CHAPTER 4

The (Unenforceable) Unconstitutionality of the “Secret War” in Laos, 1962–1969

The roar of the bombs and the noise of the planes frightened me terribly. Our life... was without tomorrows. Each day, across the forests and ditches, we sought only to escape from the bombs. When looking at the face of my innocent child, I could not stop crying for his future... Why do the men in this world not love each other... and why do they kill each other this way?... In any case, in all that happens, it is the innocent people who suffer all the terrible consequences so fatal and tragic.

—Laotian Refugee, 1971

You can’t let your people know what the government is doing without letting the wrong people know—those who are in opposition to what you’re doing.

—Ronald Reagan, 1983

Often over the past couple of years, as I told one or another friend I was writing about the war in Indochina, I was greeted with a quizzical look. “The war in Vietnam,” I’d quickly add, and then they’d understand—kind of. It is not the point of this vignette to suggest that my friends are dull-witted. It’s rather that the general picture most of us had of the American war in Indochina—certainly it was the picture our government was giving us—was that we were fighting to defend the Saigon government from a North Vietnamese invasion (and, initiates understood, indigenous Communist insurrection as well). To the extent the war slipped across the borders, as we knew it did into Cambodia in 1970 (and suspected it had in minor ways all along), that was because the North Vietnamese were using the eastern rim of that country (and probably southeastern Laos as well) as a transport and staging area for its assault on South Vietnam.

In many ways this picture was closer to the truth than radical critics would have had us believe at the time. There really was a North Vietnamese infiltration of the South, and there really was a “Ho Chi Minh Trail” stretching down through Laos and Cambodia, just across the western border of South Vietnam. However, the picture we were getting was seriously incomplete. The United States was engaged in a hot war against “Communism” throughout all of Indochina, siding with the governments in Saigon, Phnom Penh, and Vientiane against a Communist threat that in each case did involve an element of North Vietnamese aggression but also importantly involved Communist elements (Viet Cong, Khmer Rouge, and Pathet Lao) that were indigenous to the country involved.

In chapter 2 I concluded that the first of these wars—the “war in Vietnam” our government told us about—was constitutional under currently prevailing notions of congressional authorization. (Chapter 3 suggested the need to clarify those notions in ways that will more effectively force Congress to face up to its constitutional obligation to decide on war and peace.) In this chapter and the next I shall suggest that the rest of the American war in Indochina (the part they didn’t tell us about) was (essentially for that reason) unconstitutional.

AMERICA’S ROLE IN THE WAR IN LAOS

They made a wasteland and called it peace.

—Tacitus

The least goddam thing somebody could do is come back and say “I’m sorry.”

—“Pop” Bell

At Geneva on July 23, 1962, fourteen nations, including the United States and North Vietnam, signed agreements guaranteeing the neutrality of Laos. They outlawed “foreign military personnel” in Laos and prohibited the introduction of arms and war materials into that country except for “conventional armaments... necessary for the national defense.” “Foreign military personnel” was defined to include “members of foreign military missions, foreign military advisers, experts, instructors, consultants, technicians, observers and other foreign military persons... and foreign civilians connected with the supply, maintenance, storing and utilization of war materials.”

Initial American compliance with the 1962 Geneva agreements was better than that of the North Vietnamese. Although we withdrew all of our 666 military advisers by the October deadline, they pulled out a mere handful, leaving somewhere between 6000 and 10,000 North Vietnamese fighting men in Laos. “But [e]ven as it complied with the letter of the treaty,” the United States “violated Geneva’s spirit by increasing covert military operations.” “Military advisers and CIA personnel moved across the border of Thailand, where they were flown in every day like commuters by Air America,” and it was not long before we were back in Laos in several very big ways, participating in what amounted to two wars. One was over the
Ho Chi Minh trail, a network of roads, waterways, and trails in the eastern part of the Laotian panhandle that the Communists were using as a corridor for the transportation and provisioning of their troops in South Vietnam and Cambodia. This campaign was basically an adjunct of the war in Vietnam and thus an almost exclusively American show: Laotian troops barely participated. The other was for control of northern and central Laos, and involved a struggle between Laotian government forces supported by their American and Thai allies, and the Pathet Lao and their North Vietnamese allies. American participation in these campaigns took several forms: (1) training anti-Communist troops (sometimes even accompanying them into battle), (2) supplying them with arms, food, and other equipment, (3) transporting them in and out of action, and (4) supporting them by heavy bombing of Communist positions.

General Yang Pao’s “Secret Army” (Armée Clandestine) fought (with comparative effectiveness) on the government side of the war in northern Laos. It comprised some 40,000 to 70,000 Hmongs (“Meo”) tribesmen augmented later by somewhere between 17,000 and 21,000 American-paid Thai “volunteers,” most of whom “resigned” from the Thai army to fight in Laos but were guaranteed reinstatement without loss of benefits upon their return. This Secret Army was trained and guided by Central Intelligence Agency employees, a contingent that in turn substantially comprised Army Special Forces troops who had switched their official employment after the 1962 Geneva Agreements. As Under Secretary of State U. Alexis Johnson testified in 1971: “Under the Geneva Agreements we were prohibited from having American military personnel in Laos and that is the brief answer . . . . CIA is really the only other instrumentality we have.” Some of these Green Berets-turned-CIA-operatives reported that they were “fed up with having their hands tied” in Vietnam. These “ex-Green Berets train[ed] government troops, assist[ed] reconnaissance teams, and helped plan terrorist and psychological warfare operations.” Sometimes they actually accompanied Vang Pao’s troops into battle, though generally not, as American casualties risked publicizing the fact that live Americans had been there.

The United States supplied virtually all the military and other equipment for the Armée Clandestine, often channeling it through the Agency for International Development (AID), which generally served as a cover for CIA operations. Air America (a CIA subsidiary) and Continental Air Services (a private airline working closely with the Agency) moved Vang Pao’s troops and supplies, and evacuated his wounded. Most Air America and Continental pilots had (at least officially) resigned from the United States Air Force to fly for these carriers; some “returned” to the Air Force when their Laotian chores were completed. Americans also operated the air bases. The Secret Army was thus “armed, equipped, fed, paid, guided strategically and tactically, and often transported into and out of action by the United States.”

By the mid-1960s the CIA in Laos had grown to immense proportions. No longer did the CIA just organize a small army of [Hmongs] tribesmen numbering 11,000, but the CIA found itself commanding an army numbering more than 100,000. The CIA station in Laos had created an organization of huge numbers of [Hmongs], Lao, and Thai peasants, U.S. military advisors, mercenaries, diplomats from the U.S. Mission in Vientiane, Army and Air Force attaches, members of the International Voluntary Services, people from the United States Information Service, some Americans in the Agency for International Development, and pilots from the Navy, Air Force and Marines to form a paramilitary group to conduct the ground and air war in Laos.

As if that weren’t enough, official United States armed forces units often got involved. In “Operation Prairie Fire,” which apparently lasted from 1967 to 1972, Green Beret units periodically and secretly crossed the border to fight in Laos. “Prairie Fire executed over 250 missions in 1967, including patrols penetrating as far as twelve miles into Laos. By 1968, in addition to the Green Berets serving with the 5th Special Forces Group, there were another 508 Americans assigned to Prairie Fire.” Reportedly over 1,000 such border crossings occurred during 1969 and 1970.

In the spring of 1964, when the war was going badly for government forces, American fighter-bombers began striking targets in northern Laos. This was not at the beginning a large campaign: There were only twenty such sorties during 1964. In the autumn of the same year, at American request, Laotian planes began to bomb North Vietnamese supply routes along the Ho Chi Minh trail. In 1965, as we sent our first actual combat troops into South Vietnam, American aircraft took over this mission. (Many Americans’ first suspicions that we were bombing Laos incorporated an assumption that we were doing so to close off supply routes to South Vietnam. That indeed became much of the point, but the chronology, as well as the relative tonnage involved, demonstrates that a prior goal, which remained important throughout, was support of the Vientiane government. Of course, our support of Vang Pao’s Secret Army was directed almost entirely toward that goal as well.)

Throughout the 1960s American bombing of Laos intensified enormously, especially during those purportedly dovish intervals when the bombing of North Vietnam had been halted. “The only difference was that bombs that might have fallen on North Vietnam were dropped instead on similar targets in the jungles of Laos.” (Unfortunately it made eco-
Laos was a convenient place to use them; and their use there would be secret. This therefore became "the heaviest sustained bombing campaign in history."36 By late 1969, the United States Air Force was flying at a rate variously estimated by responsible commentators as somewhere between 300 and 500 sorties a day over Laos.37 By the time the bombing stopped in 1973, United States planes had flown approximately 600,000 sorties there, which computes out at about "one plane-load of bombs every eight minutes around the clock for nine years."38 We dropped somewhere between 1.6 and 2 million tons of bombs on Laos all told,39 more than we had loosed on all of Europe and the Pacific theater during World War II.40 (By way of contrast, during Operation Desert Storm we dropped on Iraq and Kuwait "only" about 5 percent of the total tonnage dropped during World War II.41)

Until 1969 the American people, and to a lesser degree the Congress, were kept in substantial ignorance of these various American involvements in Laos. In September and October of that year, however, The New York Times began running detailed articles about our role. At first the government resolutely maintained the cover-up. However, when government troops captured the Plain of Jars in September of that year (temporarily, as it turned out) the temptation to gloat apparently proved irresistible, and "sources" within our government confirmed that the victorious troops were actually CIA proteges, and that we had provided "heavy" air and logistical support.42 (The next day the State Department, speaking corporately, "refused to confirm or deny" this story.)43 In October 1969 a subcommittee of the Senate Foreign Relations Committee chaired by Stuart Symington held closed hearings on our role in Laos. On April 20, 1970 a heavily censored transcript of these hearings was released, and on December 21 of the same year a brief and similarly unenlightening subcommittee report was issued. However, several of the senators present indicated that what came out in the hearings substantially confirmed the 1969 New York Times stories, which covered a good deal of what I have reported here.44

Secret wars are prima facie unconstitutional, since they haven't been authorized by Congress, let alone exposed to the scrutiny of the American public. There are, however, four conceivable defenses of the constitutionality of the American war in Laos, which I will discuss in turn: (1) that it shouldn't count as a "war" for constitutional purposes because it was largely fought by the CIA (and Laotians and Thais acting under its tutelage) as opposed to American armed forces; (2) that in fact it was authorized by Congress at the same time the war in Vietnam was authorized, most pointedly in the Tonkin Gulf Resolution; (3) that there were compelling military justifications for keeping the war secret from Congress and the American people, and thus for not seeking authorization; and (4) that the American war in Laos actually wasn't a secret, in that any alert member of Congress or the public could have learned what was happening by careful attention to the right public reports—and thus, I guess the argument is supposed to run, Congress authorized it by not cutting any of the appropriations they might have surmised were being used to fund it.

DEFENSE 1: BECAUSE IT WASN'T Fought BY OUR "ARMED FORCES,"
THE CAMPAIGN IN LAOS WASN'T COVERED BY THE CONSTITUTIONAL REQUIREMENT THAT WARS BE AUTHORIZED BY CONGRESS

Obviously no such defense could even be attempted with regard to the most destructive components of our war in Laos—the massive bombing campaigns, which involved United States Air Force and Navy planes—or to the actions of Green Beret and Marine units in Laos. In light of contemporary events, however, it is worth going on to discuss the applicability of the Constitution's War Clause to operations run by the CIA (or some other arm of our "intelligence" apparatus) that employ, as troops, either non-American military personnel or "civilian" CIA employees. Such operations are proving increasingly attractive, and here the argument undoubtedly would be made, at least by the CIA General Counsel's office, that the United States is not at war.

The increasing attractiveness of "paramilitary" operations and proxy battles has at least two causes. First, the consultation and reporting requirements of the War Powers Resolution apply only to the commitment of "United States Armed Forces." Second, using foreigners to fight our battles (though probably not American "civilians") is cheaper for the United States, not only monetarily but in terms of American lives as well. As former Under Secretary Johnson testified in 1971:

The only U.S. Forces involved in Laos are in the air. We have no combat forces stationed there. And I personally feel that although the way the operation has been run is unorthodox, unprecedented, as I said, in many ways I think it is something of which we can be proud as Americans. It has involved virtually no American casualties. What we are getting for our money there, as the Ambassador said, is, I think, to use the old phrase, very cost effective.45

As another witness pointed out, "[W]hen they die, you don't have to ship them home, you bury them right there on the spot."

This kind of thinking not only appeals to government cost-benefit analysts, but also is likely to reduce domestic opposition to the war in question. Americans will understandably be more concerned about a war in which there is a danger that they or their loved ones will die.
Understandable, yes, but morally indefensible: Hmong and Thai lives count too. In addition, while such situations may not be covered by the War Powers Resolution, they are covered by the War Clause of the Constitution. The fact that few American lives were at risk in Laos (at least as compared with the lives of locals) doesn’t seem like something that should take this out of the constitutional category of war. In fact, in explaining why they were trying to make wars difficult to get into, the founders mentioned their financial costs as well as their human ones. And even wars that aren’t particularly costly to the United States in either of those terms, such as the “walkover wars” of the Reagan-Bush era, carry moral and political costs. Naturally we’re all happier when Americans don’t die, but at the same time we don’t want our country risking the lives of significant numbers of foreigners—either as enemies or as soldiers on our side—without careful and constitutional consideration. Moreover, “what is initially intended to be a minor effort, perhaps involving only a bloodless show of force, can easily grow into a major war, even a nuclear one.” In any event, significant numbers of Americans were put at risk, and killed, in Laos.

Neither can the fact that many of the Americans fighting and managing the war in Laos were not officially members of the United States Armed Forces make a constitutional difference. That would make the War Clause a hollow joke indeed: All the president would have to do is redesignate a couple of Army divisions as “cisa” and use them accordingly—or, perhaps less flagrantly, let the membership of the Armed Forces dwindle while the membership of the cia, or whatever, is beefed up to the point where it can manage, perhaps even fight, full-scale wars.

In February 1970 Senator Charles Mathias argued that the presence of the Green-Berets-turned-cia-operatives in Laos constituted a violation of Congress’s earlier ban on American ground combat troops in that country. Such a “veil piercing” analysis certainly seems to make a lot of sense in the statutory context for which Mathias proposed it. However, one doesn’t have to reach it in the constitutional context, as the commissioning of nonmilitary and even private groups to take military action on behalf of the United States is a situation precisely contemplated by the War Clause. “In the eighteenth century, war had not yet become the exclusive domain of the state; many governments contracted out the business to private citizens or groups, or foreign units and mercenaries...” As we noted in chapter 3, the marque and reprisal provision was designed to insure that authority to license such acts of war or lesser hostilities in behalf of the United States, like the authority to authorize full-fledged wars, would be unambiguously vested in Congress. That such hostilities were undertaken by private parties (let alone agencies of government not officially designated “armed forces”) was irrelevant; they still had to be legislatively authorized. (As the quoted passage also suggests, hostilities contracted out to foreign mercenaries, like the Thais we hired to fight on our side in Laos, were also covered by the clause.) It is therefore as clear as any conclusion of constitutional law can be that the fact that part of the American war in Laos was fought by a combination of the cia and its protégés did not eliminate the necessity of congressional authorization.

DEFENSE 2: THE TONKIN GULF RESOLUTION AUTHORIZED THE WAR IN LAOS

Section 2 of the Tonkin Gulf Resolution, enacted in August of 1964, authorized the president to use armed force to assist any SEATO protocol state (which Laos was) “requesting assistance in defense of its freedom” (which Souvanna Phouma did). Section 1 didn’t even require a request from the country in question: It simply “supported the determination” of the president to “prevent further aggression.” True, there was no legislative history indicating that Laos was to be among the countries to which we would be lending our assistance. However, as noted earlier, declarations of war generally don’t specify allies, they specify enemies. And the Resolution’s Preamble, which referred to the “campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors,” not only identified the “enemy” but also indicated with some specificity the set of nations to which we might be lending assistance. “Neighbors” is plural, Laos abuts North Vietnam, and at the time of enactment North Vietnam was engaged in aggression against the Vientiane government.

One problem for this defense of the American war in Laos is that both of its aspects were begun substantially in advance of the enactment of the Tonkin Gulf Resolution—our training and support of the Secret Army by years, the bombing campaign by months. Beyond that, however, even the staunchest supporters of presidential power in this area grant—indeed this is a critical premise of their argument that the constitutional requirement of advance authorization can be ignored—that if Congress does not like the way a war is being conducted it can pull the financial plug on it (and by extension that if the public does not approve of the war, it can pressure Congress thus to end it). That constitutional safeguard is eliminated, however, if the way the war is being conducted, let alone the fact that it exists, is being kept secret from Congress and the American people. The validity of this defense of the war in Laos—even after August 1964—is therefore entirely dependent upon the validity of the next, that is, upon the existence of a compelling military justification for the secrecy. The fact that a resolution was once passed which facially appears to have authorized a given war cannot by itself constitutionally justify keeping the progress of that war secret, let alone its very existence.
DEFENSE 3: THERE WERE COMPELLING MILITARY REASONS WHY
CONGRESS AND THE AMERICAN PUBLIC COULD NOT BE
TOLD ABOUT THE WAR IN LAOS, AND THUS WHY
AUTHORIZATION COULD NOT BE SOUGHT

We obviously need to begin by questioning whether such a defense should be entertainable even in theory. Plainly military officers can undertake secret campaigns during a war—secret at least in the sense that no advance warning is given—in order to surprise the enemy, rendering him more vulnerable and increasing our chances of military success. It is some distance from that, however, to the conclusion that the president can covertly start a war simply because there is a military justification for doing so. (As there might be: Pearl Harbor is an example that readily comes to mind.) The argument that he should not be able to do so is obvious and strong: Such a beginning leaves the body constitutionally vested with authority to get us into wars, namely Congress, entirely out of the loop. 58

On the other hand, we can construct hypothetical cases in which most of us might instinctively want to say that the president should be able to begin a war clandestinely—the case, for example, of a country that reliable intelligence sources tell us (a) is planning to launch a nuclear attack on the United States in forty-eight hours, and (b) can be stopped by covert military action involving the use of nuclear weapons. His doing so would also seem to fit within any sensible contemporary rendition of the constitutional principle that he can repel “sudden attacks” without first coming to Congress. 59 In addition, it will often be debatable whether the clandestine operation in question is a “separate war” or merely a separate campaign in a war of whose existence we are all aware. 60 Thus on neither theoretical nor practical grounds does it appear fruitful to stake one’s constitutional analysis on whether the covert campaign in issue constitutes the commencement of a new war.

In order to make Laos even debatable, however, one’s rendition of the rationale underlying the exceptional power to repel sudden attacks must be extended not only (1) to encompass reactions to situations not actually involving assaults upon United States territory—itsel itself a debatable extension, but one of which I convinced at least myself earlier—but also (2) to deem the president constitutionally “unable to come to Congress” not simply when there is not time to do so, but in certain other situations as well—for example, where secrecy is essential to military effectiveness. That move too is highly debatable, though I suspect many of us would come out the same way on our nuclear attack hypothetical even if the intelligence estimates were that the president had a month to move. (Exposing a military plan that far in advance to the entire Congress would obviously pose a grave risk of compromising its secrecy.) 62 Still another assumption is needed before Laos becomes arguable, however, and that is (3) that the constitutionally acceptable military justifications for presidential secrecy are not limited to a desire to surprise the enemy. 63 It is not easy to come up with another plausible example of such a justification—and I say that having reviewed the various excuses the administration actually came up with—but there may be no reason in principle why that should be the only one. The reason for the cagery language is that once the enemy knows of our military campaign—and thus is in a position to tell whomever it wants—a convincing defense of the proposition that Congress shouldn’t know about it becomes essentially inconceivable. Nonetheless, for purposes of the ensuing analysis I shall assume, though we have made a number of highly debatable assumptions to get to this point—one or more of which it would not surprise or disappoint me if you had rejected—that any convincing military justification for keeping our role in Laos secret from Congress and the American people would have justified the president in doing so, and proceed to consider the excuses the administration actually threw at us when the United States’ role in Laos was finally revealed in 1969 and 1970. We shall see that even with the benefit of all these questionable legal concessions, none of the administration’s excuses will work.

The Agreement with Souvanna Phouma
First, “the State Department said the American government had agreed with Souvanna Phouma to keep such activities secret.” 64 Some such understanding does indeed appear to have existed, but our first answer should be, “So what?” Agreeing with a foreign leader to circumvent the constitutional requirement of congressional authorization does not justify the president in doing so. 65 The secrecy arrangement had domestic political benefits for the leaders on both sides. Souvanna could at least attempt to maintain his image as a “neutral” rather than a hapless dependent on United States aid, and Johnson (and later Nixon) could avoid domestic protest both within and outside of Congress. Souvanna’s attempt at image-maintenance was plainly rather silly. Virtually everyone in Laos knew what we were up to anyway, as did the governments of North Vietnam, China, and the Soviet Union. Only Congress and the American people were effectively kept in ignorance. 67 And even if it had worked, helping a foreign leader appear to his people to be something he isn’t hardly constitutes an excuse for violating the United States Constitution. Neither does the goal of avoiding criticism here at home: In fact that’s the essence of the constitutional offense.

A variation on this first excuse that was suggested at least once was that if we made the bombing public, “Souvanna Phouma, himself, in order to maintain his ‘neutrality,’ would ask us to cease the bombing that was being carried on in support of his forces.” 68 In order to make it into even the
Am I therefore accusing administration spokespersons of lying when they implied that a request from Souvanna might result in a bombing halt? Note that what I said was that it is not believable that by itself—without the intercession of Congress or the American people—such a request could have had that effect. I do not mean to deny the possibility, though in retrospect it too seems a very long shot, that such a protest from Souvanna— which might have called attention to the bombing so dramatically that our legislative representatives would have had trouble continuing to look the other way—would have induced Congress to put such pressure on the executive that he would have decided to stop bombing. (More likely, of course, it would have led to some ineffectual grousing, though that too is something the administration had every incentive to avoid.)

So no, members of the administration weren't exactly lying when they said, "If Souvanna asks us to stop, we'll have to stop." 73 What such a statement conjures up was a simple administration accession to the request, and that is not believable. But technically it could also mean, and in the heat of conflict even relatively candid officials are liable to assimilate the two, 74 "If Souvanna asks us to stop, we'll have to stop because congressional pressure will make us stop." There is, however, a world of constitutional difference between the two versions of the claim, as it can never count as a valid excuse for the president's not telling Congress about a particular warlike activity in which he is engaged that they might instruct him to stop it. Its right to do so is precisely the constitutional point.

The Desire to Preserve the 1962 Geneva Accords

It was next asserted that we did not wish publicly to confess to our violation of the Geneva Accords, because we continued to harbor hopes of putting them back together again. 75 This excuse can be dispatched more quickly. Both United States and North Vietnamese forces were flagrantly violating the Geneva Agreements, and everybody in the area knew it. As Senator Fulbright rhetorically asked at the Symington hearings, "If both sides are not living up to the Geneva Agreements, what is the use of pretending it is of any value?" 76 If we had really wanted to put the Accords back together, we could have cut down on the flagrancy of our violations.

The Wish to Retain Discretion to Withdraw

It was also argued that making our role in Laos public would make it more difficult for us to walk away from that role if and when we decided that would be advisable. 77 This too seems like post-disclosure rationalization. Certainly the secrecy of the operation did not appear to incline us toward
withdrawal, and in fact our eventual admission of our role appears to have played a part in moving everyone toward settlement. Beyond these factual problems, however, it is simply inadmissible to permit the president unilaterally to wage war and then to cite as an excuse for not seeking authorization the consideration that he wished also to retain for himself unilateral discretion as to when to make peace.

The Fear of a Propaganda Disadvantage

The fourth explanation was that if we were to admit our violations of the Geneva Agreements, while the North Vietnamese had not admitted their violations, we would suffer a “propaganda disadvantage.” Actually, we probably wouldn’t have, since everyone was aware that the North Vietnamese were also violating the accords. We had made much of that fact and undoubtedly would have continued to do so. Beyond that, a desire to shield our conduct from political scrutiny and criticism is the paradigm example of a defense that shouldn’t count.

Concern Over Possible Soviet Reaction

The final explanation was to the effect that an official acknowledgment on our part “might require the Soviet Union to take more positive action in support of our adversaries in Laos than it had theretofore done.” The first answer to this is a recurrent one, that everyone but the American public—including the Soviet government—was already aware of what we were doing in Laos. The North Vietnamese made much of our violations of the Geneva Accords, and “Soviet propaganda for several years had excoriated the United States for the bombing” without inducing the feared reaction. The idea must thus have been that if we admitted what we were doing, the Soviets would feel obligated to react somehow. Was the fear that they would actually intervene? That seems a little absurd: Our role in Vietnam was certainly admitted, and the Soviets made no move toward intervening there. No, a State Department spokesman admitted, that was not the fear. Perhaps, then, they would provide other sorts of military assistance to the Pathet Lao? Also not likely: There is every indication that Moscow was quite satisfied “watching us dissipate our assets in this Far East tragedy.”

By the time the State Department spokespersons had finished their dialogue with the Symington Subcommittee, it seemed that the feared “Soviet threat” was that they would withdraw their official recognition of the Souvanna Phouma government. Even if that had been true it would seem to have come under the “big deal” heading, certainly not enough to justify a failure to comply with the Constitution. Anyway it too was implausible.

The Soviets knew perfectly well that we were bombing Laos and providing on-the-ground assistance to Vang Pao. And indeed, when we finally did confess our role publicly, none of these things actually happened: The Soviets did not intervene, they did not send significant military aid to the Pathet Lao, and they did not even withdraw their recognition of Souvanna’s government. As a matter of fact our “going public” in 1970 seems to have been taken quite the other way. As one respected contemporary account put it: “One purpose of Nixon’s statement may have been to dramatize U.S. firmness in Laos for the benefit of the Communist powers and particularly the Soviet Union, which U.S. officials still believed might eventually persuade North Vietnam to abandon some of its aims and cooperate with the Vientiane government.”

The final reason this fifth excuse cannot count, however, is the most basic of all: It could be added in every single case of covert presidential war. The War Clause cannot be such a charade that it can be ignored simply on the basis of a presidential fear that if he made his covert war public more enemies would be arrayed against us (or those who were already our enemies would be even more misted). Some such allegation of this sort could always be made—indeed it could probably always be made in good faith. An exception that totally swallows the rule it is supposed to qualify is not admissible.

The Perennial Invocability of the Administration’s Excuses

Indeed, if you think about it, all five of the administration’s excuses share this characteristic. (1) A president embarked on a secret war could always find some ally with whom to agree that he would keep the matter secret from Congress and the public. He could always aver that he was keeping his war secret so as both (2) to increase the chances that a prior peace could be restored and (3) to leave himself more flexibility to withdraw at will. (4) Every war could also be kept secret—indeed, here, the more horrendous the war the stronger the proffered “defense” would become—on the theory that exposing it would subject us to a “propaganda disadvantage.” (5) And as we just noted, every war could be hidden in order to minimize the number of parties giving assistance to the enemy. Thus each of the excuses was incredible, and it’s doubtful that any of them should have been allowed to count even if it hadn’t been.

The Real Reasons

There appear to have been two actual reasons for the secrecy. The first was that bureaucracies generally like to operate without scrutiny whenever they can get away with it, and that the CIA in particular displays this preference
with a vengeance. As the Symington Subcommittee’s 1971 follow-up report on Laos put it: “CIA is not used to prosecuting a war in public and does not see what purpose would be served by doing so.”96 Indeed, in testimony before the Church Committee in 1975, Secretary Kissinger admitted that the CIA had been used in Laos “because it [was] less accountable.”97 The other actual reason for the secrecy about Laos within the United States was to still domestic criticism of what our government was up to there.98 All the while the administration was working so hard to keep the facts about Laos from Congress and the American people, it was its policy to publicize our Laotian efforts to the South Vietnamese, so as to keep up their morale.99 This obviously undercuts further the administration’s various post facto rationalizations for the cover-up and speaks volumes concerning the cover-up’s real purpose. That purpose, however, is what made it unconstitutional.

**Defense 4: In Fact the “Secret War” in Laos Was No Secret**

The excuses for keeping our war in Laos secret having so swiftly collapsed, the more fashionable defense of its legality has become that it wasn’t really a secret at all, that any knowledgeable American, and certainly Congress, was aware of what was going on all along.100 (The argument presumably would continue that because Congress did not qualify its various appropriations as to exclude Air Force and CIA operations in Laos, it should constitutionally be deemed to have authorized them.)

**Was “Congress” on Notice of the American War in Laos?**

Responding to allegations that the administration had hidden much of what was going on in Laos from the Senate Foreign Relations Committee, Secretary of State William Rogers told the Symington Subcommittee, “I had thought Congress was familiar with the developments in Laos .... I thought Congress understood it.”101 This attitude soon was affected by the executive branch generally: Professions of surprise on the part of the members of the subcommittee were dismissed by State Department insiders as feigned, a “political gimmick.”102 Just as predictably, Congress responded that it hadn’t known. Senate Foreign Relations Chair Fulbright testified, for example, that he “had no idea we had a full-scale war going on” in Laos.103 Admittedly Fulbright made a minor specialty of being misled, but in this he spoke for many others, including Symington: Congress hadn’t known.

Where does the truth lie on this issue? Even after months of studying the record I have to confess I don’t really know. Given the executive’s incentive to assert that Congress was on board and Congress’s interest in professing ignorance, this has proved a maddening inquiry. Certain things are plainly the case, however. One is that the administration tried in many ways to keep Congress from getting the facts about Laos. And since we are here judging the constitutionality of the administration’s behavior, what they were trying to do is very much to the legal point—unless, I suppose, they totally failed in their attempt, in which case we could count it harmless error. Plainly, however, they did not totally fail.

“None of the appropriate committees of Congress [was] notified about the full extent of U.S. involvement in Laos.”104

Congress was ignorant of the situation because no action regarding Laos had been requested openly by the executive and the war had been conducted almost entirely by executive order to bodies such as the CIA, USAID, USAF, and the armed forces, which are responsible only to the President. The United States has no treaties or written agreements with Laos which would have required congressional scrutiny or approval.105

Nor was Congress’s investigating arm, the General Accounting Office, allowed to refer to the CIA’s books for most of the war, let alone to go out in the field to see what was happening.106 And as often happens, the classification of certain information helped keep Congress in the dark.107 The Symington Subcommittee report observed:

> [By classifying the number of daily missions flown by United States aircraft over northern Laos since 1964—as distinguished from those missions flown over the Ho Chi Minh Trail and thus directly connected to the Vietnam war—the Executive Branch hid from the Congress as well as the people that additional major commitment, in men and dollars, undertaken to support the Royal Government of Laos.

Neither, on those rare occasions when they did testify about Laos, were administration officials always candid.108 For example, Deputy Assistant Secretary William H. Sullivan, who as Ambassador had essentially run the war in Laos from 1964 to 1969, testified as late as 1969—during a secret session of the Senate Foreign Relations Committee, no less—that the United States “[do] not have a military training and advisory organization in Laos” and went on to imply unmistakably that the only bombing in the north was being done by the Laotian Air Force.109 Confronted with this testimony a year later at the Symington hearings by Senator Fulbright, Mr. Sullivan contended that he did not recall the details of what he had testified to earlier, but suggested that he would have answered truthfully had there been “any direct questions asked of me about U.S. air operations.”110

Could members of Congress go to Laos and see for themselves? Mr. Sullivan testified before the Symington Subcommittee that “every Congressman who has ever come to Laos anytime I was there was fully and completely informed on all our actions . . . .”111 In fact, congressmen who
visited that country were seriously misled by the officials who were there to “brief” them. The CIA went so far as to help Vang Pao maintain two headquarters: the real one at Long Cheng (or Long Tieng), which was “strictly military and strictly clandestine” and another, much smaller, six miles to the north in Sam Thong. “Militarily,” The New York Times reported in October 1969, Sam Thong “is only a show window, a place for the general to receive visitors who are not supposed to know of the clandestine army and the American support for it.” Fred Branfman reports that he accompanied two congressmen during their visit to Laos in the summer of 1967. American officials made a consistent attempt to mislead them throughout their stay. Particular emphasis was placed on obscuring American military involvement in the Long Cheng–Sam Thong operation. The attitude of resident officials was illustrated during a visit to Sam Thong. As the congressmen proceeded down a long line of welcoming [Hmong], who draped them with Hawaiian-style leis, the author joined a group of USAID officials, including the present Deputy Chief of USAID James Chandler and “Pop” Buell [who ran the AR mission at Sam Thong]. During the course of the conversation, Buell asked Chandler, “Do they know anything?” “Don’t worry, Pop,” Chandler replied, “Harwich [then deputy chief of mission] gave them a beautiful snow job, complete with maps. They were very impressed.”

Jerome J. Brown was an Air Force Captain assigned to Vientiane, whose covert assignment in 1967–68 was to pick our bombing targets in Laos. (He wore civilian clothes and carried papers identifying him as an Air Force employee.) In 1972 he told New York Times reporter Seymour Hersh, “I couldn’t come out of my little cubicle, which was hidden at the back end of the air attaché’s office. If there was somebody there who wasn’t supposed to be there, such as a Congressman, I had to stay back in the corner of my room.”

At the same time, however—whatever the members of Congress would have us believe—the cover-up wasn’t complete. One can piece together a good deal of circumstantial evidence that certain members were briefed on certain aspects of our Laotian operations at certain times—probably more often on the bombing of the Ho Chi Minh Trail than on the CIA’s activities or the bombing in the north—though naturally they sought to minimize their knowledge. The following mind-twisting 1971 interchange between Fulbright and Allen Ellender, the former Chair of the CIA subcommittee of the Senate Appropriations Committee pretty well sets the tone:

**Mr. Fulbright:** It has been stated that the CIA has 36,000 [men in Laos]. It is [now] no secret. Would the Senator say that before the creation of the army in Laos they came before the committee and the committee knew of it and approved of it?

**Mr. Ellender:** Probably so.

**Mr. Fulbright:** Did the Senator approve it?

**Mr. Ellender:** I was not—I did not know anything about it. I never asked, to begin with, whether or not there were any funds to carry on the war in this sum the CIA asked for. It never dawned on me to ask about it. I did see it published in the newspapers some time ago.

William Colby, whose reputation for veracity is good for a spymaster (which is short of saying it's stellar) has also consistently insisted that Ellender simply was not telling the truth in claiming ignorance.

Senator Symington also appeared surprised:

That is what they said in the beginning in Laos when I was there... that they were intelligence people... The large majority of Congress was deceived by Laos... We now get reports that Americans died in Laos and that we had been lied to, because we were told they died in Vietnam. We are getting pretty sick of being lied to... I learned most of my information about Laos from the newspapers...

As to Symington too, however, the record strongly suggests that he knew a great deal more than he was here implying. The most generous reading of such statements may therefore be that he felt most of Congress and the American people had been deceived: He seems to have skirted saying that he personally had been seriously misled, at least for very long.

Plainly a number of senators and congressmen knew more than they let on in 1969 and thereafter. Like Captain Renault in Casablanca, they were “shocked, shocked to find that gambling is going on here!” At the very least they had been told enough to induce them, had they been inclined, to investigate further. Admittedly this would have been an aggravating and politically unrewarding inquiry. As Senator Fulbright responded (too gently, in my view) to Mr. Sullivan’s “explanation” that he had not been asked “direct questions” about U.S. Air Force bombing:

You see, we do not know enough to ask those direct questions, and this is what I meant about quibbling about whether the U.S. role in Laos is exclusively advisory. When you take a group of Senators who are primarily concerned with their own States, and only incidentally in this foreign affairs area, the responsibility for which we are given by the Senate, we do not know enough to ask you these questions unless you are willing to volunteer the information. There is no way for us to ask you questions about things we don’t know you are doing.

This is certainly an understandable reaction—though Fulbright’s self-description as “only incidentally concerned” with foreign affairs is arresting—but it does not seem adequate. Congress was aware that it was getting a snow job, and when that happens the appropriate response is to keep shoveling until you hit something.
But Congress didn’t get the whole story, because nobody—not the president, and not Congress itself—wanted it to. As the Symington Subcommittee concluded, “The Congress did not inquire into, nor was it kept informed of, United States military activities in and over Laos.” Thus its knowledge was spotty at best. Fulbright again: “I knew we were doing a little of this and a little of that in Laos, but I had no idea it was a major operation of this kind.” And what awareness existed was much more likely to concern the bombing of the Ho Chi Minh trail than either of the campaigns in the north.

The U.S. Congress was not informed about the extent of the bombing, and the appropriate committees of Congress did not press the executive on these matters. The few members of Congress who were selectively informed about the administration’s Laotian bombing were led to believe that the bombing was minimal and that it was related “solely to operations around the Ho Chi Minh Trail and the war in Vietnam.”

Thus to a significant degree the administration succeeded in maintaining secrecy. Though this was partly due to willful ignorance, a unwillingness to ask what should have been the obvious next question, “Revelations about U.S. involvement shocked and surprised many members of Congress in 1969 and 1970.” Indeed, a 1970 memorandum from Dr. Kissinger to President Nixon essentially admitted that “the Senators” had not known “what is going on in Laos” prior to the Symington hearings.

Is Notice to the Congressional Leadership, or to Congress
More Generally, Constitutionally Sufficient?

If the constitutional test were whether the “congressional leadership” was aware of what was going on in Laos prior to 1969, this would be a tough case (as all such cases would be, given the cross-cutting incentives of the executive to claim the leadership knew, and the leadership to claim they didn’t). But although people often talk as if it were, leadership awareness cannot be the test. At the very least the requirement must be that the entire Congress be aware of what is going on (as it plainly was not in this case). For one thing, it is by no means clear exactly who should count as the “leadership”. The potential for a president’s confiding in his yes-men and a few trustworthy hawks and calling it “notification of the leadership” is manifest. More fundamentally, there is no theory of which I am aware on which the acquiescence of the leadership (even assuming we could agree who they were) can fulfill a constitutional requirement of authorization by “Congress.”

I am certainly aware that telling something to the entire Congress might run a serious risk of leaks, and that there are occasions on which a leak could prove so damaging militarily that any reasonable person would wish to avoid it. However, we have been proceeding on the assumption that where premature disclosure would cause palpable military damage, the requirement of advance congressional authorization should be inapplicable (leaving only the requirement that the president come to Congress for approval as soon as his military move has become evident to the enemy). A fortiori, advance notice to the “leadership” or a relevant committee would be adequate in such a situation (a device that has been employed in post-Vietnam intelligence legislation). Laos was not such a situation, however; no real reason existed to keep what we were doing there secret, except to still criticism on the home front.

I personally would go further and argue that where secrecy is not a military necessity, even notice to the entire Congress is insufficient to satisfy the constitutional requirement: We the people are part of the process too. This suggestion may sound as American as apple pie, but when I made it in an earlier article, it evoked some criticism. Drawing on sources as diverse as Federalist 63 and Bruce Ackerman’s recent work, the critics argue in essence that so long as our representatives are adequately informed of the facts bearing on their decisions, it is not the business of the Constitution what the people are or are not told. I’ve thought about it, and I confess I still don’t get it.

That our representatives will on occasion quite properly interpose their consciences to deny the majority what it wants is no reason to let them hide from us the facts that indicate that is what they’re doing: Democracy demands at a minimum that we be able to evaluate our representatives’ intercessions. Granting, further, that there are periodic constitutional moments, when the people participate more directly in our nation’s fundamental decisions than when we do at others, similarly seems to me to furnish no excuse for withholding crucial facts from us on others (what our representatives deem to be others). Isn’t it, for one thing, up to us to decide whether to “make the moment constitutional”? It may not sound so much like a champagne ad, indeed I confess it’s somewhat earthbound, but I see nothing here to justify dispensing with the theory that if Congress doesn’t approve of a war it can pull the plug, and if the people don’t approve we can pressure Congress to do so. (Please do not forget that I am talking about a situation where there exists no military justification for keeping the facts from us.)

But even if you’re not with me in democratic theory, there are practical grounds on which it seems to me you have to be. An essential term of the tacit deal that has existed in recent decades, at least in the area of war and peace (and arguably more broadly)—that the president will take the responsibility as long as he can make the decisions, and Congress will live with a lack of power as long as its members don’t have to be held account-
soldiers do not fight the enemy directly. But they draw the plans, operate the radios, fuel the aircraft, direct the bombers, repair the equipment, move the supplies, and give advice (which may be tantamount to orders) to the men who do fight. American planes, with American pilots, drop bombs on roads, bridges, trucks, villages, and Pathet Lao and North Vietnamese troops. U.S. planes and helicopters are shot at and shoot back. On the ground, American officers and civilians (many of whom were formerly in uniform in Vietnam) work with Lao-tian soldiers in their base camps. The Americans fight when attacked, and several dozen have admittedly been killed. For this work, they have received "hostile fire" pay since January 1966. In the ordinary meaning of the term, they are at war.\(^{117}\)

This was written in 1972 and we now know that the administration's drumbeat claim that we didn't have ground troops in Laos was not simply misleading but (by even the narrowest definition of ground troop) at least recurrently false.\(^{123}\) However, the quotation's overall drift must be right: I'm sure the truth was merely skirted rather than actually ravished whenever that choice seemed available.

The preferred option, though, was that of simply hiding the facts.\(^{129}\) Newspaper reporters, authors, and television teams were generally not permitted to get anywhere near our operations in Laos—theoretically on grounds of "military security," although it seemed clear to most observers that the real reasons were political.\(^{140}\)

The infrequent visits of newsmen to sensitive areas have been rather carefully managed. Military personnel and foreign mercenaries are withdrawn; a briefing is given by Lao generals in which the emphasis is on the North Vietnamese invasion of the given areas; American involvement is denied; North Vietnamese prisoners and Pathet Lao defectors are made available for interviews; and stocks of captured communist weapons are exhibited.\(^{131}\)

Officers assigned to Laos "weren't allowed to associate at all with journalists under threat of court-martial,"\(^{142}\) and three reporters with sufficient initiative to walk from the show headquarters at Sam Thong to the real one at Long Cheng were taken into custody and shipped back to Vietnam—in 1970, no less, after our activities had theoretically become more open.\(^{143}\)

Finally, the stonewalling was monumental, and continued to be so to the bitter end. Even after the Times had run its series of articles, and the SYMINGTON Subcommittee had held its hearings, President Nixon took the position at news conferences that we had no combat troops in Laos, and that while it was true that we were bombing the Ho Chi Minh trail, "public opinion would not be served" by providing the nation with further details.\(^{144}\) There was, in addition, a five-month delay in the release of the

Were the American People on Notice of the American War in Laos?

As it did with Congress, the administration certainly tried to keep the American public in the dark about Laos.\(^{132}\) The most elementary method employed was that of telling us things that just weren't true. "Seeing the Laotian conflict solely in the context of the Cold War, many American officials view[ed] lying not only as a tactical aid but also as a patriotic duty."\(^{133}\) This, for example, "[f]rom May 1964 until President Nixon's March 1970 statement on Laos... American officials denied, publicly and privately, that the United States was bombing in Laos."\(^{134}\) (If the evidence got dangerously incriminating, they would indicate that we were flying nothing more than "armed reconnaissance" flights over northern Laos.)\(^{135}\) Sometimes the administration let others do its lying for it. As late as 1969, for example, Souvanna Phouma was regularly making dishonest public statements—that there were no foreign troops (specifically no Americans or Thais) fighting on his government's behalf, that American planes were not intentionally bombing northern Laos (though they might occasionally get confused about the location of the Vietnam/Laos border)—and our government did nothing to correct them.\(^{136}\)

More often, though, administration claims may have been merely misleading. As one respected account put it:

To say, as U.S. officials have said repeatedly, "There are no American ground combat forces in Laos," is true but misleading. As in every modern army, most
transcript of the Symington Subcommittee hearings, occasioned by the necessity to negotiate with the executive branch over what could be published.

What emerged was less than helpful. The fact that CIA Director Richard Helms had even been a witness was deleted from the transcript, as, incredibly, were all mentions of the CIA. So also were anything resembling helpful information about the Air Force’s bombing of northern Laos; references to the amount of tax money used to assist regular and irregular Laotian forces, to finance our bombing campaigns, and to maintain the air bases in Thailand from which our bombers operated; and details about the participation, including our financing, of third country nationals (mainly Thais) in the war in the north. This clumsy attempt to hide the legislatively relevant facts from the American people came in 1970, after most of them had appeared in the establishment press, and thus speaks quite loudly to the administration’s willingness to mislead us earlier. Yet supporters of presidential power assured us then, as they assure us now, that if we don’t like the way a war is being fought, we need only pressure our representatives in Congress to do something about it: The people hold the ultimate trump.

As I noted above, the fact that the administration was trying so hard to keep us from learning the truth about Laos is entirely to the constitutional point—unless, perhaps, its efforts were so plainly unavailing as to render them in effect harmless error. That they were just that—that despite the administration’s efforts to keep it quiet, the Laos story was well known to at least the alert segments of the American public—thus became the last line of constitutional defense of the war. This has not been articulated very often, but it certainly was with enormous self-confidence in a 1970 Foreign Affairs article by Robert Shaplen:

The truth of the matter, which bears directly on the current situation and on the fuss and fury that have attended the secret Laos hearings held by the Symington subcommittee of the Senate Foreign Relations Committee is that nobody was fooled by anything, including that portion of the American public willing to read the newspaper and magazines with a modicum of care. Throughout Asia, let alone in the United States, the bombings of the Ho Chi Minh Trail were a matter of common knowledge, and there were repeated articles in the press about the so-called “secret war” in Laos backed by the CIA and the “hush-hush” airlines, Air America and Continental Airlines.

Or as Henry Kissinger put it in his memoirs (having minimized our involvement in Laos, which made what followed closer to true): “Most of this was occasionally reported in the press . . . .”

Confident claims that “every sophisticated person knew x all along” seldom encounter contradiction, not simply because no one wants to admit he isn’t hip, but also because of the tricks our minds play about exactly when we actually learned something (as opposed to beginning to wonder whether it might not be true). Well, I’m so hip I call my girlfriend “Man,” so I’ll risk it. (The fact that I’ve done a good deal of research on what was in the media helps too.) Dr. Kissinger knew what was going on at the time, perhaps more than anyone else on earth. And to a degree Mr. Shaplen probably did as well: At least some of what the United States was up to was indeed common knowledge in southeast Asia, where he spent the relevant period. But most of us in this country (yes, Mr. Shaplen, even those of us who can read) did not.

“The CIA managed to keep happenings in Laos their own private game. Its coverage by the world’s press was sketchy in the extreme, the rarest outline, and often misleading.” For evident reasons, Laos (unlike Vietnam) received essentially no television coverage. Neither was it really covered in the daily newspapers. “In the war next door in Vietnam a fluctuating press corps of around five hundred men and women covered the story, while in Laos there were rarely more than half a dozen visiting journalists, and only one permanent American correspondent.” What got out generally were therefore ill-formed assertions of long-term patterns of behavior, better suited to magazine-style summaries than to news reports per se. Thus there was sporadic coverage in the mainstream American newswires, though given the administration’s campaign of obfuscation it was understandably underinformed. By the mid-1960s reports began to surface that we were bombing the Ho Chi Minh trail as an adjunct of our efforts in Vietnam, necessarily without anything resembling details concerning volume. Also creeping out were indications that we had supplied the Royal Laotian Air Force with old T-28 fighters and the Hmong with various supplies (rice and ammunition being most often mentioned). Lacking during this period were descriptions of the CIA’s role in the operations of the Secret Army and indications that we were bombing other than on the trail in support of our troops in Vietnam.

Thus as late as 1968, in a story titled “Spillover into Laos,” Time reported that the “U.S. regularly bombs the Trail to slow the flow. But unlike Hanoi, Washington has been unwilling to violate the ban on foreign troops in Laos . . . .” As we moved into 1969, the reports began to hint that we were bombing the north as well, and that Americans were somehow “involved” in the guerrilla struggle there, though such reports necessarily remained brief and allegorical. In September and October of that year The New York Times’ series appeared—so detailed it remains one of the best sources on the war—and the Symington hearings began.

So far as the foreign press was concerned (particularly the foreign press to which some Americans are accustomed to looking for a “different” perspective), The Economist’s coverage of Laos was essentially identical to that of the American media. The Far Eastern Economic Review was un-
Mr. Shaplen thus seems to have been quite wrong in asserting that “nobody was fooled” about Laos. In many of us were—which undoubtedly is one reason our government’s activities in that country did not elicit anywhere near the kind of opposition that more public activities in Vietnam and Cambodia did. Dr. Kissinger’s memoirs might suggest that it was all “in the press,” but this is the same Dr. Kissinger who had written President Nixon a memorandum in 1970 acknowledging that the Senate hadn’t really gotten the facts about Laos until the Senate hearings; the same memo implied that the public had not yet known “what we were doing” there. 

Earlier I tentatively stipulated the possibility of a harmless error defense here, for that is what it seems to be proffered. Actually I don’t buy the stipulation: I do not see how our government can lie to us and then successfully claim as a defense that we were actually on notice as to the truth, because we should have known the government was lying. In any event, the facts defeat the defense. It is, at root, an argument that despite the administration’s lies, we the American people were on sufficient notice of the nature of our government’s activities in Laos that by not pressuring our representatives to stop them, we tacitly acquiesced. Such an argument is nonsense. The administration sought to hide the war in Laos from both the Congress and the American people, and to a substantial degree it succeeded. Because there was no convincing military justification for doing so, even assuming such a justification should count, that war was unconstitutional.

**What is the Remedy for a Secret War?**

The illegal we do immediately, the unconstitutional takes a little longer.

—Henry Kissinger

Congress has at least the theoretical power to pull the plug on a war of which it does not approve. In order to figure out whether you approve, however, you need to know what’s going on, something the executive was busily engaged in withholding from Congress and the rest of us as well. Well, shouldn’t Congress have been more tenacious about getting the facts about Laos? Shouldn’t it have run those rumors down? Of course in an ideal world the answer to that question would be yes, but even a commentator of my considerable self-righteousness has trouble casting the first stone here, as we know perfectly well that further congressional inquiries would only have received a royal runaround. Well then, again theoretically, Congress could threaten to pull some financial plugs—though knowing which plugs were relevant was itself at the heart of the dilemma—unless it got a com-
plete and convincing account of what was going on in Laos. Here, however, a member of Congress runs into a dilemma. What is she to do when she reads in some semiobscure journal an allegation that the United States is bombing northern Laos and inquires of what she takes to be the relevant executive official, who tells her the report is not true or stonewalls her in a way that suggests that she is not quite getting the whole story?72 Since political careers are broken by charges that one is insufﬁciently solicitous of national security, we can be pretty sure that Congress would not have the hardihood—and frankly it's hard to get huffy here—to start pulling plugs under such circumstances.74

If substance would only cooperate more completely with esthetics, I would attempt to parlay this condition of substantial legislative impotence into a further argument for my central contention that the judiciary should generally abandon its hands-off attitude in this area: Okay, agreed, Congress lacks the tools as well as the will to dig out the facts on wars the executive is intent on hiding, which is why, the argument would run, it is important that courts stand ready to entertain lawsuits to do so. Even passing the courts' likely reluctance to do any such thing, however, this plainly cannot be the answer either. For the very secrecy of the war will guarantee a shortage of plaintiffs who are able and willing to bring a lawsuit. That the lawsuits challenging the war in Indochina were about Vietnam, the public 1970 ground incursion into Cambodia, and the 1973 bombing of that country—and not about Laos and the secret bombing of Cambodia—is hardly a coincidence: Those were the campaigns we knew about, most certainly the only campaigns we knew about to assemble a complaint that would have a prayer of making it past a motion to dismiss. And even assuming such a case could somehow be made before a court, developing the actual facts about a war the executive branch is intent on keeping secret would prove frustrating at best. What media exposés there are will be only suggestive and often inaccurate, and those in possession of the facts will almost certainly—at least given present attitudes—give the plaintiff and even a sympathetic judge a runaround that would make what they did to Congress seem like child's play.

Obviously the sort of statutory changes recommended in chapter 3 and the appendix can make a contribution of sorts, by reinforcing the original constitutional principle that decisions about whether we fight wars are to be made by the legislative process. Their direct contribution respecting wars the executive is intent on hiding from Congress and the American people is likely to be slight, however—it's essentially impossible to write a statute that cannot be effectively defied by a president prepared to lie to cover his tracks—unless they are accompanied by a process of socialization, a growing acceptance on all sides of the constitutional norm that wars must be authorized by Congress.

Here the participation of the courts is indispensable. Not only must commentators (and politicians for that matter) refrain from irresponsible generalizations suggesting that it is within the constitutional prerogative of the executive unilaterally and secretly to fight wars lasting the better part of a decade, but the courts—the Supreme Court of the United States in particular—must hold in no uncertain terms that the decision whether to go to war is constitutionally vested in the legislative process. Statutes or no statutes, cases or no cases, the central problem here is the big lie that was born in 1950 and has been nurtured by the executive branch fairly consistently ever since, that decisions whether to go to war, whom to go to war against, and how much to tell the rest of us about what's going on, all rest with the president. It is critical that the moment be seized to lay that lie to rest for good, and on that score the courts have been failing us as fully as the Congress.

Obviously we're not yet to the point where the courts can generally be counted on to reaffirm the arrangement of the Constitution on this subject, however, and we certainly weren't in the 1960s either: Does that mean there was nothing to be done about the executive's unconstitutional war in Laos? I noted above that prior to 1969 there were not sufﬁcient facts about that war in even the realm of respectable rumor to embolden Congress to get tough. But what about after the Symington hearings? At that point Congress had learned that for almost a decade the executive branch had fought an unauthorized war and systematically misled Congress and the American people about its progress and even its very existence. Why shouldn't President Nixon have been impeached at that point? There is little legal doubt that such a serious and willful violation of the separation of powers should count as a "high crime or misdemeanor" for purposes of the Constitution's impeachment provision.75

But this too is fantasy: There was never any chance of Congress's impeaching President Nixon, or anybody else, over the war in Laos. (Although one of the articles of impeachment on which the House Judiciary Committee ended up voting concerned the secret bombing of Cambodia, none mentioned Laos.) There appear to have been three reasons for this. First, although the executive branch worked hard, and to a large degree successfully, to keep Congress from getting the whole story, Laos was considerably short of an airtight secret. Various members of Congress knew various things about various aspects of it—surely enough to have triggered a further investigation, if they'd been doing their job.

Second, when most members of Congress finally did learn what was going on in Laos, their concern turned almost entirely toward the possibility that Laos would become "another Vietnam"—speciﬁcally that the administration was about to send regular American troops there. Thus, "in line with the expressed intention of the President of the United States,
Congress barred only the “introduction of American ground combat troops into Laos or Thailand.”\textsuperscript{173} Neither CIA assistance to Vang Pao’s Secret Army nor continued bombing of either the Ho Chi Minh trail or northern Laos was prohibited.\textsuperscript{174} As the author of the enacted provision, Senator Frank Church, indicated: “We are not undertaking to make any changes in the status quo. The limiting language is precise. And it does not undertake to repeal the past or roll back the present. It looks to the future.”\textsuperscript{174} Technically, the fact that Congress voted to continue the war in Laos once it was disclosed does not mean that the executive branch had committed no offense in previously hiding its existence. At the same time, though, it powerfully helps to explain why impeachment on this ground was never seriously considered. It takes righteous indignation to argue for impeaching a president. “You committed a very great wrong in not telling us what you were doing, but you have our permission to continue doing it” is an entirely coherent declaration, but not one that readily lends itself to indignant delivery.\textsuperscript{175}

Finally, this war (and its cover-up) were in very substantial measure the work not only of President Nixon but also of Presidents Kennedy and Johnson before him.\textsuperscript{177} Given a sufficiently horrendous offense, Congress should impeach the person in office, even if his predecessors were also culpable. However, in light of the facts that a substantial number of those in Congress had an inkling (or more) of what was happening in Laos all along, and Congress didn’t do anything to end or even scale down the war once it found out about it, the offense here did not, at least not by Congress’s lights, fall into that category.

If that is the end of the analysis, however, it is difficult to see—at least until we experience a general rededication to the principles of the Constitution—what will deter presidents from acting much the same way in the future, embarking on “secret wars” free from congressional and public scrutiny and then, if and when the press finally forces Congress to take notice, facing no sanction more severe than the termination or limitation of the war (which we have seen is also unlikely). There are two further things Congress can do, though. First, at the risk of sounding like a wimp, I would suggest that one thing Congress should do in such a situation is pass a resolution of censure. In fact the House of Representatives, having granted President Polk the funds necessary to pursue the Mexican War to a decisive victory, proceeded to vote a resolution—Representatives John Quincy Adams and Abraham Lincoln both concurring—to the effect that Polk had got us into it unconstitutionally.\textsuperscript{172} It isn’t impeachment, but it’s certainly not something any president would welcome either: Members of Congress faced with censure resolutions generally fight like Turkish prisoners of war to avoid them. (The 1973 Senate vote, or at least the “debate,” on the confirmation of Dr. Kissinger as Secretary of State would also seem to have been an appropriate place to register disapproval of the secret war in Laos.\textsuperscript{179})

The other thing Congress can do is make damn sure that on the rare occasion when the facts converge in such a way as to make impeachment a politically viable option—where the secret of the war is actually kept from Congress, and only one president is involved—it does impeach him for fighting an unjustifiably secret and unauthorized war. Deterrence can work even at high levels. Of course the facts will seldom add up that way. If you think they won’t ever, though, you should read on.
CHAPTER 5

The (Enforceable) Unconstitutionality of the Secret Bombing of Cambodia, 1969–1970

The American people cannot and should not be asked to support a policy which involves the overriding issues of war and peace unless they know the truth about that policy.

—Richard Nixon, 1969

On March 18, 1969—some thirteen months before our public ground incursion into Cambodia—United States Air Force planes began bombing Communist sanctuaries in that country. Those responsible for this bombing campaign kept it a very tightly held secret. “A dual reporting system was set up to by-pass the command and control procedures of the Strategic Air Command”; All records of the actual Cambodian targets were incinerated, and South Vietnamese targets were recorded and reported in their place. The bombing was thus not simply concealed; the records (classified records at that) were actually falsified. The State Department, Secretary of the Air Force, and the Air Force Chief of Staff were not informed of the campaign—that clause may bear rereading—or, obviously, were the relevant congressional committees. (Dr. Kissinger went so far as to suggest “that the B-52 bomber crews not be told that their targets were in Cambodia,” but was convinced that was impractical.) Although a small handful of cooperative members of Congress—I make it eight—apparently were told, those the administration subsequently identified understandably tended to belittle the extent of their notification, and in any event they did not pass the word along to their colleagues or to the American people.

From March 18, 1969 to May 1, 1970, when the United States publicly initiated ground combat operations in Cambodia, there were 3,875 secret American sorties into Cambodia, dropping 108,823 tons of bombs. Throughout the course of our ground incursion the bombing of Cambodia was quite open, and as the troops were withdrawn at the end of June 1970, President Nixon announced his intention to continue bombing that country. However, the fact that we had been bombing Cambodia from March 1969 through April 1970 remained secret until 1973.

Under other circumstances it might be tempting to begin our analysis of the secret bombing of Cambodia where we ended our analysis of the public land incursion into that country—with the question (which could be answered comfortably in the affirmative) whether the bombing constituted a rational means of supporting our troops in South Vietnam or could otherwise be fit within the authorization of the Tonkin Gulf Resolution. Having devoted so much time to the war in Laos, however, we can readily see that this would be an error. The 1969–70 Cambodian bombing campaign stands on an entirely different constitutional footing from the 1970 land incursion, for the reason that it was kept secret (very effectively, in this case) from Congress and the American public.

When the story of the secret bombing finally did become public, President Nixon explained that those who had not been advised of it (a group that included all of Congress except perhaps eight members, to say nothing of the rest of us) had neither “any right to know or need to know.” A better understanding of the Constitution was displayed by Hal Knight, the man whose job it had been in Vietnam to falsify the Cambodian bombing records and who ultimately blew the whistle on the operation: “I am not opposed to the war but I believe that full disclosure is necessary for the people of this country. It is my firm conviction that the American people, through their elected representatives, have the right to know how the war has been conducted.”

THE SIHANOUK SCENARIOS

Mr. Knight had it right, but naturally the administration had to throw some sand in our eyes. The basic theme—whose implications were generally left indeterminate—was that although Prince Sihanouk was now saying things very much to the contrary, he had actually welcomed the American bombing of his country. One’s natural first reaction, again, is to ask, “So what?” Sihanouk’s consent might conceivably have some relevance as a matter of international law, but what could it have to do with the demands of the United States Constitution?

Needless to say, changes were rung on the Sihanouk explanation that purported to make it matter. When the bombing was revealed in 1973, President Nixon stated in a speech to the Veterans of Foreign Wars: “Had we announced the air strikes, the Cambodian Government would have been compelled to protest, the bombing would have had to stop, and American soldiers would have paid the price for the disclosure and this announcement with their lives.” Two weeks later Dr. Kissinger said much the same thing during his confirmation hearings for the position of Secretary of State:
[Sihanouk was] in a difficult position. We [had] respect for him. We [did] not want to make his position more difficult. It is clear that it was in his power to stop it if he had protested, and he did not do so. But I can also understand why in his present position, where he is dependent more on his former opponents, he will take a different tack.13

Once again it is not clear that such an excuse—"We couldn’t tell Congress we were waging this war because if we had, x would have had to protest, at which point we would have stopped"—should be allowed to count. Of course it begs the question whether the war in question is desirable, which is precisely what Congress is supposed to decide. But then so does any excuse rooted in “military necessity,” and we have assumed at least for the sake of argument that some such excuses for hiding military operations from Congress should be admissible. In addition, it is an excuse that seems always capable of articulation and never subject to verification. We’ve seen that before though, too. Once again, therefore, let us assume, very much arguingo, that it can be a valid excuse: In this case too it’s incredible.

Certain critics notwithstanding, the part of the scenario that holds that Sihanouk at least acquiesced in the bombing appears to be correct (which helps account for how the secret could be kept). However, the risk that he would have protested if it had been revealed to Congress seems less clear. More fundamentally, it seems most unlikely that if he had protested the administration would actually have stopped bombing. More likely, it would have given earlier impetus to the coup that deposed him in March 1970. Again I should stress that my denial is only that the administration would have stopped the bombing of its own accord had Sihanouk protested. It is possible (and note that both Nixon’s and Kissinger’s remarks can be read to say only this) that if Sihanouk had protested, Congress would have forced the president to stop bombing Cambodia—or more realistically, that the administration feared that under such circumstances Congress might have become preevish. We covered that train of events above, however: A fear that Congress might overturn (or complain about) executive policy is not a constitutional excuse for not telling it what’s going on.

Thus this version of the scenario turned out to have a short half-life. Neither Nixon nor Kissinger mentions it in his memoirs, though the secret bombing of Cambodia is rationalized in each. For Nixon, protest from Cambodia now seems amalgamated with protest from within the United States—as something that would get in the way of his policy and thus something he felt justified in avoiding by secrecy. Kissinger now reports that "a Cambodian or North Vietnamese reaction" was "firmly anticipated":21

We would have been willing to acknowledge the bombing and defend it if there had been a diplomatic protest. There was no protest; Cambodia did not object, nor did the North Vietnamese, nor the Soviets or the Chinese. Proceeding secretly became, therefore, a means of maintaining pressure on the enemy without complicating Cambodia’s delicate condition, without increasing international tensions in general, and without precipitating the abandonment of all limits.22

A determination to “acknowledge and defend” the bombing upon receipt of an anticipated protest does not signal a disposition to stop it, so Kissinger’s suggestion is now that a public announcement of the bombing would have constituted “a gratuitous blow to the Cambodian government” that would “complicate its delicate position.”23 The idea now thus seems to be that by announcing we were bombing Cambodia we would have undercut Sihanouk’s claim of neutrality, thereby weakening his hold on his office.24

This version is, if anything, more unbelievable. The notion that such a train of events would have forced Sihanouk from office seems highly improbable: The effective political opposition to Sihanouk within Cambodia was from the right, or pro-American, side. More fundamentally, there is not the slightest indication, indeed there is every counterindication, that during this period our government would have been the least bit chagrined by the thought of Sihanouk’s leaving office. There have been persistent published allegations of various CIA plots to assassinate Sihanouk over the years and of its complicity in the coup that succeeded in March 1970. Whether or not these charges can ever be proved, the evidence that we welcomed the coup, and helped it along at least around the edges, seems irrefutable.25

That is more than enough to render incredible both Sihanouk scenarios—that the bombing of Cambodia had to be concealed from Congress and the American people because making it public would have (a) induced Sihanouk to protest, at which point the administration would have voluntarily stopped bombing, or (b) weakened his domestic position, which also would have undercut perceived American security interests. But two further nails can be put in the coffin. The first is that neither version, even if true, could reasonably justify falsifying classified records before submission to the relevant congressional committees, as opposed to simply withholding a public announcement—a conclusion Secretary Kissinger may silently concede by accompanying his defenses of the cover-up with a (contested) denial that he and the President knew the extent of it.26 If the extent of the cover-up does not fit the proferred defenses, however, it fits the goal of avoiding congressional interference like a glove.

Second, and if this doesn’t put the old tin lid on it I can’t imagine what would, even after Sihanouk was ousted from office and replaced by the
palindromic and proudly pro-American Lon Nol—and thus all basis for either version of the “Sihanouk” justification had been removed—the administration continued to keep the bombing campaign secret from Congress and the American people. This began with President Nixon’s lie, after sending troops into Cambodia in April 1970, to the effect that the United States had “scrupulously respected” Cambodia’s neutrality theretofore and had not previously “moved against” the sanctuaries.25 It continued when, in 1971 and again in 1973, the Pentagon not only submitted to the Senate Armed Services Committee falsified documents that did not list any B-52 raids on Cambodia at all during the thirteen months when they actually were taking place almost nightly,26 but flatly assured the Committee there had been “no B-52 bombing in Cambodia of any kind during the entire year of 1969.”27 The truth did not come out until Mr. Knight blew the whistle in mid-1973—if you don’t recall being shocked by his revelations it is probably because they were buried by the Watergate hearings, which were going on at the time—and even then the Defense Department continued, for a time, to lie to Congress.28 The lies soon became untenable, however, and the explanation was devised that the cover-up was designed to keep Sihanouk in the alternative, (a) from protesting, or (b) in office. At that point, however, the lies had gone on for three years past the point when either version could have claimed remotely colorable validity.

By now the actual reason for the cover-up is obvious. When Major Knight asked his commanding officer why he was being told to falsify the records, he was told that “the purpose is to hide these raids.” “Who from?” Knight asked, and the answer was given, “Well, I guess the Foreign Relations Committee.”29 Chair of the Joint Chiefs Earle Wheeler testified that President Nixon had ordered him, no fewer than six times, not to disclose the Cambodian bombing “to any member of Congress.”30

The admiring biography of Dr. Kissinger by Marvin and Bernard Kalb (written with his cooperation) reported:

Kissinger had no trouble justifying the deception. He felt that if it became known that the United States was widening the war geographically, extending the bombing into Cambodia, this would prompt a wave of angry denunciations from an increasingly disillusioned Congress and anti-war critics across the country. This kind of nationwide uproar would only complicate the Administration’s plans for peace in Vietnam.31

And in his memoirs President Nixon admitted that one reason for the secrecy—the other, as noted, was to discourage international protest—“was the problem of domestic anti-war protest. My administration was only two months old, and I wanted to provoke as little public outcry as possible at the outset.”32

What Is the Remedy for a Secret War in Which Congress Isn’t Complicit?

Now who among the Soviets voted that they should invade Afghanistan? Maybe one, maybe five men in the Kremlin. Who has the ability to change that and bring them home? Maybe one, maybe five men in the Kremlin. Nobody else. And that is, I think, the height of immorality.

—Defense Secretary Caspar W. Weinberger, 198433

The secret bombing of Cambodia almost made it into the final version of the Articles of Impeachment. Congressman John Conyers introduced an article charging that President Nixon had violated his constitutional oath of office when:

[On subsequent to March 17, 1969, [he] authorized, ordered, and ratified the concealment from the Congress of the fact and the submission to the Congress of false and misleading statements concerning the existence, scope and nature of American bombing operations in Cambodia in derogation of the power of the Congress to declare war, to make appropriations, and to raise and support armies . . . .34

Twelve members of the House Judiciary Committee supported the article when it came to a vote, while twenty-six opposed it.35

As I noted earlier, a serious and willful violation of the separation of powers constitutes an impeachable “high crime or misdemeanor.” Moreover, to the extent anyone remains in doubt about either version of the Sihanouk explanation,36 an impeachment inquiry would have been well designed to unravel alleged executive motives and determine which among them constituted post facto rationalization. Unlike the war in Laos, the secret bombing of Cambodia was an offense consummated by one and only one president. Also unlike Laos, it was a well-kept secret37—involving measures as extreme as hoodwinking the Air Force Secretary and Chief of Staff and providing falsified secret documents to the relevant congressional committees for up to four years after the events. The fact that Congress will not be in a moral position to impeach when it has in effect been part of the conspiracy makes it all the more important that it do so in the rare situation where it wasn’t.38

It is true that other presidents have masked changes in military strategy in order to avoid criticism from Congress and the public. Lyndon Johnson certainly did some things along these lines at earlier stages of the war in Indochina, McKinley led Congress to believe that our actions in the Philippines during the Spanish-American War were purely defensive, and other examples could be cited. Indeed, whenever the president acts in excess of
congressionally delegated power, he is technically violating the separation of powers and thus the Constitution. It is, however, the job of Congress in an impeachment proceeding to make just such distinctions of degree. The offense here, even viewed in historical context, was flagrant—the brutal violation of a neutral country (with, we know in retrospect, results of almost unimaginable, and continuing, horror) covered up by a meticulous falsification of records that was reiterated for years beyond the expiration of the only remotely colorable (though ultimately incredible) “innocent” justification for the deception.

I'd have impeached him for it. Surely it would have been a more worthy ground than the combination of a third-rate burglary and a style the stylish couldn't stomach. As Congressman William Hungate put it: “It's kind of hard to live with yourself when you impeach a guy for tapping telephones and not for making war without authorization.”

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CHAPTER 6

"Covert" War Today

[Another important requirement is an aggressive covert psychological, political and paramilitary organization more effective, more unique, and if necessary, more ruthless than that employed by the enemy.... There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply. If the U.S. is to survive, longstanding American concepts of "fair play" must be reconsidered.

—1954 "Doolittle Report" on Covert Operations

The greatest strength of the totalitarian state is that it will force those who fear it to imitate it.

—Adolf Hitler

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At the time of the war in Indochina there weren't really any statutes bearing on covert war. Since then (and partly as a result) Congress has enacted a series of relevant, if limited, “reform” statutes. Whereas “conventional” wars fought by uniformed armed forces personnel are covered by the War Powers Resolution and thus theoretically subject to a requirement of advance congressional approval (well, approval within ninety days) "covert" wars are not. However, covert wars are now statutorily required to be (a) based on a presidential finding that they are important to the national security, and (b) at least ordinarily reported to the Senate and House Intelligence Committees. The statutes are explicit that these committees have no power to veto such operations, but they are at least given the opportunity to try to talk the president out of his more harebrained schemes (and, the idea must be though it is seldom put this way, if they saw an overwhelming disaster coming they could go at least semipublic and attempt to generate from their congressional colleagues a statute of disapproval supported by a sufficiently overwhelming majority to survive its likely veto). This new statutory scheme leads all too easily to an erroneous corollary affecting the contemporary legality of campaigns like those we covered in the two preceding chapters: "With respect to Laos, the currently accepted procedure authorizing covert wars (which does not involve congressional authorization) seems to contradict Ely’s thesis."

The first problem with this corollary—it has another, more basic, which we will identify presently—is that the most central and destructive aspects