

# FIFTY YEARS ON: THE NORMALIZATION OF UNITED STATES MILITARY OPERATIONS IN CAMBODIA (1969-1973) AS A MIRROR OF FIGHTING IN THE LAW'S GAPS

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Pulitzer-Prize winning journalist, Barbara Tuchman (1912-1989), authored – among her many historical works – *A Distant Mirror: The Calamitous Fourteenth Century*, in which she detailed the political, military, economic, religious, and social life of a distant time in France and then challenged her readers to see the strands of that time in our present. It is, concededly, difficult to imagine a current democratically elected head of state executing his or her chief law enforcement officer as a means to ensure that planned war with an enemy state will occur without legal interference.<sup>1</sup> It is also, perhaps, difficult to imagine that a current chief of state would order his or her law enforcement officials to evict a political rival from his or her home and then torture the remaining family members

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1. BARBARA TUCHMAN, *A DISTANT MIRROR: THE CALAMITOUS FOURTEENTH CENTURY* 126-128 (1978) (describing the newly crowned Jean II, King of France having the Constable of France murdered).

after confiscating their wealth for personal gain.<sup>2</sup> In the medieval world, with its attendant chivalry and rules for just war, one might ponder how often the Augustinian, and later, just war theory tenets, were actually adhered to given the violence of that age.<sup>3</sup> This symposium article, however, is not a study in the just war doctrine (*jus ad bellum*), nor is it a study of rules for limiting the effects of war by codifying acceptable conduct for its participants *jus in bello*.<sup>4</sup> Rather, it is an examination of the liabilities of American service-members in the “law’s gaps” through an understudied, yet important politically and legally controversial event of the last half century which was cloaked in secrecy.

Between February 9 and August 15 in 1973, the United States Air Force dropped more bomb tonnage in Cambodia than its predecessor, the Army Air Forces, had dropped on Japan in World War II.<sup>5</sup> The 1973 aerial assault on Cambodia’s communist forces, the Khmer Rouge, demonstrates just how deep the United States waged “war in law’s gaps” almost fifty years ago. That campaign also shapes how the United States, in spite of its legal institutions, can conduct modern warfare without political restraint. In Operation Freedom Deal, between January 27 and August 15 in 1973, the United States Air Force and Naval aviation dropped a higher tonnage of bombs on neutral-Cambodia than it did in all of the missions flown over Germany in World War II.<sup>6</sup> The period between June 27 and August 15, 1973 is important to the conduct of law in war for several reasons, namely, that it constituted significant military operations without congressional sanction with its United States participants still fully amenable to the law of war as well as United States law.

On January 27, 1973, the United States, the Republic of Vietnam (“South Vietnam”) and the Democratic Republic of North Vietnam (“North Vietnam”), signed an agreement ending hostilities after roughly two decades of conflict.<sup>7</sup> Article 20 of the peace agreement required all three signatories to respect the neutrality and territorial integrity of Cambodia as

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2. *Id.* at 496 (describing the arrest and seizure of Pierre Craon after the attempted murder of France’s Constable in 1392).

3. *See, e.g.*, MAURICE KEEN, CHIVALRY 45-46 (1984).

4. *See, e.g.*, MICHAEL WALZER, ARGUING ABOUT WAR 87-99 (2004) (describing the concepts of *jus ad bellum* and *jus in bello*).

5. WILLIAM SHAWCROSS, SIDESHOW: KISSINGER, NIXON, AND THE DESTRUCTION OF CAMBODIA 272-277 (2002).

6. Although military operations were conducted in Laos, this article does not analyze that aspect of the war. ARNOLD R. ISAACS, WITHOUT HONOR: DEFEAT IN VIETNAM AND CAMBODIA 217 (1983). More than 250,000 tons of bombs were dropped on Cambodia between February and August 1973. *Id.*

7. Ending the War and Restoring Peace in Vietnam, Jan. 27, 1973, 24 U.S.T. 1675 [hereinafter Paris Peace Accords].

established by the 1954 Geneva Agreement on Cambodia (the Paris Agreement also required the signatories to respect the territorial integrity of Laos).<sup>8</sup> Neutrality law, as based on the 1907 Hague Conventions, protects states not participating in an armed conflict from unduly suffering as a result of the conflict.<sup>9</sup> While it is true that neutrality places a duty on a government not to aid or assist any of the belligerent forces, it is also true that the neutral government – that of Cambodia – did not have the capacity to enforce neutrality.<sup>10</sup> The United States continued to conduct military operations in Cambodia through a series of aerial bombardment missions. This article explores the legal legacy of the Nixon administration’s actions in Cambodia between 1969 and 1973, with particular emphasis placed on the last year. In doing so, the article ties together the conduct of the federal judiciary, Congress, as well as the administration, to bring light to a continuing concept of war without declaration: that war-fighters are less protected by law, while the administration sending forces into conflict have heightened legal protection.

The article, by necessity a shorter synopsis as it is a symposium piece, is divided into two sections. The first section details the Nixon administration’s reasoning and secrecy for conducting military operations in Cambodia from 1969 to the Paris Agreements. The section also details how, during 1969 to January 27, 1973, the administration had a relatively “free hand” to order military forces into Cambodia while subjecting its service-members to an uneven and arbitrary enforcement of military law in the sense that service-members were subjected to a statutory court-martial scheme with no opportunity to avail themselves of questioning the legality of military operations or the conduct of the administration. The second section details Operation Freedom Deal and the Nixon Administration’s treatment of service-members that challenged being ordered to commit to military operations contrary to congressional restraint. The section also dissects *Holtzman v. Schlesinger* as a means for evidencing that judicial remedies are non-existent for opponents of an administration’s use of force in contemporary and future conflicts.

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8. *Id.* at 58.

9. See Dietrich Schindler, *Neutrality and Morality: Developments in Switzerland and in the International Community*, 14 AM. U. INT’L L. REV. 155, 162 (1998).

10. John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn’t Tell Us About*, 42 STAN. L. REV. 1093, 1144 (1990); *contra* Timothy Guiden, *Defending America’s Cambodian Incursion*, 11 ARIZ. J. INT’L & COMP. LAW 215, 220-221 (1994).

## I. SECRECY IN AN UNPOPULAR WAR: NEUTRAL CAMBODIA, 1969-1972

On May 9, 1969, staff-journalist, William Beecher, in a New York Times article reported that the United States Air Force had bombed North Vietnamese and Vietcong targets within the neutral country of Cambodia.<sup>11</sup> The bombing missions were part of a secretive military campaign to destroy communist supply routes through Cambodia to South Vietnam, and the Nixon administration denied any orders to conduct military operations outside of Vietnam.<sup>12</sup> Moreover, because the North Vietnamese military had traversed its forces through a neutral country, their government, along with the Chinese and Soviet Union's governments, did not respond to the article or make an international protest against the Air Force strikes.<sup>13</sup> However, the New York Times article led to Nixon demanding Kissinger, among others in the cabinet, to discover who had leaked information to the journalist.<sup>14</sup> After meeting with FBI director, J. Edgar Hoover, Kissinger agreed to clandestinely wiretap several individuals including one of his assistants, Morton Halperin.<sup>15</sup> While the legal travails of Halperin are well-recorded in appellate decisions, the administration's conduct evidenced that there was doubt as to the legal efficacy of the bombing operations.<sup>16</sup>

The bombing campaign in Cambodia was, at a minimum, a signal to the North Vietnamese government that the United States' government's prior respect for Cambodian neutrality was premised on a reciprocal respect from North Vietnam.<sup>17</sup> The decision to use ground forces against Cambodia in 1970 was cloaked in secrecy. Nixon did not seek Congress'

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11. William Beecher, *Raids in Cambodia by U.S. Unprotected*, N.Y. TIMES (May 9, 1969); LUKE A. NICTER, RICHARD M. NIXON: IN THE ARENA, FROM VALLEY TO MOUNTAINTOP 173 (2014).

12. Seymour M. Hersh, *Senators Are Told U.S. Bombed Cambodia Secretly After Invasion in 1970*, N.Y. TIMES (Aug. 8, 1973), <https://www.nytimes.com/1973/08/08/archives/senators-are-told-us-bombed-cambodia-secretly-after-invasion-in.html>; WALTER ISAACSON, *KISSINGER: A BIOGRAPHY* 174-177 (1992); SHAWCROSS, *supra*, note 5, at 93.

13. Hersh, *supra* note 12.

14. *See e.g.*, RAY LOCKER, *NIXON'S GAMBLE: HOW A PRESIDENT'S OWN SECRET GOVERNMENT DESTROYED HIS ADMINISTRATION* 38 (2016).

15. *Id.* Kissinger's actions led to several decisions including *Halperin v. Kissinger*, 606 F.2d 1192 (CA DC 1979), *aff'd*, 452 U.S. 713 (1981). *See also* STALEY I. KUTLER, *THE WARS OF WATERGATE* 108-119 (1990).

16. SEYMOUR HERSH, *THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE* (1984); EDWARD R. DRACHMAN, *PRESIDENTS AND FOREIGN POLICY: COUNTDOWN TO 10 CONTROVERSIAL DECISIONS* 143-157 (1997).

17. President Lyndon Johnson had considered Cambodia a neutral country and feared that United States military escalation into Cambodia would make it more likely that China and the Soviet Union would become further involved in the war. ADRIAN R. LEWIS, *THE AMERICAN CULTURE OF WAR: THE HISTORY OF U.S. MILITARY FORCE FROM WORLD WAR II TO OPERATION IRAQI FREEDOM* 229 (2007); DRACHMAN, *supra* note 16 at 152.

approval, though he did confer with Senators Barry Richard Russell (D-GA) and John Stennis (D-MS), as well as Representatives Gerald Ford (R-MI) and Leslie Arends (R-IL).<sup>18</sup> Nixon and Kissinger deliberately excluded Secretary of Defense Melvin Laird and Secretary of State William Rogers from taking part in planning the invasion.<sup>19</sup> Laird and Rogers had earlier presciently warned Nixon that the widening of the war into Cambodia would lead to domestic upheaval, and news leaks over “Operation Menu” caused Nixon to suspect them of undermining his administration.<sup>20</sup> Thus, when Rogers informed Congress, several days prior to the invasion of Cambodia, that no plans for an invasion existed, he did so to the best of his knowledge that an invasion was unthinkable.<sup>21</sup>

Three days before announcing the use of military forces in Cambodia, Bryce Harlow, one of Nixon’s counselors, informed Congress that Nixon’s poll numbers had increased following an April 20 address in which Nixon described the success of Vietnamization and reductions in the number of service-members in Vietnam.<sup>22</sup> After the invasion of Cambodia became public, mass demonstrations across the nation, including on college and high school campuses, grew so immense as to shut down the government.<sup>23</sup> Nixon’s outreach to the public failed to produce stability until July, when the forces that had invaded Cambodia were withdrawn.<sup>24</sup> In early May, counter-protesters in New York, known as the “Hard Hat Rebellion,” attacked anti-war demonstrators.<sup>25</sup> Although by no means the only two

18. RICHARD A. HUNT, *MELVIN LAIRD AND THE POST-VIETNAM MILITARY* 150 (2015).

19. The combined US – ARVN operation into Base Area 352/353 has been under preparation by MACV for several weeks but until now, Secretary Laird has not been aware of the likelihood of it being approved and opposition can be anticipated from him as well as from the Secretary of State. Kissinger to Nixon, April 26, 1970 [RN].

20. See DAVID L. ANDERSON, *THE COLUMBIA GUIDE TO THE VIETNAM WAR 70-73* (2002); DALE VAN ATTA, *WITH HONOR: MELVIN LAIRD WAR AND POLITICS* 260 (2008).

21. See Seymour Hersh, *Rogers Said ‘Our Hands Are Clean’ on Cambodia*, N.Y. TIMES (July 25, 1973), <https://www.nytimes.com/1973/07/25/archives/rogers-said-our-hands-are-clean-on-cambodia-although-in-on-raid.html>.

22. Bryce Harlow to Anderson, April 27, 1970 [CPA/368]. In a standard letter Harlow sent to members of Congress, he claimed:

I am sure you would want to know the results of an authoritative private poll which we have just received – based on a complete national sample taken two days after the President’s April 20 TV address on Vietnam. Approval of the way Richard Nixon is handling his job as President has moved from the pre-speech Gallup rating of 55% to 62%.

23. See JASMINE FARRIER, *CONSTITUTIONAL DYSFUNCTION ON TRIAL: CONGRESSIONAL LAWSUITS AND THE SEPARATION OF POWERS* 1 (2019); see TIM WEINER, *ONE MAN AGAINST THE WORLD: THE TRAGEDY OF RICHARD NIXON* 87-92 (2016).

24. RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 496-498 (2008).

25. *Id.* at 91.

examples of public anger leading to violence, students at Kent State University in Ohio and Jackson State University were killed by Ohio and South Carolina National Guard units while demonstrating against the Cambodian invasion.<sup>26</sup>

#### A. Administration Rationale

On April 30, 1970, President Richard Nixon announced on national television that combined United States and Republic of South Vietnam military forces had entered into Cambodia with the intention of destroying North Vietnamese and Vietcong bases and munitions storage areas.<sup>27</sup> Nixon justified the use of military force in a neutral nation as a means to stop North Vietnam's use of Cambodia's territory as "a major Communist staging and communications area," and to ensure the success of Vietnamization.<sup>28</sup> In reviewing his administration's reasons for launching a secretive air war in Cambodia beginning in 1969, and then ordering a ground invasion without the express consent of Congress, Nixon, over a decade removed from his presidency penned:

When Johnson intervened in Vietnam, he had to deal with the war as he found it. It was being fought in South Vietnam with guerrilla tactics, and the government in Saigon was near collapse. Our first priority was to stop our ally's slide toward defeat at the hands of the Communist guerillas. Our second priority should have been to blunt North Vietnam's invasion through Laos and Cambodia. And because our forces would eventually be withdrawn, our third priority should have been to prepare South Vietnam to defend itself against both the internal and external forces it faced.<sup>29</sup>

On June 4, 1970, the National Broadcasting Company's syndicated news program, "Meet the Press," hosted Secretary of Defense Melvin Laird, along with General Earle G. Wheeler, the Chairman of the Joint Chiefs of Staff.<sup>30</sup> Laird and Wheeler were followed by Senators Frank

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26. STANLEY KARNOW, *VIETNAM: A HISTORY, THE FIRST COMPLETE ACCOUNT OF VIETNAM AT WAR 625-26* (1997); see CHARLES DEBENEDETTI, *AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA* 279-280 (1990).

27. DEBENEDETTI, *supra* note 26, at 279-80; Robert B. Semple Jr., *Nixon Sends Combat Forces to Cambodia to Drive Communists from Staging Zone*, N.Y. TIMES (May 1, 1970), <https://www.nytimes.com/1970/05/01/archives/nixon-sends-combat-forces-to-cambodia-not-an-invasion-president.html>.

28. Semple Jr., *supra* note 27; ARTHUR J. DOMMEN, *THE INDOCHINESE EXPERIENCE OF THE FRENCH AND AMERICANS: NATIONALISM AND COMMUNISM IN CAMBODIA, LAOS, AND VIETNAM* 741-43 (2001).

29. RICHARD NIXON, *NO MORE VIETNAMS* 79 (1985).

30. *Meet the Press*, (NBC television broadcast June 4, 1970) (transcript on file with the Library of Congress in Lawrence Spivak Papers) [hereinafter *Spivak*].

Church (D-ID) and Charles Goodell (R-NY).<sup>31</sup> In addition to the recent United States and South Vietnam military incursion into neutral Cambodia as the singular focus of the program, one of the other many noteworthy aspects was that New York Times journalist, William Beecher, served as one of the four moderators. One year earlier, Beecher had “broken” the news story that Nixon had launched a secretive aerial bombing campaign into Cambodia to disrupt the transit of North Vietnamese military forces into South Vietnam.<sup>32</sup> For several years, the North Vietnamese military and the Vietcong forces of South Vietnam had violated Cambodian and Laotian neutrality along the so-called Ho-Chi Minh Trail in an effort to bring sufficient forces to topple the South Vietnamese government and military in the south and evade United States forces while doing so.<sup>33</sup>

The “Meet the Press” episode covered the larger debates over the use of military forces, including whether President Nixon had unlawfully – or unconstitutionally – expanded the war beyond Congress’ limits, violated international law by sending forces into a neutral country, or whether the decision was strategically sound.<sup>34</sup> At the same time, mass anti-war demonstrations had gripped the nation during the preceding month and national guardsmen had fired on campus demonstrators in two instances.<sup>35</sup> Laird claimed that the incursion was necessary to protect the safety of South Vietnam and to ensure that Vietnamization succeeded, and noted that by the end of 1970, he expected that U.S. force numbers in Vietnam would be down to 384,000 from the peak in early 1969 of almost 600,000.<sup>36</sup> General Wheeler, in response to whether there could be another incursion into Cambodia, noted that as long as the North Vietnamese and Vietcong used Cambodia or Laos as a means for transporting forces and supplies, the United States would respond with air strikes against their forces.<sup>37</sup>

Laird admitted that the administration had not predicted the possibility of widespread domestic opposition to the Cambodian invasion. Laird insisted, “[w]ell first I want to say that it was never anticipated by anyone

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31. *Id.*

32. Although not the subject of this article, Beecher’s reporting led (then) National Security Advisor Henry Kissinger to ask FBI director, J. Edgar Hoover to place wiretaps and phone interception devices on the National Security Staff. Beecher, *supra* note 11; *see, e.g.*, HUNT, *supra* note 18, at 150. In turn, Kissinger’s actions led to several decisions, including *Halperin v. Kissinger*, 606 F.2d 1192 (CA DC 1979), *aff’d*, 452 U.S. 713 (1981).

33. John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, in *THE VIETNAM WAR AND INTERNATIONAL LAW, VOL 3: THE WIDENING CONTEXT* 70-71 (Richard A. Falk, ed., 1972).

34. *Spivak, supra* note 30.

35. *Id.* at 15.

36. *Id.* at 7.

37. *Id.* at 7-8.

that there would be a Kent State or a Jackson State situation developing and that was indeed an unfortunate tragedy in both cases,” before returning to the theme that the invasion bolstered the administration’s credibility not only in Vietnam but in the world as a whole.<sup>38</sup> In contrast to Laird and Wheeler, Goodell argued that since Cambodia was a neutral country, Nixon’s use of U.S. forces without Congressional approval – let alone consultation with Congress – was unconstitutional.<sup>39</sup> Church, on the other hand, advocated limiting the president’s ability to conduct further military operations by restricting the use of funding after December.<sup>40</sup>

### B. *Judicial and Congressional Reaction*

In response to the Cambodian incursion, a May 20, 1970 Congressional Research Service (“CRS”) publication titled, *The Power of the President to Commit American Armed Forces Abroad without Congressional Authorization*, was submitted to Congress. Created in 1914 as a bipartisan research arm of the legislative branch to educate legislators on a myriad of questions, the CRS was designed as a non-partisan “think tank” belonging to Congress. Early on, the CRS analysis pointed out that at the beginning of the nation’s history, there was a general consensus that Congress alone had the authority to declare wars and approve the use of the military in overseas conflicts.<sup>41</sup> In addition to the Cooper-Church Amendment, there were indications in the legislative branch that Nixon did not enjoy widespread support over the use of forces in Cambodia. Senator Clinton Presba Anderson (D-NM), who had initially supported the use of United States forces in Vietnam in 1966, noted, “[m]y New Mexico mail on Cambodia, for instance, is running heavily against President Nixon’s policy,” before adding that he opposed “widening the war” into Cambodia.<sup>42</sup>

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38. *Id.* at 15.

39. *Id.* at 21-22.

40. *See id.* at 37; WILLIAM R. TANSILL, LEGIS. REFERENCE SERV., THE POWER OF THE PRESIDENT TO COMMIT AMERICAN ARMED FORCES ABROAD WITHOUT CONGRESSIONAL AUTHORIZATION – THE PROBLEM AND SOME PROPOSALS 1 (May 20, 1970) (passing measure in Senate preventing funding for military operations in Cambodia after December 1, 1970, known as the Cooper-Church Amendment); *see* ROBERT DAVID JOHNSON, CONGRESS AND THE COLD WAR 164-67 (2006); *President vs. Cooper-Church*, N.Y. TIMES (July 18, 1970), <https://www.nytimes.com/1970/07/18/archives/president-vs-cooperchurch.html>.

41. TANSILL, *supra* note 40, at 4 (citing *Bas v. Tingy*, 4 U.S. 37, 43 (1800)); *Talbot v. Seeman*, 5 U.S. 1, 28 (1801).

42. Senator Clinton P. Anderson to Raymond G. Kroker (June 1, 1970) (on file with Library of Congress).



Senator Edwin Brooke (R-MA), in a public address claimed, “the President has undertaken an extremely hazardous policy,” before demanding that the military “be withdrawn to South Vietnam.”<sup>43</sup> Congressman Gilbert Gude (R-MD), along with seventeen other representatives, called for an end to funding for operations in Cambodia by the end of June.<sup>44</sup> Senator Barry Goldwater (R-AZ), the leader of the conservative Republicans, noted “the President’s decision to send American troops together with South Vietnamese forces into Cambodia came as a surprise to the general American public, but for those of us who have followed this war closely, it was the only decision he could make.”<sup>45</sup> In May, Senators Church and John Sherman Cooper (R-KY) introduced a bipartisan amendment to an appropriations bill to prohibit the use of military funds against any further military operations in Cambodia after June 30, 1970.<sup>46</sup> Although Nixon was reelected by a large margin in 1972, the use of force in Cambodia remained controversial because, at no time, did Congress approve such use. In 1971, Congress repealed the Gulf of Tonkin Resolution to deprive Nixon of the colorable argument that his conduct was constitutional.<sup>47</sup>

On April 30, 1970, Nixon announced that American forces would bomb Cambodia. That night, Chief Justice Warren Burger visited the White House to offer Nixon his support. Burger delivered a personal letter, which read, “[v]ery properly, the White House lines and all Western Union lines are blocked with loyal Americans who wish to express their support for your courageous decision. Whatever comes, there is no substitute for courage in a time of crisis and you have shown that tonight.”<sup>48</sup> The chief justice also favorably compared the president’s resolve against

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43. Senator Edwin W. Brooke, Public Address on Cambodia (May 1, 1970) (transcript on file with the Library of Congress).

44. Resolution to Stop Funds for War in Cambodia and Laos, H.R. Res. 984, 91st Cong. (1970).

45. Form Letter, Senator Barry Goldwater (May 22, 1970) (on file with Arizona State University Library).

46. See Amending the Foreign Military Sales Act, S. Rep. No. 91-865, at 9-10 (1970); see also, LEWIS L. GOULD, *THE MOST EXCLUSIVE CLUB: A HISTORY OF THE MODERN UNITED STATES SENATE* 258 (2005). Church later argued in favor of protecting Congress’ ability to declare war, lamenting, “[t]he real issue is to preserve the dignity and integrity of the constitutional role of Congress... We stand up now or roll over and play dead.” John W. Finney, *Nixon is Rebuffed by Senate, 52-47, on Cambodia Issue*, N.Y. TIMES (June 12, 1970), <https://www.nytimes.com/1970/06/12/archives/nixon-is-rebuffed-by-senate-5247-on-cambodia-issue-it-rejects-byrds.html>.

47. Amendment to the Foreign Military Sales Act, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

48. Letter from Chief Justice Warren Burger to President Richard Nixon (Apr. 30, 1970) (on file with the Richard Nixon Presidential Library).

the press to Presidents George Washington and Abraham Lincoln.<sup>49</sup> A year later, Nixon thanked Burger for backing the administration.<sup>50</sup> Burger seemed unmoved by the idea that there was a substantial likelihood that the Supreme Court would decide appeals on the legality of the incursion, and to the first amendment assertions of the news media and war protesters. Within the Judicial Branch, Burger was by no means alone in supporting Nixon's decision to send forces into Cambodia. On May 11, 1970, Roger Robb, a judge on the Court of Appeals for the District of Columbia, penned to Deputy Attorney General Richard Kleindienst not only a historical justification for the Cambodian operation but also the basis for an administration official's potential public speech. Robb wrote, "[a]s a student of the Civil War, I have been impressed by several parallels between the events of the spring and summer of 1864 and what is happening now," and added, "[t]his look at history strengthens my confidence that Mr. Nixon's courageous and decisive actions in Vietnam and Cambodia will be vindicated by the results."<sup>51</sup>

Although Burger possessed only one of nine votes in the Court, his conduct might be emblematic of the tone expressed by the Court of Appeals for the District of Columbia's decision, *Mitchell v. Laird*.<sup>52</sup> Issued on March 20, 1973, the decision informed the thirteen members of the House of Representatives who sued the executive branch that the question of whether a declaration of war was necessary to conduct military operations was inherently political and therefore outside of the judicial branch's competency.<sup>53</sup> One year earlier, in *Orlando v. Laird*, the Court of Appeals for the Second Circuit, determined that by appropriating money for the conflict in Southeast Asia, the military could order service members to fight in Vietnam or Cambodia.<sup>54</sup> In *Commonwealth of Massachusetts v. Laird*

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49. President Richard Nixon to Chief Justice Warren Burger (May 12, 1971) (on file with the Richard Nixon Presidential Library).

50. *Id.*

51. Robb finished his letter by writing:

"Of course Mr. Lincoln did not have critics urging that General Grant refrain from crossing the Rapidan, or that General Sherman remain in Chattanooga to avoid the risk of escalation; but in many ways the troubles of 1864 resembled the ones we have today. I predict that the historical parallel will continue with success in Cambodia and Vietnam bringing us fair skies "if our people at home will be but true to themselves." Letter from Judge Roger Robb to Deputy Attorney Gen. Richard Kleindienst [POF/HW-RN/6] (May 11, 1970) (on file with the Richard Nixon Presidential Library).

52. *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).

53. Interestingly, the majority indicated that Congress had never implicitly sanctioned the war in Cambodia, of, for that matter, Vietnam. However, that question would not have a bearing on the decision. *Id.* at 615-616.

54. *Orlando v. Laird*, 443 F. 2d 1039, 1043 (2d Cir. 1971).

(1971), the Court of Appeals for the First Circuit determined that service-members – as represented by their state legislature – could likewise not be protected against being sent to Southeast Asia and subjected to military jurisdiction because Congress had not acted to render the conflict devoid of its support.<sup>55</sup>

### C. *Jurisdiction over Service-Members in Law's Gaps*

In 1918, President Woodrow Wilson ordered American military forces to take part in allied operations in Russia to prevent the German military from capturing Russian military stockpiles and to protect the military forces of a Czechoslovakian ally.<sup>56</sup> A number of legislators, including those who voted to declare war on Germany in 1917, protested that Wilson had violated the Constitution in committing military forces into an undeclared war.<sup>57</sup> Several service-members were court-martialed for offenses under the Articles of War, and, in one instance, an argument to the Court arose as to whether the military could prosecute service-members for alleged offenses in a foreign conflict where Congress had not declared war.<sup>58</sup> That particular argument had been raised a decade earlier.

In 1912, former Secretary of War Elihu Root testified, “[i]n my judgment, there is no law which forbids the President to send troops of the United States out of this country into any country where he considers it to be his duty as Commander in Chief of the Army to send them, unless it be for the purpose of making war, which, of course, he cannot do.”<sup>59</sup> Although Root – a noted lawyer in his time who had defended William Marcy “Boss” Tweed and represented the United States in the 1899 and 1907 Hague Conventions – did not comment on the effect that such presidential power might have on the accountability of United States military personnel, it should not be missed that whether one examined courts-martial from the two decades after this statement, or from the present, when presidents send

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55. *Commonwealth of Massachusetts v. Laird*, 451 F. 2d 26, 28 (CA 1, 1971).

56. JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I 242 (2017); Erick Trickey, *The Forgotten Story of the American Troops Who Got Caught Up in the Russian Civil War*, SMITHSONIAN MAGAZINE (Feb. 12, 2019), <https://www.smithsonianmag.com/history/forgotten-doughboys-who-died-fighting-russian-civil-war-180971470/>; IAN C.D. MOFFAT, THE ALLIED INTERVENTION IN RUSSIA, 1918-1920: THE DIPLOMACY OF CHAOS 40 (2015).

57. KASTENBERG, *supra* note 56.

58. *Id.*

59. 48 CONG. REC. 10,929 (1912).

military forces anywhere in the world and for any reason, the nation's service-members remain subject to the military's jurisdiction.<sup>60</sup>

Although one could point to *Collins v. McDonald* to discover the first discernable comment in the Supreme Court that service-members were amenable to military jurisdiction in undeclared wars, the first clear decision occurred almost two decades before the Court issued that opinion from an appeal arising out of the so-called Boxer Rebellion.<sup>61</sup> In 1899, after decades of European and Japanese encroachment into China, a segment of the Chinese population rebelled and besieged the embassies in Beijing, while the Dowager Empress Cixi determined not to intervene.<sup>62</sup> In response, the United States government, along with the governments of Great Britain, Japan, Germany, Austria-Hungary, Italy, and Russia sent a combined military force in relief.<sup>63</sup> In sending over five-thousand soldiers into China without seeking Congress' approval, President McKinley, for the first time in United States history, committed American soldiers into an overseas conflict without a formal declaration of war.<sup>64</sup>

In 1905, the United States District Court of the District of Kansas, in *Hamilton v. McClaughry*, determined that the Army maintained jurisdiction over soldiers who were sent overseas into conflicts regardless of whether Congress had issued a formal declaration of war.<sup>65</sup> On February 4, 1901, a

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60. *United States v. Solorio*, 483 U.S. 435 (1987).

61. In *Collins*, the Appellant raised as a secondary issue the fact that he was ordered to Vladivostok in a mission not directly a part of the war against Germany, and therefore because Congress had not declared war against Russia as it had against Germany, he was prosecuted in a foreign land without a declaration of war. Although the Court did not directly address this challenge, Justice Clarke, in writing for the majority, called it "trivial." *Collins v. McDonald*, 258 U.S. 416, 421 (1922); see KASTENBERG, *supra* note 56, at 242.

62. For the origins of the uprising, particularly the effect of imperialism on China, see, e.g., JOSEPH ESHERICK, *THE ORIGINS OF THE BOXER UPRISING* 68-97 (1987); see generally VICTOR PURCELL, *THE BOXER UPRISING: A BACKGROUND STUDY* 57-83 (1963) (illustrating the origins of the uprising, particularly the effect of imperialism on China).

63. On President William McKinley's decision to send forces into China, see 34 CONG. REC. 2 (1900) (detailing the statement of President William McKinley). McKinley claimed that his orders were necessary to protect American lives and property in China. *Id.* However, there was a political aspect in the sense that McKinley's motives were driven, in part, by the fact that 1900 was a presidential election year, and he intended to win a second term. See, e.g., ARTHUR M. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 88-89 (1973); MERLO PUSEY, *THE WAY WE GO TO WAR* 60 (1969).

64. DIANA PRESTON, *THE BOXER REBELLION: THE DRAMATIC STORY OF CHINA'S WAR ON FOREIGNERS THAT SHOOK THE WORLD IN THE SUMMER OF 1900*, 253 (1999).

65. *Hamilton v. McClaughry*, 136 F. 445 (C.C. Kan. 1905). Although Hamilton was convicted of murder in violation of the Fifty-Eighth Article of War, he was also convicted of a general disorder for "throwing rags into his night bucket." See Record of Hamilton, U.S. Penitentiary, October 3, 1902 [NA RG 153 PC 29 Case 22806]. For unknown reasons, this was not listed in the federal case record.

court-martial convicted Private Fred Hamilton – a regular Army soldier – of murdering a fellow soldier, and sentenced him to life in prison.<sup>66</sup> After being transported to the United States Disciplinary Barracks (USDB) in Fort Leavenworth, Kansas, Hamilton sought a writ of habeas in the District Court, arguing that the sentence was invalid under the Articles of War because the crime occurred at a time where no war had been declared and no insurrection had taken place.<sup>67</sup>

While the district court recognized that Private Hamilton had a basis for seeking collateral review of his conviction and sentence, military law incorporated a basic international law premise that when a military force transits through a foreign sovereign, it maintains jurisdiction over its forces.<sup>68</sup> This tenet of international law, however, did not answer the constitutional question of whether the mere stationing of military forces in a foreign nation to protect United States interests during a period of internal hostilities not specifically directed against the United States constituted a state of war. The District Court found two aspects of the Boxer Rebellion dispositive in finding that a “state of war” existed in China. First, Congress had allocated pay rates for the soldiers serving in China as though there had been an actual war.<sup>69</sup> Second, because the aim of the so-called Boxers was

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66. *Hamilton*, 136 F. 445, at 446.

67. The district court recognized that the Fifty-Eight Article of War under which Hamilton had been prosecuted read:

In time of war, insurrection or rebellion, larceny, robbery ... murder ... shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the state, territory, or district in which such offense may have been committed. *Id.* at 447.

There was another matter which impacted on the fairness of Hamilton’s court-martial. The court-martial sentenced Hamilton to thirty years in prison. However, the reviewing judge advocate advised the court-martial that the sentence was illegal because under the Fifty-Eighth Article of War, the minimum limit a court-martial could sentence an accused soldier to, was the minimum sentence in the territory or country in which the court-martial occurred. Had Hamilton been prosecuted in a consular court – which the judge advocate stated could have been the case had the court-martial occurred in a time of peace – the sentence of thirty years would have been sustainable. But, as a result of a treaty with China and given that the court-martial was held in a time of war, the minimum sentence facing Hamilton should have been life in prison. As a result, the court-martial was ordered to be reconvened so that a lawful sentence could be adjudged. *See* Adjutant General’s Review, Jan. 25, 1901 [NA RG 153 PC 29 Case 22806].

68. *Hamilton*, 136 F. 445, at 448 (citing *Coleman v. Tennessee* 97 U.S. 509 (1878)). The district court also found it persuasive that in *Dow v. Johnson*, 100 U.S. 158 (1879), the Court determined that soldiers operating in the rebelling states during the Civil War were not amenable to the jurisdiction of those state’s civil courts. *Hamilton*, 136 F. 445, at 170.

69. *Id.* at 451.

to remove foreigners from Peking, and had, indeed, fired weapons on United States forces, a “state of war” existed, regardless of a declaration.<sup>70</sup>

As a matter of *Hamilton’s* continuing influence, in 1966, in *United States v. Mitchell*, the Court of Appeals for the Second Circuit determined that a claim of “unlawful war” could not serve as a defense for failing to report to a military duty.<sup>71</sup> One year later, in *Luftig v. McNamara*, the Court of Appeals for the District of Columbia issued a similar ruling.<sup>72</sup> Decided on June 19, 1970, the Court of Appeals for the Second Circuit, in *Berk v. Laird*, heard a service-member’s challenge to the executive branch’s authority to order him to Cambodia.<sup>73</sup> Berk argued that because Congress had not declared war or authorized the Cambodia incursion, he could not be constitutionally ordered to serve in Cambodia.<sup>74</sup> The court of appeals determined, however, that the political question doctrine militated against judicial review of the appeal.<sup>75</sup>

Although service-members were not able to argue that they could not be prosecuted for violations of law in Cambodia, it is helpful to note that the nature of military discipline had changed after 1969. The Court, in *O’Callahan v. Parker*, significantly curtailed the military’s court-martial jurisdiction in the continental United States.<sup>76</sup> On the leave of Nixon’s presidency, military discipline in Vietnam had eroded, perhaps, commensurate with the national dissatisfaction with the war itself.<sup>77</sup> Two military prisons in Vietnam experienced prisoner uprisings.<sup>78</sup> From January 20, 1969, the date of Nixon’s inauguration, until the announcement of

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70. *Id.* at 450.

71. *United States v. Mitchell*, 369 F.2d 323, 324 (2d Cir. 1966).

72. *Luftig v. McNamara*, 373 F.2d 664, 665 (D.C. Cir. 1967). Unlike *Mitchell*, *Luftig* was already in uniform but argued that the military could not send him to Vietnam, the appellate court noted:

“it was difficult to think of an area less suited for judicial action than that into which the private would have the court intrude. The court held that the fundamental division of authority and power established by the United States Constitution precluded judges from overseeing the conduct of foreign policy or the use and disposition of military power. Those matters were plainly the exclusive province of Congress and the executive”. *Luftig*, 373 F.2d 664, at 664.

73. *Berk v. Laird*, 429 F.2d 302, (7th Cir. 1970); *Berk v. Laird*, 317 F. Supp. 715, 718-724 (E.D.N.Y. 1970).

74. *Berk*, 429 F.2d 302, at 304.

75. *Id.* at 306.

76. *O’Callahan v. Parker*, 369 U.S. 258, 273 (1969); see, e.g., Joshua E. Kastenberg, *Cause and Effect: The Origins and Impact of Justice William O. Douglas’s Anti-Military Ideology from World War II to O’Callahan v. Parker*, 26 T. M. COOLEY L. REV. 163, 242-254 (2009).

77. See e.g., DEBENEDETTI, *supra* note 26, at 232-33.

78. RICHARD MOSER, *THE NEW WINTER SOLDIERS* 51-53 (1996).

ground operations in Cambodia, the (then) Military Court of Appeal determined that while the charge of desertion to avoid hazardous duty was a crime under the UCMJ, a service-member had to be found guilty of the specific intent to avoid the hazardous duty, rather than merely be proven that the avoidance of the hazardous duty was a consequence of the desertion.<sup>79</sup> In another decision, the CMA held that a service-member who left his unit in Vietnam and traveled to Saigon, but continued to wear his military uniform, was not guilty of desertion.<sup>80</sup>

#### D. *Airmen in dissent*

In 1969, the Court of Military Appeals issued a decision which upheld the conviction of a fighter pilot who argued that the conflict in Vietnam was “unjust,” and therefore ruled that orders to train pilots to fly in combat over Vietnam were unlawful.<sup>81</sup> The reasoning in the decision mirrors that of the Court of Appeals for the Ninth Circuit in *United States v. Mottola*. Issued in 1972, the federal appellate court determined that military reservists lacked standing to challenge the use of forces in Cambodia.<sup>82</sup>

Although the New York Times reported on B-52 strikes into Cambodia, the public and Congress were largely unaware as to the extent of the continual aerial campaign encompassed as Operation Menu. In fact, between March 18, 1969 and May 1, 1970, there were over 3,500 secretive bombing missions which unleashed over 105,000 tons of bombs.<sup>83</sup> Shortly after Operation Menu commenced, Major Hal Knight, an Air Force officer stationed at Ben Hoa Air Base in the Republic of Vietnam, became concerned that he falsified reports at the direction of senior officers for the

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79. *United States v. Stewart*, 41 C.M.R. 58 (1969). In this appeal, a Marine pled guilty to desertion in Vietnam, but only conceded that a consequence of his desertion was that he would not participate in search and destroy missions. *Id.* at 59.

80. *United States v. Jones*, 41 C.M.R. 618 (CMA 1969). The offense of Absent Without Leave found in Article 86, UCMJ (codified at 10 USCS § 886) is, and was, the lesser included offense of desertion. See e.g., *United States v. Boswell*, 24 C.M.R. 369 (CMA 1957).

81. *United States v. Noyd*, 40 C.M.R. 1995 (CMA 1969). The decision was obliquely upheld, but on a different basis, in *Noyd v. Bond*, 395 U.S. 683 (1969).

82. *Mottola v. Nixon*, 464 F.2d 178 (CA 9, 1972). The reservists argued that the expansion of the conflict into Cambodia, without congressional authorization, made it more likely that they would be called to active duty. *Id.* at 182. However, because no specific call-up had occurred, the reservists could not prove injury. *Id.*

83. *Statement of Information: Hearings Before the House Comm. on the Judiciary, House of Representatives, Pursuant to H. Res. 803, A Resolution Authorizing an Directing the Committee on the Judiciary to Investigate Whether Sufficient Grounds Exist for the House of Representatives to Exercise Its Constitutional Power to Impeach Richard M. Nixon, Present of the United States of America*, 93<sup>rd</sup> Cong. Sess. 6-7 (1974) [hereinafter Impeachment Report].

purpose of deceiving Congress.<sup>84</sup> Knight's military duties in Vietnam included compiling radar data for prior military missions and while doing so, he, as well as others, were instructed to have the data appear so that B-52 strike missions had occurred in Vietnam, rather than in neutral Cambodia.<sup>85</sup> He later testified to the Senate that he believed the falsification of records was done to thwart Congress from investigating clandestine military operations ordered by Nixon.<sup>86</sup> Knight believed that in doing so, he had violated the UCMJ, which expressly prohibited the signing of false records with the intent to deceive.<sup>87</sup> However, he also believed he was caught in a quandary because he feared being court-martialed for failing to obey orders.<sup>88</sup> Knight's testimony was later used in the House' consideration as to whether the Cambodian operation constituted impeachable conduct.<sup>89</sup> Equally important, it served as an example for the dynamic that questionable conflicts only heighten the liability for the service-member participants.

## II. 1973: MILITARY OPERATIONS BEYOND CONGRESSIONAL INTENT

On January 12, 1973, the New York Times had as one of its front page headlines, "B-52 Pilot Who Refused Mission Calls War not Worth the Killing."<sup>90</sup> Air Force pilot, Captain Michael Heck, was, in fact, only one of several military pilots who questioned the legality of the United States' use

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84. Bombing in Cambodia: Hearings Before the Comm. on Armed Services, 93<sup>rd</sup> Cong. 2, Sess. 1 (1973) (testimony of Hal Knight, Jr) [hereinafter Bombing in Cambodia]. Knight testified on July 16, 1973. *Id.*; see also EARL TILFORD JR., CROSSWINDS: THE AIR FORCE'S SETUP IN VIETNAM 126 (1993).

85. SHAWCROSS, *supra* note 5, at 30-31.

86. Bombing in Cambodia, *supra* note 84, at 5, 9 (statement of Hal Knight Jr.).

87. *Id.* at 5-6, 32. Knight wrote to Senator William Proxmire:

While I was in SVN, the falsification of strike reports was a common practice. I prepared at least a dozen myself. I got the impression the practice had been going on for several years prior to the time I got there in February 1970. All the reports I personally faked were B-52 strikes into Cambodia. (This was some time before the Cambodian incursion.) The procedure we used to fake the reports was rather complicated but the end result was that we had reported strikes in SVN when they were actually in Cambodia. *Id.*

88. *Id.* at 5-6.

89. *Statement of Information: Hearings on H.R. 803 Before the House Comm. on the Judiciary*, 93<sup>rd</sup> Cong 57 (1974) (forward by Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary).

90. George Esper, *B-52 Pilot Who Refused Mission Calls War Not Worth the Killing*, N.Y. TIMES (Jan. 12, 1973), <https://www.nytimes.com/1973/01/12/archives/b52-pilot-who-refused-mission-calls-war-not-worth-the-killing.html>.



of military forces in ostensibly neutral Cambodia.<sup>91</sup> Heck was not alone in his doubts as to the legality of the use of forces without Congress' express sanction or the means of achieving an illusory victory under the secrecy of an administration's military policies.<sup>92</sup> One author observed that Air Force personnel in Guam assigned to fly or maintain the B-52 tried to find a means to avoid participating in the mission.<sup>93</sup> Several airmen determined to refrain from supporting missions into Cambodia yet remained subject to a court-martial for their conduct.<sup>94</sup> Reports of refusal to comply with military orders remain one of the difficult aspects of fighting a war in laws gaps, because, after January 27, 1973, the United States was no longer technically in a war.

On January 27, 1973, the United States, South Vietnam, and North Vietnam, signed an Agreement ending hostilities after roughly two decades of conflict.<sup>95</sup> Article 20 of the Peace Agreement required all three signatories to respect the neutrality and territorial integrity of Cambodia as established by the 1954 Geneva Agreement on Cambodia (the Paris Agreement also required the signatories to respect the territorial integrity of Laos).<sup>96</sup> Although, in theory, the war in Vietnam ended with the Paris Peace Accords, the continuation of the aerial campaign against Cambodian Khmer Rouge evidences the difficulty in challenging presidential authority in military operations conducted without a declaration of war. In January 1973, the White House prepared to respond to reporters' inquiries on the continued bombing missions in Cambodia after the cease-fire with North Vietnam and the Vietcong forces. Initially, the White House counsel, Fred Buzardt, drafted a statement of justification that the North Vietnamese had not withdrawn their forces from Cambodia, and therefore, the Paris Accords

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91. *Id.*; see e.g., *An Accused Pilot Being Sent to the U.S.*, N.Y. TIMES (July 17, 1973) (detailing the refusal of Captain Donald E. Dawson to fly bombing missions over Cambodia).

92. Esper, *supra* note 90.

93. Carolyn Eisenberg, *Dissenting Airmen*, in *WAGING PEACE IN VIETNAM: U.S. SOLDIERS AND VETERANS WHO OPPOSED THE WAR* 152, 152 (Ron Carver, David Cortright & Barbara Doherty eds., 2019); Terry H. Anderson, *The GI Movement and the Response from the Brass*, in *GIVE PEACE A CHANCE: EXPLORING THE VIETNAM ANTIWAR MOVEMENT* 93, 106-110 (Melvin Small & William D. Hoover eds., 1992); Richard Halloran, *The War Is Suddenly Grim for the B-52 Fliers on Guam*, N.Y. TIMES (Dec. 30, 1972), <https://nyti.ms/1ilmBhA>.

94. DAVID CORTRIGHT, *SOLDIERS IN REVOLT: GI RESISTANCE DURING THE VIETNAM WAR* 135 (1975); Harry W. Haines et al., *GI Resistance: Soldiers and Veterans Against the War*, in 2 *VIETNAM GENERATION* 15, 59 (2011).

95. Paris Peace Accords, *supra* note 7, at 1676.

96. Geneva Conference doc. IC/43/Rev. 2, reprinted in *Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indochina*, 60 AM. J. INT'L L. 643, 643 (1954).

had not taken effect.<sup>97</sup> He stated, “[w]e believe that the President has the authority as Chief Executive in the conduct of foreign relations and as Commander in Chief to help bring an end to the various aspects of this conflict in which we have been involved as rapidly as may be possible consistent with our national interest in the peace and security of the area.”<sup>98</sup> This resulted in a congressional challenge in the judiciary against Nixon’s actions. Led by Congresswoman Elizabeth Holtzman (D-NY), several litigants, including B-52 pilots, claimed that the use of force violated both international law and congressional restraints.

On April 15, 1974, the Court denied *certiorari* to Holtzman’s challenge against the use of the military in Cambodia without a declaration of war or Congress’ approval. In a sense, the appeal was moot because aerial operations against the Khmer Rouge had ceased and Nixon’s presidential tenure was in question.<sup>99</sup> Although Justice Douglas was the only member of the Court to have argued that the judicial branch could review Holtzman’s claims, the traverse of the appeal to the Court is important to contextualize the broad expanse of presidential authority to order United States citizens into conflicts without congressional approval or the safeguards of international law. On May 15, 1973, the Senate Appropriations Committee voted 24-0 to cut-off all funds for continuing the bombing campaign over Cambodia.<sup>100</sup> Attorney General Elliot Richardson informed the Senate that if Congress were to adopt this cut-off into law, he believed that further military actions into Cambodia would be unlawful.<sup>101</sup>

On July 25, 1973, Holtzman, along with Donald Dawson and other military members, obtained a favorable ruling from Judge Orrin Judd, a United States District Court Judge in New York, enjoining the Nixon administration from continuing military operations as Congress had not authorized the use of force.<sup>102</sup> Judge Judd began his decision with a recognition that Holtzman et al. possessed standing to argue that the use of military forces without congressional sanction was unlawful based on the

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97. The statement read, in pertinent part: “Article 20 of the Paris Agreement calls for the withdrawal of North Vietnamese troops from Cambodia. They have not been withdrawn.” Draft Statement, 1973 [WHSF-SMOF/Fred Buzardt/50].

98. Press Statement, 1973 [WHSF-SMOF/Fred Buzardt/50].

99. *Browndale Int’l Ltd v. Board of Adjustment*, 416 U.S. 936, 936 (1974).

100. John W. Finney, *Senate Panel Votes 24-0 to Bar Cambodian Raids*, N.Y. TIMES (May 16, 1973), <https://nyti.ms/1QVtjft>.

101. *Id.*

102. *Holtzman v. Schlesinger*, 361 F. Supp. 553, 565-66 (E.D.N.Y. 1973). William Shawcross writes: Donald Dawson was a young Air Force captain, a Christian Scientist, serving as a B-52 pilot at Utapao, Thailand. He had been flying B-52s since the end of 1971, but throughout 1972, he found it impossible to live with the consequences of his work. SHAWCROSS, *supra* note 5 at 291; *see also* LOUIS FISHER, PRESIDENTIAL SPENDING POWER 118 (1975).

harm of continuing presidential action to the military members, as well as to Congress. He then transitioned into the legislative history of funding for the war in Vietnam as well as presidential strategy statements, for the use of force in Cambodia, before determining that Nixon had, in fact, exceeded any grant of authority to the presidency.<sup>103</sup>

Judd's decision and Holtzman's victory were short-lived. On July 27, 1973, the Court of Appeals for the Second Circuit "stayed" Judge Judd's decision and calendared argument for August 13.<sup>104</sup> Thus, during that time, the military could continue military operations without judicial interference unless the Court intervened. Holtzman sought redress to Justice Thurgood Marshall in his circuit capacity in the hopes of reinstating Judge Judd's stay. On August 1, 1973, Justice Marshall, after being motioned by the Solicitor General of the United States, denied a motion to vacate the appellate court's stay order.<sup>105</sup> The next day, former Secretary of State William Rogers provided a sworn affidavit to Justice Marshall and the Second Circuit that if Judge Judd's order were reinstated, it would "imperil the safety of United States nationals in Cambodia," and undermine "the credibility of the United States."<sup>106</sup> On August 3, Justice Douglas, from his home in Goose Prairie, Washington, issued a stay against the Second Circuit's decision, in effect, reinstating Judge Judd's ruling.<sup>107</sup> The next day, Justice Marshall entered an order staying the district court's ruling. He noted that the other seven justices agreed with his decision. Some hours later, Justice Douglas filed a dissent against Justice Marshall's order, but by this time, the Court determined that it would not intervene in the appeal until the Second Circuit determined the merits of the appeal.<sup>108</sup>

Justice Marshall's August 1 order is insightful as to how a war in the shadows can become bereft of the protection of law. He began his order

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103. Holtzman, 361 F. Supp. at 555-557. Judge Judd focused extensively on Section 20(a) of the Paris Conference on Vietnam effectively ending the war with North Vietnam as well as several fiscal appropriations to strengthen Cambodia's military which expressly stated that the United States was not obligated to the defense of Cambodia. *Id.* Equally importantly Judd considered that Secretary of State William Rogers statement to Congress on April 3, 1973, that the conflicts in Vietnam, Cambodia, and Laos were closely related as to create a singular conflict to be important to the question of a termination of hostilities with North Vietnam. *Id.* at 559.

104. However, the Second Circuit advanced the argument date to August 8.

105. Application to Vacate Stay, Holtzman. v. Schlesinger, 414 U.S. 1304, No. A-150 (Aug. 1, 1973).

106. See *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 n.1 (2d Cir. 1973) (noting the affidavit of William P. Rogers); see *Text of Rogers Affidavit to High Court on Cambodia*, N.Y. TIMES (Aug. 6, 1973), <https://www.nytimes.com/1973/08/06/archives/text-of-rogers-affidavit-to-high-court-on-cambodia.html>.

107. Order to Vacate Judgment, Holtzman v. Schlesinger, 484 F.2d 1307, No. 1132 (Aug. 8, 1973).

108. *Id.*

with the observation that “publicly acknowledged United States involvement in the Cambodian hostilities began with the President’s announcement on April 30, 1970...” Justice Marshall also recognized that, since that time, congressional resistance to the use of United States military forces had increased to include the Fulbright Proviso, several limits on appropriations for the use of the military in Cambodia, and the outright prohibition of the use of ground forces in that Country.<sup>109</sup> Justice Marshall then noted that while in 1973, Nixon vetoed the Eagleton Amendment, which prohibited the use of any funds for Cambodia, and Congress had prohibited any funds for military operations in Vietnam, Laos, and Cambodia after August 15, 1973.<sup>110</sup> Although Justice Marshall realized that the actual substantive issue confronting him was whether Nixon had illegally ordered military forces into Cambodia, the immediate question was whether to dissolve the Second Circuit’s stay of Judge Judd’s order.

Justice Marshall took cognizance of the fact that if he upheld the Second Circuit, thousands of Americans and Cambodians could be killed.<sup>111</sup> At the same time, if he vacated the Appellate Court, the act would be a restriction on Nixon’s authority as Commander in Chief, and this too, could hamper broader strategic efforts.<sup>112</sup> Yet, he conceded that after the Paris Peace Accords, it seemed implausible that the use of force could be constitutionally justified, since Congress had never allocated funding or otherwise permitted military operations to protect Lon Nol’s government against internal enemies, and Cambodia could no longer be viewed as an extension of the Vietnam War.<sup>113</sup> Although he concluded that Nixon may have acted illegally, he also stated it would be a constitutional mistake for a single Justice serving in a circuit capacity to act in place of the full Court.<sup>114</sup>

Three days after Justice Marshall rebuffed *Holtzman*, other parties in the suit sought a similar avenue through Justice Douglas. Although Justice Douglas conceded that the judicial branch was the least competent of the three to weigh the nation’s foreign policy goals, he provided a different result than Justice Marshall.<sup>115</sup> Justice Douglas compared the issue before

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109. *Id.*

110. H.R.J. Res 636, 93<sup>rd</sup> Cong. (1973-74).

111. *Id.*

112. *Id.*

113. *Id.*

114. Marshall wrote, “[w]hen the final history of the Cambodian War is written, it is unlikely to make pleasant reading.” *Id.*; *Holtzman*, 414 U.S. at 1315.

115. Justice Douglas recognized that Justice Marshall issued a denial to *Holtzman*, and he pointed out that until the Court as a whole heard the issues raised, he was nonetheless entitled to vacate the Second Circuit. *See Holtzman*, 414 U.S. at 1317.

him to a capital murder appeal.<sup>116</sup> And, even if a Justice were to vacate the Second Circuit, as in the case of a death sentence, the order to vacate in this instance would not be a ruling on the appeal itself, but rather provide a court more time to determine the substantive merits in an appeal.<sup>117</sup> He then observed that it was Congress' sole duty to declare war, and as for the question of justiciability, he noted the Court, during the Civil War and the Korean Conflict, determined that significant challenges to Commander in Chief authority were justiciable.<sup>118</sup> By the time the appeal came to the Court, the Nixon administration had abandoned its position that a Commander in Chief could, in fact, commit forces against an enemy without Congress. On August 4, Solicitor General Robert Bork argued to the Court that Justice Douglas had erred in his ruling. Bork insisted that Congress had merely refused monies to be spent on Cambodian operations in a single appropriations act but other appropriations acts had permitted the continuation of operations until August 15.<sup>119</sup>

### III. CONCLUSION

Between July 16 and August 9, 1973, the Senate Armed Services Committee held hearings to investigate the secretive 1969 bombing campaign, during the very period the not-so-secretive and quite controversial bombing campaign against the Khmer Rouge was underway. Led by Senator Stuart Symington, the investigation concluded that the Nixon administration had engaged in clandestine operations and, in turn, lied to Congress.<sup>120</sup> The committee placed, in the very back of its report, a legal opinion issued by Brigadier General Harold Vague, the acting Judge Advocate General of the Air Force. Vague had advised the Department of Defense that it was permissible for the administration to report inaccurate information for "military reasons," and did not exempt Congress from this analysis.<sup>121</sup> He also insisted that regardless of whether the defense establishment reports accurate information to Congress, service-members

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116. The present case involves whether Mr. X (an unknown person or persons) should die. They may be Cambodian farmers whose only sin is a desire for socialized medicine to alleviate the suffering of their families and neighbors. Mr. X may be an American pilot or navigator who drops a ton of bombs on a Cambodian village. The upshot is that we know someone is about to die.

117. See Holtzman, 414 U.S. at 1317.

118. Douglas also argued that Holtzman et al. had standing to challenge the President. See *id.* at 1318-19.

119. See Holtzman, 414 U.S. 1321; Robert H. Bork, Application for a Stay of Order of the United States District Court for the Eastern District of New York (Aug. 4, 1973).

120. Bombing in Cambodia, *supra* note 84, at 304 (statement of Stuart Symington, Sen.).

121. *Id.* at 511-12.

are required to conform to the orders of the Commander in Chief and his administration.<sup>122</sup>

On August 1, 1973, Congressman Robert F. Drinan (D-MA) introduced a resolution calling for the impeachment of Nixon.<sup>123</sup> Drinan specifically cited to the “totally secret air war in Cambodia for 14 months prior to April 30, 1970.” Almost one year later, as the House Judiciary Committee debated articles of impeachment arising from the Watergate break-in, Congressman John Conyers (D-MI) introduced an article of impeachment essentially mirroring Drinan’s.<sup>124</sup> However, the House Judiciary Committee determined that it would be unfeasible to pass an article criminalizing Nixon’s actions, and if, for no other reason, it would narrow a president’s future abilities to protect American lives in wartime.<sup>125</sup> Congress did not, apparently, consider that in enabling the possibility of another bombing campaign, the trend toward maximizing legal liabilities for the service-members taking part in operations while minimizing the liabilities and restraints against the executive branch would continue. This is problematic for today’s members of military forces who, as volunteers, are required to assume – in the absence of unmistakable evidence – that operational policies and commands from the Chief Executive on down are, in fact, lawful.

The issue analyzed in this article provides an example of how a presidency may act without congressional approval to send service-members into foreign conflicts, and render the service-member amenable to the full range of legal liability while, at the same time, considering its own actions to be non-justiciable. In this regard, the service-member is placed in a heightened state of legal danger than in a conflict in which the executive branch seeks congressional approval. Perhaps this is an obvious statement. Yet, if there was a time in the last Century where Congress considered impeaching a president for unlawful uses of the military, it occurred as a result of Nixon’s employment of forces into and above Cambodia. At no time did the courts of Congress appear to consider the jeopardy that service-members faced, caused by actions such as Nixon’s.

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122. *Id.*

123. See, e.g., Marjorie Hunter, *House Gets Impeach-Nixon Resolution*, N.Y. TIMES (Aug. 1, 1973), <https://www.nytimes.com/1973/08/01/archives/house-gets-impeachnixon-resolution-littleused-provision-following.html> (noting that the resolution failed in the judiciary committee); see also *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973) (holding that plaintiff was unsuccessful in their suit against Defendant Nixon over the Cambodia campaign).

124. David E. Rosenbaum, *2 Articles Fail, To Win in Panel*, N.Y. TIMES (July 31, 1974), <https://www.nytimes.com/1974/07/31/archives/2-articles-fail-to-win-in-panel-taxes-and-bombing-issues-defeated.html>; see FISHER, *supra* note 102, at 120; KUTLER, *supra* note 15, at 530.

125. SHAWCROSS, *supra* note 5 at 332.

To this time, there have been no statements from the executive branch in opposition to the advice of General Harold Vague, who opined, that even in a conflict of questionable legality, an order to maintain secrecy remains a lawful order.