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## Falk: The Six Legal Dimensions of the Vietnam War

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## BOOK REVIEWS

*The Six Legal Dimensions of the Vietnam War.* BY RICHARD A. FALK.  
Princeton: Center of International Studies, 1968. Pp. 53. \$2.00.

Richard A. Falk in *The Six Legal Dimensions of the Vietnam War* provides a valuable survey of the legal issues involved in the making of foreign policy in the nuclear age; however, he offers no practical solutions to these problems. At the outset Mr. Falk states his belief that the participation of the United States in the Vietnam War is illegal, but he admits that others hold a contrary view. His stated purpose is not to be diverted into a discussion of such illegality, but rather to proceed with suggestions regarding improvement of the decision-making power in United States foreign policy.

Using the Geneva Accords of 1954, the United Nations Charter, the Peace Treaty of Westphalia, the Hague Conventions of 1907, the four Geneva Conventions of 1949, the Tonkin Resolution, and the Nuremberg Trials as touchstones, the author analyzes the decision of the United States to come to the aid of South Vietnam and finds the decision without legal justification.

So that similar ill-fated decisions may be avoided in the future, Mr. Falk suggests that the traditional concept of separation of powers in the formation of foreign policy must be re-examined. Specifically, he recommends that the structure of the executive branch be altered and that Congress and the courts play a more significant role in the development of our foreign policy.

First, Mr. Falk recommends that a new position of Attorney General for International Affairs be created at the cabinet level. This person, it is contemplated, would operate "somewhat independent of the internal political power struggles in decision making circles in Washington."<sup>1</sup> His function would be to urge that international law be considered in all foreign policy decisions. Such an officer's power would be illusory, however, as Senator Robert F. Kennedy effectively pointed out in his June, 1968, debate with Senator Eugene McCarthy: A cabinet officer cannot have an autonomous existence; he is merely an appointee of the President—who possesses all real authority. The Attorney General for International Affairs, having no independent authority, would undoubtedly suffer frustrations similar to those suffered by those representatives to the United Nations who accepted the position with the unrealistic view that they would have a significant voice in the determination of foreign policy.

The author urges that the role of Congress in the evolution of foreign policy be enhanced. Such comments sound strikingly similar to the persistent complaints of Senator Robert A. Taft in the early 1950's that

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1. FALK, *THE SIX LEGAL DIMENSIONS OF THE VIETNAM WAR* 2 n.14 (1968).

President Harry Truman would consult Congress on foreign policy "only on the landings and not on the take-offs." Mr. Falk commends Senator J. William Fulbright for his repeated criticism of President Lyndon Johnson's conduct of the Vietnam War. Fulbright, it should be remembered, was just as critical of President Truman's handling of the Korean War and in January, 1951, called for the withdrawal of U.S. forces from Korea. But Mr. Falk's recommendations as to how to achieve a strengthening of the role of Congress in foreign policy decisions is disappointing. His proposal is that the time-tested vehicle for inaction—a presidential commission—be established to study the "question of legislative-executive relations in a period of war and come forth with recommendations as to how these relations might be reconstituted for the future."<sup>2</sup> In these fast-paced days the utility of such study commissions is limited.

The third solution offered by Mr. Falk is that the courts reappraise the political question doctrine so that they can evaluate action in the area of foreign policy. This solution is appalling. If there is one area where the impact of public opinion is not felt—and rightly so—it is the federal judiciary, where judges sit with lifetime tenure. Such a system is necessary for stability, as public opinion is subject to volatile changes. For example, defense spending does not have overwhelming support today, but in 1960, Richard Nixon, in his campaign for the Presidency, could gain the support of Governor Nelson Rockefeller only after Nixon agreed to call for increased defense spending. Similarly, John F. Kennedy, as part of his program to "get America moving," demanded more defense spending. If courts were to evaluate foreign policy, the Senate could justifiably inquire of a nominee for the Supreme Court whether he was a "hawk" or "dove," isolationist or internalist, or pro or anti-foreign aid. Ever since the disgraceful inquisition of Justice Abe Fortas when he was nominated for Chief Justice, Senate battles over Supreme Court nominations have become increasingly political. What is needed is a step back from the acrimony of recent advise and consent disputes. Mr. Falk's suggestion would further politicize the Senate debates on Supreme Court nominations.

Mr. Falk does provide one surprise. He argues against the current conventional wisdom that United States forces should be activated only pursuant to a declaration of war by Congress. He states that a declaration of war might make limited objectives impossible. He reasons that a domestic war psychology might cause dissent to be viewed as treason and also that Communist countries might be pressured into activation of collective security agreements upon such a declaration. While Mr. Falk deems the United States' action in Korea legal—principally because the United Nations approved the action while Russia was boycotting the Security Council—the fact is that President Truman committed United States forces without seeking a declaration of war by Congress. This action by Truman, however, strengthened his refusal to submit to General Douglas MacArthur's call for an escalation of the war into Manchuria in order to remove the "privileged sanctuaries."

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2. *Id.* at 34.

Richard A. Falk has pinpointed several areas of foreign policy which definitely require improvement; however, his suggestions cannot be seriously considered as possible solutions.

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