

11.19.65

W
FILE
SUBJ.
DATE
11-65

**THE QUESTION OF A FORMAL DECLARATION OF WAR
IN VIETNAM: State Department Position Paper, Dated
November 19, 1965¹**

The question has been raised whether it would be desirable for the President to seek a formal declaration of war against North Vietnam. This question should be considered with respect to both international and domestic considerations.

INTERNATIONAL CONSIDERATIONS

From the international standpoint it seems undesirable to request a declaration of war for the following reasons:

1. The policy of the United States in Vietnam is to assist the Government of the Republic of Vietnam, at the latter's request, in thwarting an armed aggression from North Vietnam and to achieve

a workable settlement of the dispute among the principal parties involved. This policy is pursued with limited aims, seeking to end the aggression against South Vietnam without threatening the destruction of North Vietnam, allowing a miscalculation by the enemy as to our intentions, or unnecessarily enlarging the scope of the conflict. The United States believes that the struggle must be won primarily in South Vietnam and is in that context a defensive military effort.

2. To declare war would add a new psychological element to the international situation since in this century declarations of war have come to imply dedication to the total destruction of the enemy. It would increase the danger of misunderstanding of our true objectives in the conflict by the various Communist states, and increase the chances of their expanded involvement in it. Such a declaration would question the sincerity of the President's claims concerning his desire for a peaceful settlement allowing the various nations of the area, including North Vietnam, to live together in economic cooperation, and his reiteration that we do not threaten the existence of North Vietnam.

3. On balance, a declaration of war—which would be the first and only since the signing of the United Nations Charter—would significantly reduce the flexibility of the United States to seek a solution among extremely complex factors and reduce our adversary's own reasoned approach to a solution, when U.S. policy from the beginning has attempted to avoid closing off any possible avenue of resolution and to make the North Vietnamese more rather than less rational in the situation.

4. There is nothing in modern international law which requires a state to declare war before engaging in hostilities against another state; nor would a formal declaration of war impose any obligations on an enemy by which he would not otherwise be bound.

5. Absence of a formal declaration of war is not a factor which makes an international use of force unlawful. The only relevant legal question is whether the use of force is justified. Examples of hostilities begun without prior declarations of war abound in recent history. The fighting in Korea from 1950 to 1953, that in Indochina from 1947 to 1954, that in and around the Suez Canal in 1956, and that in west New Guinea between the Dutch and Indonesians in the spring and summer of 1962 all took place without benefit of declarations of war. We are not aware that the absence of declarations of war in these cases has been alleged to constitute a violation of international law.

¹ Prepared by the Department of State at the request of the committee.

6. The legal rules of international law concerning the conduct of armed conflicts apply to all armed conflicts without regard to the presence or absence of declarations of war. All that is required is armed conflict between two or more international entities. The 1949 Geneva Conventions for the Protection of War Victims were specifically made applicable to any "armed conflict of an international character" between two or more of the parties. The rules of war embodied in the Hague conventions formulated in the early years of this century are considered, in general, to be part of customary international law binding on all states, and their applicability is unrelated to declarations of war.

DOMESTIC CONSIDERATIONS

From the point of view of U.S. law it would be undesirable for the President to seek a declaration of war for the following reasons:

1. A declaration of war is not necessary either to authorize the actions that have been taken by the United States in Vietnam or to provide an expression of congressional intent on the Vietnamese situation. The President has power under article II, section 2, of the Constitution as Commander in Chief to deploy U.S. military forces to Vietnam for the purpose of assisting South Vietnam to defend itself from armed aggression by North Vietnam. Since the Constitution was adopted, there have been at least 125 instances in which the President, without congressional authority and in the absence of a declaration of war, has ordered the Armed Forces to take actions or to maintain positions abroad. Some of these historical instances have involved the use of U.S. forces in combat. Congressional intent is expressed by the joint resolution of Congress of August 10, 1964, passed by a combined vote of 504 to 2, explicitly approving all necessary steps, including the use of armed force, in the defense of freedom in southeast Asia. A much fuller presentation of the views of the executive branch on the question of the President's constitutional authority was published in February 1951, as a joint committee print of the Senate Committees on Foreign Relations and Armed Services.

2. A declaration of war does not seem necessary in order to provide emergency authority to the executive branch. Many laws become operative in time of national emergency or in time of war. Most of these are operative today by virtue of the state of emergency proclaimed by President Truman in December 1950. These laws give the executive branch increased power to deal with the problems in Vietnam as well as other areas of the world. For example, they include special authority with respect to the movement of aliens in and out of the United States; the Armed Forces, Reserves, and the National Guard; procurement of material for the services; transactions in foreign exchange; Government contracts; security and the protection of defense information; and defense transportation. A few emergency laws would not come into effect unless there were a declaration of national emergency or of war subsequent to the 1950 declaration of national emergency. However, there are only a few laws which can become operative only in time of war, and they have not been found necessary for the conduct of hostilities in Vietnam.
