

Heck No, They Won't Go!: Opposition by
Two State Legislatures to U.S. Policy in Vietnam

by

M. Alan Shepherd

Submitted in Partial Fulfillment of the Requirements for the Degree of
Master of Arts
in the
History Program

Youngstown State University
August, 2009

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M. Alan Shepherd

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Signature:

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Approvals

W.D. Jenkins, Thesis Adviser

Date

Anne York, Committee Member

Date

Ron Slipski, Committee Member

Date

Peter J. Kasvinsky, Dean of the School of
Graduate Studies and Research

Date

Abstract

In April 1970 Massachusetts Governor Francis W. Sargent signed a law that forbade the federal government from drafting citizens of Massachusetts and sending them to Vietnam. One year later, Minnesota Governor Wendell Anderson signed a similar bill into law. The language of each law sought to have the U.S. Supreme Court determine whether the U.S. war in Vietnam was unconstitutional because undeclared. State authority in relation to foreign and military policy is not mentioned in the U.S. Constitution. Central to this paper is the question of the rights of citizens and the power of individual states in relation to the federal government. This paper examines four areas to determine what factors may have influenced legislators in Massachusetts and Minnesota to use state law in their attempt to challenge federal policy.

The first area to be examined is presidential use of military power without congressional declaration of war. Also examined are federal court cases, such as *Talbot v. Seeman* (1801) in which the courts validated the actions of presidents during an undeclared war. The Twentieth Century has seen almost continuous involvement by U.S. forces in congressionally authorized yet undeclared conflict. The Tonkin Gulf Resolution, used by Lyndon Johnson to justify the massive commitment of American troops to Vietnam, offered congressional authorization for war without explicit declaration of war.

The second area examined is the growth and impact of the antiwar movement during the U.S. war in Vietnam. The Vietnam antiwar movement had antecedents in citizen opposition to the draft during the First World War. The structure of the antiwar movement was very complex. There was no overall national organization nor was there some single command group. After more than two decades of governmental information regarding the need to fight communism all antiwar and anti-draft groups faced the daunting task of re-educating the public.

Elected officials, including state legislators, must determine which actions will maximize voter satisfaction. During America's war in Vietnam the opinion of a significant portion of the voting public turned against the war. Elected officials within Massachusetts and Minnesota reacted to the growing unpopularity of the war. The third area to be examined is the effect on elected officials of growing public dissatisfaction with U.S. policy in Vietnam. This paper argues that although public opinion against the war had no direct effect on federal policy, legislators in both states felt compelled to introduce legislation to end the war.

The fourth area to be examined is federal court cases regarding the constitutionality of America's war in Vietnam. Throughout the war federal courts heard cases regarding individuals opposing the war. No individuals were successful in having the courts question presidential authority to wage congressionally authorized war. The Supreme Court heard the Massachusetts law. In that case the court ruled that questions concerning congressionally authorized presidential wars were political questions, and beyond the scope of judicial review. As part of the attempt to enforce the Minnesota law the state attorney general filed a case in the federal court in Minneapolis. That court ruled that the question of presidential war making was a political question. The federal appeals court concurred with that ruling. The Solicitor General of

Minnesota failed in his effort to have the U.S. Supreme Court hear the case. Neither law was successful in having courts decide the question of the constitutionality of the war.

Acknowledgements

I learned of Minnesota's anti-draft law as I was finishing a Research Methods class, my first class in grad school. I had posted on a web forum for former Marines about my paper for that class – a description of the transition from the draft to the all-volunteer armed forces. Seeing that post, Bill Ojala contacted me, explaining that he wrote the original version of the bill submitted to the Minnesota House of Representatives. I learned that Bill had been a Marine combat veteran of the Second World War, and since the war had carried a strong desire to end America's extensive use of its military. During the writing of this thesis Bill has offered very much encouragement.

I received a great deal of support from the faculty of the History Department. I had the good fortune of having Dr. Jenkins assigned as my thesis adviser. If I have any ability to write it is only because of his direction and patience. Dr. York suggested the chapter on the antiwar movement. Understanding the movement made me aware of the forces that drove individual legislators. Dr. York was instrumental in bringing Attorney Slipski to the committee midway through the writing of my thesis. I thoroughly enjoyed discussions with Atty. Slipski concerning the U.S. Constitution and federal court interpretations of the application of the document. Twice Dr. Berger demonstrated a kindness I will not forget. First, he agreed to step away from the committee in order to allow Atty. Slipski to step in. Since I had taken no classes from Atty. Slipski, Dr. Berger's second kindness was to agree to take part in my written and oral exams. Both of those episodes illustrate his and the department's commitment to students.

My wife, Lynda Bumback, has been a constant support and sounding board throughout all of my classes, but especially while I was writing this thesis. She has, however, encouraged me to wear a warning label when I am in public. That's right, I am a history geek with a warning label. The label reads "Regardless of what a person may say, nobody is really interested in the details of the civil war within the Minnesota Democratic Party during 1968." Wisdom I try to remember.

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Introduction

In October, 1971, two U.S. Supreme Court justices agreed to hear a case concerning a bill signed into law by the Governor of Minnesota the previous April. The law, designed to be a test case of the constitutionality of the American war in Vietnam, prohibited the federal government from drafting one man from Minnesota and sending him to Vietnam. Four justices are necessary to grant certiorari. Since four justices did not agree that the case should be heard, a lower court's decision denying jurisdiction became final. Thus ended the effort by the governments of the only two states that attempted to thwart U.S. military policy in Vietnam using state legislation. This paper will examine four areas to determine what may have influenced legislators of Massachusetts and Minnesota to choose state law in their attempt to change federal policy.

The first area is the growing power of the U.S. President to use the military in conflicts without Congressional declaration of war as described in the U.S. Constitution. Although these war-like actions have taken place throughout U.S. history, their occurrence has accelerated in the Twentieth Century.

Beginning with John Adams' ordering an attack on French naval forces lurking off the U.S. coast in 1798, the trend toward Presidential war making has grown. Two factors are common to these undeclared wars. First, these military actions were conducted to advance the interests of the U.S. as interpreted by each President based on their observations of world events; second, though not a declared war as described in the Constitution, Congress

acquiesced by funding the operations of each of these conflicts. Vietnam was only the latest and, by far, most costly in lives lost, of these undeclared wars.

The second area to be examined will be the growth and impact of the antiwar movement during the Vietnam War. Although many U.S. wars have spawned antiwar activities, involvement in Vietnam fostered a movement that spread to many areas of American civil life. The rapid expansion of American ground combat troops in South Vietnam, with an attendant increase in the number of men being drafted to fill the ranks of the armed forces, placed new urgency to these expressions of antiwar feeling. Although large portions of the movement during the early years of the American war in Vietnam involved university students and faculty, the movement expanded to include participants from all socio-economic classes.

The third facet to be examined will include a description of the effect of growing dissatisfaction with U.S. policy regarding Vietnam within the electorate and the political structures of Massachusetts and Minnesota. Observing the behavior of elected officials leads one to accept the premise that the primary function of political leaders is to secure their own re-election. Many legislators in Massachusetts and Minnesota understood the damage the U.S. war in Vietnam was imposing on American society and held long-term antiwar views. However, others in each state government sought to use an antiwar stance for their own, or their Party's gain. For example, although the Governor of Massachusetts was Republican, he expressed sentiments counter to the Nixon administration when he spoke against the war during the October 1969 Moratorium. In Minnesota the Democratic Farmer Labor Party (DFL) had been severely strained by differences about American involvement in the war during

the 1968 Presidential election cycle. Hubert Humphrey and Eugene McCarthy were both from Minnesota, both members of the DFL, and each expressed opposing views about the war while campaigning to achieve the Democratic nomination for President.

The war in Vietnam led to significant legal action. During the U.S. involvement in Vietnam, supreme and federal court cases raised questions regarding the rights of individuals in relation to military conscription and undeclared wars. Both state laws were written to protect citizens of Minnesota and Massachusetts from being drafted into the military and used in what was described as an illegal because undeclared war. Both laws sought to have the U.S. Supreme Court declare American involvement in Vietnam unconstitutional. These were the first state laws challenging federal policy in Vietnam. The fourth area to be examined will be prior federal court cases involving individuals who raised the same question regarding the war as these state laws.

The passage of these two state laws represents the intersection of two opposing threads that developed in American culture during the 20th Century. One is the repeated use of military force by each president – commencing with William McKinley in 1898. The second line represents the opposition to these wars by portions of the American public. Although the American war in Vietnam and citizen opposition to it were each continuations of policy and opposition to policy, the laws from Massachusetts and Minnesota were unique. No other state legislatures were successful in attempts to defend the rights of citizens of those states by challenging federal authority to conduct war.

Chapter One: Presidents, War, and the Constitution

The Constitution of the United States, written to limit the powers of the sovereign states in relation to each other and to the central, national government, delegates foreign policy and war making to the national entity. In order to ensure that no single leader or branch of the government would have overwhelming power the writers of the Constitution divided war making functions between the legislative and the executive branches. The concept of dividing responsibility for the conduct of war was unique to the United States during the early years of the Republic.

This division of power was a manifestation of the concern that either branch, the executive or legislative, if too strong, would involve the nation in frequent wars, or that wars could be used to advance a political agenda. There are examples throughout the history of the United States of wars declared and directed following the model offered by the Constitution.

A declaration of war, with potential consequences for nations and for individuals, should have a purpose. War is, or should be, a last resort, something a government turns to when all other options have failed. A threat to the peace or security of the nation by some force should be present. Its necessity is implied in Article II, Section 2 of the Constitution – the presidential power of commanding the federal military and state militias would occur only to quell revolution or repel invasion.¹

The commencement of many of the military conflicts in which the United States has been involved did not follow the method offered in the Constitution. The method used to start these undeclared wars is the President, in the role of

¹ Akhil Reed Amar, *America's Constitution: a Biography*, New York: Random House, 2005, 187.

Commander-in-Chief, utilizes the Armed Forces with Congressional authorization. Since the Constitution contains no reference to a Congressional authorization of war-like acts, questions concerning the constitutionality of undeclared wars continued to the late 20th Century.

These undeclared wars violate the Constitution's ideal of dividing war-making powers between the executive and legislative branches. During the Twentieth Century, undeclared wars have been used to advance commercial, ideological, or political agendas. An example of this style of war was the United States' conquest of Grenada, October 25, 1983.² That small conflict was launched, it may be argued, to rally U.S. public opinion toward the Reagan administration. Two days prior to the invasion of Grenada, 241 American military personnel were killed in a terrorist bombing while on a peacekeeping mission to Beirut, Lebanon.³ Neither the religious war in Lebanon, nor the government of Grenada offered any threat to the United States. The conquest of Grenada, however, allowed the American public to "rally around the flag", and masked the failure of Reagan administration policy in the Middle East.

Small wars demonstrate that Congress continues to relinquish its constitutional responsibility of declaring war, instead authorizing the president to utilize the armed forces. Congress has, in effect, transformed its functions under the Constitution without amendment. A test of this model of authorized rather than declared war occurred when elected officials in two states wrote and passed legislation meant to challenge federal policy. Both laws questioned the national government's adherence to methods set forth in the U.S. Constitution.

² Arthur M. Schlesinger, Jr., The Imperial Presidency, Boston and New York: Houghton Mifflin, 1989 ,443.

³ Max Boot, The Savage Wars of Peace: Small Wars and the Rise of American Power, New York, Basic Books, 2002, 328.

The war making powers granted to Congress are defined in Article I, Section 8. Congress is empowered “to declare war, grant Letters of Marque and Reprisal.” A second, significant war power granted to Congress is “To raise and support Armies, but no appropriation of Money to that use shall be for a longer term than two years.” Additionally, Congress is authorized “To make Rules for the Government and Regulation of the land and naval forces.”⁴

Congress’ role, to declare war, is, by implication, more complex than mere declaration and funding of war. Present, though not explicitly stated in the Constitution, is the expectation of deliberation – weighing the necessity to use force.

Article II, Section 2 describes the president’s war making role to be “Commander in Chief of the Army and the Navy of the United States, and of the Militia of the several States, when called into actual service of the United States.” The President would also have the power “by, and with the consent of the Senate, to make Treaties”⁵ for ending wars or to make alliances with other nations.

Congress, as described by the Constitution, has the power to declare wars, fund wars, and to approve treaties that may be used to end wars. The President negotiates treaties, commands the military and, and in conjunction with advisers, determines when, where, and how the military will be used.

The Federalist Papers written immediately after completion of the Constitution were used to explain the Constitution to those in individual states’ legislatures as each state considered its acceptance. An examination of Federalist Paper Number 69 reveals how those who proposed the acceptance of

⁴ Constitution of the United States, Article I, Section 8.

⁵ Constitution of the United States, Article II, Section 2.

the Constitution explained the war making powers of the national legislature and of the executive.

According to Federalist Paper 69, “The President will have only the occasional command of such part of the militia of the nation as by Legislative provision may be called into the active service of the Union.”⁶ This is a clear statement that there would be no large standing army. The military would only be enlarged during times of national emergency. The power to control the military by the president, as defined in the Constitution, would be very limited, and only available as long as the Legislature continued to fund its operations. Federalist Paper 69 states that “The King of Great Britain and the Governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this Article [Article 2, Section 2, U.S. Constitution], therefore, the power of the President would be inferior to that of either the monarch or the Governor.”⁷

The limited military power to be granted to the President is explicitly stated in this Paper. It stated:

The President is to be Commander in Chief of the Army and Navy of the United States. In this respect his Authority would be nominally the same with that of the King of Great Britain, but in substance, much inferior to it. It would amount to nothing more than the supreme command and direction of the military, as First General and Admiral of the Confederacy; while that of the British King extends to the declaring of war and the raising and regulating of fleets and armies; all which, by the Constitution under consideration would appertain to the Legislature.⁸

⁶ Jacob E. Cooke, editor, The Federalist, Cleveland and New York: The World Publishing Company, Meridian Books, 1961, 464-5.

⁷ Cooke, 465.

⁸ Cooke, 465.

Comparing Paper 69 and the Constitution provides a view of how the early executive branch, with subsequent approval by the Supreme Court, adapted Constitutional strictures to real world diplomatic problems. These adaptations of the Constitution, accepted without amendment to the document, provided the foundation to the argument that American involvement in the Vietnam War was unconstitutional.

The Constitution's definition of war ignored the concept of conflict that did not involve states, that is, against an organized center of power. For example, during 1805 U.S. forces landed on the Barbary Coast of Africa in an effort to halt piracy perpetrated against American commercial interests in the Mediterranean.⁹ This small, undeclared war did not fit the Constitutional definition of war, yet was prosecuted by President Adams, with authorization and funding provided by Congress. Since war, as defined by the Constitution, would be declared and later concluded with a treaty, conflict between the U.S. and other nations could be viewed as being similar to a light switch – the nation would be in one of two states –either at war, or at peace. A significant weakness of this “two state” concept of war was that it did not fit the reality of diplomacy – governments relate to each other along a continuum, with infinite variation of their relations in the range between peace and war. The cited conflict with the Barbary pirates, though warlike in appearance, was not war according to the limited concept of the Constitution.

The Constitutional definition of war contains several omissions that have repeatedly been utilized by presidents in order to fit American foreign policy to situations beyond the concept presented in the Constitution. There is no

⁹ Robert Debs Heinl, *Soldiers of the Sea: The United States Marine Corps, 1775-1962*, Baltimore: The Nautical and Aviation Publishing Company of America, 1991, 15.

definition of what a “declaration of war” by Congress would be, nor is there definition of what “war” consists. The sequence to be followed is not defined – it is not clear that Congress must declare war before the President can order military action. The most significant omission within the Constitution is any statement that a declaration of war is at all necessary before the military may be utilized. This lack of definition allowed conflicts short of war to become part of the library of foreign policy actions by the executive branch of the federal government. With no explicit explanation of those key phrases, war and declaration, 20th Century Presidents have repeatedly used American military forces when there was no immediate threat to the United States and without Congress making a declaration of war. In each case Congress, by the action of authorizing and funding these military activities, has in effect, allowed the President to declare war in direct opposition to the method described in the Constitution.

Since the early days of the Republic Presidents have involved the United States in military conflict below the threshold of declared war. David Gray Adler wrote that, “consistent with the understanding of the Framers and the Constitution, the authority to initiate hostilities, short of and including war, is vested solely and exclusively in Congress. The president has only the power to repel invasions.”¹⁰

Beginning in the early years of the nation and continuing throughout the nation’s history numerous examples of presidential use of the military without Congressional declaration of war have occurred. These actions were beyond the apparent bounds of the Constitutional authority granted to the President. Adler

¹⁰ David Gray Adler, “The Constitution and Presidential Warmaking: The Enduring Debate”, in Political Science Quarterly, Vol. 103, No. 1, (Spring, 1988), 3.

wrote, “the actual number of these episodes varies among the several compilations...each of which constitutes a legitimizing precedent for future executive wars.”¹¹ Adler found that there have been between one hundred and two hundred such episodes since the nation’s founding.

The concept of war as defined in the Constitution underwent change in the early decades of the Republic. An undeclared naval “war” with France occurred in 1798.¹² American involvement in that conflict took place with Presidential direction and Congressional authorization and funding. Repeated military action, by direction of the President, has been the cause of Constitutional debate since the early years of the Republic.

When considering issues related to the war with France, the Supreme Court set aside the Constitutional concept of divided responsibility for declaring and directing war. As John Norton Moore noted “within twelve years of the adoption of the Constitution, no less an authority than Chief Justice John Marshall recognized... that Congressional action not amounting to a formal declaration of war could be a valid Congressional authorization of hostilities.”¹³ Moore’s conclusion was based upon the Supreme Court decision in *Talbot v. Seeman* (1801).¹⁴

That case developed as a consequence of the undeclared naval war with France – war-like activity by U.S. Navy units off the U.S. coast. The President, with Congressional approval, authorized these actions without declaration of war. Talbot, captain of the U.S.S. Constitution, in “pursuance of instructions from the president of the United States subdued, seized, &c. on the high seas,

¹¹ Adler, 35. Citing Henry P. Monaghan, “Presidential War-Making” in Boston University Law Review, Vol. 50, (Spring 1970),19.

¹² *Talbot v. Seeman*, 5 U.S. 1 (1801).

¹³ John Norton Moore, Law and the Indochina War, Princeton, NJ: Princeton University Press, 1972, 546.

¹⁴ Moore, 546.

the said ship Amelia and cargo, &c. and brought her into the port of New-York.”¹⁵ A U.S. Navy ship captured an armed, French flagged, cargo ship and escorted it to harbor. Clearly an act of war, yet the U.S. was not, according to the Constitution, in a state of war with France. In action seemingly contradictory to the intent of the Constitution, Congress allowed the executive to wage war without declaration:

The first act authorizing captures of French vessels, is that of 28th May, 1798, Laws of United States, vol. 4, p. 120. The preamble recites that "whereas armed vessels sailing under authority, or pretence of authority, from the republic of France have committed depredations on the commerce of the United States," &c. therefore, it is enacted that the president be authorized to instruct and direct the commanders of the armed vessels of the United States "to seize, take and bring into any port of the United States, ... any such armed vessel, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations on the vessels belonging to citizens thereof..."¹⁶

The Supreme Court held that the actions of the Navy, authorized by the Congress, and ordered by the President, fit the constitutional definition of presidential powers as Commander-in-Chief. Even so near in time to the adoption of the U.S. Constitution the President was forced to adapt military action to circumstances unforeseen by the writers of the document. The model of war offered in the Constitution seemed deficient. President Adams, the Congress, and the Supreme Court, by their actions and subsequent decisions, proved Moore’s contention that “the delegation problem is more likely to be

¹⁵ Talbot.

¹⁶ Talbot.

resolved by a pattern of practice responding to felt needs than by overly neat *a priori* constitutional hypotheses.”¹⁷

This practice – deployment of armed forces without declaration of war – grew to become customary practice as the U.S. joined the European powers in establishing a worldwide commercial empire during the late 19th and early 20th Centuries. A brief listing of these small, undeclared wars demonstrates that presidents have involved U.S. forces in foreign adventures, either in conflict or in occupying foreign soil, during every year of the Twentieth Century. The U.S. involvement in Vietnam was only the latest of these wars, formally undeclared according to the Constitution, yet justified by precedent, funded by Congress, and approved by federal courts.

The declared war with Spain in 1898 led to the U.S. acquiring its first offshore colonies – Guam and the Philippine Islands.¹⁸ Unknown to or ignored by U.S. leaders, the Spanish colonial authorities in the Philippines had been suppressing a nascent independence movement among island natives. Efforts by the U.S. to eliminate the independence movement and a subsequent Muslim insurgency in the southern Philippines concluded in 1913.¹⁹ The Philippines gained their independence from the U.S. in 1946 – albeit, with continuing significant American military presence.

In 1915 President Wilson ordered U.S. Marines to Haiti with the mission to “re-establish enough order to permit a Haitian government to be reconstituted.”²⁰ The Marines occupied and controlled Haiti until 1933.²¹

¹⁷ Moore, 549.

¹⁸ Heidl, 117.

¹⁹ Heidl, 127.

²⁰ Heidl, 173.

²¹ Heidl, 246.

From Summer 1918 to Summer 1919, U.S. forces were deployed to Russia in an attempt to aid the “White” Czarist forces in their civil war against the revolutionary Soviet government.²² This year long struggle saw repeated instances of U.S. forces shooting at, and being shot at by, Red Army forces. Combined U.S. / British / Canadian forces held outposts extending along the Dvina River to a point two hundred miles south of Archangel.²³ President Wilson’s efforts to halt the spread of Communism meant U.S. forces in Russia found themselves “under heavy attack by more than a thousand Soviet infantry”²⁴ in the village of Toulgas, Russia, in November 1918. This seemingly insignificant conflict provides a foretaste of the ideological struggle, The Cold War, which would dominate the latter decades of the 20th Century.

During the 1920s and 1930s units of the U.S. Navy and Marine Corps served in China, “where banditry and communism continue[d] rife along the Yangtze Valley.”²⁵ As this use of the military placed American forces in the path of Japanese expansion into China, it was not without risk. In December 1937 an American gunboat of the Asiatic Fleet, “the U.S.S. Panay was bombed and sunk by Japanese aircraft while anchored in the vicinity of Hoshien on the Yangtze River.”²⁶ During 1938 Marines, stationed at Shanghai, “were engaged during the Shanghai siege in protecting the lives and interests of Americans.”²⁷

Since the United States was at war with neither China nor Japan, these uses of the Armed Forces were significant examples of Presidential projection of

²² John Keegan, The First World War, New York: Vintage Books, 2000, 390.

²³ Keegan, 390.

²⁴ E.M. Halliday, The Ignorant Armies: The Anglo-American Archangel Expedition, 1918-1919, London: Weidenfeld and Nicolson, 1961, 1.

²⁵ “Yangtze River Patrol and Other U.S. Navy Asiatic Fleet Activities in China, 1920-1942”, p. 15, at www.history.navy.mil/library/online/yangtze.htm

²⁶ Yangtze River Patrol, p. 16.

²⁷ Yangtze River Patrol, p. 16.

military force to aid allies or to influence the political structure of sovereign nations. Later administrations would use similar methods – military advisers and support of unsteady national governments – in Vietnam.

Prior to the U.S. entrance into the Second World War President Franklin Roosevelt undertook measures involving military force beyond the scope of war making as described in the Constitution, significantly expanding the powers of the Presidency. For example, when Germany conquered Denmark, “Iceland, strategic key to the North Atlantic, remained in mortal peril, as both Winston Churchill...and the Icelanders themselves realized.”²⁸ U.S. forces were sent to the island in July 1941 to preempt German occupation – six months before the attack on Pearl Harbor. Successive U.S. administrations justified the effort in Vietnam, similar to U.S. interventions in China and Iceland by the necessity of forestalling perceived malevolent influence by an aggressor toward a vulnerable government.

With only a few exceptions, such as the 1918 Russian adventure and the 1916 conflict with Mexico, actions by U.S. military forces prior to the Second World War were to defend American commercial interests. Some historians, William Appleman Williams, for example, contend that American policies in the years after the Second World War, draped in the rhetoric of ideological struggle, were in fact a continuation of U.S. policies meant to secure a worldwide empire based upon the American economic model.²⁹

A new model of conflict, given the name “The Cold War”, arose soon after the end of the Second World War. This War, Cold in that there was little direct fighting between the two antagonists, had the world as its venue and proxies for

²⁸ Heintz, 311.

²⁹ William Appleman Williams, The Tragedy of American Diplomacy, New York: Dell Publishing Company, 1972, 229.

both sides doing most of the fighting. Although the primary focus of U.S. antagonism was the Soviet Union, other Communist nations, such as North Korea, Cuba, and China, became loci of American concern. The American public was inculcated with an almost irrational fear of Communist ideology, as if communism were a virus, and any who came in contact with it would be irrevocably infected. The Cold War provides the lens through which American foreign and military policy during the post-Second World War decades, especially in relation to Vietnam, must be observed.

During the years immediately following the Second World War there existed only two nations capable of projecting political and military power across Europe – the United States and the Soviet Union. The end of the Second World War found Soviet forces occupying all of the nations between Germany and the Soviet borders. Preventing Soviet domination of Western Europe was the object of American economic and military policy. The United States provided aid to rebuild the economies of Germany, as well as those countries Germany had fought and conquered. In order to forestall the threat of military action by the Soviet Union in Western Europe, a significant American military presence in Germany, France, Great Britain and Italy was maintained. Both of these actions - economic aid to, and permanently stationing troops in established sovereign nations, were new concepts, proposed by the President, funded by Congress, but unforeseen by the writers of the Constitution.

The Cold War represented a twist to the phrase “national emergency” as a facet of the process of selling war to the American public. With no immediate threat to the nation, yet with dire consequences of any slow response to threats, the U.S. public found itself in a constant state of being ready for war, yet

possessing a self-image of a peaceful nation. At the conclusion of the Second World War the American public was unprepared for the rigors offered by the Cold War. As George Kennan noted, “We were right about the nature of Soviet power, but we were wrong about the ability of American democracy, at this stage of its history, to bear for long a situation full of instability, inconvenience, and military danger.”³⁰

The Soviet Union and the United States had cooperated in the defeat of Nazi Germany. Given the destruction caused by the war against Germany, and the lack of any significant political force on the continent at its conclusion, struggle for the political control of Europe was almost unavoidable. The end of the war meant the leaders of these two erstwhile allies had to adapt to new power arrangements in Europe. Gar Alperovitz described the almost purposeful steps the Truman administration took against the Soviet Union near the end of America’s war with Germany. Truman’s understanding of the political dynamics in Europe led to a new direction in American – Soviet relations. Alperovitz wrote that, “far from following his predecessor’s policy of cooperation...Truman launched a powerful foreign policy initiative aimed at reducing or eliminating Soviet influence from Europe.”³¹

For all the benignity of the name, the Cold War represented real danger to the U.S., the Soviet Union and all of mankind. After 1950 both nations possessed nuclear weapons, and a few years later, exponentially more destructive thermonuclear weapons. By the late 1950s the development of intercontinental ballistic missiles meant that a misunderstanding by either side

³⁰ George Kennan, American Diplomacy 1900-1950, New York: The New American Library, Inc. 1951, 76.

³¹ Gar Alperovitz, Atomic Diplomacy: Hiroshima and Potsdam, The Use of the Atomic Bomb and the American Confrontation with Soviet Power, New York: Penguin Books, 1985, 63.

could lead to millions of deaths in a few hours. In order to avoid direct military confrontation, with its chance of quick escalation, both sides funded proxy military forces to fight in Asia, in Africa, and in Latin America. These U.S. – U.S.S.R. conflicts, though indirect, carried great stakes, as each side attempted to gain some advantage in the developing world.

Economic and military aid was offered to nations in order to influence the political direction of those governments. These changes are reflective of the Truman administration's adaptation to the new geopolitical realities of the post – Second World War world. The United States was the only nation able to challenge the Soviets. This self-imposed responsibility meant that certain actions must be taken by the United States, regardless of the Constitutional constraints upon those actions. America's involvement in the Vietnam War was among the consequences of these extra-Constitutional activities.

Throughout the Cold War a significant portion of the struggle between the Soviets and the U.S. took place in the former European colonial empires in Asia and Africa. For more than two decades, self-determination had been a foundation of U.S. foreign policy, explicitly stated by the Wilson administration during treaty negotiations concluding the First World War. Nations, and political and ethnic minorities within nations, would have the right to establish their own national entities.³² The establishment of independent nations from the remains of the Ottoman and Austro-Hungarian Empires was one of the tangible results of the First World War.

Before the Second World War the independence movements in these European colonies received little attention from the United States. K. M.

³² Henry A. Kissinger, *Diplomacy*, New York: Simon & Schuster, 1994, 221.

Panikkar described how the evolution of nationalist movements in Asia in the decades before the Second World War brought them to the front of the world stage during the post-war years. Panikkar stated, “till after the First Great War there was no large scale national movement basing itself on a scheme of reconstruction and reform. When that movement started, the Russian Revolution had already become a major factor in Eastern Asia, and therefore from the beginning the new nationalism of Indo-China had a Marxist bias, which later developed into Communist leadership.”³³

Panikkar described how the power of the European colonial administrations in Asia had begun to decline decades before independence was gained by the colonies. Pannikar wrote, “the Second World War only gave the *coup de grace* to a system which had already broken down and which could no longer function effectively.”³⁴ John Lewis Gaddis concurred, stating “...the British would have left the Indian subcontinent whatever Washington did; nor would the Dutch have found it easy to hang on in ... Indonesia, even if Americans had never heard of the place.”³⁵ Though Indochina was a minor factor in the decades preceding it, in the new reality of the post-Second World War Indochina and its political status grew to great importance in U.S. foreign policy goals. These nationalist movements became one of the venues in which the Soviets and the Americans competed during the Cold War.

Support of a colonial power in its effort to retain a colony was counter to one of the tenets of 20th Century American foreign policy – the concept of “self

³³ K.M. Panikkar, Asia and Western Dominance: A Survey of the Vasco Da Gama Epoch of Asian History, 1498-1945, New York: The John Day Company, 1951, 369.

³⁴ Panikkar, 311.

³⁵ John Lewis Gaddis, We Know Now: Rethinking Cold War History, Oxford: Oxford University Press, 1997, 156.

determination for all peoples”.³⁶ The U.S. now found itself with a policy supporting self-determination for France against Soviet encroachment, while limiting the self-determination of France’s former Southeast Asian colonies. The reality of this new, post-Second World War world, dominated by the ideological struggle between the Soviets and the U.S. had led U.S. “policy makers...to conclude that the United States had more important, countervailing interests”³⁷ than the independence of nations in the developing world.

As a means of bolstering France the Truman administration was forced to develop policies which would support as much as possible its efforts to re-establish its colonial claims. In this new position as leader of the “free” world, “Truman... seemed equally determined to restore the pre-War position of the French in Indochina.”³⁸ If a stable pro-Western, non-communist government was to be maintained in France, and if part of that stability was reliant upon its pre-War empire being regained by the French, then an exception to traditional U.S. anti-colonialism must be made. Washington’s “policy toward the French – Vietnamese dispute did indeed fly in the face of an anti-colonialism that was still popular in the United States in the post-war years.”³⁹ Richard Barnet noted, “the United States has sought to apply the imperial model to the post-Imperial world.”⁴⁰

The immediate post-war U.S. policy focusing on Europe placed events in Asia, including nationalist movements, as a “side show” to the Cold War.

³⁶ Andrew J. Rotter, The Path to Vietnam: Origins of the American Commitment to Southeast Asia, Ithaca and London: Cornell University Press, 1987, 3.

³⁷ George McT. Kahin, Intervention: How America Became Involved in Vietnam, New York: Alfred A. Knopf, 1986, 3.

³⁸ Gaddis, 155.

³⁹ Kahin, 3.

⁴⁰ Richard J. Barnet, Intervention and Revolution: The United States in the Third World, New York: New American Library, 1968, 278.

However, “because of France’s position as the keystone of U.S. European polices, American priorities in Europe – not Asia – brought U.S. power indirectly, but nevertheless, heavily, to bear in Vietnam.”⁴¹

The French sponsored a new government structure in Vietnam, established by Bao Dai during July 1949. The Bao Dai government received American recognition in February 1950.⁴² Vietnam “became a kind of laboratory in which the Truman administration sought to design a strategy that would maintain support for nationalism without at the same time advancing the interests of Communism.”⁴³ Self-determination and independence for Vietnam were important. However, according to U.S. foreign policy, a non-communist Vietnam was much more important.

Cold War policies and objectives had overriding priority in all facets of U.S. foreign policy. Officials at all levels of the U.S. State Department “had little sympathy for, or understanding of, colonial nationalism, and they were quite unwilling to use American leverage to move France toward such goals.”⁴⁴ The Truman administration concluded that the rewards for a stable France and a stable Western Europe outweighed the goodwill to be gained in the developing world by supporting independence for Southeast Asian colonies. This policy centered on Europe “continued to dominate American policy toward Indochina throughout the long postwar struggle France waged with Vietnamese nationalism.”⁴⁵

⁴¹ Kahin, 3.

⁴² Mark Bradley, “Slouching Toward Bethlehem: Culture, Diplomacy, and the Origins of the Cold War in Vietnam”, in The Political Culture of United States Imperialism, 1945-1966, Christian G. Appy, editor, Amherst: University of Massachusetts Press, 2000, 29.

⁴³ Gaddis, 156.

⁴⁴ Kahin, 5.

⁴⁵ Kahin, 5.

Dean Acheson, Truman's Secretary of State, developed an answer which "turned out to be paradigmatic: Washington would support the French in their efforts to defeat Ho's insurgency while at the same time pushing them to prepare Vietnam, Laos, and Cambodia for eventual independence."⁴⁶ This solution would, it was hoped, lead to military stability in Indochina and aid in supporting political stability in France. Although the focus of U.S. policy was to thwart Soviet expansion in Europe, "European security might yet require 'third world' stability."⁴⁷ As Andrew J. Rotter noted, American policy makers, adjusting to the new realities of the Cold War, learned that "along with the recognition that the stability of the developed world was linked to that of the underdeveloped came the understanding that Southeast Asia was the most important region in the underdeveloped linkage."⁴⁸

Leaders of both major U.S. political parties soon discovered that utilizing the Cold War could be advantageous for individual candidates, and for their party. No candidate could appear soft on Communism and hope to be elected. In 1954, the French suffered a major defeat at the hands of the Viet Minh.⁴⁹ The communist victory there, as presented to the American public, was proof of the seemingly inexorable march of communism in Asia. By the end of the 1950s, the United States had supplanted France in all facets of Vietnamese government and society.⁵⁰

The Truman administration and later the Eisenhower administration, utilizing the powerful United States economy and military, sought to affect the political structure of sovereign nations. What was not seen was that "in none of

⁴⁶ Gaddis, 157.

⁴⁷ Gaddis, 157.

⁴⁸ Rotter, 5.

⁴⁹ Stanley Karnow, Vietnam, A History, New York: Penguin Books, 1983, 214.

⁵⁰ Karnow, 264.

these situations was there any immediate prospect that what the United States did – or did not do - might bring Communists to power.”⁵¹

When, in 1955, Communist China attacked several Nationalist held islands near Formosa, the Eisenhower administration submitted, and both houses of Congress overwhelmingly approved, the Formosa Resolution. This Resolution became the first of five to be approved during the next decade, each granting sweeping powers to the President to use U.S. armed forces to defend various regions of the world from Communist attack or subversion.

The penultimate paragraph of the Formosa Resolution described the actions of Congress, delegating war-making authority to the President:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President of the United States be and he hereby is authorized to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, ...and the taking of such other measures as he judges to be required or appropriate in assuring the defense of Formosa and the Pescadores.⁵²

The closing paragraph of the Resolution, presaging almost identical language expressed in the Gulf of Tonkin Resolution, fixed no definite ending to the hostilities that might arise as a result of it, leaving that chore to the Executive:

This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, and shall so report to the Congress.⁵³

⁵¹ Gaddis, 156.

⁵² www.cns.miis.edu/straittalk/appendix16.

⁵³ www.cns.miis.edu/straittalk/appendix16.

This document, an antecedent of the Tonkin Gulf Resolution a decade later, had direct ties to Lyndon Johnson. These ties indicated Johnson's use and re-use of a successful formula to gain passage of legislation pertaining to war. In an interview with CBS News, and reported by the Boston Herald Traveler, Johnson described his thoughts about presidential war action and congressional support for that action. In the interview Johnson stated:

If the President's going in, as he may be required to do, he wants the Congress to go in right by the side of him. Why? Because that's the course of action I'd recommended for President Eisenhower when I was a senator, when I was the leader and he wanted the commitment for Formosa. That was the action I recommended in the Middle East Resolution.⁵⁴

When in 1957 religious strife in Lebanon gave an apparent opening for Soviet activity, the Middle East Resolution was submitted and passed, promising U.S. assistance to any Middle East nation that asked for aid in stopping Communist insurgency.⁵⁵ During July 1958, "following the fall of the neighboring Iraqi government to a communist led coup d'etat, President Chamoun appealed to the United States to send troops to uphold his government."⁵⁶ U.S. forces were deployed to Lebanon, and stayed until new Presidential elections could be held.⁵⁷

This Middle East Resolution furthered the erosion of Congressional authority in relation to the President. Although the Resolution's pre-approval of war-like actions could be explained as necessary because of the rapid evolution of events during conflict in a nuclear age, one of its effects was to reduce the constitutionally mandated authority of Congress. This significant expansion of

⁵⁴ Boston Herald Traveler, February 6, 1970, Sec. 1, 24.

⁵⁵ Heidl, 596.

⁵⁶ Heidl, 596.

⁵⁷ Heidl, 597.

Presidential power was authorized by Congress and accepted by the American public.

This newly expanded presidential power was exhibited in Vietnam. Although the United States was not a signatory of the Geneva Accords terminating France's war against the Viet Minh, it had honored some features of the agreement. As negotiators in Geneva sought to establish an independent Vietnam, Ngo Dinh Diem was appointed Prime Minister of South Vietnam.⁵⁸ Subsequently, the U.S. encouraged Diem's choice to not hold national unification elections in 1956, in effect negating the entire purpose and success of the negotiations.⁵⁹ The immediate aftermath of the 1954 division of Vietnam meant "while Vietnam appeared relatively quiet on the surface after Geneva, the Americans were stealthily moving into the political, administrative, economic, and military domains"⁶⁰ of the now dependent nation.

The United States, by virtue of its economic aid and military presence, had become the *de facto* colonial power in Vietnam, replacing France, and allowing South Vietnam to possess only the appearance of an independent nation. American policy makers soon discovered that "while the United States often managed to assist in removing a government, it did not, and could not, remake the various societies."⁶¹ Rebuilding a political structure, or supporting specific factions within a nation to the detriment of others, is a time and resource consuming process, and often leads to unforeseen consequences. These consequences may include long term commitment of military force, as in

⁵⁸ Kathryn C. Statler, Replacing France: The Origins of American Intervention in Vietnam, Lexington: The University of Kentucky Press, 2007, 117.

⁵⁹ Karnow, 235.

⁶⁰ Statler, 281.

⁶¹ Karabell, Zachary, Architects of Intervention: The United States, The Third World, and the Cold War 1946 – 1962, Baton Rouge: Louisiana State University Press, 1999, 225.

Haiti or the Philippines, or significant economic aid. America's commitment to Vietnam was to require both.

After 1956, "the amount of aid to Vietnam actually went down...but the number and activities of official and unofficial Americans in South Vietnam climbed steadily.⁶² The Eisenhower policies had "completed the transition from French to American control in Vietnam, which represented a transition between...the old-fashioned French variety of formal bureaucratic control and a new American neocolonial, or informal, one."⁶³ During the Truman and Eisenhower administrations, U.S. policy toward Vietnam consistently had two purposes, each related to the other. First, the government of the South would be given enough military aid to hold the external threat of North Vietnam at bay. Second, economic aid and political guidance would enable a stable, though repressive, government to control the internal threat presented by local insurgents.

During the last years of the Eisenhower administration, the Communist Party of North Vietnam renewed its efforts to eliminate the separate governance of the South.⁶⁴ As William Conrad Gibbons noted, Vietnam was "probably the foremost representative of a 'new state' freed from colonialism and threatened by communism."⁶⁵ Despite the increased tempo of North Vietnamese support for insurgents in South Vietnam, the Eisenhower administration maintained a minimal presence of American military personnel in South Vietnam. When John Kennedy took office in 1961, the number of American military forces aiding the Saigon government amounted to less than one thousand troops,

⁶² Statler, 281.

⁶³ Statler, 282.

⁶⁴ Boot, 287.

⁶⁵ William Conrad Gibbons, The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, Part II: 1961 - 1964, Princeton, NJ: Princeton University Press, 1986, 6.

working as advisers and as support personnel to the South Vietnamese military.⁶⁶ In the beginning, the Kennedy administration did not seek to change the status of American aid to the South. Gibbons wrote, “when he took office, Kennedy, whose personal commitment to Diem and to the defense of Vietnam was consonant with the commitment to Vietnam made by previous Presidents, did not question or feel the need to re-examine U.S. policy toward Vietnam.”⁶⁷

The increasing pace of insurgent activity fostered by the North led United States policy to shift toward an emphasis on training the South Vietnamese army. In an effort to increase the efficiency of the Vietnamese military American advisers were assigned in growing numbers to South Vietnam.⁶⁸ Although presented to the American public in a benevolent light the advisers were, after all, trainers; American military personnel were in many instances in direct, armed contact with insurgents and North Vietnamese forces.⁶⁹ There were more than thirty American advisers killed during the first years of the Kennedy administration.⁷⁰ [The writer is personally acquainted with several men who served as advisers in Vietnam prior to 1965. The dangers they faced were every bit as deadly, yet unknown to the American public, as those faced by troops after the official placement of combat troops.]

The numbers of American military service personnel grew exponentially during the Kennedy administration. Advisers, support staff, and pilots, all

⁶⁶ H.R. McMaster, Dereliction of Duty: Lyndon Johnson, Robert McNamara, The Joint Chiefs of Staff, and the Lies that Led to Vietnam, New York: Harper Collins, 1997, 37.

⁶⁷ Gibbons, 6.

⁶⁸ Karnow, 267.

⁶⁹ Karnow, 269.

⁷⁰ Boot, 288.

-serving in South Vietnam, totaled approximately 16,500⁷¹ by November 1963 – a twenty-fold increase in less than three years.

The year 1965 became a turning point in both U.S. foreign policy and in the expansion of Presidential power. During that year two events occurred which demonstrated that the Johnson administration sought to dramatically expand the reach of the presidency. In April, following a coup there, “Johnson ordered 22,000 American troops to the Dominican Republic without seeking congressional approval.”⁷² The military effort was launched with the objective of forestalling suspected Cuban interference with the island nation’s new government.⁷³ This “armed intervention for political purposes clearly raised questions under the Constitution, if not in the mind of the President, which called for congressional participation.”⁷⁴

Of much greater significance, in early March a battalion of Marines had gone ashore at Danang, South Vietnam. These troops, joining the U.S. military forces already present in Vietnam, represented the first ground combat troops committed under the auspices of the Gulf of Tonkin Resolution.⁷⁵ This Resolution, identified as Joint Resolution 1145, was submitted to Congress August 7, 1964. The bill was quickly approved by the Senate, with only two Senators – Wayne Morse, Democrat from Oregon, and Ernest Gruening, Democrat of Alaska – voting against adoption of the resolution.

The Resolution allotted nonspecific war making powers to the President. The President was authorized to use the military “to promote the maintenance

⁷¹ Seyom Brown, The Faces of Power: Constancy and Change in United States Foreign Policy from Truman to Johnson, New York and London: Columbia University Press, 1968, 330.

⁷² Schlesinger, 178.

⁷³ Schlesinger, 178.

⁷⁴ Schlesinger, 178.

⁷⁵ Schlesinger, 177.

of international peace and security in Southeast Asia”⁷⁶. This stated objective was a concept well beyond the scope of the Constitution, since the resolution explicitly stated the United States was not threatened. Instead, U.S. armed forces were to be used to halt “a deliberate and systematic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors.”⁷⁷

A thin veil of constitutionality was included, as the Resolution stated that

Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.⁷⁸

With this resolution Congress effectively authorized the President “to take all necessary steps, including the use of armed force”⁷⁹ in Southeast Asia. U.S. involvement, from this point, had no foreseeable termination, as “this resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured”⁸⁰ – text almost identical to the previously cited Formosa Resolution of 1955.

Although not a declaration of war, as described in the Constitution, the Resolution gave the President authority to exercise his authority as commander-in-chief to utilize the armed forces as the President deemed necessary. The submission and quick passage of the Tonkin Resolution, seemingly at a time of national crisis, must be viewed in the context of national

⁷⁶ H.J. Resolution 1145, also identified as Public Law 88-408, the “Gulf of Tonkin Resolution”, from www.ourdocuments.gov.

⁷⁷ H.J. Resolution 1145.

⁷⁸ H.J. Resolution 1145.

⁷⁹ H.J. Resolution 1145.

⁸⁰ H.J. Resolution 1145.

politics. Johnson needed to appear to the electorate to be making a strong stand against the expansion of Communism in Asia.

Gibbons described events at the White House as the Tonkin Gulf Resolution was being prepared for its submission to the Congress. In this examination Gibbons includes a discussion of Kenneth O'Donnell, a political adviser to Johnson, who "...said that after the meeting [on August 4] Johnson wondered about the political effects of retaliation [for the attacks on U.S. ships by the North Vietnamese], and O'Donnell said that he and Johnson agreed as politicians that the President's leadership was being tested...and that he must respond decisively."⁸¹

Only a few weeks before, Senator Barry Goldwater, a hawk in matters of national defense, had been selected by the Republican Party to be its Presidential candidate in the November election. O'Donnell knew the strength of Johnson's opponent. According to O'Donnell "the attack on Lyndon Johnson was going to come from the right and the hawks, and he [Johnson] must not allow them to accuse him of vacillation or being an indecisive leader."⁸²

Ensuring his own reelection was the apparent motive for Johnson as, Seyom Brown noted, "foreign affairs were...if anything, conducted in response to a domestic political alignment rather than an international one."⁸³ With a military hawk as an opponent to Johnson, and national elections three months distant, these conversations make it apparent that considerations of domestic political gain were a large part of the commitment of combat units of the U.S. military to Vietnam. The conflict in Vietnam, presented to the American public

⁸¹ Gibbons, 289.

⁸² Gibbons, 289.

⁸³ Brown, 325.

as an effort to protect South Vietnam from North Vietnamese aggression, became a tool to aid the re-election of Lyndon Johnson.

Events in the South China Sea during August 1964 carried no demonstrably direct threat to the United States. However, by portraying the dangers of communist aggression, the Johnson Administration was following precedent established by previous administrations. As Roger Hull and John Novogrod wrote in Law and Vietnam, “precedent may serve a valuable function...it demonstrates the changing nature of the Presidency and the futility of attempting to confine the President’s protective function to the mere duty of repelling invasion or immediate physical attack.”⁸⁴

During October 1965, Senator Wayne Morse, in an effort to set forth the legality, or illegality, of the now broadened U.S. involvement in Vietnam, established a “Lawyer’s Committee on American Policy Toward Vietnam.”⁸⁵ This committee compared America’s actions in South Vietnam in relation to the charter of the United Nations, to the Geneva Accords, to the agreement establishing the Southeast Asia Treaty Organization, and to the Constitution of the United States.

The preamble of the report of the Committee states the primary finding of its effort. The “Committee has reached the regrettable, but inescapable, conclusion that the actions of the United States in Vietnam contravene the essential provisions of the United Nations Charter...violate the Geneva Accords,

⁸⁴ Roger H. Hull, and John C. Novogrod, Law and Vietnam, Dobbs Ferry, NY: Oceana Publishing Company, 1968, 171.

⁸⁵ Lawyer’s Committee on American Policy Toward Vietnam, Congressional Record, Senate, February 9, 1966, 2665.

which we pledged to observe, are not sanctioned by the treaty creating the Southeast Asian Treaty Organization, and violate our own Constitution.”⁸⁶

The Committee expressed concern for the American system of government, as the war was harmful to “the system of checks and balances, which is the heart of it by the prosecution of the war in Vietnam without a Congressional declaration of war.”⁸⁷ According to the Committee, “to present the picture, as the United States has done, as though North Vietnam were an interloper having no organic relationship to South Vietnam, is to ignore both the applicable legal principles and treaties, and the facts of history.”⁸⁸

The Committee established that American support of the Diem government after 1954 was in error. In its report the Committee wrote, the “Conference recognizes that... the military demarcation line [the 17th parallel] is provisional and shall not in any way be interpreted as constituting a political or territorial boundary.”⁸⁹ The Accords required a national election to determine the composition of the government, noting “Vietnam is a single nation, divided into two zones temporarily...pending an election.”⁹⁰ The Diem Government, fearing that an election would turn them out of power, cancelled their participation in the vote. The Committee noted “it was the refusal on the part of the Diem regime, and the subsequent ‘governments’ of the South, supported by the United States, to participate in such elections that opened the door to the present conflict.”⁹¹ Hence, the U.S., in its Cold War drive to thwart the establishment of a communist government elected by popular vote, had decreed

⁸⁶ Lawyer’s Committee, 2665.

⁸⁷ Lawyer’s Committee, 2665.

⁸⁸ Lawyer’s Committee, 2670.

⁸⁹ Lawyer’s Committee, 2669.

⁹⁰ Lawyer’s Committee, 2669.

⁹¹ Lawyer’s Committee, 2669.

a territory, established by international treaty, as a new nation – South Vietnam.

The war in Vietnam was an extension of the internal struggle by the Vietnamese to build a nation and a government, a struggle that had, visibly, been underway since the end of the Second World War. The Committee noted “the action of the North Vietnamese in aiding the South Vietnamese [insurgents]...neither affects the character of the war as a civil war nor constitutes foreign intervention.”⁹² Since the Geneva Accords recognized Vietnam as already unified, the ongoing civil war, however U.S. policy makers described it, “cannot be considered an armed attack by one nation on another.”⁹³

The Committee noted that U.S. intervention in Vietnam violated Article 51 of the Charter of the United Nations. Since the Geneva Accords recognized Vietnam as a single state the conflict...[in] South Vietnam is ‘civil strife’, and foreign intervention is forbidden.”⁹⁴ Article 51 allows, “individual or collective self-defense if an armed attack occurs against a member of the United Nations.”⁹⁵ The Committee noted, “South Vietnam is indisputably not a member of the United Nations.”⁹⁶

Foreign policy, as practiced by Lyndon Johnson, and approved by Congress, ran counter to how the original concept of Constitutional war was proposed. The Lawyer’s Committee wrote, “nowhere in the debates (at the Constitutional Convention or during the acceptance phase for it) is there

⁹² Lawyer’s Committee, 2669.

⁹³ Lawyer’s Committee, 2669.

⁹⁴ Lawyer’s Committee, 2668.

⁹⁵ Lawyer’s Committee, 2668.

⁹⁶ Lawyer’s Committee, 2665-6.

support for the view that the President can wage a war, or ‘commit’ our nation to the waging of war.”⁹⁷

The report foresaw significant damage to Constitutional rule in the United States. The Committee addressed the Johnson administration’s use of threatened harm to U.S. armed forces to justify the expansion of the U.S. commitment. The Report noted, “Congress has not declared war, and the President does not claim that any declaration of war supports his action in Vietnam.”⁹⁸ That action – commitment of ground combat troops, extensive aerial bombing of North Vietnam, and promises of an ever larger American military presence in the South – was already occurring. As the Committee wrote, “if the Constitution has such elastic, evanescent character, the provisions for its amendment are entirely useless; presidentially determined expediency would become, then, the standard constitutional construction.”⁹⁹

Soon after the establishment of the government defined in the Constitution, experience with other nations led Presidents and Congress to develop, in 20th Century parlance, a workaround – a solution that allows unforeseen problems to be addressed. The workaround was that Congress would authorize a President to use military force without a declaration of war – presidential expediency, as defined by the Lawyer’s Committee. The Supreme Court validated this solution in *Talbot v. Seeman* (1801).

In its current iteration, undergoing change since the early days of the Republic, and accelerating during the 20th Century, war making has devolved to the President, with the seemingly automatic acquiescence of the legislature.

⁹⁷ Lawyer’s Committee, 2671.

⁹⁸ Laywer’s Committee, 2672.

⁹⁹ Laywer’s Committee, 2672.

This model of war making is analogous to that practiced by the European powers during the colonial period – the system the Constitution was designed to subvert. In that model, the executive determines the location, intensity, and length of the conflict. The legislature, by continuously funding these small wars, signals its agreement with both the policy, and the change to the U.S. Constitution each conflict represents.

Chapter Two: The Evolution, Growth, and Effect of the Antiwar Movement During the Vietnam War

The U.S. Constitution does not mention input from individual states in matters of foreign policy. The input of citizens regarding relations with other nations, including matters of war, is implicit in the concept of voting for representatives to the federal legislature. The first ten amendments to the Constitution describe the relation of individual citizens to the federal government. The First Amendment states, "Congress shall make no law...abridging the freedom of speech."¹⁰⁰ The Amendment continues, stating the federal government may not restrict "the right of the people to peaceably assemble, and to petition the government for a redress of grievances."¹⁰¹

This freedom to criticize any branch of the national government and its policies intimates, yet does not explicitly state, the power of citizens to affect policy. However there is no provision that the federal government will address any grievances presented. Citizens may protest national policy, foreign or domestic; the federal government may ignore those protests. Edwin Corwin, citing Supreme Court Associate Justice William O. Douglas, wrote

The right to petition for the redress of grievances ...is not limited to writing a letter, or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the president, governor, or mayor. Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be re-routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind slowly.¹⁰²

¹⁰⁰ United States Constitution, Amendment I.

¹⁰¹ United States Constitution, Amendment I.

¹⁰² Edwin S. Corwin, *The Constitution and What it Means Today*, Edition XIII, revised by Harold W. Chase and Craig R. Ducat, Princeton, NJ: Princeton University Press, 1974, 295.

One method for citizens to voice dissatisfaction with a policy is to refuse to re-elect those who support that policy. A second method, which came to the forefront during America's war in Vietnam, is public demonstration.

Although the Constitution does not recognize citizen protest as a factor in establishing policy, elected officials at the federal and state level must, and do, weigh public opinion when evaluating support for any policy. In order to remain in office, elected officials must successfully assess public opinion. Voter dissatisfaction with a policy supported by, for example, a U.S. Representative, may cause the Representative to lose a bid for re-election. Citizen protest, then, may have an indirect effect on policy.

Even a seemingly well-informed public, in a republic with a free press, may not be aware of foreign policy objectives or administrative agendas. During the Cold War each administration pursued a consistent aim of protecting American interests and containing the perceived Soviet goal of imposing communist or Marxist governments in the third world. Especially in its later stages, lack of support by the American citizenry for military involvement in Vietnam is only one example of how federal policy may be counter to the wishes of a large portion of the voting public. Elected officials "should be responsible as well as responsive"¹⁰³ to the vagaries of public opinion. Although supporting policies that may be unpopular amongst a significant portion of their electorate, elected office holders, when confronted with choice, "ought not always do that which is immediately most popular."¹⁰⁴

¹⁰³ Richard A. Brody, and Sidney Verba, "Participation, Policy Preferences, and the War in Vietnam", The Public Opinion Quarterly, Vol. 34, No. 3, (Autumn, 1970), 525.

¹⁰⁴ Participation, 525.

During the American war in Vietnam large numbers of U.S. citizens participated in demonstrations against the war, or against the military draft used to fill the ranks of the armed forces. Those demonstrations, across the nation, and extending to the street facing the White House, widespread and duplicated over a period of years, provide evidence of the depth of citizen disapproval of the war on the national level. As the war and the military draft continued, the scale and frequency of demonstrations increased, yet demonstrations had no apparent effect. Essayists Thomas Reeves and Karl Hess wrote of the frustration felt by demonstrators, decrying “the fact that the government is unresponsive to these basic needs shows that it is based on the interests of those in power whose own common good depends not on the good of all citizens, but on a successful hoax perpetrated against them.”¹⁰⁵

The American war in Vietnam and the protest against it came to dominate the political and social landscape in the United States during the last year of the Johnson administration and the first year of the Nixon administration. The extent and intensity of protest led to a “crisis atmosphere in America”, which could “be understood in terms of the interaction of the antiwar movement with a more or less responsive government.”¹⁰⁶

United States citizens’ opposition to American involvement in war was not a new phenomenon. The roots of many anti-Vietnam war groups and concepts may be found in the opposition to U.S. involvement in the European

¹⁰⁵ Karl Hess, and Thomas Reeves, The End of the Draft: a proposal for abolishing conscription and for a volunteer army, for popular resistance to militarism, and the restoration of individual freedoms, New York: Random House, 1970, 6.

¹⁰⁶ Charles DeBenedetti, and Charles Chatworth, assisting author, An American Ordeal: the antiwar movement of the Vietnam era, Syracuse, NY: Syracuse University Press, 1990, 386.

war that had begun in 1914. B.T. Harrison wrote, “the events between 1914 and 1945 produced the antiwar movement of the 1960s.”¹⁰⁷

Because there were U.S. citizens and groups that spoke against America’s involvement in the First World War, the Wilson administration “launched a frontal attack on dissidents in the United States through resort to the Espionage and Sedition Acts.”¹⁰⁸ The Espionage Acts were “enacted at the insistence of military men and a general public alarmed at the activities of pacifist groups, certain labor leaders, and a few over publicized ‘Bolsheviks’ and radicals.”¹⁰⁹ Although originally designed to halt any obstruction to the application of American arms and men to the European war, the laws were commonly used “after the armistice in what the New York Times aptly referred to as the country’s ‘war against radicalism.’”¹¹⁰

The Espionage Act, in part, forbade distributing flyers against military recruitment. If the U.S. mails were used for the distribution, the Postmaster was authorized to suspend an organization’s ability to use the U.S. mails. Rather than ignoring citizen attempts to redress grievances, the laws suspended a citizen’s rights as described in the First Amendment.

The Supreme Court, in *Schenck v. United States* (1919), upheld the validity of the Espionage Act. The Court found that “a conspiracy to distribute a circular denouncing conscription in impassioned terms and vigorously urging that opposition to the selective draft provided for by the Act of May 18, 1917...

¹⁰⁷ B. T. Harrison, “Roots of the Anti-Vietnam War Movement” in The Vietnam Antiwar Movement, in the series The United States and the Vietnam War, Significant Scholarly Articles, Walter Hixson, Series Editor, New York and London: Garland Publishing, 2000, 24.

¹⁰⁸ Christopher N. May, In the Name of War: Judicial Review and the War Powers Since 1918, Cambridge, MA and London: Harvard University Press, 1989, 133.

¹⁰⁹ Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, The American Constitution: Its Origins and Development, Volume II, Seventh Edition, New York and London: W.W. Norton & Company, 1991, 513.

¹¹⁰ May, 133.

although in form confining itself to peaceful measures, such as a petition for the repeal of the act, falls within the condemnation of the provisions of the Espionage Act of June 15, 1917.”¹¹¹ The *Schenck* decision continues, “the constitutional freedom of speech and press was not infringed by the provisions of the Espionage Act of June 15, 1917...even though in many places and in ordinary times defendants, in saying all that was said in the circular, would have been within their constitutional rights.”¹¹² Congress approved, the Wilson administration enforced, and the U.S. Supreme Court upheld laws that placed limitations on rights of citizens enumerated in the First Amendment.

During the 1920s, revulsion against war grew to be widespread amongst certain portions of the U.S. population. Although pacifist groups were able to recruit new members, much of the American public was influenced by the government’s efforts to portray the protesters as socialists and radicals. With criticism of the military viewed as unpatriotic by many citizens, “the pacifist ideal, while possessed of a long and distinguished history, never took hold in the United States until the aftermath of World War I.”¹¹³

Popular media of the 1920s espoused the concept that the World War had started, and continued, to profit a few international companies. Books written for mass audiences, such as Merchants of Death¹¹⁴, presented the view that wars were beyond the control of national governments and in the hands of those who profited by war.

¹¹¹ *Schenck v. United States*, 249 U.S. 47 (1919).

¹¹² *Schenck*.

¹¹³ Lawrence S. Wittmer, Rebels Against War: The American Peace Movement, 1933-1983, Philadelphia: Temple University Press, 1984, 1.

¹¹⁴ H.C. Engelbrecht, and F.C. Hanighen, Merchants of Death: A Study of the International Armament Industry, New York: Dodd, Mead & Company, 1934.

Some pacifist “elements between 1914 and 1945 had an enduring influence on the movement afterward.”¹¹⁵ Many of the beliefs of these post-First World War pacifists became the foundation for antiwar and anti-draft activists during protests against the U.S. involvement in Vietnam. A list of pacifist beliefs that were common to First World War pacifists and anti-Vietnam War activists include the “understanding of the ultimate value of the individual.”¹¹⁶ A second, major trend common to pacifists is a “distrust of centralized economic and political power.”¹¹⁷ Pacifists, who in many instances hold political views considered to be leftist, often “view social conflict in terms of the struggle for power.”¹¹⁸

A center of the growth of pacifism during the 1920s was a cooperative organization composed of churches representing several Protestant denominations, the Fellowship of Reconciliation (FOR).¹¹⁹ Although this nascent antiwar feeling was widespread and not limited to those who possessed religious beliefs, “pacifists cultivated church groups more assiduously than any other segments of public opinion between the wars.”¹²⁰

Although organizations such as FOR were able to establish a strong base in certain factions of American churches, during the 1930s leaders, including “Devere Allen, Roger Baldwin and others, who stressed the ethical side of pacifism, sought to deemphasize its theological cast, in order to pave the way

¹¹⁵ Charles Chatfield, For Peace and Justice: Pacifism in America, 1914-1941, Knoxville: The University of Tennessee Press, 1971, 332.

¹¹⁶ Peace and Justice, 332.

¹¹⁷ Peace and Justice, 332.

¹¹⁸ Peace and Justice, 332.

¹¹⁹ Peace and Justice, 124.

¹²⁰ Peace and Justice, 124.

for coalitions with non-Christian reformers and war resisters.”¹²¹ Other factions with stated opposition to war included labor and leftist political parties.

Evidence of the widespread acceptance of a pacifist view, The World Tomorrow, newsletter of the FOR, “exaggerated only slightly when it announced in 1934 that ‘unqualified repudiation of war is now becoming commonplace in religious conferences.’”¹²² Growing pacifism in certain portions of the electorate represented the first evidence of the gap between the worldview of U.S. citizens and that of the Franklin Roosevelt, and subsequent, presidential administrations. These divergent views developed because “the memory of World War I became formative in the thinking of State Department personnel and advocates of collective security in the thirties, but it was operative particularly for the pacifist.”¹²³ The State and War Departments, as part of their function, evaluated military and political situations in order to plan for the next war. Pacifists sought to eliminate war, and limit American participation in it.

During the 1930s expressions of antiwar sentiment appeared on university campuses in Europe and the United States. The “Oxford Oath”, developed in Great Britain during 1933, became a foundation for pacifist feeling amongst that nation’s upper-middle and upper classes. The Oath, with its simple expression of personal opposition to war, was imported, adapted, and offered during peace demonstrations on campuses in the United States.¹²⁴

Since a college education was beyond the economic means of most American families, the antiwar message held only limited resonance among the

¹²¹ Peace and Justice, 331.

¹²² Peace and Justice, 125.

¹²³ Peace and Justice, 121.

¹²⁴ Martin Ceadel, “The King and Country Debate, 1933: Student Politics, Pacifism, and the Dictators”, in The Historical Journal, Vol. 22, No. 2, June, 1979, 397.

mass of working class Americans. That worker-student split began during the 1930s and continued to be a factor hindering labor support for antiwar activities during the 1960s.

During the 1950s participation in pacifist groups reached a nadir. Education programs from the U.S. government meant the general population accepted the need for testing of nuclear weapons, civil defense preparedness, and a foreign policy meant to oppose the world's only other nuclear power. Fear of the Soviet Union meant "at the height of Cold War hostilities...the loyalty-security mania exercised a dampening effect upon dissent."¹²⁵

As the Kennedy administration deepened America's commitment to South Vietnam, some in the anti-nuclear groups began questioning the necessity and morality of that commitment. With little fanfare, "by 1963 other groups", such as FOR and SANE, "had begun to shift their emphasis" from anti-nuclear weapons activities "to the more immediate problem of the war in Indochina, and initially served as the backbone of the new antiwar movement."¹²⁶

The structure of the antiwar movement, as it developed during the United States' involvement in Vietnam, was complex.¹²⁷ There were, however, two distinct, yet interrelated goals of the movement. One goal was the elimination of the draft, the method used by the Selective Service to fill the ranks of the military. A second goal was to end American involvement in Vietnam. Each goal had factions of the movement committed to it. As the war

¹²⁵ Rebels Against War, 302.

¹²⁶ Mitchell K. Hall, Because of Their Faith: CALCAV and Religious Opposition to the Vietnam War, Contemporary American History Series, William E. Leuchtenburg, General Editor, New York: Columbia University Press, 1990, 2.

¹²⁷ Because of Their Faith, x.

progressed “opposition to the Vietnam conflict developed in three distinct but overlapping segments.”¹²⁸

The groups of which these segments were composed espoused distinctly left leaning ideologies. The liberal faction included such groups as “American Friends Service Committee, Committee for a Sane Nuclear Policy (SANE), Woman’s Strike For Peace, and Americans for Democratic Action.”¹²⁹ These groups viewed American involvement in Vietnam as “provocative of China entering the war,”¹³⁰as it had in the Korean War a decade earlier. The pacifist segment was composed of such groups as the Woman’s International League for Peace and Freedom (WILPF), the Committee for Non-Violent Action (CNVA), and FOR. These groups sought “a non-violent end to the war.”¹³¹ Other groups, representing “old Marxists and the New Left,” included Students for a Democratic Society (SDS) and the Socialist Worker’s Party (SWP).¹³² These Marxist groups viewed American involvement in the war as an “attempt by the U.S. to blunt Vietnamese national liberation.”¹³³

There was no overarching hierarchy or command structure within the movement. The movement itself and individual groups within the movement were riven by disagreements over leadership, objectives, and the tactics needed to achieve those objectives. These divisions within and between groups were a symptom of the overall weakness of the movement. As a flyer produced in 1966 by the Students for a Democratic Society (SDS) stated - “factionalism was the

¹²⁸ Because of Their Faith, 2.

¹²⁹ Because of Their Faith, 2.

¹³⁰ Because of Their Faith, 2.

¹³¹ Because of Their Faith, 2.

¹³² Because of Their Faith, 2.

¹³³ Because of Their Faith, 2.

reef of the American Left.”¹³⁴ The movement’s loose structure, composed of many small groups, had a “membership...best characterized along social as opposed to organizational lines.”¹³⁵

John A. Vasquez described a learning curve of four strategies deployed by the movement. Each of these strategies were utilized by factions within the movement with the goal of enlightening the public of the moral costs of the war. Each new tactic was deployed as the previous methods failed to convince the American public and the Johnson administration of the wrongness of the war. Drawn on an axis of confrontation, the strategies moved from discussion to electoral politics to demonstration to radicalism. The application of the strategies was not discrete in time, that is, the use of one strategy did not stop and the uses of a new strategy commence. Such an occurrence would imply an overall organization and leadership of the antiwar movement that did not exist.

The Vasquez theory, though useful, described these strategies after the fact. His theory, based upon political conditions during the 1960s, is merely a recitation of events, not a predictive tool for future social or political movements. It does, however, simplify a description of the flow of events at the height of the antiwar movement.

Vasquez’ first strategy is “rational argument”. Vasquez wrote “this was the easiest of the legitimate strategies...since in 1965 the war was neither unpopular nor highly salient to the public at large.”¹³⁶ To antiwar activists “the assumption of this strategy is that the policy is a mistake and if one rationally

¹³⁴ Irwin Unger, The Movement: A History of the American New Left, 1959-1972, New York: Dodd, Mead, & Company, 1974, 88.

¹³⁵ Jerome H. Skolnick, The Politics of Protest: Task Force on Violent Aspects of Protest and Confrontation of the National Commission on the Causes and Prevention of Violence, New York: Simon & Schuster, 1969, 58.

¹³⁶ John A. Vasquez, “A Learning Theory of the American Anti-Vietnam War Movement”, in Journal of Peace Research, Vol. 13, No. 4, (1976), 306.

points out the error the policy will be corrected.” Of course, rational argument did not change American policy in Vietnam.

Failure of the first strategy led to an evolution toward a second strategy. Vasquez posits that the “second strategy the movement employs is to try to demonstrate the unpopularity of the war”¹³⁷ to elected office holders. This method was still within the bounds of accepted political discourse. Senators and representatives would be convinced of the intensity of antiwar feeling amongst the electorate.

After the failure of the second strategy, a “third legitimate strategy evolved. The third strategy employed by the movement was the use of political institutions to force the decision maker”¹³⁸ to change Vietnam policy. This strategy entailed voting “the decision maker out of office, employ[ing] the courts to challenge the legality of the war and draft, and get[ting] Congress to end the war.”¹³⁹ The anti-draft laws of Minnesota and Massachusetts could be described as applications of this strategy, as both laws sought to have federal courts declare United States involvement in the war unconstitutional.

The 1966 elections presented antiwar activists the first chance to alter the direction of U.S. foreign policy with the ballot box. With congressional elections held bi-annually, this method might take decades to be effective, assuming that an electorate could be convinced of the value of this one issue – the wrongness of a war. This strategy has an inherent weakness: voters seldom vote for a candidate based on a single issue, especially one that has little direct impact on the voter’s district. The 1966 Congressional elections demonstrated

¹³⁷ Vasquez, 306.

¹³⁸ Vasquez, 307.

¹³⁹ Vasquez, 307.

the difficulty of electing representatives and senators who would vote to end the war.

After the failure of the first three strategies, portions of the movement sought a new strategy. Vasquez mildly described this fourth strategy as the “use of non-electoral force to get the decision maker to end the war.”¹⁴⁰ Non-electoral force meant that some factions of the peace movement turned to violence in order to transmit the antiwar message. The movement would “attempt to show the decision maker that the price of fighting the war would be the breakdown of order at home.”¹⁴¹ Violent confrontations, such as sieges of public buildings and takeovers of universities, became a new weapon for parts of the antiwar movement. These actions garnered significant media attention, further diluting the movement’s peace message with violent images.

As viscerally satisfying to frustrated antiwar proponents as this fourth strategy seemed, its use ran counter to the beliefs of a large portion of the American electorate, and may be cited as a factor in the election of Richard Nixon in 1968.

Two facets of postwar national policy led to the rapid growth of the antiwar movement when the United States began bombing North Vietnam and deploying ground forces to South Vietnam. Each of these actions by the federal government held consequences affecting a significant portion of American men between the ages of nineteen and twenty-six.

First, university education, though not universal, became common across most economic classes in the United States. Prior to the Second World War, even “as late as 1940, just 16 percent of college aged youth could afford to

¹⁴⁰ Vasquez, 308.

¹⁴¹ Vasquez, 308.

attend an institution of higher education.”¹⁴² At war’s end, the federal government, in an effort to bolster the nation’s economy and to aid the transition back to civilian life of those who had served, offered educational benefits to all military veterans. Millions of veterans returning from the war, using the educational benefits of the GI Bill, signaled rapid growth for colleges and universities nationwide. For example, Youngstown College, a small private school in northeast Ohio, counted 900 students at the start of the 1944 school year. The school grew to approximately 1,400 during the next school year. With the influx of returning veterans the college continued to expand. The start of the 1947 school year saw 4,180 students on campus. Less than a decade later, in 1956, the student population reached 5,205 students enrolled for fall semester. In 1967, as the college entered the state school system of Ohio, the student population reached more than 12,000¹⁴³ Over the span of two decades, this one school had seen almost a fourteen fold increase in student population, with a portion of that growth attributable to veterans and the G.I. Bill.

Second, Cold War policies of the United States required the maintenance of a large military establishment. The U.S. committed a significant portion of its armed forces to regions outside of the United States. These forces were used to provide stability in Germany, Japan, and Italy, and to act as a counterbalance to the continued occupation of Eastern Europe by the Soviet Union. This ongoing preparation for conflict across the globe entailed some method of acquiring men to fill the ranks of the military. The method chosen was to

¹⁴² Kenneth J. Heineman, Campus Wars: The Peace Movement at American State Universities in the Vietnam Era, New York and London: New York University Press, 1993, 77.

¹⁴³ The Jambar, Vol. 17, No. 1, September 29, 1944, p.1; The Jambar, Vol. 18, No. 1, September 29, 1945, p. 1; The Jambar, Vol. 20, No. 1, September 26, 1947, p. 1; The Jambar, Vol. 30, No. 1, September 28, 1956, p. 1; The University Jambar, Vol. 44, No. 3, September 30, 1966, p. 1.

continue the draft, based on legislation signed into law in 1940, and administered by the Selective Service System.

The concept of military service had been part of American society since early in the nation's history. The U.S. Constitution allowed "the central government directly to enlist and maintain regular troops."¹⁴⁴ This military force "comprised professional troops serving by legally voluntary enlistment and motivated by financial reward."¹⁴⁵ This was the model of military service during most of the American experience. Short-term volunteers and long-term professionals provided the necessary manpower under most circumstances.

Prior to the Cold War the draft was used to fill the ranks only during large-scale war, or during the preparation for war. Maintenance of a large standing military, as was done by the U.S. government during the Cold War, was considered to be a threat to both democratic government and to the liberties of individual citizens. Both the Declaration of Independence and the U.S. Constitution contain phrasing that specifically addresses the problems that may arise if any government keeps a military force at times when there is no external military threat. The Declaration of Independence, citing grievances against King George III, stated "He has kept among us, in time of peace, Standing Armies without the consent of our legislatures."¹⁴⁶ Illustrating the proper civil-military relation as members of the Continental Congress viewed it, the Declaration continued "He has affected to render the Military independent of and superior to the Civil Power."¹⁴⁷ The Constitution's division of powers

¹⁴⁴ Charles A. Lofgren, "Compulsory Military Service under the Constitution: The Original Understanding", in The William and Mary Quarterly, 3rd Ser., Vol. 33, No. 1, (Jan., 1976), 87.

¹⁴⁵ Lofgren, 87.

¹⁴⁶ www.archives.gov/exhibits/charters/declaration.html.

¹⁴⁷ [declaration.html](http://www.archives.gov/exhibits/charters/declaration.html).

regarding the military reflects the fear of one branch of the government controlling the military.

Over the span of the Cold War the possibility of military service was a factor in the lives of a significant portion of American males. The scale of the impact of the military on U.S. society is shown by a “study in 1969” that “reported that one half of all adult males had seen service.”¹⁴⁸

The Selective Service regulations assigned differing values to men based, in large part, on the socio-economic level of the potential draftee’s family. Selective Service policies placed greater value on the potential contribution that a college graduate would make to society than the value of a non-college educated person. The cost of attending college and the limited number of scholarships available meant that most male high school graduates were unable to further their education.

The law favored middle and upper class males, who took advantage of the law and enrolled in universities and graduate or professional schools in order to avoid military service. Those unable to attend college, meaning a majority of those turning eighteen, were liable to be drafted into the military for two years. Blacks, and low-income whites, whose families lacked the economic resources to pursue a higher education, were left with little or no choice when notified to report for their induction into the military.

All young men became eligible for the draft, with mandated registration at the eighteenth birthday. Induction into the military, under the Selective Service rules then extant, institutionalized class distinctions that seem counter to the perception of American citizens of themselves. So, “although only 6

¹⁴⁸ George Q. Flynn, The Draft, 1940-1973, Lawrence, KS: The University Press of Kansas, 1993 23.

percent of all young men were needed to fight, the Vietnam draft cast the entire generation into a contest for individual survival.”¹⁴⁹ As some historians have written, “It (the draft) worked as an instrument of Darwinian social policy. The ‘fittest’ – those with background, wit, or money, managed to escape.”¹⁵⁰

High academic achievement was not necessary to maintain immunity from the draft. The Selective Service laws of that time granted university students “IIS” classification, thus allowing students to continue at school if a C grade average were maintained. To illustrate the changing view of some antiwar protesters Lawrence Baskir and William Strauss cite Harvard graduate student James Glassman. Glassman “recalled that in 1966, before the draft calls began to rise, ‘students complained that the system was highly discriminatory, favoring the well-off. They called the IIS an unfair advantage for those who could go to college.’”¹⁵¹

Until 1972 the voting age in the United States was twenty-one. Thus young men of eighteen were given a responsibility of citizenship that carried, potentially, the possibility of death. Yet those same men were denied a basic right of U.S. citizens: a voice in choosing the political leadership that controlled their destiny. Citing this disparity between responsibility and rights “antiwar protesters denied the basic legitimacy of a Vietnam policy that directly affected an age cohort that had no vote in the matter”.¹⁵² That “as of 1968, Americans under twenty-one made up roughly one quarter of the troops, and an even higher percentage of casualties in the war”¹⁵³ validates this argument. As with

¹⁴⁹ Lawrence M. Baskir, and William A. Strauss, Chance and Circumstance – The War, the Draft, and the Vietnam Generation, New York: Alfred A. Knopf, 1978, 6.

¹⁵⁰ Chance and Circumstance, 6.

¹⁵¹ Chance and Circumstance, 6.

¹⁵² Amar, 446-7.

¹⁵³ Amar, 447.

the earlier civil rights movement, “in the minds of antiwar activists...mass disenfranchisement justified mass demonstration.”¹⁵⁴

Although students enjoyed the new right of attending college, Christopher Lasch identified them as “marginal members of society.” To Lasch, these “students, as a class...are more likely than other classes to be attracted to perspectives highly critical of society, particularly when they are faced with ‘integration’ into society in the form of the draft.”¹⁵⁵

America’s war in Vietnam thus placed these two Cold War policies – the maintenance of a large military establishment and the desirability of a college-educated citizenry - in direct opposition. The two policies intersected when the high draft calls necessitated by the commitment of American ground troops to Vietnam meant those without college deferments would be the first to go.

The structure of the U.S. military of that time included those on active duty, and a second large portion of reserve units. The military reserves were composed of men who had undergone basic training, served six months of active duty and then were obligated to serve the remainder of their initial six-year contract as part-time soldiers. Reserves were traditionally to be called up in times of national emergency. Calling up the reserves was usually the final step before a declaration of war. In an attempt to maintain normalcy at home the Johnson administration chose to not call up the reserves. The result was that “the manpower pool was sharply limited by President Johnson’s refusal to mobilize the reserves.”¹⁵⁶

¹⁵⁴ Amar, 447.

¹⁵⁵ Christopher Lasch, *The Agony of the American Left*, New York: Vintage Books, 1969, 177.

¹⁵⁶ George C. Herring, “Preparing Not to Re-fight the Last War: The Impact of the Vietnam War on the U.S. Military”, in *After Vietnam: Legacies of a Lost War*, Charles E. Neu, Editor, Baltimore and London: The Johns Hopkins University Press, 2000, 61.

In the decades following the Second World War a college education had evolved to become, seemingly, both a right of the middle-class and a policy of the federal government. Attending university then became one of the indicators of socio-economic class. Universities became centers of opposition to both the draft and U.S. policy in Vietnam. A man's draft eligibility extended to age twenty-six. After graduation, many were successful in acquiring continued deferments, either by entering grad school or by finding work the Selective Service System considered valuable, such as teaching. The numbers using these methods of continued deferment meant, "by 1968 only 46 percent of men reaching age twenty-six were serving or had served."¹⁵⁷ As many of the university centered antiwar groups were subsets of New Left political factions, "the New Left" became "a movement of white middle-class youth."¹⁵⁸ Although "opposing the war was in every draft age man's self interest"¹⁵⁹ those already safe from the draft, consequent of possessing deferments based on their enrollment in universities, became some of the most visible and most vocal critics of the war.

In addition to socio-economic class, age may be added as a characteristic of antiwar protesters. As a matter of self-preservation "the mass antiwar movement was first of all a generational phenomenon, since the youth were being drafted and doing the fighting and dying."¹⁶⁰ According to antiwar activist Fred Halstead, "college students, and occasionally those from the high schools,

¹⁵⁷ Flynn, 231.

¹⁵⁸ Unger, vii.

¹⁵⁹ Chance and Circumstance, 6.

¹⁶⁰ Fred Halstead, Out Now! A Participant's Account of the American Movement Against the Vietnam War, New York: Monad Press, 1978, 717.

formed the core of almost all the mass actions from the SDS sponsored march on Washington in 1965 to the second counter-inaugural in January 1973.”¹⁶¹

Peaceably assembling to protest a war carries a risk of police action by local authorities for minor charges concerning violation of local ordinances. Protected by the First Amendment, participants in mass demonstrations were immune to any action by federal authorities, unless such demonstrations trespassed on federal property. Draft resistance, that is, actions such as refusing to register, refusing to report for induction, or destruction of one’s draft card, did not carry any constitutional protections. Selective Service regulations made any of those actions felonies punishable by prison time. The 1948 Universal Military Training and Service Act laid forth the rules of the military draft. When the Act was renewed “in 1965 Congress amended the...Act to penalize one who ‘forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes...any Selective Service certificate.’”¹⁶² The Selective Service certificate was an individual’s draft card. And yet, despite the federal government’s history of, and continued willingness to, prosecute draft resisters there were draft eligible U.S. citizens willing to “put (their) body in the way”¹⁶³ of Selective Service regulations.

At an anti-draft rally in Boston a demonstrator named David Paul O’Brien burned his draft card and was arrested by FBI agents. O’Brien justified his actions to the arresting federal officers and to the federal judge in his trial as protected by the First Amendment free speech clause.¹⁶⁴ While making First

¹⁶¹ Halstead, 717.

¹⁶² Colonel William L. Shaw, “Selective Service Litigation and the 1967 Statute” in Military Law Review, Vol. 48, Pamphlet 27-10048, Washington, D.C: Headquarters, Department of the Army, April 1, 1970, 75.

¹⁶³ Staughton Lynd, “Déjà vu all over again” in Against the Vietnam War: Writings by Activists, Mary Susannah Robbins, editor, Syracuse: Syracuse University Press, 1999, 298.

¹⁶⁴ Shaw, 75.

Amendment rights arguments similar to *Schenck v. U. S.* (1919) after the First World War, O'Brien was convicted in federal district court. Upon appeal, the U.S. Supreme Court upheld his conviction. In *United States v. O'Brien* (1968), all but one Supreme Court Justice held that O'Brien's First Amendment rights had not been violated. In its decision "the Supreme Court upheld the constitutionality of the amendment [to the 1965 Selective Service regulations]."¹⁶⁵ The Court found "no involvement with the issue of freedom of speech."¹⁶⁶ In their decision, the justices wrote, "a law prohibiting the destruction of Selective Service Certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of driver's licenses, or a tax law prohibiting the destruction of books and records."¹⁶⁷

As with *Schenck*, the Supreme Court in *O'Brien* found that the needs of military conscription suspended application of the First Amendment during time of war. A significant difference between *Schenck* and *O'Brien*, though, is that unlike America's war in Vietnam, constitutional guidelines had been followed for U.S. entry into the First World War.

O'Brien's conviction was upheld. For his effort to end the draft, O'Brien was "turned over to the custody of the Attorney General for six years for treatment and supervision"¹⁶⁸

The conviction of these two individuals is not the most surprising aspect of these cases. The most troubling feature of both cases is passage of laws by Congress with built in restrictions to First Amendment rights, subsequent signing by Presidents, and eventual approval by the Supreme Court. Both

¹⁶⁵ Shaw, 75.

¹⁶⁶ Shaw, 75.

¹⁶⁷ *United States v. O'Brien*, 391 US 367 (1968).

¹⁶⁸ Shaw, 75.

cases demonstrate the fragility of individual rights when citizens oppose government policy.

Protesting the war by resisting the draft, therefore, took considerable courage on the part of such protesters. Legal action by federal authorities was not the only hazard demonstrators faced. Demonstrations were frequently met by counter-demonstrations, that is, citizens protesting against the views of the anti-draft or anti-war demonstrators. For example, during “Stop the Draft Week”, October 1967, police in Boston were stationed at the Arlington Street Church. The “police lined the front of the church not to arrest the demonstrators or to prevent them entering but to protect them from a threatening mob of counter-demonstrators.”¹⁶⁹

Legal actions against individuals consume a society’s resources. For leaders of the resistance movement “it was the hope...that the acts of returning a draft card and refusing all subsequent cooperation with the draft would multiply as the example became known, until there were too many for the draft and court systems to handle.”¹⁷⁰ The draft resistance movement faced two daunting obstacles to its growth and hoped for success. First, a large number of draft age men would have to be convinced to think in a new way that American Cold War rhetoric was wrong. Second, those same draft age men would have to believe that refusing the draft, with all of the legal consequences of that action, would have more value as a statement of a person’s rectitude than simply raising one’s right hand and being sworn into the armed forces.

¹⁶⁹ Nancy Zaroulis, and Gerald Sullivan, Who Spoke Up? American Protest Against the War in Vietnam, 1963-1975, New York: Hold, Rinehart, and Winston, 1984, 134.

¹⁷⁰ Michael Ferber, and Staughton Lynd, The Resistance, Boston: Beacon Press, 1971, 277.

Launching a movement to alter the course of a society requires immense optimism. Anti-draft groups had to develop and apply strategies to convince a large portion of the American public that a basic tenet of society - to serve one's country - could occasionally be wrong. Moral suasion takes time to convince enough members of a society to take a stand and make political change. The abolition of slavery in the United States provides the closest example of the task the draft resistance movement faced. Although there were U.S. citizens opposed to and working against slavery even before the establishment of the nation in 1787, sixty-seven years elapsed before a national political party was established with the specific goal of restricting slavery in the territories.¹⁷¹

Resistance leaders wrote "perhaps when ten thousand acted, perhaps when fifty [thousand], the prisons would fill, courts would clog, and the resulting bureaucratic flap would bring pressure on the federal government to end the war."¹⁷² Slowing down or stopping the machinery of war was the goal of draft resistance groups. If enough draft eligible men could be convinced of the moral value of refusing service, the Selective Service System would be stymied. An early proponent of draft resistance was Staughton Lynd. Lynd, a history professor at Yale, had in 1965 been the national chairperson of the first march on Washington to protest the Vietnam War.¹⁷³ As the draft resistance movement grew Lynd wrote, "the Selective Service System and the Pentagon have as yet encountered no real threat to their capacity to maintain as many as half a million men in Vietnam."¹⁷⁴ Such large numbers would also, according to

¹⁷¹ Michael A. Morrison, Slavery and the American West: The Eclipse of Manifest Destiny and the Coming of the Civil War, Chapel Hill, NC, and London: The University of North Carolina Press, 1997, 174.

¹⁷² The Resistance, 278.

¹⁷³ Staughton Lynd interviewed by Matthew Butts, October 23, 1990, Oral History Project 1302, "Antiwar Movement at YSU During the 1960s"

¹⁷⁴ The Resistance, 280.

resistance leaders, convince the American public and elected policy makers to end the draft and end the war. According to Lynd, “the existence of hundreds, perhaps thousands, of young men in prison over a matter of conscience would exert a steady moral pressure on the American public.”¹⁷⁵

Given the social and political atmosphere in the United States during the 1960s, the concept of draft resistance was not an easy sell. Draft resistance groups, such as the New England Resistance, although able to present cogent arguments against the military draft, were able to persuade only a few of the moral rightness of confronting the federal government, facing trial in federal courts, and being sentenced to prison. With the high personal cost, and few possessing such courage, “the epidemic of non-cooperation that some early organizers dreamed of never took place.”¹⁷⁶

Although draft resistance remained a subset of the larger antiwar movement, defiance of the Selective Service System spread to regions beyond New England. Following the precepts of Lynd and others, “in April 1967 a little group of West Coast student radicals, including David Harris...established The Resistance, an organization dedicated to defying the Selective Service and any agency or activity connected to the war.”¹⁷⁷

It is difficult to judge the scale of the numbers willing to accept the disruption of their lives that refusing induction meant. Some who refused the draft were imprisoned. Some draft opponents sought refuge in Canada, a rather drastic action of self-imposed exile. With no national organization responsible for keeping records “just how many men have returned their draft

¹⁷⁵ The Resistance, 278.

¹⁷⁶ The Resistance, 280.

¹⁷⁷ Unger, 141.

cards is impossible to determine. Adding up the counts at all the Resistance rallies from October 16, 1967, to early 1970 gives a sum of only about five thousand, and of this total a substantial percentage reneged,”¹⁷⁸ that is, accepted new cards, with no penalty, from Selective Service.

The number who refused induction, or sought exile in Canada or Europe, was tiny and hardly noticeable when compared to the numbers of men called, inducted, and serving. Leaders of the resistance movement, such as Lynd, sought to educate the American public on what was being done in its name in Vietnam. And, if more citizens accepted the path of resistance, leaders believed the numbers of those refusing induction would grow.

In comparison to that number of 5,000 refusing induction between October 1967 and early 1970, “the numerical strength of the Armed Forces on 31 October 1968, based upon a Department of Defense computation, was 3,464,160 men and women.”¹⁷⁹

A significant proportion of those more than three million serving, having been drafted, were obligated to serve on active duty for two years. Each month thousands left active duty, while equivalent thousands entered. The number serving varied only slightly. In order to maintain the number serving, the government was required to replace each person leaving active duty. The following table reflects “manpower calls from the Department of Defense to the Selective Service System for the fiscal year 1968:”¹⁸⁰

January	34,000	July	16,000
February	23,300	August	18,300
March	41,000	September	12,200

¹⁷⁸ The Resistance, 280-81.

¹⁷⁹ Shaw, 35.

¹⁸⁰ Shaw, 35.

April	48,000	October	13,800
May	44,000	November	10,000
June	20,000	December	17,500 ¹⁸¹

The estimated five thousands who, over a span of more than two years, chose to demonstrate their antiwar belief by refusing to acknowledge Selective Service regulations, is dwarfed by the 299,100 drafted in the single year 1968. That scale difference in numbers illustrates the difficulty draft resisters and anti-draft organizations faced in changing the direction of American society and United States Cold War and Vietnam policy.

With a common overall goal of opposing U.S. policy toward Vietnam, groups opposing the draft received aid from some anti-war groups, or factions within those groups. However, “from its outset the Resistance met criticism from other sections of the movement.”¹⁸² The criticism was offered because of the high-risk tactics and slow growth of the numbers resisting. The disdain offered was “leveled at the consequences of willful, illegal confrontation: the seeming disparity between an almost certain tangible loss (through imprisonment) and a very uncertain symbolic or educational gain.”¹⁸³ Despite the significant disagreement over tactics one group, the Student Non-violent Coordinating Committee, [SNCC] became an early supporter of resistance activity. Beginning in “January 1966, a year before any comparable action by Students for a Democratic Society [SDS], SNCC publicly stated its support for refusing induction.” The SDS, seeking a broad public appeal with lower risk

¹⁸¹ Shaw, 35.

¹⁸² The Resistance, 126.

¹⁸³ The Resistance, 126.

tactics, “sought ways to resist the draft effectively without losing its organizers to exile or jail.”¹⁸⁴

With a program whose consequences included either exile or being sentenced to a federal prison, the number of draft eligible men refusing induction or other interactions with the Selective Service System remained low in comparison to those merely protesting the draft or protesting the war.

Although citizens have no direct voice in national policy, anti-draft protesters may be credited with forcing the government to modify the system used to select and process all that became eligible for the draft. As a direct consequence of public dissatisfaction with the military draft, Selective Service regulations underwent significant change in 1969. In an effort to reduce some of the complaints about the draft, the method used to determine who would be called was switched to a lottery system, based on the date of birth of the inductee and the personnel needs of the armed forces.¹⁸⁵ The first draw of the lottery took place December 1, 1969. The dates drawn were for those men turning nineteen in 1970.¹⁸⁶ This lottery method allowed the armed forces to maintain the levels needed for the war.

The lottery was an interim method for acquiring troops. Permanent changes were suggested by the Gates Commission, which was established by the Nixon White House in March 1969.¹⁸⁷ The Commission was to evaluate the Selective Service System and develop a method to eventually convert the military to become an all-volunteer force.¹⁸⁸ The Commission’s concept of an all-volunteer force would be instituted only after all ground combat operations had

¹⁸⁴ The Resistance, 127.

¹⁸⁵ Flynn, 245.

¹⁸⁶ Flynn, 246.

¹⁸⁷ Flynn, 238.

¹⁸⁸ Flynn, 255.

been transferred to the South Vietnamese armed forces. With the endorsement of the Gates Commission and with the support of Congressional leaders, Nixon began the process of changing the enlistment structure to what it had been in all peacetime years prior to 1940. After five years of growing public antipathy the “government found it necessary to end the draft...in order to placate hostile public opinion.”¹⁸⁹

These changes to the Selective Service regulations enabled the Nixon administration to claim it was doing something positive about the Vietnam War. Not coincidentally, the changes reduced to insignificance the draft as an issue for antiwar demonstrators.

However, the war and protest against it remained. Three decades after the war’s end, images of masses of American citizens demonstrating against the war and United States involvement in it have become an icon of the 1960s. The years 1967 to 1969 marked the peak of protest by American citizens against United States policy in Vietnam.

Although Presidents Truman, Eisenhower, Kennedy, and Johnson sought to halt Soviet or Chinese ventures in Southeast Asia, voices from within and without each administration were raised opposing the war. These voices of opposition came from across the political spectrum. George Kennan, the architect of Cold War policy of containment, “opposed the war because he saw it as draining American resources from areas of greater strategic importance...such as Western Europe.”¹⁹⁰ Kennan’s opposition to American involvement in a land war in Asia was based upon the concept that “Korea and

¹⁸⁹ Renee Goldsmith Kasinsky, Refugees from Militarism: Draft Age Americans in Canada, New Brunswick, NJ: Transaction, 1976, 4.

¹⁹⁰ Stephen A. Garrett, “The Relevance of Great Debates: An Analysis of the Discussion Over Vietnam”, in The Journal of Politics, Vol. 33, No. 2, May 1971, 481.

Asia were not the main theater of conflict with the Communists but a diversionary theater.”¹⁹¹ Others speaking in opposition to U.S. involvement in Vietnam were “Staughton Lynd and Thomas Hayden...because they believe any American military presence abroad is both irrational and ethically intolerable.”¹⁹² Political right and left thus found common cause, if not common reason, in opposing America’s war in Vietnam.

The vision of that common cause, though, was lost in the volume of argument across the political spectrum. To European writers, viewing the American political scene at the height of the war, “Vietnam [was] a crossroads at which all the turbulent traffic of American intellectual, social, and political controversy meets – and meets, it often seems, in what Americans so appropriately dub a traffic ‘snarl.’”¹⁹³ And, just as with any traffic snarl, any change in the direction of U.S. policy was slow to have effect.

Given the goal of antiwar activists to end United States involvement in Vietnam and the constitutional restraints imposed on direct citizen involvement in foreign policy, the tactic of demonstrating carried two benefits. First, since the war was continuous, and not limited to election years, elected officials were reminded that even during non-election years the voting public was concerned. Second, television and print media coverage of demonstrations, as well as the announced numbers participating in demonstrations, gave proof of growing dissatisfaction with the war and with policy makers.

Samuel Huntington noted, “The very fact that protest was used commanded the attention of both public and leaders, and underlined the

¹⁹¹ Russell F. Weigley, The American Way of War: A History of United States Military Strategy and Policy, a volume of The Wars of the United States, Louis Morton, General Editor, New York: Macmillan Publishing, 1973, 394.

¹⁹² Garrett, 481.

¹⁹³ H.G. Nicholas, “Vietnam and the Traditions of American Foreign Policy”, in International Affairs (Royal Institute of International Affairs 1944-), Vol. 44, No. 2, (Apr., 1968), 189.

intensity of the commitment of those who marched.”¹⁹⁴ According to Huntington protest was the correct method to “achieve the goals” of the movement.¹⁹⁵

However, even using what seemed the correct methods, the antiwar movement confronted the inertia of policy makers and of a significant portion of the public the movement sought to influence. While deriding the slow response of American leaders to the changing political scene, Gabriel Kolko described how “the Johnson administration completely failed to anticipate the war’s metamorphosis of public opinion.”¹⁹⁶ After two decades of public acceptance of the government’s view of the Cold War elected officials were blind to the concept that the anti-Vietnam war message of a protest movement would be accepted.

Although an overwhelming majority of citizens did support the government, at least during the early stages of the war, public patience for the cost in lives and dollars had a short life. Thus, “while at the inception of the war the administration failed to foresee the loss of popular support, still less the emergence of an articulate and often massive antiwar movement, there were some small precedents for such opposition that could have warned them.”¹⁹⁷ Among those indicators of the brittleness of public support for the war, “Johnson’s decision to begin systematic bombing of North Vietnam was the catalyst”¹⁹⁸ of the growth of the antiwar movement.

As the war continued, despite the apparent mass and growing intensity of the antiwar movement, frustration within the movement grew. Teach-ins did

¹⁹⁴ Samuel P. Huntington, American Politics: The Promise of Disharmony, Cambridge, MA: The Belknap Press of Harvard University Press, 1981, 184.

¹⁹⁵ Huntington, 184.

¹⁹⁶ Gabriel Kolko, Century of War: Politics, Conflict, and Society Since 1914, New York: New Press, 1994, 428.

¹⁹⁷ Kolko, 429.

¹⁹⁸ Milton Cantor, The Divided Left: American Radicalism 1900-1975, American Century Series, Eric Foner, Consulting Editor, New York: Hill and Wang, 1978, 207.

not change policy. Letters to elected officials did not change policy. Marches near universities did not change policy. Marches in New York or San Francisco, even a march on the Pentagon, did not change policy. The antiwar movement's interface with federal policy demonstrated the inertia inherent in large government structures and the energy needed to effect change in such a structure.

The movement also struggled against the inertia within its second audience, the great mass of American voters. If the movement were unable to convince voters that the wrongness of the war far outweighed any value of defeating Vietnamese communists, those voters would continue to support administration policies. Studies of voter opinion polls during the war found "that it is the symbolic meaning of an issue, rather than its personal impact, that is critical to the crystallization of public opinion on it."¹⁹⁹ A primary part of the message of the antiwar movement did not resonate with large portions of the voting public.

James D. Wright described this seemingly unstoppable trend of the antiwar movement along the axis toward growing intensity of confrontation. In his The Dissent of the Governed: Alienation and Democracy in America Wright described how "during a period in which public decisions [by government] at times consciously opposed mass political preferences...feelings of powerlessness increased accordingly."²⁰⁰ It was this sense of powerlessness within the movement that led to increasing trends toward violent confrontation.

¹⁹⁹ Richard R. Lau, Thad A. Brown, and David O. Sears, "Self Interest and Civilian's Attitude Toward the Vietnam War" in The Public Opinion Quarterly, Vol. 42, No. 4, (Winter, 1978), 481.

²⁰⁰ James D. Wright, The Dissent of the Governed: Alienation and Democracy in America, a volume of Qualitative Studies in Social Relations, Peter H. Rossi, Consulting Editor, San Francisco: Academic Press, 1976, 191.

An illustration of the growing scale of public dissatisfaction with the direction of America's war in Vietnam occurred on October 21, 1967. At a demonstration in Washington, D.C., "some one hundred thousand Americans – students in the main, but older people, dropouts, housewives, others, too – marched...toward the locus of American power, the Pentagon."²⁰¹ The demonstrators clashed with U.S. marshals and soldiers.²⁰²

In this direct confrontation "something between five and ten thousand demonstrators were encamped on the Pentagon lawns, facing rows of bayonets and prospect of violence, but victorious still, and exhilarated."²⁰³ Hundreds of demonstrators were arrested; some few stayed on the grounds of the Pentagon overnight. This confrontation at the Pentagon by only part of the large mass participating in earlier demonstrations in the District of Columbia illustrate, over a very short span of time, Vasquez' learning curve of the antiwar movement. Most attending the Washington demonstration did not take part in the more radical step of challenging Secretary of Defense Robert McNamara at his center of power. Melvin Small noted "given the relatively small size of the demonstration and the unpleasant image of hippies versus soldiers, the October March on the Pentagon should have been made into a propaganda victory for the Johnson administration. It wasn't."²⁰⁴

There are two points of significance to this confrontation at the Pentagon. First, the demonstration proved that the First Amendment to the U.S. Constitution applied even during times of (undeclared) war. Unlike during the Wilson era, citizens dissatisfied with federal policy could gather together to

²⁰¹ Kirkpatrick Sale, SDS, New York: Random House, 1973, 383.

²⁰² SDS, 383.

²⁰³ SDS, 383.

²⁰⁴ Melvin Small, "The Impact of the Antiwar Movement on Lyndon Johnson, 1965-1968: A Preliminary Report", in The Vietnam Antiwar Movement, Walter L. Hixson, editor, New York and London: Garland Publishing, 2000, 14

“petition the government for redress of grievances.”²⁰⁵ Second, the scale, location, and intensity of the demonstration gave warning to the Johnson administration, and other elected officials, that antiwar groups could mobilize large numbers of demonstrators anywhere, even in the nation’s capital.

Despite the location and magnitude of the Pentagon demonstration, however, United States policy in Vietnam did not immediately change. There was no victory about which to be exhilarated.

There was, however, one major change to the Johnson administration, of which that day’s demonstration was one causative factor. In addition to proving that antiwar groups could cooperate enough to mobilize large demonstrations in Washington, D.C., the protests that day were one aspect, among several, in the calculations of Robert McNamara concerning his future in service to Lyndon Johnson. The March on the Pentagon “contributed directly to the fatigue, anxiety, and frustration that many of the Johnson officials felt as they realized in the late fall that their Vietnam policies were failing.”²⁰⁶ Just over a week after the protest, on November 1, McNamara announced his decision to step down as Secretary of Defense.

McNamara had been appointed by Kennedy and continued in that post in the Johnson administration. During his tenure McNamara helped design and implement America’s war in Vietnam.²⁰⁷ McNamara’s oversight of America’s military establishment had seen the commitment of U.S. forces to South Vietnam grow from roughly 800 personnel when he took office to more than 500,000 when he resigned.

²⁰⁵ Amendment I, U.S. Constitution.

²⁰⁶ Impact of the Antiwar Movement, 14-15.

²⁰⁷ Doris Kearns, Lyndon Johnson and the American Dream, New York: Harper & Row, 1976, 280.

1968 became a pivotal year for the American war in Vietnam and for domestic United States politics. At the beginning of the year, American victory in its Vietnam War seemed near. By the end of the year, U.S. forces had suffered what was portrayed as an apparent defeat at the hands of North Vietnamese forces. Events in Vietnam led to a growth in intensity of the antiwar movement. That growing strength, and seeming acceptance by the American public, of the movement's message led to drastic changes on the American political scene. The war, so closely identified with the Johnson administration, became a key issue in the selection of presidential candidates for both political parties. By the end of 1968 antiwar sentiment became one factor causing a sitting president to decline re-nomination to office and subsequent disarray within the Democratic Party. This disarray was a factor in the election of Republican Richard Nixon.

The Tet offensive, commencing January 30, 1968, became a turning point in the war, and in domestic U.S. politics. The National Liberation Front and their North Vietnamese sponsors violated "a truce that they themselves had pledged to observe during...the lunar New Year."²⁰⁸ In the event "nearly seventy thousand Communist soldiers had launched a surprise offensive of extraordinary intensity and astonishing scope."²⁰⁹ Attacks extended the length of South Vietnam. With more than 500,000 U.S. troops in Vietnam and the war being portrayed as all but won, the American public now "saw a drastically changed war,"²¹⁰ including an attack on the U.S. embassy in Saigon.

²⁰⁸ Karnow, 536.

²⁰⁹ Karnow, 536.

²¹⁰ Karnow, 536.

Within a few weeks American and South Vietnamese troops were able to eliminate the North Vietnamese from all of the areas gained during Tet. The North Vietnamese and the NLF had suffered a significant military defeat, with “over 30,000 men killed in the first two weeks of fighting, and 120,000 lives lost in the first six months of the year.”²¹¹ As “Tran Van Tra, a senior Communist general in the south at the time, candidly admitted...the offensive had been misconceived from the start.”²¹² In an interview with journalist Stanley Karnow, Tra stated, “we suffered large losses in material and manpower, especially cadres at various echelons, which clearly weakened us.”²¹³

This strategic victory by United States and South Vietnamese forces was portrayed by American media, and seen by the American public, as proof of the failure of Johnson’s Vietnam policies. The North Vietnamese effort to seize key areas of the South had been defeated. The North, however, had “scored a psychological victory in the United States and abroad.”²¹⁴ This non-military victory was, according to Johnson administration and U.S. military leaders, “made possible largely by the defeatist reporting of events by American reporters in Vietnam and by the pessimistic reaction to these reports in the United States.”²¹⁵ This attitude of the Johnson administration, that defeatist reporting rather than U.S. policy in Vietnam, was the cause of public dissatisfaction is reflective of the disconnection between the federal government and the citizenry that had elected it.

²¹¹ Maxwell Taylor, “Waging Negotiations – A Vietnam Study” in The Vietnam Legacy: The War, American Society and the Future of American Foreign Policy, Anthony Lake, Editor, New York: New York University Press, 1976, 301.

²¹² Karnow, 556.

²¹³ Karnow, 556.

²¹⁴ Taylor, 301.

²¹⁵ Taylor, 301.

The North Vietnamese psychological victory had immediate political implications in the United States. In a short span, “following the initial Communist attacks... endorsement for his [Johnson’s] handling of the war fell from 40 percent to 26 percent.”²¹⁶ In a short span, beginning at the October 21st March on the Pentagon, and extending just over five months, the Johnson administration suffered a series of reverses which signaled the failure of both its Vietnam policy and its efforts to retain public support for those policies. Lyndon Johnson announced on March 31, 1968 that he would not seek nomination for re-election to the office of President of the United States.

The antiwar movement thus became the hinge between America’s war in Vietnam and domestic politics. On that hinge turned the 1968 presidential election and subsequent direction of the war.

The antiwar movement, as it developed during America’s war in Vietnam, represented a new paradigm concerning the involvement of ordinary citizens in the foreign policy of the United States. This new view held that citizens, acting as a bloc, could and should be a major factor in foreign policy decisions of the federal government. The new model for policy activism demanded commitment by masses of individuals to do more than write letters to editors or congressmen.

For two decades Cold War propaganda had portrayed communism and Third World nationalism as one and the same – and used Vietnam as a primary example of that truth. Since at least 1954 the idea of supporting South Vietnamese proxies in the struggle to remain independent, and above all, non-

²¹⁶ Karnow, 559.

communist, had been the story line whenever American media presented Vietnam.

This new endeavor of citizens opposing U.S. foreign policy had roots in the anti-nuclear movement of the 1950s as well as the concurrent civil rights movement. For many U.S. citizens, the efforts of these earlier groups fit within the concept of Americans seeking that more perfect union, that is, a society that could be at peace with the world and offer all of its citizens racial, economic, and political equity. Those arguing against U.S. involvement in South Vietnam faced the almost insuperable task of convincing a large portion of the American public that two decades of Cold War ideology put forth by the federal government was in error. The scale of antiwar demonstrations and their continuance over a period of years provides evidence of success in spreading this new paradigm.

For all of the high visibility of the movement the question must be raised: what, if any, direct effect did the antiwar movement have upon the United States actions in Vietnam. Examination of the movement discloses that, despite the apparent unpopularity of the war, demonstrations had only minimal, if any direct impact on U.S. policy in Vietnam. In his War, Presidents, and Public Opinion John Mueller noted that “the opposition to the war in Vietnam came to be associated with rioting, disruption, and bomb throwing, and war protesters, as a group, enjoyed negative popularity ratings to an almost unparalleled degree.”²¹⁷ Rather than convincing the public of the validity of the message, a significant portion of the public was turned off by the messengers. With the protester’s negative image amongst the public, “it seems entirely possible that,

²¹⁷ John E. Mueller, War, Presidents, and Public Opinion, New York: John Wiley and Sons, 1973, 164.

because their cause became associated with an extraordinarily unpopular reference group, any gain the opposition to the war in Vietnam may have achieved...was nullified.”²¹⁸ Nancy Zaroulis and Gerald Sullivan wrote, “the peace movement was a conscience only; not all heard, and still fewer heeded.”²¹⁹

Exposure in print and broadcast news media does not always translate to either acceptance of a message, or acceptance of those espousing the message. Although images of massive demonstrations were common, Adam Garfinkle found that “contrary to the great weight of common knowledge, the Vietnam antiwar movement at its height was counterproductive in limiting U.S. military operations in Southeast Asia.”²²⁰ With its obvious trend toward civil conflict the antiwar movement lost its primary audience, the electorate, and any chance of influencing elected officials.

In his introduction to Garfinkle’s Telltale Hearts: The Origins and Impact of the Vietnam Antiwar Movement, Stephen Ambrose wrote “Every American war (except World War II) has spawned a significant antiwar movement, but none was so widely based, so greatly influential on American life, or so ineffective in shortening the war.”²²¹ Ambrose continued, “What stands out about the antiwar movement is how little influence it had on events.”²²²

That conclusion is correct only if one is discussing direct effects on policy. Ambrose’ statement ignores the changes wrought on American society, public opinion, and elections – each having indirect impact on America’s

²¹⁸ Mueller, 165.

²¹⁹ Zaroulis, 422.

²²⁰ Adam Garfinkle, Telltale Hearts: The Origins and Impact of the Vietnam Antiwar Movement, New York: St. Martin’s Griffin, 1997, 1.

²²¹ Garfinkle, v.

²²² Garfinkle, v.

Vietnam policy. Among the effects of the antiwar movement were several which were immediate, and several that were long term. Although indirect, what were the effects of this new paradigm of public demonstration against United States foreign policy? More important, how were they to be measured? Despite the growth of public dissatisfaction with American policy in Vietnam how should the effects of demonstration and protest be quantified? Some historians have found that “it is extremely difficult to judge a group’s impact on the decision process.”²²³

Growing public discord about the war did have several long-lasting effects. Among these effects was that U.S. citizens, using rights enumerated in the Constitution, discovered that all may freely assemble, organize, and protest – in fact, take all actions necessary to educate their fellow citizens on the wrongs of federal policy. Fear of the public’s reaction to events in Vietnam by elected officials had a considerable impact on issues and elections that indirectly changed the American political landscape and the U.S. war in Vietnam. The changes in American society and politics caused by the antiwar movement do not have the seeming inevitability of the Domino Theory; yet each small change in the war, or American opinion toward the war, led to further change, until elected officials at all levels of government finally did respond and begin to make moves to end the war.

The most visible effect of the antiwar movement occurred when the Tet offensive exposed the failure of the Johnson administration’s Vietnam policy. Lyndon Johnson’s choosing not to seek the Democratic nomination can be attributed to realization by the public of the failure of the keystone of Johnson’s

²²³ Barry B. Hughes, *The Domestic Context of American Foreign Policy*, in Series of Books in International Relations, Bruce M. Russett, Editor, San Francisco: W. H. Freeman and Company, 1978, 202

foreign policy. Johnson feared the result of the voting public's acceptance of the message of the antiwar movement, and stepped aside.

Richard Nixon won the 1968 election for President over Johnson's Vice-President, Hubert Humphrey. Antiwar groups may be credited, at least in part, for Nixon's election. With rampant street demonstrations and widespread public disapproval of the war evident, Nixon took several steps to placate the American public about the war. For example, as part of the effort to disarm a portion of antiwar protest, Nixon instituted significant changes to the methods used by the Selective Service to fill the ranks of the military.

The war continued to be a factor in elections after 1968. Changes to the political scene include election of representatives who would vote against the war. Without the movement against the war the American public in their individual districts would have seemed to have no voice against the faceless government and its war. Changes in state and national politics reflected the success of antiwar protesters in educating the American public to actions of the U.S. government. One sign of the success of that educational process was that "the proportion choosing Vietnam as the most important problem the government in Washington should take care of increased from virtually nobody in 1964 to about half the population in 1970."²²⁴

How did U.S. Senators and Representatives react to the reality of at least a plurality of citizens concerned about the war in Vietnam? Paul Bernstein and William Freudenburg attempted to determine what factors affected votes by U.S. Senators. In order to be reelected senators must gauge public opinion. Hence, the voting record of senators should be reflective of how each senator

²²⁴ Wright, 191.

understood the wishes of their electorate. Bernstein and Freudenburg discovered that

If Senators saw antiwar protest demonstrations as representing the opinions of large numbers of constituents, Senate voting could be expected to be positively related to the incidence and magnitude of such demonstrations. We do not really know what senators thought about the demonstrations...nor do we have much idea about the impact of such demonstrations.²²⁵

The conclusion of Bernstein and Freudenburg illustrates that voters did not, for the most part, vote for or against candidates espousing single issues. Evaluating the effect on elections of the Vietnam War Roger Hilsman wrote, “no one can really tell whether the majority who voted for the winning candidate did so because of his policy stand on one particular issue or in spite of his policy stand on that issue.”²²⁶

Although the life of only a few antiwar groups extended throughout the war, the movement as a whole provided a voice and a conscience to American citizens opposing the nation’s Vietnam policies. The reduction of American combat forces in Vietnam was emblematic of the power of the antiwar movement in national politics. The movement had measurable effect as well on the voting, and the beliefs, of elected officials in several states. This effect, not apparent on the national scene, had as a specific example the introduction of antiwar bills in the legislatures in Massachusetts and Minnesota.

²²⁵ Paul Burstein, and William Freudenburg, “Changing Public Policy: The Impact of Public Opinion, Antiwar Demonstrations, and War Costs on Senate Voting on Vietnam War Motions”, in The American Journal of Sociology, Volume 84, Number 1, July 1978, 105.

²²⁶ Roger Hilsman, The Politics of Policy Making in Defense and Foreign Affairs, in Harper’s American Political Behavior Series, David J. Danielski, Editor, New York: Harper & Row, 1971, 96.

Chapter Three: ...they won't go!

In a multi-layered governmental structure, such as exists in the United States, questions concerning the extent and limits of power between the various levels have been raised since the nation's founding. The Constitution of the United States, in Article I and in Article IV, defines the powers of the U.S. Congress and how that power relates to the individual states. Since the nation's founding there has been ongoing struggle between the states and the federal government over facets of the American polity. These state-federal conflicts reflect the effort to determine the extent that either a state or the federal entity may interact with individual citizens.

The preponderance of conflicts between the federal government and state governments has been settled in the federal courts. Only rarely in this ongoing struggle between various governmental layers has armed force been used to settle the dilemma of the state-federal power balance. The American Civil War and the integration crisis in Little Rock, Arkansas, in 1958 are two examples in the limited pool of when the federal government used its overwhelming military strength to impose federal opinion on individual states or groups of states.

During the latter stages of America's war in Vietnam the legislatures of several states chose to challenge federal authority by proposing legislation designed to curb the use of drafted citizens of those states in Southeast Asia. The governors of two states, Massachusetts and Minnesota, signed bills into law that forbade the federal government from drafting citizens of their states and sending them to Vietnam. The United States Constitution is opaque concerning the relation of state governments to foreign policy. One must question,

therefore, the circumstances that would drive a state legislature to approve, and governor to sign, bills interjecting states into U.S. Vietnam policy.

State and federal legislatures are composed of representatives from both major political parties. Since those representatives face election, some as frequently as bi-annually, efforts to gain advantage for individuals or political parties are visible when considering the deliberations of these legislative bodies concerning the United States' war in Southeast Asia. Both the House and the Senate of the Massachusetts legislature held a Democratic majority. The Conservative Party held a slim majority in the Minnesota House. Massachusetts' governor was Republican; Minnesota's governor was of the Democrat-Farmer-Labor Party.

Several authors have described how questions of U.S. policy in Vietnam were affected by political considerations. In their article "Ending the Vietnam War: Components of Change in Senate Voting on Vietnam War Bills," Paul Burstein and William Freudenburg described the change over time of the composition and attitude of the U.S. Senate toward U.S. policy in Vietnam. Burstein and Freudenburg found that a multitude of factors, including "military reverses, changes in public opinion...and so on,"²²⁷ could be cited as reasons for this change in Senate attitude toward American involvement in Vietnam. Burstein and Freudenburg note "the Senate did not pass a significant anti-involvement measure until six years after the Gulf of Tonkin Resolution."²²⁸ In describing the Senate in the early years of the Nixon administration, the authors "found that doves were disproportionately Democratic, young, new in

²²⁷ Paul Burstein, and William Freudenburg, "Ending the Vietnam War: Components of Change in Senate Voting on Vietnam War Bills", in *The American Journal of Sociology*, Vol. 82, No. 5, (Mar., 1977), 1003.

²²⁸ Ending the Vietnam War, 1003.

the Senate, low in seniority, and from the northeast and north central parts of the country.”²²⁹ The authors posit that Senators did not change their views on the war. Rather, “replacement of non-dove by dove was disproportionately important in the Senate change of mind.”²³⁰ Three elections (’64, ’66, ’68) after passage of the Tonkin Gulf Resolution meant that by 1970 at least some of those who supported the expansion of the war no longer served in the U.S. Senate.

Although not cited by the authors, another factor in the increased opposition to the war in the Senate and the House of Representatives was change in control of the White House. In 1964, when the heavily Democratic Congress approved the Tonkin Gulf Resolution, the President, Lyndon Johnson, was also a Democrat. Richard Nixon was President in 1970, after the six years Burstein and Freudenburg state elapsed before the still heavily Democratic Senate passed anti-involvement legislation.

In an effort to illustrate the commitment of the Nixon administration to reduction of at least the American portion of the Vietnam War, two new policies were instituted. First, the draft was modified to a format of a lottery based on date of birth. Second, a program of gradual reduction of U.S. troop strength in Vietnam was begun. This replacement program, termed ‘Vietnamization’, gave gradually increasing responsibility for combat operations to the South Vietnamese armed forces. While having the appearance of meeting the demands of the American public to end the U.S. war, Vietnamization was only a gradual process. American forces would leave Vietnam only after the Nixon administration deemed South Vietnamese troops capable of the replacement.

²²⁹ Ending the Vietnam War, 1003.

²³⁰ Ending the Vietnam War, 1003.

Despite reducing the number of Americans in South Vietnam, Vietnamization did not meet with universal acclaim. Vietnamization did little to satisfy those Americans demanding an immediate, or at least rapid, end to U.S. involvement in the war. A Gallup Poll reported in the *Boston Globe* March 15, 1970, found “the American people are now divided into two camps of equal size in terms of their views on the rate of troop withdrawal from Vietnam.”²³¹ Vietnamization had been underway over a year by the time of the poll. The same article reported “Democrats are more likely than Republicans to favor immediate withdrawal or withdrawal by the end of 18 months.”²³² This difference in view of the success of Vietnamization is reflective of the nation’s partisan split. Democratic demands for immediate withdrawal meant that Vietnam was now Nixon’s War.

Even as the Massachusetts legislature discussed challenging the constitutionality of the war, the Pentagon announced the troop “Pullout in April May Top 50,000 G.I.s”²³³ This one-month reduction represented 9% of the approximately 540,000 U.S. troops in Vietnam at Nixon’s inauguration. The April reduction was in addition to the 60,000 Americans withdrawn from Vietnam during the first ten months of the Nixon administration.²³⁴

Vietnamization was not the only action undertaken by the Nixon administration during early 1970. As part of the effort to end America’s war in Vietnam, Nixon renounced the keystone of Johnson’s justification for the war, the Tonkin Gulf Resolution. In mid-March “two top officials” of the [Nixon] State Department testified in the U.S. Senate “the department’s interpretation

²³¹ *Ending the Vietnam War*, 1003.

²³² *Ending the Vietnam War*, 1003.

²³³ *Boston Evening Globe*, March 3, 1970, 1.

²³⁴ Karnow, 698.

of the Tonkin Resolution has changed 180 degrees under the administration of President Nixon.”²³⁵ The Nixon administration position was now in direct opposition to that presented by Johnson’s Assistant Secretary of State, “Nicholas deBelleville Katzenbach, who told the committee in 1966 the Tonkin Resolution, which Congress overwhelmingly approved in 1964, was considered by the Johnson administration to be a legally binding de facto declaration of war.”²³⁶ Nixon’s Undersecretary of State Elliot Richardson declared, “the department did not consider the existence of the Resolution “as evidence of congressional authorization for or acquiescence in any new military efforts, or as a substitute for...timely congressional consultation to which the administration is firmly committed.”²³⁷

The U.S. Department of State and the Department of Defense are each responsible for implementing the foreign and military policy of the United States. Neither department has the appearance of being influenced by the opinions of the electorate. Describing the limited affect public opinion on this facet of the American government Barry Hughes wrote, “the arm of the executive branch in control of foreign relations, the State Department, is, unlike the Department of Commerce or Labor, ...free from pressure group influence, compared to Congress or domestic policy components of the executive.”²³⁸ Harlan Hahn wrote, “controversies over world problems have been relatively insulated from popular influence.”²³⁹ Hahn notes, “perhaps the only means by which rank-and-file citizens can influence military actions directly, however, is

²³⁵ Boston Evening Globe, March 16, 1970, 11.

²³⁶ Boston Evening Globe, March 16, 1970, 11.

²³⁷ Boston Evening Globe, March 16, 1970, 11.

²³⁸ Hughes, 199.

²³⁹ Harlan Hahn, “Correlates of Public Sentiments About War: Local Referenda on the Vietnam Issue, in The American Political Science Review, Vol. 64, No. 4 (Dec., 1970), 1186.

through a popular referendum.”²⁴⁰ Since the electorate is excluded from direct input via popular referendum in foreign policy affairs, amendment of the U.S. Constitution would be required before voters could determine yea or nay on war. Harlan continues, “this proposal was nearly adopted by Congress in 1937. The Ludlow Amendment, named after Democratic Representative Louis Ludlow of Indiana, would have granted the electorate ‘sole power by a national referendum to declare war or to engage in warfare overseas.’ The proposed amendment was rejected in the House of Representatives by 21 votes.”²⁴¹ By the time the proposed amendment was introduced, antiwar sentiment had become common on American college campuses. And, with the continuing economic problems of the United States, involvement in foreign adventures would not be popular among the electorate. With rejection of the amendment, American voters lost a chance for a direct voice in foreign policy.

During America’s war in Korea Senator John W. Bricker, a Republican from Ohio, “waged a heated campaign for the adoption of a constitutional amendment which would have curtailed the President’s power to make commitments abroad without the express approval of Congress.”²⁴² The war in Korea, being waged under the auspices of the United Nations, meant “President Truman had sent troops to Korea without a formal declaration of war.”²⁴³ Supporters of Bricker thought the “Amendment...would stop that sort of nonsense.”²⁴⁴ Since Truman was a Democrat, and Bricker a Republican, “most good liberals of the day roundly denounced the Bricker Amendment as a dangerous breach of the separation of powers and an attempt to tie the

²⁴⁰ Hahn, 1187.

²⁴¹ Hahn, 1187-88.

²⁴² “Foreign Policy on Beacon Hill”, editorial, Boston Herald Traveler, March 17, 1970, 12.

²⁴³ “Foreign Policy on Beacon Hill.”

²⁴⁴ “Foreign Policy on Beacon Hill.”

president's hands."²⁴⁵ An editorial in the Boston Herald Traveler, dated March 17, 1970, noted with some asperity "one of the leaders in the fight to kill the Bricker Amendment was Sen. J. William Fulbright (D), though last year [1969], ironically, the Arkansas Senator proposed to accomplish essentially the same thing with the 'National Commitments Resolution.'"²⁴⁶ The National Commitment Resolution was written to clarify whether the "President constitutionally can make security commitments on his own, without senate or congressional approval."²⁴⁷ The editorial writer compared the Bricker Amendment to the pending antiwar bill in the Massachusetts legislature. Of course, the difference between the undeclared war of 1951 and the undeclared war of 1969 was which party controlled the White House. Senators of each party sought to limit the president of the opposing party. Such partisan bickering gains more public notice than suggestions to remedy the weakness of the war making mechanism written into the U.S. Constitution.

The war in Vietnam was one among many issues confronting American voters in 1968. The single issue of the war spawned questions concerning other facets of American society. Despite the more than 500,000 Americans in Vietnam "voters did not treat the 1968 [Presidential] election as a referendum on Vietnam policy."²⁴⁸ In their paper "Policy Voting: The Vietnam War Issue" Benjamin Page and Richard Brody argue "the average American perceived Nixon and Humphrey as standing very close together on the escalation / de-escalation dimension."²⁴⁹ Hahn wrote "for very small sectors of the population the chance

²⁴⁵ "Foreign Policy on Beacon Hill."

²⁴⁶ "Foreign Policy on Beacon Hill."

²⁴⁷ <http://foreign.senate.gov/testimony/2008/GlennonTestimony/080410a.pdf>

²⁴⁸ Richard A. Brody, and Benjamin I. Page, "Policy Voting and the Electoral Process: The Vietnam War Issue", The American Political Science Review, Vol. 66, No. 3 (Sep., 1972), 982.

²⁴⁹ Page/Brody, 983.

to express personal convictions about the Vietnam War has been available through picketing and mass protests; but it has been difficult to determine whether or not the demonstrations accurately reflected popular sentiments about the issue.”²⁵⁰ Elected officials, including presidents, must express positions that appeal to most of the electorate. In 1968, “the similarity of the Vietnam position of the major party candidates was consistent with – though it could not itself confirm...that vote maximizing candidates in a two party system adopt similar issues.”²⁵¹ An implication of national dissatisfaction with the war meant voter sentiment against the war seemed to be growing within states. In order to maximize their appeal to voters elected officials within states had to correctly determine the level of antiwar feeling in each individual district.

As the United States’ involvement in Vietnam grew, elected officials placed referenda condemning American policy in Vietnam on local ballots. Local decisions do not change foreign policy, yet “between 1966 and 1968, at least seven cities in the United States – Dearborn, MI; San Francisco; Cambridge, MA; Madison, WI; Mill Valley, CA; Lincoln, NE; and Beverly Hills, CA – held local referenda on the Vietnam War.”²⁵² Despite the Constitution’s silence regarding local input to national policy, city and state officials endorsed these efforts.

Heeding the direction of public opinion, legislators in several states introduced antiwar bills. These bills were introduced in an effort to prove that America’s war in Vietnam was unconstitutional. The legislatures of Massachusetts and Minnesota chose to protest U.S. policy in Vietnam by

²⁵⁰ Hahn, 1197.

²⁵¹ Page/Brody, 994-5.

²⁵² Hahn, 1188.

attacking the mechanism that provided manpower to fight the war. Each bill held that citizens of those states, drafted to serve, should be exempt from use in the undeclared war in South Vietnam.

Just as America's war in Vietnam may only be understood in relation to the Cold War, the passage of the antiwar legislation must be viewed in relation to the 1968 Presidential election and political struggles within Massachusetts and Minnesota. Politics in Massachusetts followed the decades old Republican versus Democratic model. Francis W. Sargent, Republican governor of Massachusetts, could be portrayed as a maverick of the national Party. As governor his administration faced a legislature, the General Court of the Commonwealth of Massachusetts, in which both the Senate and the House was, in majority, Democratic. Sensing the politically expedient path, Sargent had "gotten off the opposition's hook rather deftly in Lexington (MA) last October 15 (1969) when he participated in the Moratorium."²⁵³ Boston Globe political writer David B. Wilson noted that Sargent's delicate dance "emphasized his dedication to Peace", and that Sargent "restated his loyalty to the Republican Party" because "President Nixon was listening"²⁵⁴ to the Moratorium events.

Opinion polls within the state demonstrated that a majority of citizens, across socio-economic lines, agreed with efforts to end the war. The Boston Globe reported a Massachusetts Poll dated March 2, 1970, with one of the questions asking whether the respondent "Support[ed] peaceful protest?"²⁵⁵ Among workers and college students, "significant majorities (64% of workers

²⁵³ The Boston Globe, March 17, 1970, Sec. 1, 15.

²⁵⁴ The Boston Globe, March 17, 1970, Sec. 1, 15.

²⁵⁵ The Boston Globe, March 2, 1970, Sec. 1, 14.

and 92% of college students) answered in the affirmative.²⁵⁶ Most of those workers and college students were self-identified as “liberal”.²⁵⁷ As these voters represented the pool to which both legislators and the governor must appeal, Sargent’s Moratorium actions contained a risk of voter backlash from conservatives of his own Party, as his antiwar stance “flirt(s) with the peace at a time when the national Republican administration is conducting a war.”²⁵⁸ Sargent’s stance reflected the balance a Republican governor in a predominantly Democratic state was forced to maintain.

Even with the changes to the draft laws, and with the withdrawal of significant numbers of U.S. troops from South Vietnam, the struggle for Party control made America’s war in Vietnam one of the most significant issues facing the Massachusetts electorate. A cartoon published in the Boston Globe March 18, 1970, illustrated that leaders of both parties, but especially Democrats, hoped that voters would have few memories of recent U.S. history:

²⁵⁶ Boston Globe, March 2, 1970, Sec. 1, 14.

²⁵⁷ Boston Globe, March 2, 1970, Sec. 1, 14.

²⁵⁸ Boston Globe, March 17, 1970, Sec. 1, 15.



Note that the action takes place inside the Democratic National Committee, written backward in the background; Larry O'Brien was then National Chairman of the Democratic Party. The cartoon was published during the final weeks of the passage through the Massachusetts legislature of the antiwar bill. The cartoon reflects the inability of the leadership of the National Democratic Party to develop coherent positions other than opposition to a war its own President, Lyndon Johnson, had led.

It was not only the national Democratic leadership that sought to attach the Vietnam War to the Republicans. Ken O'Donnell "former aide to President Kennedy, and a candidate for Governor, introduced the Rev. John M. Wells...author of the bill, to Rep. H. James Shea, D-Newton, who sponsored it in the house, last fall."²⁵⁹ O'Donnell, who "had been a speaker during the Moratorium," was "trying to help it (the antiwar measure) pass the final

²⁵⁹Boston Globe, March 15, 1970, 62.

reading”²⁶⁰ in the Massachusetts House. Although O’Donnell had “worked on the peace plank at the Democratic National Convention in 1968,”²⁶¹ he had been a close adviser to John F. Kennedy, whose administration oversaw a twenty-fold increase in American forces committed to South Vietnam.

Although the bill gained much support from legislators, not all Massachusetts voters supported the bill. According to the Globe, House Speaker David M. Bartley, Democrat, “denies Viet bill vote [is] political.”²⁶² According to Bartley “if opinion is closely divided in the House, most likely it’s closely divided among voters.”²⁶³ The governor of Massachusetts, unlike members of the House, represented all voters. Bartley “criticized the governor for not taking a stand on the bill”, and for the governor’s “stating that the bill raises serious constitutional issues.”²⁶⁴ Despite Bartley’s denial of partisanship concerning the bill, political events in Massachusetts belie that claim. 1970 was an election year. Among the offices to be contested that year was the governorship. Two months after Governor Sargent signed the bill into law, the Democratic Party of Massachusetts held its state convention.²⁶⁵ The antiwar bill allowed elected officials of both parties to establish a position regarding the legislation that would maximize their chances of retaining office.

Although Massachusetts’s legislators portrayed the bill as a valid action against the war, political writers and some legal authorities decried that stance. In an article entitled “Blunder By the Democrats”, Boston Herald Traveler political writer Thomas C. Gallagher cited “Archibald Cox, the nation’s former

²⁶⁰ Boston Globe, March 15, 1970, 62.

²⁶¹ Boston Globe, March 15, 1970, 62.

²⁶² Boston Evening Globe, March 16, 1970, 3.

²⁶³ Boston Evening Globe, March 16, 1970, 3.

²⁶⁴ Boston Evening Globe, March 16, 1970, 3.

²⁶⁵ Boston Evening Globe, June 4, 1970, 17.

solicitor general.”²⁶⁶ Cox “suggested that passage of the law was merely ‘an exercise in futility.’”²⁶⁷ Gallagher also quoted “Asst. U.S. Atty. Stanislaw R. J. Suchecki of Boston”, who “was a little more blunt concerning the legislation. He termed the law ‘really ridiculous’ and ‘another gimmick’ used by those seeking to avoid military duty in Vietnam.”²⁶⁸ Gallagher noted, “as has been pointed out before, the so-called anti-Vietnam war law apparently isn’t worth the paper it is printed on.”²⁶⁹

Gallagher described the short- and long-term effects of the law. First, “there seems little doubt that the new law is not going to prevent a single Massachusetts citizen from being sent to Vietnam.”²⁷⁰ Gallagher then questioned whether “this futile gesture cost the Democrats, whose leadership in the legislature espoused it, the governorship?”²⁷¹ Gallagher noted “House Speaker David M. Bartley and Senate President Maurice A. Donahue got the anti-Vietnam bill through the legislature, but it would be Sargent who will be remembered by the voters at election time for signing the meaningless measure into law.”²⁷² Gallagher’s opinion of the bill is reflective of the right of center Boston Herald Traveler.

Leaders of the Democratic majority in the Massachusetts House portrayed the legislation as apolitical. Speaker of the House David Bartley “was indignant at the allegation that the proposal was intended to strengthen the appeal of Democratic candidates among youth.”²⁷³ According to Bartley,

²⁶⁶ Boston Herald Traveler, April 8, 1970, 22.

²⁶⁷ Boston Herald Traveler, April 8, 1970, 22.

²⁶⁸ Boston Herald Traveler, April 8, 1970, 22.

²⁶⁹ Boston Herald Traveler, April 8, 1970, 22.

²⁷⁰ Boston Herald Traveler, April 8, 1970, 22.

²⁷¹ Boston Herald Traveler, April 8, 1970, 22.

²⁷² Boston Herald Traveler, April 8, 1970, 22.

²⁷³ Boston Evening Globe, March 16, 1970, 3.

“Congress may be unwilling to make a fight for its own right. But this legislature – which has seldom backed off from a good scrap – has before it today precedent setting legislation which could force a determination at the highest level of the constitutionality of the Vietnam War.”²⁷⁴

Bartley, and with him the Democratic leadership of the General Court of the Commonwealth of Massachusetts, sought to direct any criticism of elected officials to the governor. The governor would be wrong in the eyes of Democratic voters by vetoing the bill and wrong in the eyes of Republican voters by signing it. Bartley noted, “as for putting the governor on the spot, that’s what he’s there for, to decide to sign or veto a bill.”²⁷⁵

The antiwar bill, submitted in the Massachusetts House, was known as the “Shea-Wells Bill”, and named after the Rev. John M. Wells and State Representative H. James Shea, Jr. The title of the legislation, AN ACT DEFINING THE RIGHTS OF INHABITANTS OF THE COMMONWEALTH INDUCTED OR SERVING IN THE MILITARY FORCES OF THE UNITED STATES²⁷⁶ injected state authority where it did not exist – into the ranks of the U.S. military.

Section 1 of the legislation forced the Massachusetts General Court into foreign and military policy, with the statement “No inhabitant of the commonwealth inducted or serving in the military forces of the United States shall be required to serve outside the territorial limits of the United States in the conduct of armed hostilities not an emergency.”²⁷⁷ The focus of this section is the perceived lack of a formal declaration of war by the U.S. in Vietnam. The authors of the legislation sought to limit conflicts in which citizens of

²⁷⁴ Boston Evening Globe, March 12, 1970, 16.

²⁷⁵ Boston Evening Globe, March 16, 1970, 3.

²⁷⁶ Acts of the General Court of Massachusetts, 1970, Chapter 174.

²⁷⁷ Acts of the General Court of Massachusetts, 1970, Chapter 174, Section 1.

Massachusetts should serve to those “authorized in the powers granted to the President of the United States in Article 2, Section 2, of the Constitution of the United States designating the President as the Commander-in-Chief.”²⁷⁸ The legislation would allow Massachusetts draftees to serve in a foreign war if “such hostilities were initially authorized or subsequently ratified by a congressional declaration of war according to the constitutionally established procedures in Article 1, Section 8, of the Constitution of the United States.”²⁷⁹

The text of the Shea-Wells bill directs state officers to test the validity of Vietnam policy, referring to Article III, Section 2 of the U.S. Constitution, “The attorney general shall, in the name and on behalf of the commonwealth and on behalf of any inhabitants thereof who are required to serve in the armed forces of the United States in violation of section one of this act, bring an appropriate action in the Supreme Court of the United States.”²⁸⁰ Article III, Section 2 states “In all cases affecting...those in which a State shall be a party, the Supreme Court shall have original jurisdiction.”²⁸¹

The bill directed the Massachusetts Attorney General “to defend and enforce the rights of such inhabitants and of the commonwealth under section one.”²⁸² In order to have the courts view this case as a state versus the federal government the bill informs citizens that “Any inhabitant of the commonwealth who is required to serve in the armed forces of the United States in violation of section one of this act may notify the attorney general thereof, and all such inhabitants so notifying the attorney general shall be joined as parties in such

²⁷⁸ Acts of the General Court of Massachusetts, 1970, Chapter 174, Section 1.

²⁷⁹ Acts of the General Court of Massachusetts, 1970, Chapter 174, Section 1.

²⁸⁰ Acts of the General Court of Massachusetts, 1970, Chapter 174, Section 2.

²⁸¹ Article III, Section 2, Constitution of the United States.

²⁸² Acts of the General Court of Massachusetts, 1970, Chapter 174, Section 2.

action.”²⁸³ According to Shea, “this is the only way, by having the state as an actual party, that Supreme Court review of this constitutional question can be maximized.”²⁸⁴ Regardless of the questionable validity of a state legislature opposing federal foreign policy, the bill mandated that “the attorney general shall take all steps necessary and within his power to obtain favorable action thereon, including a decision by the Supreme Court of the United States.”²⁸⁵

Proponents and opponents of the bill garnered legal opinions concerning the legislation. The Boston Globe in an article entitled “20 legal scholars endorse Shea’s Vietnam Bill” reported that “more than 20 telegrams, supporting the Shea bill, have been sent by constitutional experts to Governor Francis W. Sargent, House Speaker David M. Bartley, and to Shea himself.”²⁸⁶ Included in those supporting the legislation were “such internationally known scholars as Wallace McClure, University of Virginia; Hans J. Morgenthau, University of Chicago, and Richard Falk, Princeton University. Most are constitutional specialists who teach either law or political science.”²⁸⁷

Morgenthau, writing in support of the bill, stated “I urge the (the Shea anti-Vietnam bill) be passed in order to raise a viable challenge to the legality of the war. The President, no less than the humblest citizen, should have to obey the law.”²⁸⁸ Despite this support from legal and constitutional authorities, support of the bill was not universal. In an editorial entitled “No Objection?” the Boston Herald noted, “the bill, as the lawmakers of Massachusetts failed to

²⁸³ Acts of the General Court of Massachusetts, 1970, Chapter 174, Section 2.

²⁸⁴ The Boston Evening Globe, March 12, 1970, 16.

²⁸⁵ The Boston Evening Globe, March 12, 1970, 16.

²⁸⁶ The Boston Globe, March 15, 1970, 49.

²⁸⁷ The Boston Globe, March 15, 1970, 49.

²⁸⁸ The Boston Globe, March 15, 1970, 49.

say, is an unconstitutional exercise of state power.”²⁸⁹ The writer continued, “to pass a patently unconstitutional law as a ploy to get the federal courts to pass on the constitutionality of the President’s emergency powers as Commander-in-Chief would be an abuse of the legislative function.”²⁹⁰ Of course, 1970 was six years after passage of the Tonkin Gulf Resolution, and five years after the commitment of U.S. ground combat troops to South Vietnam. Left unquestioned by this editorial was when the President’s emergency powers as Commander-in-Chief end, and when a formal declaration of war should be used.

The Herald Traveler, in another editorial entitled “Foreign Policy on Beacon Hill” noted, “it may be perfectly legitimate...for Congress to try to curtail the president’s war-making powers, and to attempt to reassert its own.”²⁹¹ In the opinion of the editorial writer, “it is rather ludicrous for a state legislature to pass a law prohibiting its citizens from fighting on foreign soil until Congress has formally declared a war or until the Supreme Court deigns to rule on the constitutionality of the conflict.”²⁹² In the opinion of this editorial writer Massachusetts legislators were ignoring obvious constraints placed on state action by the U.S. Constitution.

The bill gained easy approval in the Massachusetts legislature. The House, for example, after a total of “seven hours forty five minutes” of debate “approve(d) Vietnam [the] war bill, 128 to 90.”²⁹³ That short time for debate seems inadequate for a question the legislators portrayed as the most consequential to the citizens of the state and the nation.

²⁸⁹ Boston Herald Traveler, February 15, 1970, 36.

²⁹⁰ Boston Herald Traveler, February 15, 1970, 36.

²⁹¹ Boston Herald Traveler, March 17, 1970, 12.

²⁹² Boston Herald Traveler, March 17, 1970, 12.

²⁹³ The Boston Globe, March 19, 1970, 11.

Governor Sargent signed the bill into law April 2, 1970.²⁹⁴ Public opinion, as reflected in Boston newspapers, was divided. To the editors of The Boston Globe, the new law meant Massachusetts “would in effect be acting in behalf of all of the 50 states and of Congress itself, which should have raised the same Federal question long ago.”²⁹⁵ In an editorial entitled “The Whole country is watching”, the editorial staff of the Globe viewed the law as working “within the bounds of our legal system.”²⁹⁶

In the cartoon below, the Globe’s editorial staff urged that “Massachusetts once again, as she did in her proudest days, show the nation the way!”²⁹⁷



Unexpected allies!

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²⁹⁴ Boston Herald Traveler, April 3, 1970, 1.

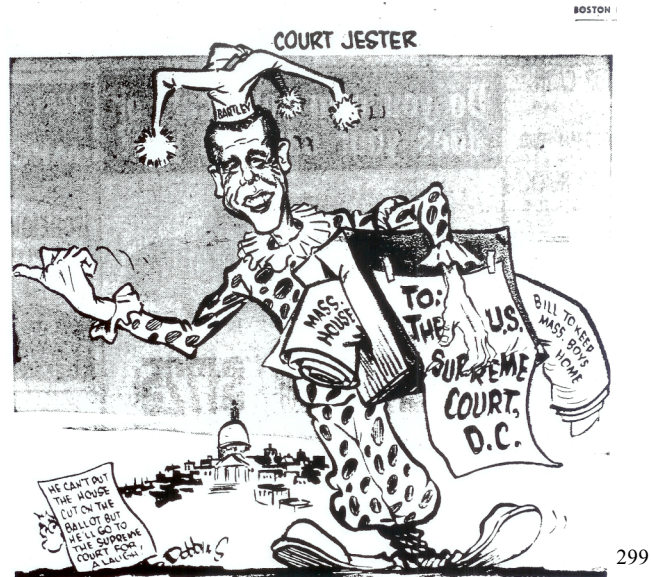
²⁹⁵ The Boston Globe, April 1, 1970, 14.

²⁹⁶ The Boston Globe, April 1, 1970, 14.

²⁹⁷ The Boston Globe, April 1, 1970, 14.

²⁹⁸ The Boston Globe, April 7, 1970, 16.

The editorial staff of the Boston Herald Traveler viewed the new law as frivolous, not worthy of the time of the state legislature, the governor, the state Attorney General, or the Supreme Court of the United States. In the Herald cartoon below, House Speaker Bartley is portrayed hitchhiking to Washington, D.C. dressed as a clown and carrying the new anti-draft law.



One year after debate about the anti-draft law began in the Massachusetts legislature, a member of the Minnesota House of Representatives submitted a similar piece of legislation to that body for consideration. Although there would be debate as legislators considered the bill, much of the conflict regarding Vietnam was intra-Party rather than inter-Party. An intra-Party struggle, centered on Vietnam policy, had occurred within Minnesota's Democratic-Farmer-Labor Party during the last months of the Johnson administration, during the spring and summer of 1968. Before the bill was offered to the Minnesota legislature in January 1971, a presidential

²⁹⁹ The Boston Herald Traveler, March 18, 1970, 35.

election and subsequent off-year election allowed Minnesota Democratic leaders to re-focus Party operatives against national policy, since the Vietnam War now belonged to Republican Richard Nixon.

The Democratic-Farmer-Labor Party (DFL) of Minnesota faced a dilemma in early 1968. Two favorite sons of the state, Hubert Humphrey and U.S. Senator Eugene McCarthy, were attempting to win the nomination as the national Democratic Party candidate for president. Hubert Humphrey was inextricably tied to Johnson's unpopular war – a hard sell to a war weary public. Jeremy Lerner described how, “in the Fall of 1967, the mood of Americans who openly opposed the war was desperate and gloomy.”³⁰⁰ November 30, 1967, marked a turning point in the American political scene. Sensing the unpopularity of the war in Vietnam as an issue that would resonate with voters, Senator Eugene McCarthy announced his willingness to campaign in several upcoming Democratic primaries to be the next Democratic candidate for president.³⁰¹ At the time of McCarthy's announcement Lyndon Johnson was still considered the leader of the Democratic Party and presumptive nominee for re-election in 1968. If McCarthy's gamble were to prove unsuccessful, his campaign against a sitting president of his own party could mark the end of McCarthy's political career on the national scene.

In the November 30th speech, McCarthy did not appear to speak as a candidate with a plan for America, a position on all significant issues, nor even a plan to end America's war in Vietnam. McCarthy seemed, rather, to be a messenger from his perception of the real Democratic Party to the Johnson

³⁰⁰ Jeremy Lerner, Nobody Knows: Reflections on the McCarthy Campaign of 1968, New York: The Macmillan Company, 1969, 17.

³⁰¹ Lerner, 17.

administration, telling any who would listen that Johnson's war in Vietnam had distorted the American political scene and American society beyond recognition. In the speech, McCarthy stated "I am concerned that the administration seems to have set no limits on the price it will pay for military victory."³⁰² McCarthy continued, stating, "the issue of the war in Vietnam is not a separate issue, but one which must be dealt with in the configuration of problems in which it occurs."³⁰³ McCarthy's speech expressed the hope that by opening the discussion on Vietnam America would have both "the resources and moral energy to deal effectively with the pressing domestic problems of the United States."³⁰⁴ According to McCarthy, he sought to return the Democratic Party, and with it, the United States, to "a clearer sense of purpose, and of dedication to the achievement of that purpose."³⁰⁵ Above all McCarthy "was hopeful that his 'challenge' might 'alleviate the sense of political helplessness and restore...a belief in the processes of American politics.'"³⁰⁶

In an article published soon after McCarthy's decision to enter the Democratic primaries, the political newsletter I.F. Stone's Weekly commented on McCarthy and his commitment to ending the war. In an article entitled "A Graceful Patsy Against a Dirty Fighter", the writer observed that "Eugene McCarthy's speech, like the one he delivered a few weeks earlier before SANE's national meeting...fell flat."³⁰⁷ The article continued, noting that McCarthy "has wit, charm, and grace. But he seems to lack guts."³⁰⁸ McCarthy made a negative impression upon the reporter, who stated "watching him at the press

³⁰² Eugene Mc,Carthy, The Year of the People, Garden City, New York: Doubleday and Company, 1969, 267.

³⁰³ McCarthy, 267.

³⁰⁴ McCarthy, 267.

³⁰⁵ McCarthy, 267.

³⁰⁶ Larner, 15.

³⁰⁷ I.F. Stone's Weekly, Washington, D.C., I.F. Stone, editor, Volume XV, No. 30, December 11, 1967, 1.

³⁰⁸ I.F. Stone's Weekly, December 11, 1967, 1.

conference at which he launched his candidacy, one began to wonder why was he running at all.”³⁰⁹ Rather than viewing the Senator’s statement as expressing a strong antiwar view, the reporter stated, “McCarthy gives one the uneasy feeling that he doesn’t really give a damn.”³¹⁰

The paths of Eugene McCarthy and Hubert Humphrey were intertwined in the history of the Minnesota Democratic Party over a span of decades. Above all, both were infected with the bug common to elected officials: re-election, and higher office. It is this common infection, rather than opposition to Johnson’s Vietnam War, to which the conflict between Humphrey and McCarthy may be traced.

Four years earlier, as the nation recovered from the assassination of John F. Kennedy, the Democratic Party prepared to nominate Lyndon Johnson to his first full term as President at the 1964 National Convention. As leader of the national ticket, Johnson and his advisors evaluated potential vice-presidential candidates, to find the strongest match to the electorate. Among those seeking the office, “Senator McCarthy was competing with Hubert Humphrey to become Lyndon Johnson’s Vice-Presidential nominee.”³¹¹ Jeremy Larner noted that “McCarthy wanted the job, and he allowed a campaign to be formed by Democrats who were unsympathetic to Humphrey and for Humphrey’s backing, which came largely from organized labor.”³¹²

Humphrey had been one of the architects of the 1944 merger of Minnesota’s Democratic Party with the Farmer-Labor Party.³¹³ In addition to

³⁰⁹ I.F. Stone’s Weekly, December 11, 1967, 1.

³¹⁰ I.F. Stone’s Weekly, December 11, 1967, 1.

³¹¹ Larner, 22.

³¹² Larner, 22.

³¹³ Allan H. Ryskind, Hubert: An Unauthorized Biography of the Vice President, New York: Arlington House, 1968, 41.

guiding the merger, Humphrey was at the heart of one of the party's early conflicts. Humphrey led the effort to purge the Minnesota DFL of the influence of Communists.³¹⁴ Humphrey had stepped onto the national stage at the 1948 Democratic National Convention. At that event "Humphrey's Americans for Democratic Action" was part of the "move to jettison Truman" as candidate for President. The convention also showed Humphrey as a leader within the Democratic Party in efforts reaching out to African-Americans.³¹⁵ Humphrey was successful on the national scene, and subsequent to Johnson's declining to seek re-nomination received support from the Democratic Party leadership to succeed Johnson. Political satirists, such as Tom Lehrer, noted the personal cost to Humphrey of his political success, singing,

Whatever became of Hubert?
Has anyone heard a thing?
Once he shone on his own,
Now he sits home alone,
And waits for the phone to ring...

Once a fiery liberal spirit,
Ah, but now when he speaks
he must clear it....³¹⁶

The song concluded, "Do you dream about staging a coup? Hubert what happened to you?"³¹⁷

Humphrey's ambition drove his public statements concerning the war. I.F. Stone's Weekly evaluated Humphrey's commitment to his DFL roots versus his drive for higher office. Humphrey's plans to continue Johnson's Vietnam policy ensured that the national Party leadership would support his candidacy.

³¹⁴ Ryskind, 125.

³¹⁵ Ryskind, 126.

³¹⁶ Tom Lehrer, "Whatever Became of Hubert", on "That Was the Year that Was", Reprise Records, 1965.

³¹⁷ "Whatever Became of Hubert."

Humphrey seemed fearful of losing his ties to Johnson's political organization and fund raising. In an article entitled "Why Hubert is as Tricky as Dicky," Stone's Weekly noted, "it is delusion to believe that Humphrey is not saying what we want him to say on Vietnam because he is afraid of Johnson."³¹⁸ Stone's evaluation of Humphrey's campaign continued, "Humphrey is a prisoner of the Johnson administration and perhaps even more so of the labor movement, his only organized support outside of the Party Machine."³¹⁹ Humphrey was seen as disconnected from both the antiwar movement and growing ranks of dissidents within the Democratic Party base. The Stone's Weekly article described Humphrey's comments to the staff of the United States embassy in Saigon during a trip there in 1967. Humphrey told the staff "This is our great adventure, and a wonderful one it is."³²⁰ Although that message was appropriate as a method of raising the spirits of an embassy audience, few other Americans understood America's war in Vietnam to be an adventure or wonderful. Humphrey viewed a pro-war stance as being more beneficial to his campaign than one opposed to the war. During the spring 1968 primary season Humphrey refused to "disavow the President's policies [toward the war] 'this week or ever.'"³²¹ In an effort to demonstrate his complete support of Johnson's war policies, Humphrey "emphasized that his private views on the basic U.S. commitment in Southeast Asia were the same as his public statements."³²²

³¹⁸ I.F. Stone's Weekly, "Why Hubert is as Tricky as Dicky," Volume XVI, Number 20, October 7, 1968, 1.

³¹⁹ I.F. Stone's Weekly, October 7, 1968, 1.

³²⁰ I.F. Stone's Weekly, October 7, 1968, 1.

³²¹ Alpha Smaby, Political Upheaval: Minnesota and the Vietnam Anti-War Protest, Minneapolis: Dillon Press, 1987, 259.

³²² Smaby, 259.

The civil war within the Minnesota Democratic-Farmer-Labor Party can be traced to the difficult choice the leadership of the state DFL Party faced after Lyndon Johnson withdrew his name from consideration for nomination. During the spring of 1968, supporters of both Humphrey and McCarthy struggled to gain delegates to the DFL state convention. As a preliminary to the state convention district caucuses were held. State Party Chairman Warren Spannaus sought to avoid a factional split within the Party by endorsing the pro-war Humphrey faction. In an effort to forestall intra-party struggle, “the day before the caucuses DFL Chairman Spannaus called a press conference to make a last minute plea for party unity.”³²³ According to Spannaus, “the caucuses should not be considered a referendum on the Vietnam War...McCarthy is not the only issue.”³²⁴ Recognizing that rural Minnesotans held different views from those in Minneapolis / St. Paul, Spannaus “agreed that Vietnam policies will be the hottest topic at the Metro Area caucuses, but said the War is not a big issue out-state.”³²⁵ Despite State DFL leaders expressing support for Humphrey, McCarthy garnered significant votes in the district caucuses. According to “State Senator Wendell Anderson, chairman of the Minnesota Johnson-Humphrey campaign, McCarthy had done very well.”³²⁶ Although Humphrey won a majority of delegates to the state DFL convention, McCarthy had carried three of eight Minnesota congressional district caucuses.³²⁷ Prior to the district caucuses, Anderson had predicted, “McCarthy would fail to carry any of the districts.”³²⁸ Spannaus had been successful in

³²³ Smaby, 158.

³²⁴ Smaby, 158.

³²⁵ Smaby, 158.

³²⁶ Smaby, 159.

³²⁷ Smaby, 160.

³²⁸ Smaby, 160..

leading the DFL to support Humphrey's position before the national convention of continuing the war.

Humphrey lost the Presidential election to Republican Richard Nixon. Despite the significant reduction in American forces in Vietnam during Nixon's administration, the war remained a significant issue in national and Minnesota politics. Syndicated columnist Joseph Kraft, in a guest editorial March 5th 1971, wrote that though American involvement in the war had decreased, "President Nixon has not wound down opposition to the war."³²⁹ In the editorial Kraft also reminded readers of the 1968 rift within the DFL, based solely on support of or opposition to, continuing the war. Kraft noted that, although during the last year of the Johnson administration, there had been a nascent anti-war movement within the state Democratic Farm Labor [DFL] party, "the leadership of the party in the state went after the doves with a vengeance."³³⁰ Kraft wrote that Minnesota Senator Walter Mondale had during the 1968 Presidential election cycle "denounced 'one issue'", meaning anti-war, "politics."³³¹ Kraft observed, "with Mr. Nixon in the White House, the constraints on dovish opinion have dropped away."³³²

Wendell Anderson, former campaign chair for Humphrey, was elected Minnesota governor in 1970. In an article in the Minneapolis Star dated March 4, 1971, entitled "Leaders in DFL back war bills", Governor Anderson stated, "I support it."³³³ Former DFL Chairman Warren Spannaus had been elected State Attorney General, and now discovered that the war in Vietnam was wrong. In the same article "Spannaus said 'I believe that we should seek out and utilize

³²⁹ The Minneapolis Tribune, March 5, 1971, Sec. A, 14.

³³⁰ The Minneapolis Tribune, March 5, 1971, Sec. A, 14.

³³¹ The Minneapolis Tribune, March 5, 1971, Sec. A, 14.

³³² The Minneapolis Tribune, March 5, 1971, Sec. A, 14.

³³³ The Minneapolis Star, March 4, 1971, Sec. B., 15.

every conceivable technique to impress upon the Nixon administration our disapproval of the continued engagement in this futile and cruel war.”³³⁴

Legislators in Minnesota were aware of strong feelings against the war amongst their constituents. Public opinion in Minnesota, as represented via newspaper editorials, was running strongly against continued U. S. involvement in South Vietnam. In an editorial March 4, 1971, the Minneapolis Star challenged the Nixon administration to get “all U.S. troops – not just combat, or ground forces – out of Vietnam by June 30, 1972.”³³⁵ The editors stated they “have little taste left for patience, or for deferential restraint in commenting on the administration’s tactics of delay and ambivalence.”³³⁶

Questions regarding the constitutionality of the Tonkin Gulf Resolution were at the center of the Minnesota law, submitted in the House by William Ojala. The legislation was introduced January 8, 1971, the day Ojala, DFL, representing Aurora, MN, was first sworn into office.³³⁷ Ojala was a former Marine, a combat veteran of the Second World War. Following the war, Ojala attended the University of Minnesota, and later, its School of Law.³³⁸ Prior to his election to the Minnesota House of Representatives, Ojala practiced law in Aurora, and served in several elective offices, including as county commissioner in St. Louis County, Minnesota.³³⁹ According to Ojala, his opposition to U.S. policy in Vietnam had been long-standing. In addition to the duties of

³³⁴ The Minneapolis Star, March 4, 1971, Sec. B., 15.

³³⁵ The Minneapolis Star, March 4, 1971, Sec. A, 8.

³³⁶ The Minneapolis Star, March 4, 1971, Sec. A, 8.

³³⁷ Author’s interview with William Ojala, December 27, 2007.

³³⁸ Ojala interview.

³³⁹ Ojala interview.

representing his electorate, Ojala chose to use each of his elective offices as a platform to educate the public on his view of the immorality of the war.³⁴⁰

The October 1969 National Moratorium offered Ojala an opportunity to continue his education of the public. Two events, each related to the observance of the Moratorium by citizens of St. Louis County, allowed Ojala to demonstrate his antiwar belief. As part of the Moratorium, students from a nearby college wanted to hold a service at which the names of Minnesotans who died in Vietnam could be read. Several elected officials forbade the students from holding the demonstration on government property. Ojala, as county commissioner, allowed the students to hold the memorial on the steps of the St. Louis county courthouse.³⁴¹

As part of his public observance of the Moratorium, Ojala introduced a resolution to the Board of Commissioners that recognized “it is apparent that there is no end to the war in Vietnam under present conditions without drastic changes to American policy.”³⁴² The resolution continued, proposing that the St. Louis county commissioners “memorialize the administration of President Richard M. Nixon to take all extra-ordinary measures to de-escalate the war in Vietnam and to quickly and drastically reduce the American involvement.”³⁴³ The Board of Commissioners unanimously adopted the resolution.³⁴⁴ Two weeks later the commissioners rescinded approval of the resolution without

³⁴⁰ Ojala interview.

³⁴¹ Ojala interview.

³⁴² No. 579, Proceedings of Board of County Commissioners of St. Louis County Minnesota, 227.

³⁴³ No. 579, 227.

³⁴⁴ No. 579, 227.

comment.³⁴⁵ According to Ojala, the other commissioners feared county voters were scornful of county government becoming involved in foreign policy.³⁴⁶

An introductory synopsis of Ojala's bill details its intent, as well as actions required of the state Attorney General. From its first words the bill infringes on the constitutional powers granted to the federal government, stating, "No resident of the state inducted or serving in the military forces of the United States shall be required to serve outside the territorial limits of the United States in the conduct of armed hostilities not an emergency."³⁴⁷ The bill offers a definition of acceptable conflict, stating that all armed hostilities launched by a President are invalid

Unless such hostilities were initially authorized or subsequently ratified,...by a congressional declaration of war according to the constitutionally established procedures in Article I, Section 8, of the Constitution of the United States.³⁴⁸

The Attorney General would undertake this action "to defend and enforce the rights of such residents and of the state under Section 1."³⁴⁹

As the bill progressed through the Minnesota House, it was amended several times. Once to match its wording to a parallel Senate bill. A more significant change was to alter its effect from any Minnesota draftee to only one. This change, proposed by Conservative representative Salisbury Adams, would "limit the bill to a test case involving only one serviceman, and leave the filing of the test case to the discretion of the attorney general."³⁵⁰ This version of the bill gained Conservative support in the House Judiciary Committee because the

³⁴⁵ Ojala interview.

³⁴⁶ Ojala interview.

³⁴⁷ Minnesota House File 368, Section 1.

³⁴⁸ H.F. 368, Section 1.

³⁴⁹ H.F. 368, Section 2.

³⁵⁰ The Minneapolis Star, March 20, 1971, 3A.

bill's preamble was also amended. The new preamble noted, "to lay blame or cause embarrassment to any administration would be a misuse of the legislative process... and create unwarranted expectations of an immediate withdrawal of Minnesota servicemen from foreign lands."³⁵¹ Although the amended version gained support from legislators who had previously opposed the bill, Ojala's original concept was gone. Ojala voted against the amended version in committee. The amended bill, which became the final version, described the impotence of state action in the arena of foreign affairs, noting

The Minnesota legislature recognizes its lack of power and responsibility in the field of international affairs and the defense and security of our nation; to pass judgment or enact laws with respect to areas which are solely the domain of the federal Congress and executive branch would be an improper use of a legislature's time.³⁵²

That statement notwithstanding the bill continued, "Yet, if constitutional questions about the United States overseas military involvement do exist...the state... can aid in raising said issues before the federal courts of this nation."³⁵³ By a vote of 82 to 51 the bill was passed. Some Conservative Party representatives voted with the DFL for the bill. Some DFL representatives voted against. The bill was signed into law April 14, 1971.³⁵⁴

Two state legislatures thus placed in question the authority of the federal government to use citizens of those states in a war which the legislatures considered unconstitutional because undeclared. The federal courts would now be asked to answer the constitutional question of this interface between national foreign policy, state government and individual rights.

³⁵¹ The Minneapolis Star, March 20, 1971, 3A.

³⁵² Section 1, Senate File 181, as passed by House Judiciary Committee.

³⁵³ Section 1, Senate File 181

³⁵⁴ Minneapolis Star, April 15, 1971, Sec. A1.

Conclusion: Only One Was Saved

The U.S. Constitution, in its definition of federal court powers, states “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution.”³⁵⁵ Throughout America’s war in Vietnam numerous individuals attempted to have federal courts determine how U.S. involvement in a conflict in Southeast Asia met the definition of a constitutionally declared war. These individual court cases also questioned whether citizens, compelled by law to serve in the nation’s military, should then be used to fight an undeclared foreign war. Several cases, including *Luftig v. McNamara*, (D.C. Cir. 1967) and *Mora v. McNamara* (1967), led federal courts and the Supreme Court to rule that the war in Vietnam was a political question, that is, a decision on the validity of the war was “outside of the judicial function.”³⁵⁶

Federal court judges viewed matters of national defense as beyond the realm of judicial review. In *Luftig* federal district judge Holtzoff, citing *Pauling v. McNamara* (D.C. Cir 1963), found “decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them.”³⁵⁷ *Luftig* was dismissed “for lack of jurisdiction over the subject matter.”³⁵⁸ In *Mora v. McNamara* (1967), Justices Stewart and Douglas dissented from the majority decision denying Mora’s request for a “declaratory judgment that the present United States military activity in Vietnam is ‘illegal.’”³⁵⁹ In his dissent Justice Stewart identified a series of questions that, in his opinion, the courts should ask.

³⁵⁵ U.S. Constitution, Article III, Section 2, Clause 1.

³⁵⁶ *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir 1967).

³⁵⁷ *Pauling v. McNamara*, 118 F. 2d. 796 (D.C. Cir 1963).

³⁵⁸ *Luftig*.

³⁵⁹ *Mora v. McNamara*, 389 U.S. 934 (1967).

Among the questions, “Is the present United States military activity in Vietnam a war within the meaning of Article I, Section 8, Clause 11 of the Constitution?” The Justice continued, “If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?”³⁶⁰ Stewart also asked

If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict, limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress’ power to declare war?³⁶¹

Stewart’s dissent noted the Court “cannot make these problems go away simply by refusing to hear the case of three obscure Army privates...I think the Court should squarely face them by granting certiorari and setting this case for oral argument.”³⁶² In his presentation during this case, U.S. Attorney General Nicholas Katzenbach “testified that he did not regard the Tonkin Gulf Resolution to be a declaration of war and that while the Resolution was not constitutionally necessary, it was politically, from an international viewpoint and from a domestic viewpoint, extremely important.”³⁶³

By choosing to declare United States involvement in Vietnam a political question, the courts validated the Johnson (and later, Nixon) administration view that the Tonkin Gulf Resolution and Congress’ continued funding of the war made the war constitutional. No individuals were successful in having the courts declare America’s war in Vietnam unconstitutional. Nor were any of the

³⁶⁰ Mora.

³⁶¹ Mora.

³⁶² Mora.

³⁶³ Mora.

petitioners successful in having the courts suspend their assignment to Vietnam.

The antiwar legislation in both states was signed into law after the U.S. Supreme Court decided the limits of judicial participation in cases involving individuals opposed to the Vietnam War. Despite these federal and Supreme Court decisions the legislatures of Massachusetts and Minnesota included language in each law designed to ask a question similar to one the Supreme Court had already answered.

The decision of the Supreme Court in *Massachusetts v. Laird* (1970) meant the Court would not explicitly determine the constitutionality of the Vietnam War. The Supreme Court denied the validity of the Massachusetts law's interference in foreign policy. Justice Douglas, in his dissent of *Massachusetts* (1970) noted, "Massachusetts attacks no federal statute. In fact, the basis of Massachusetts' complaint is the absence of congressional action."³⁶⁴ Douglas wrote that the state law was not protesting a congressional statute. The state law instead protested that Congress had taken no declaratory action regarding the war.³⁶⁵ Douglas wrote, "only one representative of the people, the Executive, has acted and the other representatives of the citizens have not acted, although, it is argued, the Constitution provides that they must act before an overseas 'war' can be conducted."³⁶⁶

³⁶⁴ Commonwealth of Massachusetts v. Laird, 400 U.S. 886 (1970).

³⁶⁵ Massachusetts.

³⁶⁶ Massachusetts.

Justice Douglas cited previous Court decisions, including *Youngstown Sheet and Tube Co. v. Sawyer* 343 U.S. 579 (1952)³⁶⁷ in his argument that *Massachusetts* was justiciable. Douglas stated,

If we determine that the Indochina conflict is unconstitutional because it lacks a congressional declaration of war, the Chief Executive is free to seek one, as was President Truman free to seek congressional approval after our Steel Seizure decision.³⁶⁸

Douglas described the differences between *Massachusetts* and previous cases, noting that “in those cases a private party was asserting a wrong to him; his property was being taken.”³⁶⁹ In *Massachusetts* “the lives and liberties of Massachusetts citizens are in jeopardy. Certainly the Constitution gives no greater protection to property than to life and liberty.”³⁷⁰ Douglas argued, “the question of an unconstitutional war is neither academic nor political. This case has raised questions in an adversary setting. It should be settled now.”³⁷¹ That the Supreme Court did not settle the question meant the question of the constitutionality of the Vietnam War would be left to the Minnesota law.

The anti-draft law in Minnesota was introduced in the legislature after the Supreme Court decision in *Massachusetts*. The Minnesota law asserted that the U.S. war in Vietnam, with no explicit declaration of war, was unconstitutional. John Mason, Minnesota’s Solicitor General, was successful where *Luftig*, *Mora*, and *Massachusetts* were not. Mason convinced District

³⁶⁷ *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952).

³⁶⁸ *Massachusetts*.

³⁶⁹ *Massachusetts*.

³⁷⁰ *Massachusetts*.

³⁷¹ *Massachusetts*.

Judge Earl Larson to issue “a temporary restraining order...preventing the Army from sending Clifton D. Perkins to Vietnam.”³⁷²

The lever by which Minnesota’s law attempted to establish the U.S. war in Vietnam was unconstitutional was aided by “disclosures by the New York Times about a Pentagon study on the Vietnam War”³⁷³ – the Pentagon Papers. Minnesota Solicitor General John Mason “asked federal Judge Earl R. Larson to consider the Times’ disclosures when the judge rule[d] on his request for a preliminary injunction.”³⁷⁴ Mason noted, “This evidence has never been presented to a court before and it’s an additional ground by which our case is distinguishable from the other cases.”³⁷⁵ Mason and Minnesota Attorney General Warren Spannaus “contend[ed] that portions of the Pentagon study indicate that congressional actions to ratify war actions...were not based on full knowledge of the facts and that the war, therefore, is not being prosecuted legally.”³⁷⁶

Judge Larson refused to issue a “temporary injunction, which would have kept Perkins out of the war zone until the case had been decided.”³⁷⁷ Larson did grant a “temporary restraining order against Perkins’s overseas assignment to allow the state to appeal his ruling to the 8th Circuit Court of Appeals.”³⁷⁸ Larson also “set August 13 as the date for a hearing on the state’s request for a permanent injunction – in effect, a declaration that the war was unconstitutional.”³⁷⁹ The Minneapolis Tribune noted that, while allowing a

³⁷² The Minneapolis Star, June 1, 1971, 1A

³⁷³ The Minneapolis Tribune, June 16, 1971, 7A.

³⁷⁴ The Minneapolis Tribune, June 16, 1971, 7A.

³⁷⁵ The Minneapolis Tribune, June 16, 1971, 7A.

³⁷⁶ The Minneapolis Tribune, July 2, 1971, 11A.

³⁷⁷ The Minneapolis Tribune, July 2, 1971, 11A.

³⁷⁸ The Minneapolis Tribune, June 26, 1971, 5B.

³⁷⁹ The Minneapolis Tribune, June 26, 1971, 5B.

temporary restraining order in Perkins's case, "the language of Judge Larson's memorandum suggests strongly that he is not disposed to grant the permanent injunction."³⁸⁰ The Tribune described Larson's preliminary view of the state's case, stating, "the depth of the U.S. involvement in Southeast Asia and the traumatic changes which that involvement has caused...makes the question of whether or not the United States is technically at war seem foolish and legalistic."³⁸¹ Discounting Solicitor Mason's argument that Congress's actions regarding Vietnam were undertaken without complete understanding of the issue, Larson noted, "that Congress's failure to declare war may be deliberate rather than the result of its lack of knowledge."³⁸² The August 13 hearing was delayed to August 25th.³⁸³

At the hearing on August 25th, Judge Larson "rejected this motion, but said it could be renewed if the appeals court remanded the case to him."³⁸⁴ Perkins's assignment to Vietnam was delayed "until the Court of Appeals for the Eighth Circuit ruled on his (Perkins's) preliminary appeal."³⁸⁵ Judge Larson "said the Army should either reassign Perkins...to military leave without pay, or assign him to some other duty than in Indochina."³⁸⁶ Larson said, "while he felt Perkins had not made 'sufficient showing of probability of success on the merits to justify a preliminary injunction there is no reason why he should be denied the opportunity to appeal."³⁸⁷ Judge Larson "dismissed Minnesota's

³⁸⁰ The Minneapolis Tribune, June 26, 1971, 5B.

³⁸¹ The Minneapolis Tribune, June 26, 1971, 5B.

³⁸² The Minneapolis Tribune, June 26, 1971, 5B.

³⁸³ The Minneapolis Tribune, August 13, 1971, 5B.

³⁸⁴ The Minneapolis Tribune, August 26, 1971, 1B.

³⁸⁵ The Minneapolis Star, July 9, 1971, 9A.

³⁸⁶ The Minneapolis Star, July 9, 1971, 9A.

³⁸⁷ The Minneapolis Star, July 9, 1971, 9A.

challenge.”³⁸⁸ In his dismissal, Larson stated, “that the state had not shown any likelihood of ultimately winning its case.”³⁸⁹ Citing precedent, Larson noted, “This court believes itself compelled to accept the decisions of superior courts and fellow trial judges.”³⁹⁰ Larson also remarked, “the U.S. Supreme Court had the opportunity to rule on the issues in a challenge by the State of Massachusetts but had declined to do so.”³⁹¹

The attempt to achieve a permanent injunction by the federal courts that would halt Perkins’ deployment to Vietnam failed. The 8th U.S. Circuit Court of Appeals upheld the decision against the Minnesota law.³⁹² Perkins “was to report to Fort Snelling [near Minneapolis].”³⁹³ Perkins was assigned to a military police unit at Fort Snelling.³⁹⁴

Attorney General Spannaus appealed to the Supreme Court. As part of Spannaus’ appeal, the court was requested to make Perkins’ orders permanent.³⁹⁵ However, “Supreme Court Justice Harry Blackmun denied a request by the Minnesota attorney general’s office to extend an injunction that kept the Army from sending Perkins to Southeast Asia.”³⁹⁶ Only two members of the high court, Justices Douglas and Brennan, voted to hear the appeal of the Minnesota case.”³⁹⁷ The decision, dated February 28, 1972, states

Petition for writ of certiorari to the United States
Court of Appeals for the Eighth Circuit denied.
Mr. Justice Douglas and Mr. Justice Brennan are
of the opinion that certiorari should be granted.³⁹⁸

³⁸⁸ The Minneapolis Tribune, August 26, 1971, 1B.

³⁸⁹ The Minneapolis Tribune, August 26, 1971, 1B.

³⁹⁰ The Minneapolis Tribune, August 26, 1971, 1B.

³⁹¹ The Minneapolis Tribune, August 26, 1971, 1B.

³⁹² The Minneapolis Star, October 14, 1971, 17B.

³⁹³ The Minneapolis Star, October 14, 1971, 17B..

³⁹⁴ The Minneapolis Star, October 15, 1971, 21A.

³⁹⁵ The Minneapolis Star, October 14, 1971, 17B.

³⁹⁶ The Minneapolis Star, October 14, 1971, 17B.

³⁹⁷ The Minneapolis Star, March 15, 1972, 3A.

³⁹⁸ Perkins v. Laird, cert. denied 405 U.S. 965 (1972).

In order for any case to be heard by the Supreme Court four justices must agree to do so. Only Justices Brennan and Douglas agreed to hear the merits of the case the Minnesota anti-draft law. With only two months left of his two-year enlistment, Perkins orders to Vietnam were cancelled. He finished his enlistment at Fort Snelling.³⁹⁹

During research for this paper legislative efforts by several other states to oppose federal policy in Vietnam were found. Only the legislatures of Massachusetts and Minnesota were successful in having an antiwar bill signed into law. The U.S. Constitution is opaque concerning the relation of individual state in relation to foreign and military policy of the federal government. Rather than ruling on the constitutionality of the war, the courts ruled that the questions raised by these state laws were political questions, not answerable by the courts.

What would motivate two state legislatures to pass bills opposing U.S. foreign and military policy? Both bills were introduced and signed into law after Richard Nixon was elected. Although Nixon instituted changes in both the operation of the war and to the draft that fed it, by early 1970 the number of American forces committed to the war had been reduced only slightly. The combined American – South Vietnamese invasion of Cambodia two weeks after the Massachusetts bill was signed into law signifies how tentative was Nixon's commitment to end America's involvement in the war.⁴⁰⁰ That sequence – the election of Nixon followed by the introduction of the bills, offers partisan gain as one motivating factor. For some elected officials in both states personal or

³⁹⁹ The Minneapolis Star, October 28, 1971, B1.

⁴⁰⁰ Karnow, 608.

party gain was an incentive. In a representative democracy, such as the United States, elected officials have two primary duties: voting as the majority of their constituents wish and getting re-elected. Each of these states offers a different model of how the individual legislators viewed the U.S. war in Vietnam, as either inherently wrong, or wrong only because to view it so would aid one's self or one's political party.

In Massachusetts there was little apparent effort to use support or opposition to the bill for political gain. The Republican governor expressed strong antiwar sentiment before the bill was introduced in the Democratic controlled legislature. Using that bi-partisan support for the bill as a gauge the citizenry of Massachusetts appear to have been among the first to reach a unified view against the war. In the Minnesota House of Representatives, the author of the antiwar legislation, William Ojala, had a lifelong belief in the wrongness of war. He viewed each public office he held as a platform to educate the public on U.S. government actions in Vietnam. The antithesis of Ojala, Minnesota Attorney General Warren Spannaus, led the effort to stifle the antiwar McCarthy faction in the state Democratic Party in 1968. Spannaus sought to bolster the pro-war Humphrey faction within the state party. Two years later, while the Minnesota bill was being considered by the legislature, Spannaus sought to use the bill "to impress upon the Nixon administration our disapproval of the continued engagement in this futile and cruel war."⁴⁰¹

Passage of each antiwar bill by these two legislatures was an indicator of widespread antiwar sentiment in Massachusetts and Minnesota. If legislators sensed that at least a plurality of their voters were against the war, voting for

⁴⁰¹ The Minneapolis Star, March 4, 1971, Sec. B., 15.

each antiwar bill carried little risk of voter backlash. In approving these two measures, the legislatures of Massachusetts and Minnesota were taking actions that the federal legislature was unable to do – vote to end the war.

The laws asked the federal courts to evaluate whether the U.S. war in Vietnam fit within the framework of the Constitution. With only a few federal and Supreme Court justices dissenting, the courts found the war to be a political question, and beyond the scope of their authority. With that answer the Supreme Court invalidated both state laws. The Court's decision also gave tacit approval to congressionally authorized, rather than declared, presidential wars.

Both state legislatures sought, if not to end America's war in Vietnam, at least to protect citizens of each state from being drafted into federal military service and used in an undeclared foreign war. After all of the effort, only one man, Clifton Perkins of Minnesota, was saved from serving in Vietnam.

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