

THE WAR IN KOSOVO: FAILED LESSONS OF INCREMENTALISM

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I used to play basketball. I worry about height. I measure hotel rooms by the height of the shower curtain and I have an ancestor who served in Congress, actually, before the Civil War. He was six feet, eight inches, which was tall for those days, and he, among other things, ridiculed dueling to death in the State of North Carolina. He was sort of an eccentric. My view is we ought to bring dueling back as a substitute for the current “ethics” wars, which are very unpleasant. Rather, we should just have duels—one shot and it is all over.

My ancestor was very tall, and he got into an argument once with Senator Douglas of the Lincoln-Douglas debates,¹ who was very short, you may recall, very short but cocky, and sure of himself. Douglas gave my ancestor a choice of both weapon *and* place for the duel that ensued after this dispute. And my ancestor said: “Okay, if that is the way you want it--broad swords in the Potomac.” And he won by default because Douglas went under water first.

Speaking of Congress, though, I do think that they have an important role to play, and I am going to make some remarks that may seem counterintuitive, but I will try to explain my point of view. I believe that in the absence of any direct threat to the national security

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1. *See generally* 3 COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY (Edwin Erle Sparks ed., 1908).

and without congressional authorization, the action in Kosovo was probably not legally supported.

I do not think a court, for political question reasons, would ever have a right to stop it. But, I believe it was and is very bad precedent that undermines the lessons of the Gulf War, revives the mistakes of Vietnam, and sets a bad course for inter-branch relationships, because the process that is used in the White House and the legal advisors, the State Department and the Chiefs, and the Joint Chiefs and the Defense Department to determine the legality, even if the court is not going to oversee it, is important, and that process was degraded by what happened.

Why does it matter, you may ask? What is the harm done? You look at what happened. If a court is not to be involved, who cares? What does it matter? Let me try to explain why the process point I just made is important. I believe that the mistake of Vietnam was the incrementalism that was involved, the failure to come to grips at the outset with what was expected, and the lack of public buy-in, which was always a problem.

Johnson never had the courage to call up the Reserves, which would have posed the question about the war's authorization at the outset when the build-up started. He decided that he did not want to do that and instead used the slow drip, drip of the draft, which got him in huge trouble in the long term, even if in the short run it allowed him to escalate. But appropriate force was never applied to win the war. It was always the graduated approach with Johnson, picking out the targets in the Map Room or wherever he was, or in the Situation Room of the White House. The generals were never allowed to do what they needed to do in order to win the war.

I believe the Vietnam War could have been won if the U.S. Reserves had been activated at the outset and had gone in and done a landing in Hanoi, the way it was done in Korea at the landing at Inch'on. I believe that if troops had been sent over there in an up-front manner with an explanation to the American public, we would have had a different outcome. Instead, we had a very unpopular

drawn-out war that discredited the military for almost an entire gen-

eration.²

Now, along comes the Gulf War. I believe that President Bush thought that he was rectifying this wrong done by Vietnam, not just for the process, but also for the integrity of the military itself. And out of this came what we know now, I guess, as the Powell Doctrine, which is, you figure out what your mission is, then you amass the force necessary to achieve it, and then you go in and do it.³ The military has a clear mission and you are not going to get involved with mission creep. You are not going to get involved with incrementalism. Your mission at the outset is to win what the politicians have set as your goal. And it went very well and very quickly.

The President wanted Congress in on what happened. He had to fight to get Congress to act, but he wanted a united government to support the troops and he wanted Congress in because if the war went sour, he wanted them to help cushion the blow, and if it went well, he wanted to hold those who voted against him accountable. The result was a very, very, quick war, certainly as compared with Vietnam.

Now, in Kosovo, by contrast, there was no public debate about what happened. There was this aura of incrementalism, of graduated bombing beginning with a committee of seventeen nations picking over each target—not a way to win war. We backed into it. We may have triggered a lot more killing and a lot more ethnic cleansing than was necessary. The jury will probably always be out on that. But, there are a lot of people who believe, and I am with them, that had the troops been amassed or at least the bombing been clearly understood, including its goals at the outset, Milosevic would have been scared, would have backed off, and would not have done what he ultimately did do.⁴

2. See generally HERBERT Y. SCHANDLER, *THE UNMAKING OF A PRESIDENT: LYNDON JOHNSON AND VIETNAM 194-96* (1977) (discussing the disenchanting feeling of the American people with the Vietnam War and its strategies).

3. See Colin L. Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFF., Winter 1992-93, at 32, 39.

4. See Michael Mandelbaum, *A Perfect Failure: NATO's War Against Yugoslavia*, FOREIGN AFF., Sept.-Oct. 1999, at 2, 5.

There is a devastating critique of the war by Michael Mandelbaum that “the war, as a deliberate act of policy, [was] a perfect failure. The humanitarian goal NATO sought—the prevention of suffering—was not achieved by the bombing”⁵ As a political goal the air campaign was made possible in favor of the Albanian Kosovars independence.⁶ “NATO not only did not seek but actively opposed the campaign.”⁷ Mandelbaum goes on to say that the war in Kosovo did great damage to our relationships with Russia and with China.⁸

So the precedent is, I believe, a very bad one, reversing the lessons of the Gulf War, going back again to the mistakes of Vietnam. The reality is, the White House never tried to justify what it did to the public, which it would have had to do if it had had to go to Congress and get an affirmative vote. I do not believe that the White House could have justified it and therefore, I believe, it would not have done it. Remember that even in the Gulf War, U.S. Reserves were called upon at the outset, as of course eventually happened in Korea.⁹ The U.S. Reserves should have been activated in the beginning in Kosovo in a way that was part of a call-up.¹⁰ I think, again, that would have triggered public debate, but that never occurred at the outset.

There is one little anecdote about the Reserves. We had a big rally in the East Room to try and generate support for the resolution that ultimately authorized the Gulf War. A lot of congressmen came in. I cannot remember whether Congressman Kucinich was there or not, but it was a big crowd. As I was coming out of the room, I found myself with General Powell going down the stairs, and I reminded him because there had been some discussions of Reserve call-up as part of the authorization, that MacArthur had refused to use Army regulars for the landing at Inch'on and had instead insisted on using Marine Corps Reserves to do the landing because the Army was in such bad repair.¹¹ General Powell was a bit embarrassed to

5. *Id.*

6. *See id.*

7. *Id.*

8. *See id.* at 7.

9. *See* Exec. Order No. 12,743, 56 Fed. Reg. 2661 (Jan. 18, 1991).

10. *See* Mandelbaum, *supra* note 4, at 7-8.

11. *See* JOHN W. SPANIER, THE TRUMAN-MACARTHUR CONTROVERSY AND

hear this in front of other officers and told me in jest to keep quiet. But it is true that MacArthur insisted on using Marine Reserves who did not even have M1 rifles. They had Springfield rifles first issued in 1898.

I do not believe that either the War Powers Resolution¹² or the contemporaneous budget appropriation authorized or is cover for what happened in the Balkans. I do not think any president has ever agreed to the constitutionality of the War Powers Resolution, and I do not believe that the supplemental appropriation, which ostensibly provided money, actually flowed dollar for dollar into the Balkans. In fact, the money that was used to prosecute the bombing at the outset came from other accounts in the Pentagon, which were simply replenished by the supplemental authorization.

Walter Dellinger, the former Office of Legal Counsel Chief and Acting Assistant Attorney General in the Clinton administration, has made the point that Kosovo was the first violation of the notion that troops could not be committed in a hostile situation beyond sixty days without congressional authorization.¹³ I believe that Dellinger is right about that, and I think that it is, again, a very bad precedent. Now, Lou Fisher had argued that President Bush's actions in the Gulf War were no different than Kosovo and no different than Vietnam.¹⁴

People seem to want to take the view that once President Bush got international authority, that the coalition together got the UN resolutions, and he then felt he had done all he needed to do, and that somehow the congressional authorization was forced on him by Senator Mitchell. The reverse is true. He had to force Mitchell into agreeing to give him a vote. It took him about three months to get Mitchell to do it, and it was a struggle all the way.

THE KOREAN WAR 78-81 (1959).

12. H.J. Res. 542, 93d Cong. (1973) (enacted).

13. See *Campbell v. Clinton*, 203 F.3d 19, 50 (D.C. Cir. 2000); Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 116-19 (1995).

14. See Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 964 (1999); Louis Fisher, *Sidestepping Congress: Presidents Acting Under the U.N. and NATO*, 47 CASE W. RES. L. REV. 1237, 1264 (1997).

Congressman Aspen, now deceased, who was a great help on the House side, said: "I can guarantee you a win in the House. You will have Solarz, Danny Fascell, and me with you."¹⁵ Aspen further said, "I cannot speak for the Senate, but I think we will give you enough momentum to win."¹⁶ Well, it was just barely enough. I think we won by one or two votes, but at the end of the day, Secretary Dick Cheney was very, very grateful for the vote, saying on more than one occasion that this was the single most important part of winning the war.

Now, the administration and the country ultimately did well in Kosovo. There were no casualties. It had no measurable impact on the U.S. economy the way Vietnam did. It is not clear whether it had any impact on the economy of any other important place. The Balkans are not, you know, Silicon Valley. And we have finally had free elections there. But, I think the precedent does matter, and if we are not careful, we will see this, I am afraid, repeated again.

I repeat that the process by which lawyers in the executive branch agonize over deployment of troops in hostile situations is a very important process, and it is engaged in great seriousness with the expectation the courts will not intervene.¹⁷ The process governs inter-branch relations, and to undermine that process is to undermine a discipline that I think is very, very important in the conduct of foreign policy. And I think, as a practical matter, if you are confronted with having to ask Congress for authority because it is one of the things you have to do in order to win the mission, then I do believe it helps achieve that mission, as it did in the Gulf War.

I believe the lack of up-front confrontation with the issues politically undermined the mission in Vietnam and led to the loss there. It had a very real impact on the ultimate outcome, and that is more important than whether or not you win or lose the issue in court, which is not the issue here. But it can be outcome determinative. I believe that this is a major lesson of Vietnam and the Gulf War, which should not be lost, but runs the risk of being lost, by what

15. See generally J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 43-48 (1991).

16. See *id.*

17. See Dellinger, *supra* note 13, at 110-11.

happened in Kosovo.