antiwar Movement.

Schlesinger was right; these were imperial presidents, and such executives wield authority more like monarchs than as holders of an office that the Founders intended to be co-equal with the legislature and judiciary through checks and balances. Given this, it is completely unsurprising that imperial presidents also tended to dismiss popular sentiment against their policies, regardless of the anti-Vietnam War's large, widespread, and dramatic public demonstrations.

In this essay, first we will examine the two presidents (Johnson and Nixon) whose tenure encompassed most of the Vietnam War and certainly its most significant years of combat. Consistent with the Imperial Presidency, both Johnson and Nixon conducted the Vietnam War with their own prerogatives paramount. The executive branch largely created the war, escalated it, and modified policy when it saw fit, if sometimes making somewhat token acknowledgements of the war's growing unpopularity with the public and Congress. Nixon and National Security Advisor Henry Kissinger (later secretary of state) ended the war largely and belatedly on their own terms and specifically not those long advocated by antiwar protestors or congressional doves. We may readily conclude that Johnson, Nixon, and Kissinger did not yield to the Antiwar Movement, as reflected in their actions, words, and policies at the time, confirmed later in retrospective comments.

¹ Article I, Section 8, Clause 11.

² See, ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

As disturbing as their presidential secrecy may have been, we should remember to see such executive behavior within the Cold War historical context when leaders all over the world feared the prospect of a third world war, or at least a nuclear war between the United States and the Soviet Union. One could also argue that the secrecy aspect was simply part of the modern administrative state (not to be confused with the conspiracy theory of the Deep State³) which inherently features a significant degree of classified information within and far beyond the executive branch.⁴ Sadly, government officials in general have regularly violated the 1966 Freedom of Information Act,⁵ but this conduct is merely a regular feature of the modern and contemporary bureaucratic state.⁶ Having said that, where do necessary secret policies end and illegal war conduct begin? The war actions of imperial presidents would suggest that such a question was and is immaterial to them. Yet such a question would be central for any philosophy of democracy, both in its representative and direct forms.

Next we will analyze the two other branches of government – legislative and judicial – ideally designed to check and balance each other and the executive branch. Whether inadvertent or deliberate, legislators’ and judges’ actions and inactions allowed the Imperial Presidency comparatively free reign. There was never a majority in either the House or Senate that voted to end funding for the war. Only toward the war’s final years did various senators begin introducing substantial bills designed to curtail the conflict, but they all ended in failed votes or were passed in diluted form. Congress notably failed to use their constitutional “power of the

³ David Rohde addresses this conspiracy theory in *IN DEEP: THE FBI, THE CIA, AND THE TRUTH ABOUT AMERICA’S “DEEP STATE”* (2020).

⁴ The era of “modern government secrecy” is actually centuries old, beginning during the Italian Renaissance among various city-states negotiating peace and power-sharing among themselves and with foreign powers. Historians usually trace the birth of this diplomacy to the 1454 Treaty of Lodi. See GARRETT MATTINGLY, *RENAISSANCE DIPLOMACY* (1959). Subsequent Machiavellian politics (mainly from Machiavelli’s early 1500s treatise, *THE PRINCE*) included a realpolitik embrace of diplomatic secrecy. For example, see the maneuverings of Castruccio Castracani in Niccolò Machiavelli, *The Life of Castruccio Castracani of Lucca*, *THE PRINCE* (1532). Today’s proponents of realistic politics would likely find WikiLeaks’ recent exposures of governmental secrets as naïve, at best. For an overview of WikiLeaks’ founder Julian Paul Assange and his collaborators, see ALEX GIBNEY, dir., *WE STEAL SECRETS: THE STORY OF WIKILEAKS* (2013).

⁵ PL 89-487, 80 Stat. 250.

⁶ Sam Archibald, a former director for the Special Subcommittee on Government Information, wrote “the sharpness of the tool depends substantially upon the will of the government—the will of the executive branch to honor the open-records provisions of the law, the will of the judicial branch to enforce the access-to-information provisions of the law and the will of the legislative branch to stand up for the people’s right to know if the other two branches emasculate the freedom of expression necessary to make participatory democracy work in the Information Age.” See SAM ARCHIBALD, *The Early Years of the Freedom of Information Act. 1955 to 1974*, PS: POLITICAL SCIENCE AND POLITICS 26:4 (Dec. 1993) at 731. Also see TED BRIDUS AND JACK GILLUM, *US Gov’t Sets Record for Failures to Find Files When Asked*, ASSOCIATED PRESS (March 18, 2016), and JOHN CHENAULT, *The Myth of Freedom of Information*, KENTUCKY LIBRARIES 78:2 (Spring 2014), available at <https://ir.library.louisville.edu/faculty/13/>.

purse”⁷ to cease funding the war, or to take any other significant legislative action to modify the war policies of the Imperial Presidency. The judiciary also balked in the face of the conflict, untenably arguing for executive prerogatives in the face of a missing congressional declaration of war, even to the point of obfuscating the fact that the Constitution specifically vests war powers in Congress, not the executive.

Some of those in the legislative and judicial branches who deferred to the executive war politics in Vietnam probably felt that the Imperial Presidency was a Cold War necessity. Detractors would undoubtedly feel concerned that such precedents served as an erosive effect on the democratic constitutional system itself. But when considering how these major branches of the national government failed to mitigate or end the war, it becomes all the less tenable to claim (as many have) that the populist Antiwar Movement had any more success.⁸

This brings us to our last section of the essay where we shall assess the much-noted Antiwar Movement. This was basically a populist movement with direct democracy aspirations. First, despite all the sensational media coverage of antiwar protests, at any given time demonstrators represented a small minority of Americans. As early as 1967, a much larger demographic began doubting and opposing the war, even while many of them objected to the public demonstrations and particularly their radical elements. We have such vivid images of the Antiwar Movement because of unprecedented media coverage, but overall this coverage was ambiguous. Massive demonstrations waged year after year had no substantial effect in ending or even shortening the war. This point is crucial because many Americans (and protesters in particular) nurture unrealistic notions of direct democracy that a representative system in a large nation simply cannot accommodate. Despite direct democracy elements (such as the famous trio of legislative referendum, ballot initiative, and candidate recall), the United States overwhelmingly operates its democracy through local, state, and national representative institutions.

Then-contemporary media (as well as subsequent historians) probably noticed and described the Antiwar Movement as much or even more than the war itself, including the reportage of numerous polls that consistently reflected significant unease with or outright opposition to the Vietnam War. And yet the war dragged on year after year, despite poll results and massive public unrest all over the nation. In the final assessment, the Antiwar Movement had a marginal, ambiguous, and sometimes even an outright backlash effect on the conduct of the war. Thus,

⁷ Article I, Section 8, Clause 1 of the U.S. Constitution reads: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” Article I, Section 9, Clause 7 of the U.S. Constitution reads: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”

⁸ Examples include JOE ALLEN, *VIETNAM: THE (LAST) WAR THE U.S. LOST* (2008) at 174, 175, 176; TERRY H. ANDERSON, *THE MOVEMENT AND THE SIXTIES* (1995) at 418; TOM WELLS, *THE WAR WITHIN: AMERICA’S BATTLE OVER VIETNAM* (2016) at 579. More generally, see MELVIN SMALL, *JOHNSON, NIXON, AND THE DOVES* (1988). For a gathering of former antiwar activists who still apparently believe they were instrumental in ending the war, see STEPHAN TALBOT, dir., *THE MOVEMENT AND THE ‘MADMAN’*, *American Experience*, season 35, episode 4, (PBS, March 28, 2023).

the Antiwar Movement's failures themselves defied notions direct democracy. By contrast, the Elite Theory of democracy⁹ holds that various corporate and governmental elites (not the people) actually wield the bulk of real power within American democracy anyway; certainly they would likely dismiss the Antiwar Movement's efficacy altogether.

II. THE EXECUTIVE

JOHNSON AND THE ANTIWAR MOVEMENT

President Johnson was far more concerned about hawks than doves when it came to Vietnam War policy. At one point Johnson apparently told undersecretary of state George Ball, "don't pay any attention to what those little shits on the campuses do. The great beast is the reactionary elements."¹⁰ Hawks wanted an expanded war, including a land invasion of North Vietnam and possibly even the use of nuclear weapons. Johnson clung to his limited war, much to the frustration of some of the military commanders on the ground, including General William Westmoreland.¹¹ But he had no respect nor agreement with doves opposing the war altogether.¹²

Johnson's popularity ratings were plunging, but his reasons for not seeking reelection were multifaceted, complicated, and often interrelated. Physical and mental exhaustion plagued Johnson at the end of his first term. His adherence to a limited war in Vietnam satisfied practically no one except Cold Warriors who appreciated that an expanded conflict risked the possibility of global expansion and even World War III. Antiwar candidate Robert Kennedy's entry into the Democratic primary race of 1968 was another crucial final factor in Johnson's decision to resign, and antiwar candidate Eugene McCarthy's strong second place showing in the New Hampshire primary was also ominous for Johnson's future prospects. Primary challengers followed other factors that had harmed Johnson's popularity, such as the numerous and widespread urban riots of 1967 and an economy succumbing to inflation (partly because of Johnson's hidden Vietnam War expenditures) going from 1% in 1964 up to 4.7% in 1968.¹³ As for the Vietnam War itself, it was the Tet Offensive – not antiwar protests on the home front – that became the most influential factor in deciding Johnson's retirement from politics.¹⁴ Undoubtedly

⁹ Generally see THOMAS R. DYE AND HARMON ZEIGLER, *THE IRONY OF DEMOCRACY: AN UNCOMMON INTRODUCTION TO AMERICAN POLITICS*, 13th ed. (2006).

¹⁰ As quoted by Secretary of Defense Clark Clifford. See CLARK CLIFFORD AND RICHARD HOLBROOKE, *COUNSEL TO THE PRESIDENT: A MEMOIR* (1991) at 417. Also see ROBERT S. MCNAMARA AND BRIAN VANDEMARK, *IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM* (1995) at 283-84.

¹¹ GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975* 3rd ed. (1996) at 223.

¹² As historian George Herring wrote, "Mistakenly believing that the peace movement was turning the public against the war, he [Johnson] set out to destroy it," even illegally employing the CIA to discredit Antiwar Movement leaders. See *id.* at 198.

¹³ Figures from Investopedia, <https://www.investopedia.com/inflation-rate-by-year-7253832>.

¹⁴ DORIS KEARNS GOODWIN, *LYNDON JOHNSON AND THE AMERICAN DREAM*, 2nd ed. (1976; 1991) at 335, 343.

Johnson was aware that his Vietnam War policy was faltering with the American electorate and that the Antiwar Movement (including dissent in the news media) was probably a contributing factor. But claiming the Antiwar Movement ended the Johnson presidency stretches credibility.

According to biographer Doris Kearns Goodwin, Johnson actually sympathized with the protesters but dismissed their claims and concerns as naïve, inexperienced, and uninformed, a product of youthful ignorance. Johnson actually blamed the professors for campus unrest, thinking they were old enough to know better, and that they were mired in their “egghead” world of theory rather than contending with profoundly consequential *realpolitik* decisions. During his decreasing popularity, Johnson actually began deceiving himself into believing that the American public liked him, approved of his policies (including his execution of the Vietnam War), and blamed widely disseminated contrary information on faulty pollsters and the media.¹⁵ Goodwin wrote that Johnson began descending into “rationalization, wishful thinking, denial, repression”¹⁶ instead of accepting the bleak realities of the Vietnam conflict and the public response.¹⁷ Dismissing young demonstrators as mere “exhibitionists” indicated how Johnson was not getting their message.¹⁸

The idea that Johnson more or less discounted the antiwar demonstrations becomes all the more clear when we consider that, increasingly, he began to ignore his own policy advisors who had any doubts about the premise of Vietnam as a crucial stance against the threat of worldwide communist revolution. When Secretary of Defense Robert McNamara himself began doubting the wisdom of the war, his days in the cabinet were numbered. He left in 1968 to head the World Bank. McNamara was but the highest profile cabinet member who began doubting Johnson’s Vietnam policy, yet Johnson had begun to ignore them all. Instead, fatefully, Johnson began listening only to those cabinet members who agreed with his approach, especially National Security Advisor Walt Rostow.¹⁹

Johnson himself never conceded to having been influenced by the Antiwar Movement. In fact, in 1971 he stood firm in asserting that he had well-served American foreign policy interests and the greater regional stability of Southeast Asia.²⁰ In fact, a pronounced stubborn streak characterized Johnson’s entire approach to the Vietnam War. Even after the Tet Offensive he refused to back down and actually escalated the air war in the following months.²¹ After leaving the presidency, Johnson looked back and blamed the media for a “chorus of defeatism” following the Tet Offensive.²² He felt those in the Antiwar Movement needed to examine their consciences for having been wrong about the war and America’s

¹⁵ *Id* at 312, 315; HERRING, *supra* note 11, at 240.

¹⁶ GOODWIN, *supra* note 14, at 311. Also, generally see pages 310-15, 318-20, 324-28.

¹⁷ Johnson began making fateful mistakes, like focusing on supportive letters from GIs, saying they “didn’t get the attention the TV people gave the exhibitionists.” See GOODWIN, *supra* note 14, at 315.

¹⁸ As Goodwin observed, “Long before the end of his Presidency, Johnson lost all ability to communicate with the peace movement.” See GOODWIN, *supra* note 14, at 327.

¹⁹ *Id* at 320.

²⁰ LYNDON BAINES JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963-1969* (1971) at 355, 422, 531.

²¹ HERRING, *supra* note 11, at 197, 201, 210, 227, 232.

²² JOHNSON, *supra* note 20, at 384.

foreign policy in Vietnam.²³ He blamed the Antiwar Movement for causing a “self-inflicted wound of critical proportions” to the United States.²⁴ An increasingly stalemated war had to be central in Johnson’s decision not to run for reelection, but one could argue that miscalculating the place of the North Vietnamese within Cold War international politics – and especially underestimating North Vietnamese resolve – was more important in this regard than the American Antiwar Movement. Certainly Johnson’s stated reaction to the Antiwar Movement’s influence was only negative or even retaliatory.

Whether or not we find Johnson’s retrospective views credible, his actions during his time in office certainly reflected the same policy he later defended. In other words, if the demonstrations had been so effective, why did Johnson refuse to end the war during the last eight months of 1968 after he had announced his retirement and had no reelection considerations at stake? Senator Thomas Eagleton offered what was probably the most likely reason: Johnson was simply not going to admit he had been mistaken about Vietnam, for it would be equivalent to admitting that the billions spent and the thousands of American lives lost had all been in vain. Unlike former Secretary of Defense Robert McNamara (who eventually admitted that the war was a mistake), Johnson remained resolute about his Vietnam War policy.²⁵ The Antiwar Movement may have contributed to Johnson’s unpopularity, his physical and mental exhaustion – and thus his decision not to seek reelection – but Johnson’s own actions made no concessions and followed no course demanded by the Antiwar Movement.

1968: THE MELTDOWN YEAR

Arguably, 1968 was the most intense year of anti-Vietnam War protests. That was also the year when American deaths peaked in Vietnam, following the Tet Offensive that both surprised American military commanders and revealed to the American public how Johnson had been lying about or at least vastly exaggerating North Vietnamese weaknesses and lack of resolve. 1968 was also when the nation witnessed the meltdown at the Democratic National Convention in Chicago, mainly between status quo Democrats (Hubert Humphrey supporters) and anti-war Democrats severely disheartened after Robert Kennedy’s assassination in June, but still hoping Gene McCarthy could carry the anti-war torch.

Nixon actually capitalized upon this public sentiment during the 1968 GOP convention, giving one of his many speeches about law and order. He described a supportive demographic: “the non-shouters, the non-demonstrators, that are not

²³ *Id* at 530, 531.

²⁴ In 1971 Johnson wrote, “There is not the slightest doubt in my mind that this dissension prolonged the war, prevented a peaceful settlement on reasonable terms, encouraged our enemies, disheartened our friends, and weakened us as a nation.” See *id* at 530.

²⁵ Senator Eagleton said, “Johnson was never going to do a 180° *mea culpa*. That’s not Lyndon Johnson. That’s not most politicians. John Kennedy said the Bay of Pigs was a failure and his popularity went up. But most politicians don’t like to say, ‘I failed.’ It’s tough to say.” See Thomas F. Eagleton interview (Nov. 3, 1998), *Politics in Missouri Oral History Project*, Collection #3929, Western Historical Manuscript Collection (Columbia, Missouri).

racist or sick, that are not guilty of the crime that plagues this land.”²⁶ And remember, the antiwar protests were but an aspect of the greater youth rebellion that included long male hair, abandonment of sexual mores, no end of narcotics, wild rock’n’roll music, et cetera—so, undoubtedly, Nixon was appealing to various conservative people who found *all of this* objectionable. The irony that male college students were exempt from the draft rankled the parents of working class young men who disproportionately served and died in the war.²⁷

How and why some candidates win and lose is always very complex, but it would be reasonable to conclude that the 1968 protests in particular played into Nixon’s “law and order” campaign appeal. Granted, the 1968 antiwar protests were preceded by a great deal of inner city rioting over racism, poverty, and police brutality throughout the 1960s. Following the widespread 1967 urban riots, James Earl Ray murdered Martin Luther King, Jr., in April 1968 and an entire new slew of urban riots broke out in over a hundred cities resulting in the deaths of over 35 people. Many Americans found the violent versions of the Antiwar Movement to be but a repulsive subset of all this. Thus, the “law and order” advocacy had a broad application in the campaigns of any number of political candidates that year, including Alabama’s governor George Wallace. 1968 not only witnessed Nixon’s victory in the presidential race but the defeat of the only two senators (Alaska’s Ernest Henry Gruening and Oregon’s Wayne Lyman Morse) who had opposed the 1964 Gulf of Tonkin Resolution, Johnson’s “police action license” for escalating the Vietnam War. None of this indicated much effectiveness for the Antiwar Movement’s efforts.

NIXON-KISSINGER AND THE ANTIWAR MOVEMENT

If the Antiwar Movement could not reverse or even mitigate Lyndon Johnson’s course in Vietnam, Richard Nixon and his powerful National Security Advisor Henry Kissinger were even less receptive to populist antiwar appeals. Nixon was especially dismissive of demonstrators, saying that allowing antiwar demonstrators to make foreign policy was equivalent to anarchy.²⁸ Nixon vowed that “under no circumstances” would he allow the antiwar protests to affect or influence him.²⁹ In his much-noted “Silent Majority” speech of November 3, 1969, Nixon offered the polite version of this objection when he stated, “I would be untrue to my oath of office if I allowed the policy of this Nation to be dictated by the minority who hold that [antiwar] point of view and who try to impose it on the Nation by mounting

²⁶ DAVID EMORY SHI & GEORGE BROWN TINDALL, *AMERICA: THE ESSENTIAL LEARNING EDITION* (2015) at 1040. *Also see* ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF THE LIBERALISM IN THE 1960S* (1984) at 401; MICHAEL SCHUMACHER, *THE CONTEST: THE 1968 ELECTION AND THE WAR FOR AMERICA’S SOUL* (2018), especially at 232, 237, 305, 331.

²⁷ As eminent historian Eric Foner wrote, Nixon “campaign[ed] as the champion of the ‘silent majority’—ordinary Americans who believed that change had gone too far—and called for a renewed commitment to ‘law and order.’” *See* ERIC FONER, *GIVE ME LIBERTY! AN AMERICAN HISTORY*, 4th ed., vol. 2 (2014) at 1017.

²⁸ STANLEY KARNOW, *VIETNAM: A HISTORY* (1983) at 599. *Also see* page 633.

²⁹ Quoted in Thomas J. Knock, “*Come Home, America*”: *The Story of George McGovern*, in *VIETNAM AND THE AMERICAN POLITICAL TRADITION: THE POLITICS OF DISSENT*, Randall B. Woods, ed. (Cambridge University Pr., 2003) at 112.

demonstrations in the street.”³⁰ In his 1978 memoir, Nixon reiterated some of Johnson’s objections to the Antiwar Movement when he claimed it had prolonged the war, hindered efforts to negotiate with the North Vietnamese, and harmed American military morale.³¹ Violent antiwar protesters especially angered him; he called them the “super hypocrites of our time.”³²

Despite polite public speech, historian Robert Dallek concluded that behind the scenes Nixon (similar to Johnson) was actually determined to retaliate against antiwar activists.³³ In sunnier moments Nixon even believed the Antiwar Movement would actually backfire and result in greater overall public support for him and his Vietnam War policies.³⁴ Follysome as this may have been, Nixon was not even close to allowing the Antiwar Movement to influence his course in Vietnam policy. If anything, he settled more stubbornly into his own prerogatives.³⁵ This sort of defiance in the face of public unrest perhaps epitomizes the Imperial Presidency. In May 1972, Nixon actually escalated the war more than any time since 1965 during the so-called “Linebacker” offensive (in retaliation for North Vietnam’s Easter Offensive) and then enjoyed a subsequent rise in approval ratings.³⁶ This probably made Nixon feel vindicated in his defiance of the Antiwar Movement.

In his memoirs, Kissinger presented himself as a non-angry counterpart to Nixon’s open hatred of the demonstrators, as if he and the war opponents were merely expressing differences of opinion among gentle folk.³⁷ But Kissinger echoed Nixon when he wrote, “My theme was constant, that the war had to be ended as an act of policy, not in response to demonstrations.”³⁸ Like Johnson and Nixon, Kissinger also retrospectively blamed the Antiwar Movement for prolonging the war, not ending or shortening its duration.³⁹ Again, there is no evidence to support the idea that the Antiwar Movement influenced Kissinger any more than it influenced Johnson or Nixon.

THE ANTIWAR MOVEMENT AND 1969 OPERATION DUCK HOOK

Contrary to all the foregoing evidence, media like Stephan Talbot’s 2023 documentary film, *The Movement and the ‘Madman’*, represent another example of aging former activists who insist they influenced the ending of the Vietnam War.⁴⁰

³⁰ Richard Nixon, “Silent Majority Speech,” (Nov. 3, 1969), transcript available at Watergate Info: <https://watergate.info/1969/11/03/nixons-silent-majority-speech.html>.

³¹ RICHARD M. NIXON, *THE MEMOIRS OF RICHARD NIXON* (NY: Grosset & Dunlap, 1978) at 350-51. Also see HERRING, *supra* note 11, at 263, 356, 401.

³² *Id.*, at 493.

³³ ROBERT DALLEK, *NIXON AND KISSINGER: PARTNERS IN POWER* (2007) at 200, 208. Robert Brigham also mentions this in ROBERT K. BRIGHAM, *RECKLESS: HENRY KISSINGER AND THE TRAGEDY OF VIETNAM* (2018) at 117. Also see HERRING, *supra* note 11, at 264.

³⁴ DALLEK, *Id.* at 133, 159.

³⁵ As historian George Herring wrote, “Rather than fearing the domestic backlash he was sure would come, he seems to have welcomed it.” See HERRING, *supra* note 11, at 260.

³⁶ *Id.* at 273-275.

³⁷ HENRY KISSINGER, *WHITE HOUSE YEARS* (1979) at 300.

³⁸ *Id.*, at 302. Kissinger concluded, “There can be no serious national policy when an attempt is made to coerce decisions by an outpouring of emotion and when those in high office are forced to take measures they do not really believe in simply to calm protests in the streets.” See *id.* at 516.

³⁹ *Id.*, at 510.

⁴⁰ Talbot, *supra* note 8.

The premise of the film is that massive protests on October 15, 1969⁴¹ convinced Nixon and Kissinger against executing Operation Duck Hook, a scheme of possibly dropping nuclear bombs on North Vietnam. This is a doubly disingenuous premise. First, we only learned of the highly secret nuclear warfare brinksmanship many years later, when the government declassified documents during the 1990s.⁴² The demonstrators of the National Moratorium in October 1969 had no clue about Operation Duck Hook's existence. Thus, in an example of eisegesis, the commentators in *The Movement and the 'Madman'* are reading later knowledge into the past.⁴³

Second, what the 1969 demonstrators did not know—but what Talbot and his commentators should have known—was that Nixon and Kissinger had already abandoned Operation Duck Hook before the National Moratorium of 1969 began.⁴⁴ Accounts vary as to why Nixon and Kissinger abandoned the ploy, and likely there was a combination of factors. Global opposition to Vietnam War escalation supposedly influenced Nixon himself,⁴⁵ though that seems debatable considering Nixon and Kissinger secretly continued to expand the war into Cambodia. National Security Council staff member Roger Morris remembered the cancelation as based in doubts over military effectiveness, not because of the Antiwar Movement.⁴⁶ Other National Security Council members (especially Lawrence Lynn) also predicted against Operation Duck Hook's military effectiveness.⁴⁷

It is also important to recognize Operation Duck Hook as a subset of Nixon and Kissinger's "Joint Chiefs of Staff Readiness Test," a global show of American military force, more specifically nuclear warfare saber rattling.⁴⁸ Operation Duck Hook and the Joint Chiefs of Staff Readiness Test themselves turned out to be nuclear warfare bluffs, and in a sense, the Soviets and China merely called that bluff. As for the North Vietnamese, they showed no change in their resolve to continue fighting for their homeland.

Talbot's film is long on the reminiscences of former antiwar activists (such as Tom Wells, Melvin Small, and Daniel Ellsberg) as well as former Vietnam War veterans who turned against the war—but it reflects wishful thinking more than cause-and-effect. For example, Melvin Small erroneously claimed "Nixon folded," as if public disapproval alone caused him to abandon Operation Duck Hook.

⁴¹ BBC News, On This Day: 15 October 1969: *Millions March in US Vietnam Moratorium*, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/15/newsid_2533000/2533131.stm).

⁴² William Burr & Jeffrey Kimball, *Nixon's Secret Nuclear Alert: Vietnam War Diplomacy and the Joint Chiefs of Staff Readiness Test, October 1969*, 3 COLD WAR HISTORY 114 (2003); William Burr & Jeffrey Kimball, *Nixon's Nuclear Ploy*, BULLETIN OF THE ATOMIC SCIENTISTS 30 (2003); Nina Tannenwald, *Nuclear Weapons and the Vietnam War*, 29 JOURNAL OF STRATEGIC STUDIES 677 (2006); Scott D. Sagan & Jeremi Suri, *The Madman Nuclear Alert: Secrecy, Signaling, and Safety in October 1969*, 27 INTERNATIONAL SECURITY 156-57 (2003).

⁴³ Also, in this case, called the "presentism fallacy" of historical thought. See DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* (1970) at 135-40.

⁴⁴ Burr & Kimball, *Nixon's Secret Nuclear Alert*, *supra* note 42, at 115.

⁴⁵ Tannenwald, *supra* note 42, at 714-15.

⁴⁶ *Id.*, at 715.

⁴⁷ *Id.* See also Sagan & Suri, *supra* note 42, at 159-62.

⁴⁸ Sagan & Suri, *supra* note 42, at 113-14. See also HERRING, *supra* note 11, at 249.

Majority public opinion had been at least uneasy about the war since 1967, but that did not preclude Nixon and Kissinger from threatening nuclear warfare in an effort to leverage a Vietnam peace agreement on terms they considered favorable to the United States. This was part of the Nixon-Kissinger's global anti-communist strategy.⁴⁹ In other words, Nixon and Kissinger were focusing more on the large and complex picture of foreign affairs within the Cold War context, and far less on antiwar demonstrations.

To Talbot's credit, he includes an observation from Stephen B. Bull, who was Special Assistant to the President and Appointments Secretary, 1969-73. Bull represents a solitary voice of reason in Talbot's film, overshadowed numerically by former activists who ignore even the possibility of bluffing, which Bull emphasizes. Bluffing is the standard interpretation now, contradicting the thesis of Talbot's film.⁵⁰ And, after all, bluffing and saber rattling was par for the course during the entire Cold War. Some political scientists at the time called it "brinkmanship," as in going up to the brink of nuclear war.

In an interview about the film, director Talbot said, "We didn't stop the war anywhere near soon enough, but the protest movement ended the draft and Nixon began to step up the withdrawal of troops."⁵¹ But Nixon had promised to end the draft during the 1968 presidential campaign and executed a phased withdrawal of American soldiers which garnered overwhelming public support.⁵² Numbers of American soldiers in Vietnam went from 536,100 in 1968 to 475,200 in 1969, Nixon's first year in office. Thereafter the numbers went down to 334,600 in 1970, then 156,800 the following year.⁵³ The draft did not actually end until 1973, but the reduction of ground soldiers (and substituting, to some degree, an air war) undoubtedly appeased a large sector of the non-demonstrating antiwar public. Nixon's "Vietnamization" policy of slowly shifting war burdens from American soldiers to South Vietnamese military forces became a face-saving exit, along with the oft-repeated idea of finding "peace with honor."

In 1969, a Gallup poll asked, "Do you approve or disapprove of the way President Nixon is handling the situation in Vietnam?"⁵⁴ 64% of American adults approved, 25% disapproved. Despite some popular images of college campuses as bastions of majority antiwar activism, half of the college students surveyed approved of Nixon's handling of the war and only 44% disapproved, with significant regional differences (more approval in the South, the least approval in the northeast).⁵⁵

⁴⁹ As William Burr and Jeffrey Kimball argue, "In contrast to skeptical anti-war critics, Nixon, Kissinger, and other policy-makers believed that achieving their goals in Indochina would have a critical bearing on the global influence of the United States." See Burr & Kimball, *Nixon's Secret Nuclear Alert*, *supra* note 42, at 30.

⁵⁰ For example, Scott D. Sagan and Jeremi Suri wrote, "Nixon hoped that his nuclear bluff would compensate for his domestic and bureaucratic constraints, convincing Moscow to put pressure on the Hanoi government to sue for peace on terms acceptable to the United States." See Sagan & Suri, *supra* note 42, at 153.

⁵¹ G. Allen Johnson, *San Francisco Filmmaker Goes Back to Roots as Vietnam War Protester in PBS Documentary*, SAN FRANCISCO CHRONICLE (March 27, 2023).

⁵² BRIGHAM, *supra* note 33, at 76-77.

⁵³ Statistics from the University of Houston's "Digital History" website, available at https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=11&psid=3844.

⁵⁴ Lydia Saad, *Gallup Vault: 1969 College Students' Resistance to Vietnam*, news.gallup.com (March 16, 2018).

⁵⁵ *Id.*

Ironically, neither Johnson's limited war strategy nor Nixon's threats of nuclear escalation had any practical effect in lessening (much less arresting) North Vietnamese resolve to persevere. If we were to claim any single reason for the North Vietnamese victory, it was because fighting for one's homeland turned out to be far more inspiring than fighting for a semi-abstract anti-communist ideology thousands of miles from home. As Ho Chi Minh famously predicted in 1946, "You will kill ten of us, we will kill one of you, but in the end, you will tire of it first."⁵⁶ The skewed kill ratio actually turned out to be far more severe (closer to 34::1, if we conservatively count two million dead Vietnamese to 58,000 American deaths).⁵⁷ But Ho Chi Minh was quite prophetic in this regard. The North Vietnamese were well aware of the Antiwar Movement in the United States, and undoubtedly they considered this an asset in their focus on the *longue durée*. But fundamentally they were fighting a civil war with a legacy of foreign interference; first the 19th French colonials, then the Japanese during World War II, a post-war attempt by the French to reclaim their colony, followed by American Cold War entanglement.

COLD WAR AND IMPERIAL PRESIDENTS

Many Americans object to the idea of an American Empire,⁵⁸ but is there a better word to describe hundreds of global military outposts⁵⁹ still protecting American interests in the post-Cold War era? The United States emerged as the only world superpower after the collapse of the Soviet Union in 1991, yet its worldwide military outposts remain. It is in this sense that the world now has an American Empire.

One reason the word likely causes discomfort is because "democracy" and "empire" more or less contradict one another, or at least set a double standard of democracy at home and imperialism abroad. And yet this dualism goes back to the birth of western democracy itself with the polis of Athens and its 5th Century

⁵⁶ KARNOW, *supra* note 28, at 17.

⁵⁷ R.J. Rummel, *Deaths in Vietnam War (1954–75)*, University of Hawaii study available at <https://www.hawaii.edu/powerkills/SOD.TAB6.1B.GIF>

⁵⁸ But not so for scholar, professor, and former CIA consultant Chalmers Johnson, who not only believed there was an American Empire, but warned how it endangered American democracy. As he told interviewer Amy Goodman, "A nation can be one or the other [democracy at home or imperialist abroad] but it can't be both." He felt the Roman Republic had chosen the imperialist path and lost its democracy thereby. See Amy Goodman, *Chalmers Johnson: "Nemesis: The Last Days of the American Republic,"* DEMOCRACY NOW! (Feb. 27, 2007) available at

https://www.democracynow.org/2007/2/27/chalmers_johnson_nemesis_the_last_days

Also see Johnson's trilogy of books: BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE; THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC; and NEMESIS: THE LAST DAYS OF THE AMERICAN REPUBLIC.

Republican-Libertarian Pat Buchanan has also long decried the American Empire, as reflected in numerous television interviews and appearances, especially in the role as pundit for the weekly public television magazine, THE McLOUGHLIN GROUP. His blog titles are indicative: *A Republic Not an Empire*; *America's Unsustainable Empire*; and *Is the American Empire Worth the Price?* See

<https://buchanan.org/blog/Topics/imperialism>

<https://buchanan.org/blog/pjb-a-republic-not-an-empire-312>

<https://buchanan.org/blog/americas-unsustainable-empire-129168>

⁵⁹ Chalmers Johnson, *Empire of Bases*, NEW YORK TIMES (July 13, 2009).

BCE empire located mainly in the Ionian Sea region. Athens featured an admittedly limited democracy at home for its citizens (yet so too did the United States until the 20th century) but imposed colonial rule, including the extraction of monetary tribute, from its colonies.⁶⁰ More troubling for the American Founders was the intermixed decline of democracy and the rise of imperialism during the latter period of the Roman Republic,⁶¹ an era they studied carefully.⁶²

⁶⁰ A great many scholars have studied this. For a few examples, see ROBERT J. BONNER, *ASPECTS OF ATHENIAN DEMOCRACY* (1933) at 159, 176; WILLIAM SCOTT FERGUSON, *GREEK IMPERIALISM* (1913) at 39, 65, 66, 70; D.B. Gregor, *Athenian Imperialism*, *GREECE & ROME* 22:64 (Feb. 1953) at 27-32.

The British Empire would, of course, provide another famous example of democracy at home and colonial domination abroad. The influential British scholar John Atkinson Hobson lived and wrote during the British Empire's apex. His observations included how imperialism fundamentally contradicted democracy and fostered international racism. Hobson also described how imperialism benefitted a domestic plutocratic oligarchy who indulged their own greed and exacerbated socio-economic disparities at home. See J.A. HOBSON, *IMPERIALISM: A STUDY* (1902) at 158, 159, 160-61, 335-36, 365. For examples of positive and negative interpretations of the history and legacy of the British Empire, respectively see NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2003) and CAROLINE ELKINS, *LEGACY OF VIOLENCE: A HISTORY OF THE BRITISH EMPIRE* (2022).

⁶¹ Many scholars have described this. For examples, see STEWART PEROWNE, *DEATH OF THE ROMAN REPUBLIC : FROM 146 B.C. TO THE BIRTH OF THE ROMAN EMPIRE* (1968), at 53; Nathan Rosenstein & Robert Morstein-Marx, *The Transformation of the Republic*, in *A COMPANION TO THE ROMAN REPUBLIC* 632 (Nathan Rosenstein & Robert Morstein-Marx, eds., 2006); DAVID COLIN ARTHUR SHOTTER, *THE FALL OF THE ROMAN REPUBLIC* (1994) at 10, 14. The expanding foreign territory seems to have been the main cause for the Republic's eventual demise, though many corollary or dependent factors included the displacement of farmers, increase in slavery, widening socioeconomic disparities, and political infighting. See EDWARD J. WATTS, *MORTAL REPUBLIC : HOW ROME FELL INTO TYRANNY* (2018) at ch.3, *Empire and Inequality*. As for political infighting, the late Roman Republic's senators in particular recognized imperialism's dangers to its legislative body. See TENNEY FRANK, *ROMAN IMPERIALISM* (1914) at 274. As Edward Gibbon, famous historian of Rome wrote, "The victory over the senate was easy and inglorious. Every eye and every passion were directed to the supreme magistrate, who possessed the arms and treasure of the state; whilst the senate, neither elected by the people, nor guarded by military force, nor animated by public spirit, rested its declining authority on the frail and crumbling basis of ancient opinion. The fine theory of a republic insensibly vanished, and made way for the more natural and substantial feelings of monarchy." See EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE*, v.1 (1836) at ch.V: *Sale of the Empire to Didius Julianus, Part II*; available at Project Gutenberg, <https://www.gutenberg.org>.

Undoubtedly the undeclared Korean and Vietnam wars and the general post-World War II shifting of war powers to the executive were on the mind of U.S. Senator Robert C. Byrd when he wrote, "The Roman Senate which, for almost five centuries, controlled the power of the purse and had been the supreme organ under the republic, had voluntarily given up these powers, had become dependent, had become fearful, had lost its nerve, and had ceded power, without being forced to do so, to an emperor." See ROBERT C. BYRD, *SENATE OF THE ROMAN REPUBLIC: ADDRESSES ON THE HISTORY OF ROMAN CONSTITUTIONALISM* (1995) at 157-58.

⁶² Paul Meany, *Rome's Heroes and America's Founding Fathers*, *J. AM. REVOLUTION* (Oct. 23, 2018); Charles F. Mullett, *Classical Influences on the American Revolution*, *CLASSICAL JOURNAL* 35:2 (Nov. 1939) at 96, 97; CARL J. RICHARD, *GREEKS AND ROMANS*

In the case of the United States, one could argue that the contradictions of selective democracy were present at birth, and certainly so from the perspectives of indigenous peoples and African slaves, to name but two groups who remained disenfranchised well into the 20th century. The United States is a nation of conquest, so in a sense its first “empire” was its contiguous continental territories and states⁶³ gathered under the ideology of Manifest Destiny,⁶⁴ which spilled over the continental borders to include various 19th century imperial acquisitions abroad.⁶⁵ This empire has now finally reached its furthest extent owing to post-World War II superpower status.

During the Cold War, the United States did not pursue imperial conquest and territorial acquisition per se, but the nation contended mightily for an anti-communist world order, and this meant attempting to “contain” communism in the USSR and China. In Asia, containment included many military outposts in places like Okinawa, Taiwan, South Korea, and – temporarily – South Vietnam. For the Vietnamese, the Vietnam War was more of a civil war complicated by post-colonial factions and the various proxy aspirations of the United States, the USSR, and China. The latter had natural proximitous geographical concerns (similar to the ones they had during the Korean War) as would any nation bordering another nation at war with foreign powers.

Historical empathy is necessary if we are to understand the influence of the Cold War during the Vietnam era. All the presidents who oversaw the Vietnam War were firm believers in the two main foreign policy theories that we now call myths: the Monolithic Communist Theory/Myth and the Domino Theory/Myth. The USSR certainly espoused a great deal of rhetoric that helped reinforce the now obviously untenable idea that communist ideology would somehow supersede

BEARING GIFTS : HOW THE ANCIENTS INSPIRED THE FOUNDING FATHERS (2008) at 97; ERAN SHALEV, *ROME REBORN ON WESTERN SHORES: HISTORICAL IMAGINATION AND THE CREATION OF THE AMERICAN REPUBLIC* (2009). For an interesting interview with scholar Edward J. Watts comparing the decline of the Roman Republic with recent events in American politics, see Clay S. Jenkinson, *America, Rome and the Slow Erosion of Republics*, GOVERNING.COM (Dec. 14, 2020), available at <https://www.governing.com/context/america-rome-and-the-slow-erosion-of-republics.html>

Or, as scholar Edward J. Watts wrote, “the Second Punic War (218-201 BCE) fundamentally and permanently changed the economic, political, and military life of [republican] Romans, and, as the second century dawned, Romans came increasingly to understand that a state that reconfigured itself to project power across wide distances during a war would never return to its previous form. (The United States would reach a similar realization after World War II.)” See WATTS, *supra* note 61, at 45.

⁶³ Mainly acquired through the following agreements with other European or Euroamerican colonial powers: Louisiana Purchase (France, 1803), the Oregon Treaty (Britain, 1846), the Treaty of Guadalupe Hidalgo (Mexico, 1848), and the Gadsden Purchase (Mexico, 1853).

⁶⁴ The journalist John L. O’Sullivan coined the term “Manifest Destiny” in 1845. Since then historians have treated it as a standard topic in introductory textbooks. See *generally* FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A REINTERPRETATION* (1963). For a very helpful and nuanced interpretation of Manifest Destiny, see WALTER A. McDOUGALL, *PROMISED LAND, CRUSADER STATE* (1997) at ch.4.

⁶⁵ Including Caribbean and Pacific territories seized from the Spanish during and after the Spanish-American War, but also Pacific Islands such as Guam, Wake Island, part of Samoa, the Northern Mariana Islands, and the Hawaiian Archipelago.

nationalism, thus fostering a “monolith” of global communism. Dominos falling became the metaphor for the creation of this monolith, and adherents premised their notions upon the fatally inaccurate idea that nations “fell” to communism, one after the other. An obvious alternative interpretation for a nation like China would be more along the lines of communism serving the Chinese as a transition from pre-industrial vulnerability to international colonialism to contemporary autonomy and capitalism. But during the Vietnam era, all American presidents embraced the Monolithic and Domino ideas. Moreover, Democratic Party presidents Truman, Kennedy, and Johnson all had to contend with domestic Republican Party pressures of appearing “soft” on communism.⁶⁶ This tragically helped foster initial involvement, escalation, and prolongation of the Vietnam War.

Another important aspect of presidents Johnson and Nixon in particular was what the aforementioned historian Arthur Schlesinger, Jr., dubbed the Imperial Presidency.⁶⁷ Unlike pre-World War II presidents, Cold War era executives began exercising unprecedented power as well as employing a great deal of secrecy in their exercise of that power.⁶⁸ As Imperial Presidents, both Johnson and Nixon deliberately and carefully deceived the American public and Congress regarding their war policies and practices. Johnson clung to a limited war and Nixon repeatedly attempted to intimidate the North Vietnamese and their allies with shows of force and increased air war – both approaches were ultimately ineffective, but so too was the Antiwar Movement in changing these fundamental presidential approaches to the conflict.

Regardless of the Imperial Presidency and its flagrant abuses, we should avoid laying too much of the responsibility for the war on the executive branch. After all, from the founding of the nation, the Constitution has empowered Congress with control over finances,⁶⁹ the much-repeated “power of the purse.”⁷⁰ Tellingly, Congress did not use its funding powers to end the war. The case of action speaking louder than words (including antiwar words) may be crucial here. Congress only began making what amounted to token financial gestures when the war was already in its final phase.

III. THE LEGISLATURE AND THE JUDICIARY

CONGRESS AND MARGINAL ANTIWAR AMENDMENTS

Similar to those claiming that antiwar demonstrations and protests ended the Vietnam War, various scholars claim that Congress was an effective antiwar force

⁶⁶ HERRING, *supra* note 11, at 82, 155, 195, 198; KARNOW, *supra* note 28, at 320.

⁶⁷ SCHLESINGER, *supra* note 2. Also see Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, POLITICAL SCIENCE QUARTERLY 95:2 (Summer 1980) at 213; JACOB K. JAVITS, WHO MAKES WAR: THE PRESIDENT VERSUS CONGRESS (1973), at 262-66.

⁶⁸ Schlesinger wrote, “by the 1960s and 1970s, Presidents began to claim the power to send troops at will around the world as a sacred and exclusive presidential right.” SCHLESINGER, *supra* note 2, at 310. Also see ch. 7, “The Presidency Rampant: Vietnam,” at 177-207.

⁶⁹ See *supra* note 7.

⁷⁰ Historian and biographer Doris Kearns Goodwin observed the obvious when she wrote, “At any time in the course of the war, the Congress could have stopped America’s involvement in Vietnam if it had wanted to.” See GOODWIN, *supra* note 14, at 324.

during the conflict.⁷¹ Sadly, this is again far more wishful thinking than a convincing argument.⁷² In the case of Vietnam, Congress granted Johnson the Tonkin Gulf Resolution in 1964, basically giving the president permission to escalate the war. As later revealed in the Pentagon Papers,⁷³ Johnson proceeded to oversee the conflict with a great deal of secrecy, hiding facts from both Congress and the public. Toward the end of the war (during 1970-71) various senators and representatives proposed five congressional amendments (four in the senate, one in the house) that would have limited soldier numbers or curtailed funding – but all failed.⁷⁴ In other words, even antiwar senators and representatives during the Vietnam War tended to be long on rhetoric and short on action, and they were ever in the numerical minority regardless of party affiliation.⁷⁵

In 2014, Kelly McHugh published a masterful article that analyzed the congressional role during the Vietnam and Iraq wars, as well as schools of thought regarding these topics. In both conflicts McHugh noted that “although members of Congress were vocal in opposing the war, there were few legislative attempts to curtail the president’s ability to conduct the war.”⁷⁶ There are many reasons for this, from buck-passing to risk aversity among legislators (especially as it pertained to reelection concerns).⁷⁷ When it came to war in particular, Congress tended to defer to the executive regardless of funding or defunding powers.⁷⁸ So Congress did not really rein in Nixon and Kissinger. The sponsors of the much-noted Cooper-Church amendment of 1971 intended to end funding of the war’s expansion into Cambodia. Of it McHugh wrote,

The Senate passed the [Cooper-Church] amendment quickly, but only after distilling its provisions; specifically, the Senate modified the language of the amendment to make it clear that Congress did

⁷¹ For examples see William G. Howell & Jon C. Pevehouse, *When Congress Stops Wars: Partisan Politics and Presidential Power*, FOREIGN AFFAIRS 86:5 (Sept./Oct. 2007) at 95-107; Julian E. Zelizer, *How Congress Got Us Out of Vietnam*, PROSPECT (March 2007) at 30-34.

⁷² As Louis Fisher and Ryan C. Hendrickson wrote regarding foreign wars, “In most cases, Congress has chosen the politically expedient route of deferring to the president.” See Louis Fisher & Ryan C. Hendrickson, *Congress at War*, FOREIGN AFFAIRS 87:3 (May-June 2008) at 167.

⁷³ Among the many volumes on this topic, see DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* (2002); GEORGE C. HERRING, ed., *THE PENTAGON PAPERS*, abridged edition (1993); *THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISION-MAKING ON VIETNAM (1971-72)* 5 vols.

⁷⁴ Kelly McHugh, *Understanding Congress’s Role in Terminating Unpopular Wars*, DEMOCRACY AND SECURITY 10:3 (July-Sept. 2014) at 204.

⁷⁵ As Stephen R. Weissman wrote, “Holding hearings, imposing reporting requirements, adopting resolutions stating that Congress should authorize any future military action, and sponsoring independent legislation opposing military action amount to no more than putting up a fuss, unless they actually culminate in significant legal constraints on presidential power.” See Stephen R. Weissman, *Congress at War*, FOREIGN AFFAIRS 87:3 (May-June 2008) at 169.

⁷⁶ McHugh, *supra* note 74, at 192.

⁷⁷ *Id.* at 195-97.

⁷⁸ *Id.* at 193. McHugh concluded that “Nixon used the leeway provided by a skittish Congress to geographically expand the war, in the hopes of averting a defeat.” See *id.* at 218.

not intend to trammel on the president's constitutional authority to set policy. Moreover, the amendment pledged that Congress would work "in concert" with the administration in disengaging from Cambodia. Despite these modifications, the amendment lingered for months in the House of Representatives; the final bill was not sent to the president until December of 1970, after the administration had already signaled its intention to withdraw US troops from Cambodia. In essence, the amendment had no obvious effect on the operations in Cambodia.⁷⁹

Given such half-measures and failures of legislative limits on the executive, some senators pursued a more fundamental change to reemphasize congressional war powers. Many scholars make strong arguments that the Framers originally intended that Congress (and not the president) should have war-making powers and this remained central to the war-making aspect of the Vietnam conflict.⁸⁰ Contrary legal arguments during the Vietnam era itself (claiming the president had war powers coequal with Congress)⁸¹ were largely matters of eisegesis, or more specifically, an employment of the presentist fallacy of history.⁸² Article II, section 2 of the Constitution designates the president as Commander in Chief, but by this the Framers meant *ex post facto* presidential war powers, not *declaratory* congressional war powers – at least in most circumstances, outside of things like a sudden, emergency response to foreign aggression toward the United States.⁸³

Senators Tom Eagleton and Jacob Javits wrote eloquently⁸⁴ about Johnson and Nixon's abuse of the congressional War Powers clause.⁸⁵ And yet Javits and Eagleton's efforts backfired in the 1973 War Powers Resolution⁸⁶ that actually surrendered war powers to the president for the first 60-90 days of a conflict without the requirement of Congress formally declaring war.⁸⁷ In a profound way, the War Powers Resolution merely became a crowning non-achievement in legislative checks on executive war powers. For this reason, Senator Eagleton ironically began as a sponsor of the bill but ended up voting against it because an entirely different dynamic surrounds initial war funding compared to financing an ongoing conflict.⁸⁸ Eagleton was making a strong

⁷⁹ *Id.*, at 205.

⁸⁰ For examples, see David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, POL. SCI. Q. 103:1 (Spring 1988) at 2, 7, 8, 36; CRONIN, *supra* note 67, at 214; FISHER AND HENDRICKSON, *supra* note 72, at 168-69; Charles A. Lofgren, *War-Making under the Constitution: The Original Understanding*, YALE L.J. 81:4 (March 1972), at 699-700; WEISSMAN, *supra* note 75, at 169.

⁸¹ Adler, *id.* at 2; CRONIN, *supra* note 67, at 209-237 at 212.

⁸² FISCHER, *supra* note 43.

⁸³ ADLER, *supra* note 80, at 12-14, 29; LOFGREN, *supra* note 80, at 700.

⁸⁴ THOMAS F. EAGLETON, WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER (1974); JAVITS, *supra* note 67.

⁸⁵ U.S. Constitution, Article I, Section 8, Clause 11.

⁸⁶ Public Law 93-148; 87 Stat. 555.

⁸⁷ *Id.* at § 5(b).

⁸⁸ As Eagleton told his colleague Senator Javits, "Once the president has 60 or 90 days, and the troops are there, the decision is already made. You can't cut off the money while they're shooting at our troops in the trenches or in the jungles." See EAGLETON, *supra* note 25. Circuit Judge George E. MacKinnon made a similar commonsensical

point based on then-recent history, for this is exactly what happened in the Senate during 1965-68, when senators only voted (three different times) for continuing appropriations for soldiers already in Vietnam—not against the war policy itself.⁸⁹

The central point to remember is, Congress did not and would not rein in presidential war power during the most contentious and divisive war in American history.⁹⁰ The subtitle of Eagleton's 1974 book more or less says it all: *War and Presidential Power: a Chronicle of Congressional Surrender*.⁹¹ Eagleton was hardly alone. For example, noted legal scholar John Hart Ely described the 1973 War Powers Resolution as "a tale of congressional spinelessness."⁹²

This is especially daunting considering that the attempt to reassert congressional war powers took place after Congress discovered that Kissinger and Nixon had secretly and illegally expanded the Vietnam War into Cambodia. If Congress could not rein in presidential war power during the highly controversial Vietnam-Cambodia conflict, it seems unlikely they ever will. The Vietnam War ended, but there is no legal reason another president could not engage the nation in another such conflict. In fact, presidents since 1973 have routinely ignored the War Powers Resolution altogether.⁹³ And if Congress refused to rein in the Imperial Presidency during the Vietnam War, the judicial branch behaved similarly.

THE JUDICIARY AND THE "POLITICAL QUESTION"

Far less visible than the mass demonstrations on college campuses and in city streets were the lawsuits that various soldiers, prospective draftees, and even

observation in 1973: "in voting to appropriate money or to draft men a Congressman is not necessarily approving the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent." See *Mitchell v. Laird*, 488 F.2d 619 (1973), 159 U.S. App. D.C. 352.

⁸⁹ GOODWIN, *supra* note 14, at 325, 326.

⁹⁰ HERRING, *supra* note 11, at 186.

⁹¹ It is astonishing to find, repeatedly, how various writers and scholars have mistaken the War Powers Resolution as an effective congressional check on executive war powers—when it was just the opposite. For examples, see CHARLES DEBENEDETTI & CHARLES CHATFIELD, *AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA* (1990) at 405; FONER, *supra* note 27, at 1029; ADAM GARFINKLE, *TELLTALE HEARTS: THE ORIGINS AND IMPACT OF THE VIETNAM ANTIWAR MOVEMENT* (1997) at 283; KARNOW, *supra* note 28, at 684; Kevin M. Kruse & Julian E. Zelizer, *Have We Had Enough of the Imperial Presidency Yet?* NEW YORK TIMES (Jan. 9, 2019). Eagleton himself described how—many times, over the decades—he had to explain and re-explain to various journalists why he made a 180-degree turn against the legislation he helped initiate as a sponsor. See Eagleton, *supra* note 25.

⁹² John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, COLUMBIA L.R. 88:7 (Nov. 1988) at 1419. Also see CRONIN, *supra* note 67, at 217; JAVITS, *supra* note 67, at 239, 261; SCHLESINGER, *supra* note 2, at 206.

⁹³ DYE AND ZEIGLER, *supra* note 9, at 268.

members of Congress filed against the war during 1968-73. Most often, they filed these cases on the grounds that the Vietnam conflict was unconstitutional due to a missing congressional declaration of war.⁹⁴ In response, many judges pointed out that Congress was fully complicit in the Vietnam War despite having made no formal declaration of war. For example, in 1968 U.S. District Judge Charles Edward Wyzanski, Jr., observed that Congress had not only passed the Tonkin Gulf Resolution allowing expansion of U.S. involvement in Vietnam, but repeatedly appropriated money to conscript men into the military.⁹⁵ In making such assessments, Wyzanski and other judges dismissed these cases. A couple of judges pointed out that a formal declaration of war would have international consequences that Congress was obviously avoiding with good reason, especially in the interest of precluding escalation of the Vietnam conflict into a broader regional or global war.⁹⁶ But repeatedly, judges during this period dismissed plaintiffs' cases due to what they described as a "political question" rather than a judicial one. Judge Wyzanski described this most succinctly when he wrote, "this Court concludes that the distinction between a declaration of war and a cooperative action by the legislative and executive with respect to military activities in foreign countries is the very essence of what is meant by a political question."⁹⁷

Among many others, political scientist Francis D. Wormuth strongly disagreed with the courts' refusal to rule on the constitutionality of the Vietnam War by relegating it to a "political question."⁹⁸ In other words – in direct contradiction to what judge after judge ruled – the fact that the Vietnam War lacked an explicit congressional war declaration was a perfectly justiciable topic.⁹⁹ Many years later, legal scholar Louis Fisher agreed with this general assessment.¹⁰⁰ Furthermore,

⁹⁴ *U.S. v. Sisson*, 294 F. Supp. 513 (1968), *Medeiros v. U.S.*, 294 F. Supp. 199-200 (1968), *Switkes v. Laird*, 316 F. Supp. 365 (1970), *Berk v. Laird*, 317 F. Supp. 717-18 (1970), *Mottola v. Nixon*, 318 F. Supp. 541 (1970), *Orlando v. Laird*, 443 F.2d 1041 (1971), *Com. of Mass. v. Laird*, 451 F.2d 29 (1971), *Atlee v. Laird*, 339 F. Supp. 1350 (1972), *Atlee v. Laird*, 347 F. Supp. 692, 705 (1972), *Mitchell v. Laird*, 488 F.2d 614-15 (1973), 159 U.S. App. D.C. 347-48.

⁹⁵ *U.S. v. Sisson*, 294 F. Supp. 515 (1968). For similar reasoning, see *Medeiros v. U.S.*, 294 F. Supp. 200 (1968), *Berk v. Laird*, 317 F. Supp. 727-29 (1970), *Mottola v. Nixon*, 318 F. Supp. 549, 544 (1970), *Orlando v. Laird*, 443 F.2d 1043-44 (1971), *Com. of Mass. v. Laird*, 451 F.2d 31, 35 (1971), *Atlee v. Laird*, 347 F. Supp. 712 (1972), *Mitchell v. Laird*, 488 F.2d 619 (1973), 159 U.S. App. D.C. 352, *Mitchell v. Laird*, 488 F.2d 617-19 (1973), 159 U.S. App. D.C. 350-52.

⁹⁶ *U.S. v. Sisson*, 294 F. Supp. 516 (1968), *Berk v. Laird*, 317 F. Supp. 725-26, 729 (1970).

⁹⁷ *U.S. v. Sisson*, 294 F. Supp. 516 (1968). *Berk v. Laird*, 317 F. Supp. 729 (1970), *Mottola v. Nixon*, 318 F. Supp. 549, 552 (1970), *Atlee v. Laird*, 347 F. Supp. 692, 693, 701-06 (1972), *Campen v. Nixon*, 56 F.R.D. 406 (1972), *DaCosta v. Laird*, 471 F.2d 1153-54, 1158 (1973), *Mitchell v. Laird*, 488 F.2d 617 (1973), 159 U.S. App. D.C. 350, *Holtzman v. Schlesinger*, 484 F.2d 1309-10, 1314 (1973).

⁹⁸ Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, CAL. L.R. 60:3 (May 1972) at 678-88.

⁹⁹ *Id* at 681. In no uncertain terms, Wormuth concluded that the courts should have followed "the explicit textual commitment of the war power to Congress" and should have held "invalid any exercise of the war power that [did] not result from the decision of Congress itself. See *id* at 680.

¹⁰⁰ Fisher wrote, "The record from 1789 to the Steel Seizure Case of 1952 is replete with court cases that scrutinized presidential claims for emergency power and frequently

Fisher identified the oft-mentioned “political question” explanation as a misconception, noting that presidential war-making power was well within judicial purview.¹⁰¹ Toward the end of the Vietnam conflict, a couple of dissenting judges themselves began to see it this way.

In a rare minority opinion in 1972, Chief District Judge Joseph S. Lord, III (Eastern District of Pennsylvania) wrote in *Atlee v. Laird* that the case involved what we would now call the central question of executive versus legislative war powers.¹⁰² A month later, District Judge William Thomas Sweigert (Northern District of California) went further when he elaborated upon the central importance of *congressional* war powers for preserving the American democratic and constitutional system.¹⁰³ The following year, Appellate Judge James Lowell Oakes (Second Circuit Court of Appeals) wrote that the constitutionality of the war was indeed justiciable, partly because Nixon and Kissinger had covertly expanded the war into Cambodia.¹⁰⁴ Alas, such belated dissenting opinions proved utterly ineffective in shortening or ending the war, or in reining in the Imperial Presidency.

IV. POPULISM AND ELITISM

PUBLIC DIVISION OVER THE WAR

Commentators often write that the United States was more divided during the Vietnam War era than at any previous time in American history since the Civil War.¹⁰⁵ This idea is generally true, but many scholars studying public opinion polls

found them wanting. It was only with the Vietnam War that courts began to systematically avoid war power questions.” See Louis Fisher, *Judicial Review of the War Power*, PRESIDENTIAL STUDIES QUARTERLY 35:3 (Sept. 2005) at 467.

¹⁰¹ *Id* at 469.

¹⁰² Judge Lord wrote that the case involved “a determination of whether the executive branch has exceeded the scope of its constitutional [war-making] power.” See *Atlee v. Laird*, 347 F. Supp. 692, 693, 713 (1972).

¹⁰³ Judge Sweigert wrote, “If the state of the law remains as it now stands the American people will never be able to determine with any degree of certainty from equivocal Congressional actions and votes whether this Vietnam War, or any future presidentially conducted war, is being conducted with the kind of Congressional declaration and approval required by the Constitution; they will never be able to determine with any degree of certainty whether Congress is meeting or shirking its Constitutional responsibility and, if shirking its responsibility, then which members thereof are to blame for permitting a President to usurp the warmaking power.” See *Campan v. Nixon*, 56 F.R.D. 408 (1972).

¹⁰⁴ *Holtzman v. Schlesinger*, 484 F.2d 1316-18 (1973). He noted, “The Defense Department is continuing to bomb in Cambodia despite the cease-fire in Vietnam and despite the return of our prisoners of war from North Vietnam. The justiciable question then is whether there is any Constitutional authorization for the employment of United States armed forces over Cambodia, now that the war in Vietnam has come to an end.” See *id.* at 1317.

¹⁰⁵ For examples see Kenneth T. Walsh, *A Deeply Divided Nation*, U.S. NEWS AND WORLD REPORT (Aug. 24, 2018); *The Anti-War Movement and the effects of the War on the USA*, RGS HISTORY: THE NEWCASTLE RGS HISTORY BLOG (<https://rgshistory.com/the-anti-war-movement-and-the-effects-of-the-war-on-the-usa/>); *The American Antiwar*

about the war have reached ambiguous or complex conclusions.¹⁰⁶ For example, in 1970, Philip Converse and Howard Schuman especially objected to the simplistic idea of pro- and anti-war factions among the public.¹⁰⁷ In stark contrast to the media's focus on sensational campus demonstrations, Converse and Schuman also found pro-war sentiments among students at smaller colleges actually *exceeding* that of the general population.¹⁰⁸ Some of these pro-war students reflected a more general conservative backlash against radical antiwar protesters.¹⁰⁹ Those romanticizing the Antiwar Movement, then and now, tend to ignore the backlash

Movement, ENCYCLOPEDIA.COM (<https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/american-antiwar-movement>); Ray Tyler, *Peace Is at Hand*, TEACHING AMERICAN HISTORY (Nov. 1, 2022), <https://teachingamericanhistory.org/blog/peace-is-at-hand/>.

¹⁰⁶ For one example of ambiguity and complexity, pollsters found differing results when asking if American involvement in Vietnam was a “mistake” versus asking people if they supported “withdrawing” the American military from Vietnam. In 1970, Hazel Erskine studied fourteen Gallup polls (taken between 1966-69) asking, “Is the Vietnam War a mistake?” In all fourteen, a higher percentage of older people (50 and older) opposed the war compared to younger people (between 21-29). The middle age cohort (ages 30-49) also reflected more war opposition than the younger group in nine out of the fourteen polls (three polls were tied). See Hazel Erskine, *The Polls: Is War a Mistake?* PUB. OPINION Q. (Spring 1970) at 134-50. Strikingly, Tim Rosentiel reaffirmed this pattern of age demographics after studying decades of poll results spanning the Vietnam War era up to 2006. See Tom Rosentiel, *Youth and War: From Vietnam to Iraq, Generations Disagree About the Use of Military Force*, Pew Research Center (Feb. 21, 2006). William Lunch and Peter Sperlich also asked the public about withdrawing from Vietnam rather than finding American involvement a “mistake.” They found that, between 1964-1968, at most only a fifth of the American public supported withdrawing from Vietnam. See William L. Lunch and Peter W. Sperlich, *American Public Opinion and the War in Vietnam*, WESTERN POL. Q. (March 1979) at 25-26.

¹⁰⁷ Philip E. Converse & Howard Schuman, *Silent Majorities and the Vietnam War*, SCIENTIFIC AMERICAN 23 (June 1970) at 19-20. Converse and Schuman wrote, “For the war in Vietnam the controversial aspects are almost innumerable. Each aspect requires a somewhat different question, which has its own unique meaning. Moreover, since polling agencies prefer to word their own questions, it is possible to obtain different results even when two agencies are examining essentially the same aspect of an issue.” See *id.* at 17.

¹⁰⁸ Converse and Schuman called these pro-war students at smaller colleges “the backbone of popular support for the war.” See *Id.* at 23.

¹⁰⁹ Converse and Schuman believed that “the net effect of vigorous protest in the streets has been to shift mass opinion toward renewed support of the President.” See *id.* at 24. More generally, Dye and Zeigler observed that mass opinion tends to *disfavor* demonstrators, sometimes vehemently so. See DYE AND ZEIGLER, *supra* note 9, at 174. Matthew Feinberg, et al, also support backlash effect as a general phenomenon when radical protesters inspire counter-reactions. See Matthew Feinberg, et al, *The Activist's Dilemma: Extreme Protest Actions Reduce Popular Support for Social Movements*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 119:5 (Jan. 2020) at 1086–1111. Even during the Civil Rights Movement, black leaders disagreed about the efficacy of public protesting, and some of them wisely appreciated that such demonstrations could actually backfire and antagonize whites. See Paul Burstein, *Public Opinion, Demonstrations, and the Passage of Antidiscrimination Legislation*, PUB. OPINION Q. 43:2 (Summer 1979) at 168.

effect.¹¹⁰ The Antiwar Movement's ultimate effectiveness is probably doomed to eternal ambiguity, and thus scholars will likely debate it without end.

CAUSE AND EFFECT OF THE ANTIWAR MOVEMENT

Philosophers and the better scientists are wary about declaring matters of cause and effect.¹¹¹ Regarding the anti-Vietnam War Movement, Andrew Priest wrote, "it is almost impossible to disaggregate it [public opinion for or against the war] from other influences acting upon policymakers, such as the progress of the war itself or other domestic and international events."¹¹² Before Andrew Priest, Adam Garfinkle had become one of the most provocative scholars to deny Antiwar Movement effectiveness. Yet, early in his 1997 book, *Telltale Hearts*, Garfinkle admitted that "speculation" might be the most honest term rather than any claim to cause-and-effect or lack thereof.¹¹³ It is logical to conclude that some Americans were against the war *despite* the protesters, and others *irrespective* of the protesters—but it is impossible to conclude that the protesters *caused* the end of the war.¹¹⁴

¹¹⁰ In 1969, a Harris poll asked, "do you sympathize with the goals of the people who are demonstrating, marching, and protesting against the war in Vietnam, or do you disagree with their goals?" Only 28% of those 50 and older expressed sympathy, while 52% of those 35 and younger sympathized (36% of those between 35-49 sympathized). See CONVERSE & SCHUMAN, *supra* note 107, at 23. Extraordinary antiwar activist Todd Gitlin and others noted that, as the antiwar movement itself grew frustrated, radicalism became the only alternative for some of the antiwar protesters, but this fantasy of revolution *further* backfired with the general public, pro- and anti-war alike. See TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987) at 285, 286, 380, 381, 384, 408, 411. As Michael Schaller, et al, concluded, "Pictures of bloodied student demonstrators involved some sympathy, but many Americans were frightened by the protests." See MICHAEL SCHALLER, ET AL, *AMERICAN HORIZONS: U.S. HISTORY IN A GLOBAL CONTEXT*, 2d ed., vol. 2 (2016) at 991-92. Also see DEBENEDETTI & CHATFIELD, *supra* note 91, at 393-95, 398. As political scientist W. Lance Bennett put it, the public sometimes finds offense in "negatively perceived events like demonstrations, sit-ins, and other protest activities." See W. LANCE BENNETT, *NEWS: THE POLITICS OF ILLUSION*, 5th ed. (2003) at 126-27.

¹¹¹ For example, climate scientist Frances Drake observes how confusion or conflation of causation and correlation regularly obscures debates over global warming. See FRANCE DRAKE, *GLOBAL WARMING: THE SCIENCE OF CLIMATE CHANGE* (2000) at 123, 124, 148, 154-55, 171. Geoffrey Kabat demonstrates similar difficulties in distinguishing causation from correlation regarding environmental pollution and human health problems. See GEOFFREY C. KABAT, *HYPING HEALTH RISKS: ENVIRONMENTAL HAZARDS IN DAILY LIFE AND THE SCIENCE OF EPIDEMIOLOGY* (2008) at 35-36.

¹¹² Andrew Priest, *Power to the People? American Public Opinion and the Vietnam War*, § 1, chap. 4, in *THE U.S. PUBLIC AND AMERICAN FOREIGN POLICY* 42 (Andrew Johnstone and Helen Laville, eds., 2010). Priest concluded that "the idea that a combination of peaceniks, hippies, Marxists and journalists undermined the American effort and, for the first time in US history, forced the government to rethink its policies and eventually withdraw from a foreign war is outlandish." See *id.* at 42.

¹¹³ GARFINKLE, *supra* note 83, at xii. Garfinkle himself proceeded to speculate a great deal. See *id.* at 1, 2, 3, 8, 13, 19, 26-31, 266, 267, 269.

¹¹⁴ Notably, in 1979, Lunch and Sperlich concluded that "Antiwar demonstrations had not convinced most citizens that the United States was morally wrong in being in Vietnam and may have even slowed the development of withdrawal sentiment by acting as a negative reference point." See LUNCH & SPERLICH, *supra* note 98, at 31.

This indicates a paradox of sorts, captured by Charles DeBenedetti and Charles Chatfield, who observed that many came to agree with the Antiwar Movement's goals while disagreeing with its methods.¹¹⁵

William Berkowitz studied fifteen major anti-Vietnam War protests between 1965 and 1971, then examined subsequent Gallup polls in an attempt to discern the effect of the demonstrations.¹¹⁶ Berkowitz concluded that "the data in general do not reveal any consistent, dramatic, or lasting effects of the demonstrations one way or another."¹¹⁷ He also concluded that maybe his study revealed no demonstrable effects from the protests simply because there *were* no effects.¹¹⁸ This troubled Berkowitz, who alluded to himself as an antiwar activist who was left feeling powerless in light of his findings.¹¹⁹ He ended his article with an open question wondering what could possibly influence controversial policy when both gentle and "bitingly critical persuasion," civil disobedience, and prolonged massive demonstrations, had all failed.¹²⁰

A few romantics might argue that the Antiwar Movement did indeed end the war. The better question might be, was the multifaceted Antiwar Movement *influential*? If so, how? We can never really measure it. Allen Matusow concluded that the Antiwar Movement ultimately helped de-escalate the war,¹²¹ despite periodic expansions and escalations during both the Johnson and Nixon administrations. Aside from that, it might seem like a reasonable supposition even if it remains impossible to prove in any precise sense. But even if Matusow's assertion is true on its face, we would still have to consider other contributing factors, such as the continuing costs of the war, mounting death toll, and the unwillingness of either Johnson or Nixon to invade North Vietnam. The "limited war" approach was partly to avoid provoking hot war from China (as occurred in the Korean War, after the U.S. and its allies got too close to the Chinese border), but even hawks began seeing this as a no-win strategy that would only perpetuate stalemate.

Perhaps the best assessments of the Antiwar Movement's influence are couched in cautious terms.¹²² It profoundly contributed to national divisions but

¹¹⁵ DeBenedetti and Chatfield wrote, "Public opinion surveys indicated that the American people consistently resented the Antiwar Movement but increasingly agreed with its arguments and conclusions." See DEBENEDETTI & CHATFIELD, *supra* note 91, at 398.

¹¹⁶ William Berkowitz, *The Impact of Anti-Vietnam Demonstrations Upon National Public Opinion and Military Indicators*, SOCIAL SCIENCE RESEARCH 1-14 (March 1973).

¹¹⁷ *Id.* at 10. Berkowitz concluded that "The protests were thus "neither particularly productive nor counterproductive." *Id.*

¹¹⁸ Berkowitz wrote, "It is possible that anti-Vietnam, demonstrations, and perhaps many social protests in general, may simply have little or no impact whatsoever." See *id.* at 12.

¹¹⁹ *Id.* at 13, 14.

¹²⁰ *Id.* at 13.

¹²¹ MATUSOW, *supra* note 26, at 344.

¹²² For example, George C. Herring notes that antiwar demonstrations "did not turn the American people against the war," but adds that "Perhaps most important, the disturbances and divisions set off by the Antiwar Movement caused fatigue and anxiety among policymakers and the public, and thus eventually encouraged efforts to find a way out of the war." See HERRING, *supra* note 11, at 190. Or, as Mitchell K. Hall concluded, even though the Antiwar Movement failed "to end the war directly, the movement was strong enough to alarm the government, creating social conditions that limited policy options and made stopping the war possible." See Mitchell K. Hall, *The Vietnam Era Antiwar Movement*, OAH MAGAZINE OF HISTORY 18:5 (Oct. 2004) at 16. Finally, as

it also reflected and amplified divisions already present. Media coverage likely contributed to this amplification. Media amplification remains important in and of itself, but it also reflected a meeting place among populist protestors and corporate elites. Sensational news is big business.

POPULISTS AND MEDIA ELITES MEET IN AMBIGUITY

Following the Elite Theory of Democracy, the news media constitutes one component of select power brokers that also includes corporate moguls, high level bureaucrats, and elected office holders. Having said that, it remains difficult to make generalizations about the media coverage of the Vietnam War and the Antiwar Movement. Sometimes the protestors may have benefitted from publicity; other times, some of them expressed frustration and anger over how the media covered them.¹²³ Continuing a long and deep tradition of sensationalism, the American news media almost definitely focused unduly on the radical elements of the Antiwar Movement.¹²⁴

Early media coverage of the war was generally in sync with the White House, predicting that victory would arrive soon in a limited land war. But especially during 1968, media coverage became far more complex—sometimes angering the hawks or the military itself, sometimes sensationalizing the antiwar demonstrations, sometimes questioning political authority. At this point “truth” was not necessarily the “first casualty of war,” as the old saying went;¹²⁵ rather, media coverage (and omissions) more resembled a chaotic free-for-all of information overload and all sorts of “truths” and “falsehoods.” Media coverage of the war and Antiwar Movement was undeniably influential, but the details of influence are almost hopelessly muddled.

As often repeated, the Vietnam conflict was the first to be broadcast in people’s living rooms, and it used the notorious “body count” in lieu of tangible progress in the vein of World War II.¹²⁶ Political scientist Guenter Lewy concluded that television coverage came to be clearly biased against the war, focusing on atrocities committed by America’s South Vietnamese ally, but omitting how North Vietnam prevented press access altogether.¹²⁷ The media delivered numerous horrific images, such as that of the South Vietnamese police commander Nguyen Ngoc Loan

DeBenedetti and Chatfield wrote, “Antiwar activists contributed to the growth of public disaffection with the war and helped to give it focus, but they were unable to harness it.” See DEBENEDETTI & CHATFIELD, *supra* note 91, at 393.

¹²³ For examples, see GITLIN, *supra* note 102, at 261, 265, 308, 411; also, N.L. ZAROULIS & GERALD SULLIVAN, WHO SPOKE UP? (1984) at xiii.

¹²⁴ See GARFINKLE, *supra* note 83, at 4, 101, 285.

¹²⁵ For a good analysis of this saying’s history, see “Truth Is the First Casualty in War,” Quote Investigator (April 11, 2020) <https://quoteinvestigator.com/2020/04/11/casualty/>

¹²⁶ As the political scientist Guenter Lewy wrote, “The nightly portrayal of violence and gore and of American soldiers seemingly on the brink of disaster contributed significantly to disillusionment with the war.” See GUENTER LEWY, AMERICA IN VIETNAM (1980) at 433-34.

¹²⁷ “War has always been beastly,” Lewy wrote, “but the Vietnam war was the first war exposed to television cameras and seen in practically every home, often in living color. Not surprisingly this close-up view of devastation and suffering, repeated daily, strengthened the growing desire for peace.” *Id.*

executing a Viet Cong prisoner on the street with a snub-nosed handgun in 1968. Eddie Adams (Associated Press) took a photograph of this that won the Pulitzer Prize and made it into newspapers around the world. Four years later, Nick Ut took another Pulitzer-winning photograph for the Associated Press of a nine-year-old naked girl—the severe burns on her back hidden from the camera—running from an American napalm attack. Then there was the footage of Buddhist monks sitting in the lotus position, burning themselves to death to protest mistreatment by the South Vietnamese government. After soaking themselves in gasoline, they lit themselves afire, immediately attracting Vietnamese people who ran toward them bowing and kneeling and making salutary prayers before the monks slowly succumbed to death and fell over.

One of the most-noted media moments arrived when anchorman Walter Cronkite offered his first-ever editorial comment on CBS News. Cronkite had just returned from Vietnam, following the Tet Offensive. On February 27, 1968, he famously said, “To say that we are mired in stalemate seems the only realistic, if unsatisfactory conclusion,” and that it was “increasingly clear to this reporter that the only rational way out then will be to negotiate, not as victors, but as an honorable people who lived up to their pledge to defend democracy, and did the best they could.”¹²⁸

Cronkite’s famous commentary raises the question whether journalists merely represent actuality or rather assist in the creation or enhancement of the experience they seek to report. The claim that LBJ responded to Cronkite’s commentary with, “If I’ve lost Cronkite, I’ve lost Middle America,” remains apocryphal. After all, by this time—and consistent with Elite Theory of democracy¹²⁹—business leaders, legal professionals, and other “conventional” leaders like Secretary of Defense Clark Clifford began opposing the war less on ideological grounds than because they simply saw it as a hopeless quagmire with no chance of military victory for the United States.¹³⁰ In other words, these were “Establishment” figures who shared little or nothing in common with demonstrators objecting to the war on moral grounds. And yet, because of their very conventionality, these white-collar professionals likely had more clout when it came to congressional and presidential considerations regarding the hopelessness of the war. In 1969, Clark Clifford wrote, “We should reduce American casualties by reducing American combat forces. We should do so in accordance with a definite schedule and with a specified end point.

¹²⁸ The transcript of this editorial is available at “Final Words: Cronkite’s Vietnam Commentary,” NPR’s *All Things Considered* (July 18, 2009). Veteran journalist David Halberstam, who extensively covered Vietnam, claimed that “Cronkite’s reporting did change the balance; it was the first time in American history a war had been declared over by an anchorman.” See DAVID HALBERSTAM, *THE POWERS THAT BE* (1975; 2000) at 514. Journalist Joel Achenbach more cautiously wrote, that “Cronkite mainstreamed antiwar sentiment,” but remarked that “Journalists look for direct causality, while historians see complexity.” See Joel Achenbach, *Did the News Media, Led by Walter Cronkite, Lose the War in Vietnam?* WASH. POST (May 25, 2018).

¹²⁹ In Elite Theory, scholars see a select few in the top tiers of elective office, bureaucracies, corporations, and media as exercising genuine power, in stark opposition to populism. See DYE & ZEIGLER, *supra* note 9, at 1-4, 10, 17-19, 128-29, 137-43, 195, 291, 323-24, 331, 412.

¹³⁰ HERRING, *supra* note 11, at 222, 224; HARRY MCPHERSON, *A POLITICAL EDUCATION* (1972) at 433-34.

Let us start to bring our men home-and let us start now.”¹³¹ W. Lance Bennett has pointed out the impact that this kind of opposition from Washington D.C. elites like Clifford had on changing the general media conversation about the war.¹³² As for the antiwar protests themselves, it is difficult to imagine the support, emulation, opposition, and backlash they evoked had there *not* been media coverage.¹³³

In the final analysis, television coverage of the Vietnam War and antiwar demonstrations probably only contributed to existing divisions, confusions, and ambiguities at home.¹³⁴ The impact of media coverage was profound, but sometimes that profundity was merely reflective of a reality (in a *reporting* sense) rather than evoking a reality, as in *making* news and creating or enhancing reactions where none previously existed. As Daniel Hallin concluded, the media was only part of a larger scenario that doomed the Vietnam war to failure. By the time Cronkite made his monumental editorial assessment of the war, Hallin noted that the Vietnam conflict was already failing due to the “limited war” aspect,¹³⁵ since Johnson (wisely or not) was unwilling to invade North Vietnam and risk regional or global escalation. Thus, in a reporting sense, to a major degree the media merely came to reflect public and political divisions that already existed.¹³⁶

THE ANTIWAR MOVEMENT AND ELITE THEORY

The limited effectiveness of the populist aspect of the Antiwar Movement is largely consistent with the Elite Theory of democracy,¹³⁷ a political science philosophy that views the masses as marginally effective in influencing policy. This would apply to domestic policy, but even more to foreign policy and perhaps especially to policy involving the making, conducting, and the ending of war.

Elite Theory scholars have argued that real power in the United States rests with and is wielded not by the people at large but rather by political, bureaucratic, corporate, and media elites.¹³⁸ Political and policy outcomes are skewed by financial contributions from political elites that can be, and often are, enormous. Low voter turnout, widespread voter apathy, and an electorate that remains largely ill-informed about policy issues result in elections that are largely symbolic. Even individual political activists tend to be better educated and wealthier than the population at large.¹³⁹ This kind of analysis recognizes the limitations of a system of representative democracy which encourages politicians to pursue policies of short-term advantage.¹⁴⁰

¹³¹ Clark M. Clifford, *A Viet Nam Reappraisal*, FOREIGN AFFAIRS 622 (July 1969).

¹³² BENNETT, *supra* note 110, at 163.

¹³³ DEBENEDETTI & CHATFIELD, *supra* note 91, at 390.

¹³⁴ HERRING, *supra* note 11, at 221.

¹³⁵ See DANIEL C. HALLIN, *THE UNCENSORED WAR: THE MEDIA AND THE VIETNAM* (1986) at 213.

¹³⁶ *Id.*

¹³⁷ See generally, DYE & ZEIGLER, *supra* note 9.

¹³⁸ *Id.* at 1-4, 10, 17-19, 128-29, 137-43, 195, 291, 323-24, 331, 412, and especially chapters 8 and 9. See also, BENNETT, *supra* note 110, at 126.

¹³⁹ *Id.*

¹⁴⁰ As Paul Burststein has noted, “members of Congress find it difficult to gauge public opinion on complex issues. Because electoral politics is fraught with uncertainty, many members of Congress adopt conservative voting strategies, changing their stands on

A major reason for the failure of the Antiwar Movement was its lack of a cohesive democratic form. As Jan-Werner Müller has observed, “Street protests . . . have genuinely democratic meaning, but they lack proper democratic form, and they cannot yield a kind of democratic trump card against representative institutions.”¹⁴¹ Demonstrations, marches, sit-ins, and the like work best when interwoven with existing political, legal, and policymaking systems. And yet, these existing systems also largely failed during the Vietnam War.

The Cold War context remains the crucial backdrop. Fear of communism and a prospective nuclear World War III heavily influenced a generation or two of leaders following the Second World War; perhaps they found it easier or even wiser to defer to a strong executive in these circumstances foreboding possible emergencies that could not accommodate the luxury of judicial and legislative deliberation. So, if the legislative-judicial system and mass protests did not end the war, what did? More than anything, probably the persistence of the North Vietnamese in fighting for their homeland—within a context of America’s self-chosen limited war—explains their eventual triumph. In light of this, the United States gradually acknowledged that they were entangled in a hopeless quagmire, short of dangerously escalating the conflict with a land invasion of North Vietnam, employing nuclear weapons, antagonizing China and the Soviet Union and possible sparking a third world war.

V. CONCLUSION

In this broadest of contexts, the Vietnam War was but one example of the U.S. Constitution compromised during the ongoing aftermath of World War II. Other examples included the Korean and Persian Gulf wars, but also a great many lesser military activities¹⁴² and a huge host of covert CIA operations (some with congressional knowledge, others not).¹⁴³ Then there is the entire issue of

issues only when it is very clear where their advantage lies.” Burstein was speaking of Civil Rights legislation, but his observation applies equally to the failures of the Antiwar Movement. See BURSTEIN, *supra* note 109, at 158.

¹⁴¹ JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016) at 68. As Dye and Zeigler have observed, the most direct influence over governmental action and policy will come from organized stakeholders rather than ‘the people.’ See DYE & ZEIGLER, *supra* note 9, at 233.

¹⁴² Aside, beyond, or in addition to outright wars, exercise of American military power globally has been and continues to be part of the Cold War and post-Cold War reality. For collections of essays, see SHORT OF WAR: MAJOR USAF CONTINGENCY OPERATIONS, 1947-1997 (A. Timothy Warnock, ed., 2000). See also, SHORT OF GENERAL WAR: PERSPECTIVES ON THE USE OF MILITARY POWER IN THE 21ST CENTURY: ANTHOLOGY OF STUDENT RESEARCH PAPERS FROM THE U.S. ARMY WAR COLLEGE CLASS OF 2008 (Harry R. Yarger, ed., 2010); Thomas C. Linn, *Military Power Short of War*, PROCEEDINGS, U.S. NAVAL INSTITUTE, v.112 (Nov. 1986).

¹⁴³ The CIA has a long history of operating in secrecy and public dishonesty, often without congressional oversight or authorization. CIA covert activity has reflected enhanced executive power, its own self-preservation and power as a government agency, and both of these dynamics. See TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* (2007) at 105-07, 240, 243, 348, 351, 406-10, 414-15, 500-01, 511-12. Especially see the “Fuck the Congress” [sic] attitude and behavior described at 381-84.

“extraordinary rendition,” military prisons abroad, and the torture of prisoners¹⁴⁴ – all of which would be unconstitutional in the United States itself. In this light, it seems unreasonable to expect the Founders’ conception of congressional war powers in a democratic republic to survive such massive conquest and expansion. The development of *de facto* presidential war powers constitutes but one aspect of an evolving reality, even if it still violates the Constitution *per se*.

In 1977, despite having left office in disgrace, then-former president Richard Nixon notoriously reaffirmed his belief in the imperial presidency when British journalist David Frost asked him about the Huston Plan, a Vietnam War era scheme of illegally spying on antiwar protesters. Nixon said, “when the president does it . . . that means that it is not illegal.”¹⁴⁵ Nixon went on to rationalize such executive behavior with questionable claims that national security and/or domestic peace required such authoritarian actions. But any leader can *claim* to be addressing emergencies when they are actually violating democratic and constitutional process.

On July 1, 2024, in *Trump v. United States*, the Supreme Court of the United States ruled that presidents enjoy immunity from criminal prosecution for at least some official acts.¹⁴⁶ The details and ramifications of this ruling will take decades to work their way through various legal and legislative systems. But *Trump v. United States* certainly did not come out of a vacuum. In fact, one could argue persuasively that it is but one logical result from what is now a deeply ensconced tradition of increased executive power.

During all post-World War II decades – but especially during the Vietnam War – if judges and members of Congress did not, could not, or were unwilling to rein in Imperial Presidents, could we possibly expect something *more* effective from the public demonstrators? Short of genuine populist revolution, perhaps little or nothing. The Vietnam War and those who opposed it constitute a very important chapter in American history, and yet this story is also merely a subset example of the broader phenomenon we now call the Imperial Presidency. Among many others, the great legal scholar Lawrence M. Friedman starkly described the *de facto* war powers of the Imperial Presidency: “Congress has sole power to declare war, according to the Constitution. But these are now empty words.”¹⁴⁷ We now have a nearly eighty-year-old tradition of unprecedented presidential war power. Who knows where it may lead.

¹⁴⁴ For an overview going back to the Spanish American War up until contemporary times, see WILLIAM L., D’AMBRUOSO, *AMERICAN TORTURE FROM THE PHILIPPINES TO IRAQ : A RECURRING NIGHTMARE* (2022).

¹⁴⁵ Transcript of David Frost’s Interview with Richard Nixon (1977), edited and introduced by Jeremy D. Bailey, available at <https://teachingamericanhistory.org/document/transcript-of-david-frosts-interview-with-richard-nixon/>

¹⁴⁶ *Trump v. United States* 603 U.S. _ (2024).

¹⁴⁷ Friedman observed how Congress “rather meekly” went along with respective presidents in all the major post-World War II conflicts in Korea, Vietnam, and the Persian Gulf. See LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* (2004) at 175.