

THE WHITE HOUSE
WASHINGTON



Professor Bickel says the Church-Cooper, Hatfield-McGovern amendments are within the prerogative of Congress.

President does not need the approval of Congress to do what he is doing in Cambodia. He is exercising, perhaps, a broader power than Framers imagined, but practice of Presidents of the last 100 justify the present practice. But, at the same time, Congress retains the authority to determine where and for how long the U. S. can wage war. So, it can say the U. S. will NOT fight in Cambodia.

Lamar

THE WHITE HOUSE
WASHINGTON

MAY 26 1970

May 26, 1970

MEMORANDUM FOR BRYCE HARLOW

Enclosed opinion from Professor Bickel
deserves your attention.



Leonard Garment

cc: Bob Haldeman

ALEXANDER M. BICKEL
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NEW HAVEN, CONNECTICUT 06511

May 23, 1970

Dear Len:

A brief note, pursuant to your request, in amplification of the comment I volunteered to you on the phone concerning the so-called constitutional issue raised by the Cooper-Church and McGovern-Hatfield amendments.

I am myself not persuaded by the Administration's position on Cambodia and Vietnam. That's a matter of judgment, and I try not to be self-righteous about it, even though firm. But the constitutional position that the Cooper-Church and McGovern-Hatfield amendments are altogether unlawful invasions of the President's function as Chief Executive and Commander-in-Chief -- this position I find, in a word I choose with care, untenable. And I suggest that to couple an untenable, indeed even a weak, legal argument with a substantive policy position which may be debatable but which does rest on merits of its own is to weaken and perhaps discredit the latter.

The Commander-in-Chief is empowered to repel attacks on the United States and its armed forces, and it would follow that he may respond to the imminent threat of an attack, where there is a requirement of speedy and perhaps secret action. Presidents have assumed broader powers as well, which can be supported as lawful in terms of the practice of about a century or so, although not

Leonard Garment, Esq.
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necessarily in terms of the intent of the Framers. I would say, and have said recently, that the Cambodian action falls within the ambit of this tradition of lawful practice, albeit I would not say the same for President Johnson's deliberate decision in 1965 to go to full-scale combat in Vietnam. But the point is that the practice of a century has rendered lawful certain Presidential actions taken in the absence of any legislative mandate to the contrary. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (Frankfurter, J., concurring), 634 (Jackson, J., concurring), 660 (Clark, J., concurring) (1952). Nothing in this practice, let alone in the Constitution and its history, reduces the power of Congress, when Congress exercises it, to determine where and for how long the United States should wage war. Congress is empowered to raise armies and to support them with appropriations of no more than two years' duration, and Congress is authorized to make all laws necessary and proper for executing its own powers "and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Of course, Congress in this parlance means the legislative process, which includes the President through his veto power, unless both Houses override by a two-thirds vote.

Congress is not authorized to command troops, and cannot take from the Commander-in-Chief responsibility for their safety in the field. But Congress must have the authority, when it chooses to exercise it, to describe in terms of international boundaries the areas within which the armed forces of the United States should operate, else the authority to declare war against one nation and not against other nations is meaningless. Fairly read, although very possibly not drafted with the utmost artistry, the Cooper-

Church and McGovern-Hatfield amendments keep within the area of Congressional power. They would legislate, for the time being, until Congress should decide otherwise, the termination of military operations in certain places within a certain time, and forbid their initiation or resumption. To be sure, this is to take strategic risks, which may be wise or unwise, as any decision on war and peace takes risks; but it is not to impair the President's function to see to the safety of the troops by reacting to attacks made upon them and by otherwise deploying them tactically while they are carrying out their newly-defined mission. It cannot be that the responsibility of the Commander-in-Chief to see to the safety of troops means that Congress may not limit the Commander-in-Chief's freedom to fight in any part of the world from which an enemy draws support, else, again, the power to declare war against a named nation or nations, and against them only, is nugatory. Absent legislation, the Commander-in-Chief may lawfully pursue an enemy to whose attack he has reacted, and the enemy's helpers, as and where he finds them. But Congress, if it chooses to do so, has ample constitutional authority to decide where and whom the United States should fight. Congress has made such decisions in the past. Senators may now be proposing to make an unwise one. But the issue is that -- the wisdom of what they propose -- not their constitutional authority.

The brief note got a little long. Thank you for listening.

Sincerely,

A handwritten signature in cursive script, appearing to read "Drew".