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THE “LESSONS OF VIETNAM”: A CORRECTION

Mattei Ion Radu*

INTRODUCTION

Since the fall of Saigon in April 1975, scholars, politicians, military officers, government officials, and commentators have attempted to elucidate the “lessons” of the Vietnam War.¹ The ongoing conflicts in Iraq and Afghanistan have infused this project with fresh vigor and purpose.² Joining this debate in 2005 in *Foreign Affairs*, Melvin R. Laird sought specifically to apply the lessons of Vietnam to the Iraq War.³ He took U.S. policymakers to task for failing to establish a le-

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1. See, e.g., Memorandum from Smyser to Secretary of State Kissinger, Lessons of Vietnam (May 12, 1975) (on file with Gerald R. Ford Library), available at <http://www.ford.utexas.edu/library/exhibits/vietnam/750512a.htm>; CLARENCE MARINEY, VIETNAM: LESSONS LEARNED (1989), available at <http://www.globalsecurity.org/military/library/report/1989/MC.htm>; David Fromkin & James Chace, *What Are the Lessons of Vietnam?*, 63 FOREIGN AFF. 722 (1984); see generally THE REAL LESSONS OF THE VIETNAM WAR: REFLECTIONS TWENTY-FIVE YEARS AFTER THE FALL OF SAIGON (John Norton Moore & Robert F. Turner eds., 2002); TIMOTHY J. LOMPERIS, FROM PEOPLE’S WAR TO PEOPLE’S RULE: INSURGENCY, INTERVENTION, AND THE LESSONS OF VIETNAM (1996); ROBERT S. MCNAMARA & BRIAN VANDEMARK, IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM (1996); VIETNAM RECONSIDERED: LESSONS FROM A WAR (Harrison E. Salisbury ed., 1984); MICHAEL LIND, VIETNAM: THE NECESSARY WAR (1999). Even President Richard Nixon, in post-Watergate retirement, offered views on the subject. See generally RICHARD NIXON, NO MORE VIETNAMS (1985).

2. See generally IRAQ AND THE LESSONS OF VIETNAM, OR, HOW NOT TO LEARN FROM THE PAST (Lloyd C. Gardner & Marilyn B. Young eds., 2007); RUFUS PHILLIPS, WHY VIETNAM MATTERS: AN EYEWITNESS ACCOUNT OF LESSONS NOT LEARNED (2008); VIETNAM IN IRAQ: TACTICS, LESSONS, LEGACIES AND GHOSTS (John Dumbrell & David Ryan eds., 2007); Mark Atwood Lawrence, *The Uses of Vietnam in the Age of Terrorism*, 59 INT’L J. 919 (2004); Dale Andrade, *Three Lessons from Vietnam*, WASH. POST, Dec. 29, 2005, at A23; Evan Thomas & John Barry, *The Surprising Lessons of Vietnam*, NEWSWEEK, Nov. 16, 2009, at 34; George Packer, *What Obama and the Generals Are Reading*, THE NEW YORKER, Oct. 8, 2009, available at <http://www.newyorker.com/online/blogs/georgepacker/2009/10/what-obama-and-the-generals-are-reading.html>.

3. See Melvin R. Laird, *Iraq: Learning the Lessons of Vietnam*, 84 FOREIGN AFF. 22 (2005).

gitimate government in South Vietnam (“SVN”), cautioning that the United States must not repeat this fundamental mistake in Iraq.⁴ In support of his charge that the United States created a “puppet” government in South Vietnam, Laird alleged, “In Vietnam, an American, Ambassador Philip Habib, wrote the constitution in 1967. Elections were choreographed by the United States to empower corrupt, selfish men who were no more than dictators in the garb of statesmen.”⁵

Laird’s experience with and knowledge of the Vietnam War are undoubtedly considerable.⁶ As Secretary of Defense in the first Nixon Administration, his primary task was winding down the U.S. role in that conflict.⁷ However, while Laird’s major claim about governmental illegitimacy in Saigon may well be correct, his specific assertions about the SVN constitution and elections stand in stark contrast to the historical record.⁸ As James McAllister has demonstrated, the United States did indeed commit an error in the 1967 elections; however it was one of inaction, not manipulation.⁹ Using archival material, this Article will similarly offer needed clarification of the precise nature of U.S. policy towards the SVN constitution of 1967.

It is natural for decision makers to look to historical precedents in deciding how to deal with current problems.¹⁰ During the Cuban Missile Crisis, President John F. Kennedy famously consulted *The Guns of August*, Barbara Tuchman’s classic account of the outbreak of the First World War,¹¹ while President Lyndon B. Johnson seems to have been heavily affected in his own choices about Vietnam by the experience of Munich 1938.¹² Though the benefits of looking to the past for guidance can be easily overstated, the practice has its place in analy-

4. *See id.* at 34–35.

5. *Id.*

6. *See* LEWIS SORLEY, A BETTER WAR: THE UNEXAMINED VICTORIES AND FINAL TRAGEDY OF AMERICA’S LAST YEARS IN VIETNAM 32 (1999).

7. *See* DALE VAN ATTA, WITH HONOR: MELVIN LAIRD IN WAR, PEACE, AND POLITICS 147 (2008).

8. Contentions that the SVN government lacked organic roots are frequent in Vietnam War inquests. *See, e.g.*, William B. Pickett, *Vietnam, 1964–1973: An American Dilemma*, 56 J. MIL. HIST. 113, 115 (1992) (noting Norman Graebner’s conclusion that the “Saigon government was an ‘artificial entity’”).

9. *See* James McAllister, “A Fiasco of Noble Proportions”: *The Johnson Administration and the South Vietnamese Elections of 1967*, 73 PAC. HIST. REV. 619 (2004).

10. *See generally* JEFFREY RECORD, MAKING WAR, THINKING HISTORY: MUNICH, VIETNAM, AND PRESIDENTIAL USES OF FORCE FROM KOREA TO KOSOVO (2002).

11. *See* Richard Holbrooke, *The Guns of August*, WASH. POST, Aug. 10, 2006, at A23; *see also* Memorandum from the Ambassador at Large (Bowles) to President Kennedy (Oct. 13, 1962), in 11 FOREIGN RELATIONS OF THE UNITED STATES, 1961–1963, at 26, 27 (1996) (showing that a Kennedy Administration official discussed *The Guns of August* with a Soviet ambassador).

12. *See* Mikkel Vedby Rasmussen, *The History of a Lesson: Versailles, Munich and the Social Construction of the Past*, 29 REV. INT’L STUD. 499, 504 (2003).

sis.¹³ However, in order for the "lessons learned" to have any actual utility, the history of the event being studied must be correctly described.¹⁴ A reconsideration of the interaction of Washington and Saigon concerning the drafting of the 1967 SVN constitution may thus be beneficial.

There are additional reasons to undertake such a review. Despite the immense amount of academic literature on U.S. involvement in Vietnam, the particular topic this Article will explore has apparently received little attention.¹⁵ While there is some material on related issues, there does not seem to be one piece of scholarship that focuses solely on U.S. policy towards the SVN constitution of 1967.¹⁶ Even William Conrad Gibbons's magisterial treatment does not give the matter substantial attention.¹⁷

The subject covered here also raises the issue of constitution-building, specifically the issues of when the U.S. government has sought to influence the drafting of the constitutions of foreign states, what its goals have been in these processes, and how it has endeavored to achieve them.¹⁸ This area of inquiry has received considerable coverage in both legal and historical academic forums,¹⁹ though perhaps not

13. See, e.g., ERNEST R. MAY, "LESSONS" OF THE PAST: THE USE AND MISUSE OF HISTORY IN AMERICAN FOREIGN POLICY (1981); RICHARD E. NEUSTADT & ERNEST R. MAY, THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS (1986).

14. See Gerhard L. Weinberg, *Munich After 50 Years*, 67 FOREIGN AFF. 165 (1988); Lewis Sorley, *The Real Afghan Lessons from Vietnam*, WALL ST. J., Oct. 11, 2009, available at <http://online.wsj.com/article/SB10001424052748703746604574463024150622310.html> ("Lessons learned from the past are only as good as our understanding of the past.").

15. For an excellent summary of recent historiography on the Vietnam War, see MARK MOYAR, TRIUMPH FORSAKEN: THE VIETNAM WAR, 1954–1965 (2006); see also Christopher T. Fisher, *Nation Building and the Vietnam War: A Historiography*, 74 PAC. HIST. REV. 441 (2005).

16. See McAllister, *supra* note 9, at 619; see also Christopher T. Fisher, *The Illusion of Progress: CORDS and the Crisis of Modernization in South Vietnam, 1965–1968*, 75 PAC. HIST. REV. 25 (2006); Michael E. Latham, *Redirecting the Revolution?: The USA and the Failure of Nation-Building in South Vietnam*, 27 THIRD WORLD Q. 27 (2006).

17. See WILLIAM CONRAD GIBBONS, THE U.S. GOVERNMENT AND THE VIETNAM WAR: EXECUTIVE AND LEGISLATIVE ROLES AND RELATIONSHIPS PART IV JULY 1965—JANUARY 1968, at 410–12 (1995).

18. See, e.g., Paul D. Carrington, *Writing Other Peoples' Constitutions*, 33 N.C. J. INT'L L. & COM. REG. 167 (2008); Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244 (2003); Viktor Mayer-Schönberger, *Into the Heart of the State: Intervention Through Constitution-Making*, 8 TEMP. INT'L & COMP. L.J. 315 (1994).

19. See, e.g., THEODORE McNELLY, THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION (2000); KOSEKI SHŌICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION (Ray A. Moore ed. & trans., 1997); EDMUND SPEVACK, ALLIED CONTROL AND GERMAN FREEDOM: AMERICAN POLITICAL AND IDEOLOGICAL INFLUENCES ON THE FRAMING OF THE WEST GERMAN BASIC LAW 81–105 (2001); Zachary Elkins, Tom Ginsburg & James Melton, *Baghdad, Tokyo, Kabul . . . : Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139 (2007); Erich J. Hahn, *U.S. Policy on a West German Constitution, 1947–1949*, in AMERICAN POLICY AND THE RECONSTRUCTION OF WEST GERMANY, 1945–1955, at 21–44 (Jeffrey M. Diefendorf, Axel Frohn & Her-

enough,²⁰ particularly considering that the U.S. government continues to be involved in the drafting of constitutions for other nations.²¹ However, the experience of the U.S. government and the 1967 SVN constitution is apparently absent from these studies as well. Presenting the actual U.S. posture towards the drafting of the SVN constitution in 1967 will fill a hole in the literature. It will also add a note of caution to those, like Laird, who seek to portray the relationship between the United States and SVN as simply one of a dominant power dictating commands to its client state.²²

In approaching the creation of the SVN constitution in 1966–67, the United States adopted a middle course between seeking to dictate every line that would appear in the document and adopting a completely hands-off attitude towards the process.²³ On the one hand, U.S. policymakers considered the drafting of a constitution and the transition to a representative constitutional government in SVN major goals.²⁴ Thus, even before the SVN Constituent Assembly (“CA”) began work, U.S. officials had a set of core principles they wished the

mann-Josef Rupieper eds., 1993); Ulrich K. Preuss, *Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization*, 51 N.Y.L. SCH. L. REV. 467 (2006); Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907 (2004).

20. See, e.g., Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 364–65 (1995) (noting “gap[s] in the literature”).

21. See, e.g., Ann Elizabeth Mayer, *The Fatal Flaws in the U.S. Constitutional Project for Iraq*, 61 J. INT’L AFF. 153 (2007); Michael Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a “State at Risk”: Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 VAND. J. TRANSNAT’L L. 819 (2006) (confirming United States influence on the Afghan constitution-making process); Michael J. Stepek, *The Importance of Commercial Law in the Legal Architecture of Post-Conflict “New” States*, 60 ME. L. REV. 487, 507 n.85 (2008) (explaining U.S. involvement in the creation of the Bosnian constitution).

22. See Laird, *supra* note 3, at 35 (“Those who call the new Iraqi government Washington’s ‘puppet’ don’t know what a real puppet government is.”); see also JAMES M. CARTER, *INVENTING VIETNAM: THE UNITED STATES AND STATE BUILDING, 1954–1968* (2008) (depicting the South Vietnamese as basically pawns in hands of Americans). Critics have scrutinized United States performance in the Vietnam War from a number of other perspectives, including the cultural, institutional, and military. See, e.g., C. DALE WALTON, *THE MYTH OF INEVITABLE US DEFEAT IN VIETNAM* (2002); JEFFREY RECORD, *THE WRONG WAR: WHY WE LOST IN VIETNAM* (1998); R.W. KOMER, *BUREAUCRACY DOES ITS THING: INSTITUTIONAL CONSTRAINTS ON U.S.-GVN PERFORMANCE IN VIETNAM* (1998); George C. Herring, “PEOPLES QUITE APART”: AMERICANS, SOUTH VIETNAMESE, AND THE WAR IN VIETNAM, 14 *DIPLOMATIC HIST.* 1 (1990).

23. See Telegram from Ball to American Embassy Saigon [hereinafter Saigon] (Sept. 23, 1966) (on file with the U.S. National Archives and Records Administration [hereinafter NARA]).

24. See Letter from Komer to Katzenbach (Jan. 11, 1967) (on file with Declassified Documents Reference System [hereinafter DDS]); Telegram from Secretary of State to Ambassador, Saigon (Jan. 31, 1967) (on file with DDS); Memorandum from Harriman to President Johnson and Secretary of State Rusk (Oct. 14, 1966), in 4 *FOREIGN RELATIONS OF THE UNITED STATES, 1964–1968*, at 726, 726 (1998) [hereinafter 4 FRUS].

SVN constitution to contain.²⁵ During the drafting process, the U.S. government monitored the CA's activities and analyzed the form that the constitution was taking.²⁶ In speaking with CA delegates, Saigon embassy personnel and other U.S. government representatives made the case for including those provisions deemed essential by U.S. policymakers and rejecting the ones adjudged truly problematic.²⁷

On the other hand, however, U.S. officials refused to seek to influence those portions of the constitution not considered vital by Washington.²⁸ Moreover, they recognized that the U.S. government could not realize all of its wishes for the document, even some they viewed as very important.²⁹ Indeed, the SVN constitution promulgated on April 1, 1967, contradicted U.S. plans in several vital respects.³⁰ "Flexible Response" was the name chosen by the Kennedy and Johnson Administrations for their national security policy.³¹ As has been correctly noted, U.S. practice in Vietnam did not live up to the theoretical goals of this defense strategy in important ways.³² However, in describing U.S. policy towards the drafting and promulgation of the 1967 SVN constitution, the term "flexible response" does seem to be merited.

25. See Telegram from Saigon to Secretary of State (Sept. 4, 1966) (on file with NARA).

26. See Telegram from Saigon to Secretary of State (Dec. 12, 1966) (on file with NARA); Telegram from Saigon to Secretary of State (Jan. 13, 1967) (on file with NARA); Directorate of Intelligence, Intelligence Memorandum, South Vietnam's Constituent Assembly: A Preliminary Appraisal (Oct. 25, 1966) (on file with DDRS); Telegram from Katzenbach to Saigon (Feb. 18, 1967) (on file with NARA) ("It would be helpful to us if [the] Embassy CA watchers could include in their reporting a breakdown of the vote on key constitutional provisions.").

27. See Telegram from Saigon to Secretary of State (Jan. 26, 1967) (on file with DDRS).

28. See Telegram from Saigon to Secretary of State (Oct. 12, 1966) (on file with NARA).

29. See Telegram from Saigon to Secretary of State (Feb. 7, 1967) (on file with NARA) ("While single-member constituency technique has disadvantages, we believe that opportunity for changing or significantly altering this constitutional provision has passed.").

30. See AMERICAN FOREIGN POLICY: CURRENT DOCUMENTS 1967, at 897-909 (1969) [hereinafter CURRENT DOCUMENTS].

31. See JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN NATIONAL SECURITY POLICY DURING THE COLD WAR 197-234 (rev. ed. 2005); LAWRENCE S. KAPLAN, RONALD D. LANDA & EDWARD J. DREA, HISTORY OF THE OFFICE OF SECRETARY OF DEFENSE: THE McNAMARA ASCENDANCY, 1961-1965, at 293-322 (2006); RONALD E. POWASKI, THE COLD WAR: THE UNITED STATES AND THE SOVIET UNION, 1917-1991, at 140-42, 169 (1998); JANE E. STROMSETH, THE ORIGINS OF FLEXIBLE RESPONSE: NATO'S DEBATE OVER STRATEGY IN THE 1960s (1988). For skepticism as to how much Kennedy and Johnson Administration officials actually believed in the strategy, see Francis J. Gavin, *The Myth of Flexible Response: United States Strategy in Europe During the 1960s*, 23 INT'L HIST. REV. 847 (2001); INGO TRAUSSCHWEIZER, THE COLD WAR U.S. ARMY: BUILDING DETERRENCE FOR LIMITED WAR 114 (2008) ("Flexible Response . . . was a deliberately ambiguous doctrine . . .").

32. See GADDIS, *supra* note 31, at 235-71; see also Walter A. McDougall, *Contra Globalization and U.S. Hegemony*, in FOREIGN POLICY FOR AMERICA IN THE TWENTY-FIRST CENTURY: ALTERNATIVE PERSPECTIVES 6, 124 (Thomas H. Henriksen ed., 2001) ("Vietnam besmirched Kennedy's and Johnson's flexible response and counterinsurgency . . .").

II. CONSTITUTIONAL GOVERNMENT IN SVN AS A MAJOR U.S. OBJECTIVE

Among the top priorities of the Johnson Administration in Vietnam were creation of a constitution for SVN and the transition to constitutional government.³³ When on July 28, 1965, President Lyndon B. Johnson publicly announced his decision to make a major military commitment to the defense of SVN against communism, the political situation in that country was not good.³⁴ A series of coups and attempted coups in Saigon culminated in the June 12, 1965 toppling of the civilian leadership by the SVN military.³⁵ A group of officers took control of the SVN government and established a military directorate (the Directorate), with Nguyen Cao Ky as prime minister and Nguyen Van Thieu as chief of state.³⁶

From early on in the U.S. war effort, a rectification of this state of affairs was viewed by U.S. officials as very important.³⁷ On February 7 and 8, 1966, representatives of the U.S. government and the Government of the Republic of Vietnam ("GVN") met at Honolulu for the purpose of discussing the non-military aspects of the war.³⁸ The high level delegations, which included President Johnson and Chief of State Thieu, reached a number of conclusions and agreed on a plan for further action.³⁹ At the Honolulu conference, the SVN leaders assured the U.S. government of their intention to establish democratic government in their country, while the U.S. representatives in turn confirmed their support for open and honest elections in SVN.⁴⁰

33. See Letter from Taylor to President Johnson (Jan. 30, 1967), in 5 FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968, at 64, 69, 72 (2002) [hereinafter 5 FRUS].

34. See WILLIAM CONRAD GIBBONS, THE U.S. GOVERNMENT AND THE VIETNAM WAR: EXECUTIVE AND LEGISLATIVE ROLES AND RELATIONSHIPS PART III JANUARY-JULY 1965 (Comm. Print 1988); FREDRIK LOGEVALL, CHOOSING WAR: THE LOST CHANCE FOR PEACE AND THE ESCALATION OF WAR IN VIETNAM 333-74 (1999); MOYAR, *supra* note 15, at 350-416; Dror Yuravlivker, "Peace Without Conquest": Lyndon Johnson's Speech of April 7, 1965, 36 PRESIDENTIAL STUD. Q. 457, 458 (2006); President Lyndon B. Johnson, Presidential News Conference: Why We Are in Viet-Nam (July 28, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, LYNDON B. JOHNSON, 1965, at 794 (1966).

35. See GUENTER LEWY, AMERICA IN VIETNAM 49 (1978).

36. See Memorandum for Bundy (Jan. 7, 1966) (on file with DDCS); JOHN PRADOS, VIETNAM: THE HISTORY OF AN UNWINNABLE WAR, 1945-1975, at 188-21 (2009).

37. See Telegram from Saigon to Secretary of State (Nov. 22, 1965) (on file with NARA).

38. See Telegram from Department of State to American Embassy in Korea (Feb. 5, 1966), in 4 FRUS, *supra* note 24, at 214, 214.

39. See Editorial Note, in 4 FRUS, *supra* note 24, at 215.

40. See Paper Prepared by Bundy, Honolulu Meeting: Record of Conclusions and Decisions for Further Action (Feb. 23, 1966), in 4 FRUS, *supra* note 24, at 246, 250.

The GVN promised to select an advisory council that was truly representative of the country's people to draft a constitution.⁴¹ The delegates charged the U.S. Embassy in Saigon (the Embassy) with monitoring the advisory council appointment process.⁴² The representatives agreed that both the GVN and the Embassy were responsible for seeing that these constitutional plans came to fruition.⁴³ The summit participants wanted to have the SVN constitution and popular referendum on the document completed by the end of 1966.⁴⁴ According to the conclusions and goals reached at Honolulu, elections for a government based on this constitution were to follow.⁴⁵ However, although U.S. policymakers certainly considered these political objectives important, President Johnson stressed at the meetings that the United States did not wish the GVN to move faster towards constitutionalism than would be prudent.⁴⁶

In a March 2, 1967 letter to Secretary of State Dean Rusk, President Johnson stated, “[T]he bringing to life within the next six months of a constitutional government in Saigon is as important to us as the course of military events in the field.”⁴⁷ In that same month, top U.S. and SVN leaders met in Guam.⁴⁸ There, the President expressed to Thieu, Ky, and the other SVN representatives his views on the significance of the constitutional development taking place in their country and the importance of the CA's work on the constitution.⁴⁹ He also indicated how happy he was to observe a democratic polity being constructed and stressed how eager the United States was to help in the project.⁵⁰ President Johnson's emphasis on a democratic constitution and free elections established the tone and theme for the day's proceedings.⁵¹

Secretary Rusk was in full agreement with the President on the importance of establishing democratic constitutionalism in SVN.⁵² In December 1966, Rusk met with Thieu, Ky, and the GVN's foreign

41. *See id.*

42. *See id.*

43. *See id.* at 247, 250.

44. *See id.* at 250.

45. *See id.*

46. *See id.* at 251.

47. Letter from President Johnson to Secretary of State Rusk (Mar. 2, 1967), in 5 FRUS, *supra* note 33, at 226, 226.

48. *See* Memorandum for the Record, Working Notes on First Day's Session of Guam Conference (Mar. 20, 1967), in 5 FRUS, *supra* note 33, at 268.

49. *See id.*

50. *See id.* at 272.

51. *See id.* at 268.

52. *See* Telegram from Secretary of State Rusk to Department of State (Dec. 11, 1966), in 4 FRUS, *supra* note 24, at 925, 925.

minister Tran Van Do.⁵³ He stressed to them how critical it was to have a problem-free transition to a constitutional government.⁵⁴ In response to Ky's view that the common people of his country did not greatly value a constitution as such, Rusk contended that the political process could be crucial, both in improving the GVN's image on the world stage and in fostering cooperation among the disparate groups in SVN.⁵⁵ The following month, in a secret telegram to Ambassador Henry Cabot Lodge, Jr. in Saigon, Rusk again emphasized the enormous importance he attached to the "transition to a representative constitutional government in South Viet Nam."⁵⁶ He maintained that political development must serve as an essential complement to victories on the battlefield in the struggle against the North Vietnamese and the Viet Cong.⁵⁷

Sub-cabinet officials shared the concern that SVN make the shift to constitutional democracy.⁵⁸ On February 21, 1966, Walt W. Rostow, head of the Policy Planning Staff at the Department of State and later special assistant to the President, sent a confidential memo to President Johnson and Rusk.⁵⁹ In it, Rostow recommended that the U.S. government help organize a multi-country educational trip on constitutional and political issues for those tasked with drafting the SVN constitution.⁶⁰ As one of the "significant purposes" the journey might serve, he listed the following: "[T]he trip would dramatize to the world that the appropriate route to political peace and order in South Viet Nam is via the creation of a constitutional democracy and free elections rather than a negotiated coalition government, without roots in an electoral process."⁶¹

Rostow went on to say in an April 1966 eyes-only memorandum to the President that if the GVN weathered the political crisis it was then facing and the drafting group for the constitution was established as planned, "we will have passed a great turning point."⁶² After the Ky regime did survive the spring 1966 political emergency to which Ros-

53. *See id.*

54. *See id.* at 927.

55. *See id.*

56. Telegram from Secretary of State to Ambassador, Saigon (Jan. 31, 1967), *supra* note 24.

57. *See id.*

58. *See* Action Memorandum from Rostow to Secretary of State Rusk, A Political Proposal for Viet Nam: Putting the Democracy Building Council on the Road (Feb. 21, 1966) (on file with NARA).

59. *See id.*

60. *See id.*

61. *Id.*

62. Memorandum from Rostow to President Johnson (Apr. 5, 1966), in 4 FRUS, *supra* note 24, at 329, 329.

tow referred, he recommended the issuing of a high-level U.S. government statement indicating happiness with the forward movement toward constitutional democracy that had occurred in SVN.⁶³ In January 1967, Rostow communicated to President Johnson how important it was that agreement be reached on the constitution among the different SVN leaders.⁶⁴

Similar views were held by others in the Johnson Administration.⁶⁵ In a top secret memorandum on October 14, 1966, Ambassador at Large Averell Harriman wrote of "[t]he importance we place on the constitutional process [in SVN] with the emergence of a government that has legitimate roots."⁶⁶ In Harriman's prediction, the realization of constitutional government in Saigon would bolster the global position of both the GVN and the U.S. government in significant ways.⁶⁷ At the beginning of 1967, Robert W. Komer, then special assistant to President Johnson and later head of Civil Operations and Revolutionary Development Support (CORDS) in Vietnam, listed the promulgation of a constitution as one of the U.S. government's chief Vietnam priorities for that year.⁶⁸ In January 1967, General Maxwell Taylor, special consultant to the President and former ambassador to Saigon, reported on his recent visit to SVN.⁶⁹ He wrote, "Although I have mentioned the favorable progress toward constitutional government, success in this field is so critical that all remaining problems related to it should be watched closely to assure timely resolution."⁷⁰

It is clear that U.S. policymakers considered the establishment of a constitutional order in SVN as a major goal to be achieved, though at times there is evidence in the documentary record that suggests that this high-minded belief in democracy and constitutionalism was tem-

63. See Paper Prepared by Rostow, Headings for Decision and Action: Vietnam (Apr. 14, 1966), in 4 FRUS, *supra* note 24, at 347, 347.

64. See Memorandum from Rostow to President Johnson (Jan. 10, 1967), in 5 FRUS, *supra* note 33, at 32, 32. At another point, Rostow suggested that America's leading political and military officials in Vietnam "should take Thieu up on a mountain and let him see what a grand role he could play if he took over the Vietnamese military and modernized them for the long pull while keeping unity and *backing the constitutional process*." Memorandum from Rostow to President Johnson (Feb. 20, 1967), in 5 FRUS, *supra* note 33, at 198, 198-99 (emphasis added).

65. See Memorandum from Harriman to President Johnson and Secretary of State Rusk (Oct. 14, 1966), *supra* note 24, at 726.

66. *Id.*

67. See *id.*

68. Letter from Komer to Katzenbach (Jan. 11, 1967), *supra* note 24.

69. See Letter from Taylor to President Johnson (Jan. 30, 1967), in 5 FRUS, *supra* note 33, at 64, 64.

70. *Id.* at 72.

pered by hard-nosed realism.⁷¹ While U.S. officials wished very much to see SVN turn into a constitutional democracy, they also acknowledged the importance of a stable regime that was able to carry out the war against the North Vietnamese communists competently.⁷² Similarly, while this Article will show that in practice the U.S. government respected SVN independence in the creation of its basic law to a considerable extent, the public and private statements of U.S. officials on this point were not always consistent.⁷³

71. See Memorandum from Rostow to Secretary of State Rusk (Feb. 21, 1966), *supra* note 58; see also Memorandum from Rostow to Secretary of State Rusk, Breaking Tri Quang's Momentum (Apr. 9, 1966), in 4 FRUS, *supra* note 24, at 338, 338 ("We are a nation that cannot use force to shoot people apparently demanding a constitution and free elections; and we cannot support for long governments that do this."); Memorandum by Lansdale, The Battleground in 1967 (Nov. 8, 1966) (on file with DDRS) (noting that while the "new Constitution for Viet Nam probably will contain beautiful and profound precepts[,] [t]he precepts will have to be honored by the government and the people, if these precepts are to live"); Telegram from Lodge to President Johnson (Mar. 15, 1967) (on file with DDRS).

72. See Memorandum from Taylor to President Johnson, Current Situation in South Viet-Nam (Apr. 12, 1966), in 4 FRUS, *supra* note 24, at 340, 341 ("The problem is to restore order in South Viet-Nam under a cooperative government capable of an effective prosecution of the war, while progressing toward a constitutional, freely elected government."); Action Memorandum from Rostow to Secretary of State Rusk (Feb. 21, 1966), *supra* note 58 (showing that Rostow hoped that his proposed trip "would dramatize to the world the seriousness of Ky's government in finding constitutional and political party arrangements that promised to reconcile an important degree of democratic procedure with political stability."); see also Memorandum for Bundy (Jan. 7, 1966), *supra* note 36.

73. In response to an inquiry by a law school librarian about what books would be available to the SVN constitution drafters, the U.S. Office of the Legal Adviser wrote, "As you know, the constitution will be written by the 117-member assembly which was chosen in the September 11 election, and the role played by the United States Government in this process will be quite limited." Letter from Feldman to Blaustein (Sept. 13, 1966) (on file with NARA). Similarly, in a January 22, 1967 discussion with CA deputies, Deputy Assistant Secretary of State Leonard S. Unger asserted that U.S. policymakers understood that the writing of the SVN constitution was a Vietnamese concern and that it was incumbent upon the Vietnamese people to craft a suitable document. See Telegram from Saigon to Secretary of State (Jan. 23, 1967), *supra* note 168. However, although he did so politely, Unger did go on at that very meeting to offer U.S. views on a key provision of the draft SVN constitution. See *id.* On April 12, 1966, in a secret memorandum for President Johnson, General Taylor described the present U.S. goals as establishing a stable regime in Saigon that could fight the communists effectively and moving SVN towards constitutional democracy. See Memorandum from Taylor to President Johnson (Apr. 12, 1966), *supra* note 72, at 341. In that communication, Taylor opined that "[t]he ideal would be an indigenous Vietnamese solution without visible U.S. participation. This does not mean U.S. neutrality toward the issues involved—we have too much at stake." *Id.* At other times U.S. leaders and officials could evince a far more cavalier attitude towards SVN independence. For example, at an April 1966 meeting of top U.S. policymakers, President Johnson voiced his concerns about an SVN constitution-drafting body and stated that he would prefer an assembly America could "control" to one that had been seized by the communists. See Notes of Meeting (Apr. 4, 1966), in 4 FRUS, *supra* note 24, at 323, 323. Later that year, at a conference of sub-cabinet officials, Ambassador Harriman advocated observing constitutional developments in SVN carefully and "not permit[ting]" the GVN to produce a constitution that would run contrary to the guarantees of national reconciliation articulated in the Manila Communiqué. See Memorandum of Meeting

III. INITIAL U.S. VISION AND PLANS FOR THE SVN CONSTITUTION

Before the CA began its drafting work, the U.S. government already had identified a number of provisions it considered indispensable in an SVN constitution.⁷⁴ As early as May 16, 1966, President Johnson was in possession of a briefing paper, prepared by Deputy Assistant Secretary of State Leonard S. Unger, entitled "Principles Governing U.S. Operations Concerning Elections and Constitutional Assembly in South Viet Nam" (the Principles).⁷⁵ Washington sent a copy of this paper to the Embassy's personnel for information purposes and guidance.⁷⁶

The Principles called for the Embassy to exert maximum influence in attempting to attain the specific goals outlined in the paper.⁷⁷ However, U.S. officials were instructed to prevent, to the extent possible, anti-American sentiment from becoming a major problem.⁷⁸ The Principles recognized that the United States "shall be accused of interference in any event," but cautioned, "[I]t is vitally important not to give potential anti-American elements (or the press and outside observers) any clear handle to hit [the U.S. government] with."⁷⁹

According to the Principles, U.S. policymakers wanted the CA elections to be held on schedule, by September 15, 1966, and all SVN groups not actively participating in the communist insurgency to be

(Nov. 10, 1966), in 4 FRUS, *supra* note 24, at 820, 820. At the same time, the U.S. government was wary of accusations of interventionism. See Memorandum from Taylor to President Johnson (Apr. 12, 1966), *supra* note 72, at 341 ("But we can do little in the open other than support the principle of an eventual constitutional government without incurring the charge of intervention and the blame for Vietnamese governmental failures."); Action Memorandum from Rostow to Secretary of State Rusk (Feb. 21, 1966), *supra* note 58 ("The Vietnamese government should charter a large jet aircraft—preferably from, say, Japan or Australia rather than the U.S.—to emphasize its independence and to minimize the notion the Council is traveling under U.S. guidance or pressure."); see also Memorandum by the Department of State, Political Tactics in Vietnam over Next Few Months (Apr. 1966) (on file with DDRS). More importantly, the Johnson Administration did seem to recognize the importance of an organic solution to the challenges posed in Vietnam. See Letter from Taylor to President Johnson (Jan. 30, 1967), *supra* note 33, at 72 ("To have maximum lasting effect, [the establishment of constitutional government in SVN] must be a genuine Vietnamese success without direct U.S. influence or involvement in shaping the outcome."); Telegram from the Department of State to the Embassy in Vietnam (Mar. 30, 1966), in 4 FRUS, *supra* note 24, at 312, 313 ("We face the fact that we ourselves cannot succeed except in support of the South Vietnamese.").

74. See Telegram from Saigon to Secretary of State (Sept. 4, 1966), *supra* note 25.

75. See Memorandum for the Record, in 4 FRUS, *supra* note 24, at 388, 388 n.1.

76. See Telegram from the Department of State to the Embassy in Vietnam (May 25, 1966), in 4 FRUS, *supra* note 24, at 403, 403.

77. See *id.*

78. See *id.*

79. *Id.*

fairly represented in the constitution-drafting body.⁸⁰ The Principles made clear that the Johnson Administration considered it vital that the CA elections be open and honest, so that the GVN's reputation was improved to the greatest extent possible, both in America and globally.⁸¹ The Principles directed U.S. officials to focus their efforts on seeing qualified individuals elected to write the basic law; any worry about developing healthy political parties was deemed premature.⁸² Prior to the CA elections, the Embassy was to "work quietly with selected promising candidates all across the political spectrum in the expectation that some will be elected to the assembly and provide useful continuing contacts."⁸³ The U.S. government hoped to employ the CA election process as a tool for educating and involving the SVN people in democracy.⁸⁴ Finally, the Principles charged Americans on the ground in SVN with discouraging any attempt by the military directorate to create a government party whose sole purpose was keeping the generals in control to the exclusion of other important elements of SVN politics.⁸⁵

At the beginning of September 1966, Ambassador Lodge, expressing the opinions of the whole Embassy, cabled Rusk with a statement of his views concerning both the chief U.S. goals for the SVN constitution and the flexible approach that he and Embassy personnel advocated that the U.S. government adopt towards the drafting process.⁸⁶ Lodge explained that these recommendations for the document were a fusion of the U.S. Interdepartmental Vietnam Planning Group's paper on the SVN constitution, views elicited from prominent SVN officials on what the constitution should contain, and the Embassy's own thinking on the subject.⁸⁷ However, before going into specific elements the United States wanted to see in the basic law, Lodge and the Embassy staff made the following important general point:

We do not propose that we [] seek to influence every detail going into the formation of the Vietnamese constitution. We should, rather, concentrate on those features which we consider [absolutely] necessary to the achievement of our [objectives] in Viet-Nam.

To the greatest extent possible, we should not try to prevent the Vietnamese from drawing up a Vietnamese document—which they will assuredly do anyway. This means being flexible about forms.

80. *See id.*

81. *See id.* at 403–04.

82. *See id.* at 404.

83. *Id.*

84. *See id.*

85. *See id.*

86. *See* Telegram from Saigon to Secretary of State (Sept. 4, 1966), *supra* note 25.

87. *See id.* at 1.

The Constitutional Assembly will be quite competent in its way, and we believe our influence can be applied effectively, either directly on its members or through the government with a minimum of fuss and visibility.⁸⁸

The first requirement for the SVN constitution articulated in the telegram was that it provide for a powerful and secure executive.⁸⁹ Given the political and cultural realities they perceived in SVN, Lodge and the other Embassy officials argued for a presidential system.⁹⁰ However, they were willing to consent to the president–prime minister hybrid found in South Korea, provided that the SVN cabinet could not be exposed to excessive legislative pressure.⁹¹ Apparently, the former version of the executive had received the most support from SVN leaders canvassed by the Embassy, though the latter had garnered serious attention as well.⁹²

Next, Lodge and the Embassy staff considered it essential that under the SVN constitution the executive possess control over the armed forces and enjoy adequate powers during times of emergency.⁹³ They concluded that, among other requirements, the SVN president must be the nation's commander-in-chief, as under the U.S. Constitution.⁹⁴ The cable expressed the U.S. objective in this matter to Washington in the following way: The "[i]mportant thing is to fold [the] military into [the] governmental structure in such a way as to recognize their real power position, use their executive talents, and minimize [the] danger of coups."⁹⁵

As for emergency powers, Lodge and the Embassy wanted to avoid a situation where the executive was constrained by the legislative branch during a war crisis.⁹⁶ Consequently, they recommended that the constitution contain broad emergency powers for the SVN presi-

88. *Id.*

89. *See id.*

90. *See id.* at 1–2. Lodge and the Embassy justified their claim as follows:

We favor [a] presidential system because parliamentary systems generally work well only where there are large, well-developed national parties. This is not [repeat] not [the] case in Viet-Nam nor will it be for [a] long time. We think stability requires [a] long term in office assured by [a] presidential system. We think [the] Vietnamese as a people are short on [the] ability to compromise and tolerate, to take responsibility and always see the national interest clearly, qualities which are essential to [the] success of [a] parliamentary system, with its combining of legislative and executive power in the same people.

Id.

91. *See id.* at 2.

92. *See id.*

93. *See id.* at 2–3.

94. *See id.* at 2.

95. *Id.*

96. *See id.*

dent, including the ability to suspend the legislature and to promulgate orders that are legally binding if they involve matters relating to war.⁹⁷ While Lodge and the Embassy granted that such powers could be circumscribed by the legislature, they cautioned that any legislative veto of executive actions during emergencies should be difficult to use.⁹⁸ Lodge and the other Embassy officials suggested that a two-thirds majority vote in both houses might serve as a minimum threshold for any legislative action in such cases, or alternatively that there be a cap on the amount of time for which the legislature could meet during an emergency.⁹⁹ Lodge and the Embassy were frankly worried about the potential susceptibility of the SVN legislature to "terroristic pressure."¹⁰⁰

The cable contained two final major U.S. goals for the SVN constitution.¹⁰¹ First, Lodge and the other Embassy officials stressed that it should contain a bill of rights, a clear articulation of the democratic nature of SVN, and a proclamation of the nation's purpose and collective ambitions.¹⁰² According to Lodge and the Embassy, the constitution ought to pledge that democracy will be allowed to grow and flourish in the equitable peace for which the SVN were fighting.¹⁰³ Whatever guarantees the bill of rights made, Lodge and the Embassy opined that at the very least, the provision could not run afoul of the UN Declaration on Human Rights.¹⁰⁴

Second, they also judged it vital that the SVN constitution adequately protect SVN's ethnic minorities.¹⁰⁵ From the U.S. perspective, this meant that the document had to contain a promise that a "citizen's right to his own ethnic and cultural traditions" would be respected and that minorities would be equitably represented in the national legislature.¹⁰⁶ Lodge and the Embassy staff mused on ways that the document could assure a minority voice in government: for example, by reserving seats in the legislature for the ethnic minorities or by selecting an upper chamber with a narrow set of responsibilities that would advocate minority and other special interests.¹⁰⁷ They

97. *See id.*

98. *See id.*

99. *See id.* at 2-3.

100. *Id.* at 3.

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. *Id.*

107. *See id.*

were confident, however, that the CA could devise a formula on this point that would be agreeable to the SVN minorities.¹⁰⁸

Having articulated a constitutional floor, Lodge and the other Embassy officials spelled out several other features of the document that the United States should try to influence if the essentials of U.S. government constitutional policy were assured.¹⁰⁹ They recommended that the amendment process for the SVN constitution be fairly easy and even that the document potentially be subject to comprehensive review five years after ratification.¹¹⁰ Lodge and the Embassy wanted it to be quite hard under the constitution to remove either the president or a member of the legislature.¹¹¹ However, they thought it advisable that the president "have [the] right to prorogue [the] legislature, call for new elections for major cause, and exercise the item veto."¹¹²

Possibly because they were concerned about would-be dictators, Lodge and the Embassy staff counseled that the SVN president should be restricted to either two terms of four years or one term of five or six years.¹¹³ The cable also contained some suggestions for how the SVN constitution should handle the judiciary.¹¹⁴ Despite the long history of judicial review in American jurisprudence, Lodge and the Embassy emphatically rejected such a power for the SVN lower courts.¹¹⁵ They did, however, recommend a "provision for [the] Supreme Court to pass on [the] constitutionality of laws and executive decrees once [the] war emergency is past."¹¹⁶ Finally, Lodge and the other Embassy officials thought it would be good if the document promoted the general idea of local government, with the specifics to be spelled out later in legislation.¹¹⁷

Washington responded favorably to the policy laid out by Lodge and the Embassy.¹¹⁸ A September 23, 1966, telegram from the Department of State noted, "We agree completely . . . that we should concentrate our advice to [the] GVN and [the] Constituent Assembly on [the] fundamental questions posed in [the] constitution drafting

108. *See id.*

109. *See id.* at 3–4.

110. *See id.* at 3.

111. *See id.*

112. *Id.*

113. *See id.* at 4.

114. *See id.*

115. *See id.*

116. *Id.*

117. *See id.*

118. *See* Telegram from Ball to Saigon (Sept. 23, 1966), *supra* note 23.

process, and resist [the] temptation to try to press our views on every detail."¹¹⁹ The cable, drafted by officials at the State Department's Vietnam Working Group and sent under the name of Undersecretary of State George W. Ball, affirmed that the recommendations offered by Lodge and the Embassy on the SVN constitution, certain further detailed comments that Lodge and the Embassy promised to send by airgram, and the Vietnam Planning Group's paper would supply a firm foundation for the U.S. posture toward the creation of the SVN constitution.¹²⁰

The State Department expanded upon the analysis sent from Saigon on September 4 on two issues of importance to the U.S. government.¹²¹ As to the emergency powers, the State Department concurred that the SVN president should have extensive authority during war crises.¹²² However, like Lodge and the Embassy, the State Department wanted the language to be drafted precisely so as to prevent exploitation by the executive.¹²³ While the State Department acknowledged the potential merit in the proposals put forth by Saigon to make it difficult to exercise legislative power during a national emergency,¹²⁴ it added, "Another possibility might be to set [a] time limit for [the] duration of emergency powers with [an] extension for [an] additional specified period [that would be] subject to review by [the] executive and legislative branches."¹²⁵

The September 23 cable to the Embassy also raised a subject that would evolve into the U.S. government's single greatest problem with the CA's drafting work: the anti-communism article.¹²⁶ The State Department expressed the issue as follows:

Hopefully, [the] constitution about to be drafted will be [the] last document although, as you point out, provisions will have to be made for its amendment and possibly for [a] wholesale review in, say, five years. If we are to look forward to dealing with [the] problem of [the] eventual reintegration of those under [Viet Cong ("VC")] control and influence into Vietnamese society and to [the] gradual evolution toward [a] freer and broader political activity, we believe that [the] constitution should avoid any language which explicitly outlaws communism or "pro-communist neutralism[.]" If any treatment of this subject appears in [the] constitution, we would

119. *Id.* at 1.

120. *See id.*

121. *See id.* at 1-3.

122. *See id.* at 1.

123. *See id.*

124. *See id.* at 1-2.

125. *Id.* at 2.

126. *See id.* at 2-3.

hope [that] it would be in terms of language conveying [the] idea of "agents of foreign powers" or "those who seek to overthrow [the government] by force" to describe treasonable individuals or activities. In this way, it will be easier in [the] future to make [a] distinction between hard core VC leadership and cadres, and rank and file of population under VC control or whose ties with VC are tenuous at best.¹²⁷

Washington acknowledged that it was hard to convince the SVN to accept any solution other than forthrightly criminalizing their mortal enemy, the communists.¹²⁸ However, the State Department urged that U.S. officials must attempt to persuade the SVN of the considerable benefits of magnanimity in this area.¹²⁹

Summing up, then, it is clear that well before the CA began serious drafting work, the U.S. government had a clear idea of the shape it wished the SVN constitution to take and what provisions it considered indispensable to U.S. policy in Vietnam,¹³⁰ and these included a powerful and secure executive commanding the country's armed forces and fortified with significant emergency powers, a bill of rights, a clear affirmation of democracy, and protections for ethnic minorities.

IV. MAJOR ISSUES OF CONCERN TO THE UNITED STATES

A. *The Anti-Communism Provision and National Reconciliation*

No issue would vex U.S. officials more in conducting their policy towards the SVN constitution in 1966–67 than that of the anti-communism article. As has been discussed, this matter was already on the Department of State's radar on September 23, 1966.¹³¹ The Department again raised the issue in an October 28 telegram to Saigon.¹³² In response to a draft constitution that outlawed "all actions profiting communism or pro-communist neutralism," the Department worried aloud that any such unequivocal bans would totally undercut U.S. efforts towards national reconciliation in SVN.¹³³ The telegram advocated making the U.S. government's position on the anti-communism article clear early on to both the GVN and significant CA delegates, before the problem metastasized.¹³⁴

127. *Id.* at 2.

128. *See id.* at 3.

129. *See id.*

130. *See* Editorial Note, in 5 FRUS, *supra* note 33, at 30 n.2 (revealing that the CA wrote substantive articles of the SVN constitution in November and December of 1966).

131. *See* Telegram from Ball to Saigon (Sept. 23, 1966), *supra* note 23.

132. *See* Telegram from Katzenbach to Saigon (Oct. 28, 1966) (on file with NARA).

133. *Id.* at 1–2.

134. *Id.* at 2.

The State Department asked for a reaction to these concerns from the Embassy and received one on November 4.¹³⁵ Lodge and his staff reported frankly that there was a strong desire on the part of both the GVN and CA for some sort of prohibition against communism and "pro-Communism neutralism."¹³⁶ The successful banning of candidates representing such views from the CA elections was apparently often cited by the SVN as a precedent.¹³⁷ Nevertheless, Lodge and the Embassy had already begun discreet conversations with the GVN and certain CA delegates that attempted to show the pitfalls of a broad ban on communism and so-called pro-communist neutralism.¹³⁸

Lodge and the Embassy made the following recommendation:

On [the] basis [of the] preliminary reactions[,] we believe [the] greatest chan[c]e for success lies in presenting some alternative concept of wording which . . . can satisfy [the] strong anti-communist feeling in [the] CA and [the] GVN—a feeling which, with anti-colonialism, has in one very real sense given birth to this nation.¹³⁹

The telegram from Saigon contained two alternative ideas for constitutional language.¹⁴⁰ The first ran along the lines proposed by the Department of State, namely a provision outlawing all subversive activities against the legitimate government that employed violent or unlawful means and preventing anyone who advocated such violent dissidence from running for office.¹⁴¹ The second suggestion granted the SVN their anti-communism article, but inserted an additional provision on national reconciliation that would protect the rights and privileges of all who genuinely abandoned communism.¹⁴²

The realistic warning given by Lodge and the Embassy foreshadowed the long struggle by the United States against the inclusion of sweeping anti-communist language in the SVN constitution. By November, other areas of the U.S. government were also worried about the anti-communist article.¹⁴³ It was a major agenda item at a November 10 meeting, which included a special consultant to President Johnson and officials from the Departments of State and Defense.¹⁴⁴ Ambassador Harriman recommended that U.S. policymakers watch the constitution-making process in SVN carefully and voiced his con-

135. See Telegram from Saigon to Secretary of State (Nov. 4, 1966) (on file with NARA).

136. *Id.* at 1.

137. See *id.* at 1-2.

138. See *id.* at 2.

139. *Id.*

140. See *id.*

141. See *id.*

142. See *id.*

143. See Memorandum of Meeting (Nov. 10, 1966), *supra* note 73, at 820.

144. See *id.* at 820, 824.

cerns to the other attendees about the provision banning communists and neutralists.¹⁴⁵ He stated plainly that the United States should "not permit" the SVN government to draft a document that contradicted the guarantees that had been made as to national reconciliation.¹⁴⁶ John P. Roche, the President's special consultant, opined that it could be dangerous to delay applying pressure to the GVN in order to get the type of constitution that the U.S. government could support.¹⁴⁷ There was general agreement among the meeting's participants that the United States must take steps to see national reconciliation go forward, both in the SVN constitution and in the decrees and programs of the GVN.¹⁴⁸

The next day, November 11, the Department of State sent a priority cable to Saigon urging the Embassy to continue its attempts to quash the anti-communism article.¹⁴⁹ In unmistakable language, the Department stated that "it [is] of [the] utmost importance that the [c]onstitution create no institutional obstacles to [a] 'national reconciliation' program and that it represent a clear democratic alternative to communism."¹⁵⁰ The officials at the Department argued that any outright ban of communism and pro-communist neutralism in the SVN constitution would undercut the idea of national reconciliation in the minds of both the SVN people and the global community.¹⁵¹ They "much prefer[red]" keeping any explicit condemnation of communism out of the constitution to balancing an ideological ban with a guarantee of rights for those citizens who had truly renounced communism.¹⁵²

By December 1966, this thinking on the anti-communism article seems to have represented the general consensus of U.S. policymakers.¹⁵³ A draft National Security Action Memorandum ("NSAM") called for the United States to "[e]nsure that [the] new [SVN] Constitution is consistent with [the] reintegration of VC into the national

145. *See id.* at 820, 824–25.

146. *See id.* at 820.

147. *See id.* at 825.

148. *See id.* at 825–26.

149. *See* Telegram from Secretary of State Rusk to Saigon (Nov. 11, 1966) (on file with NARA).

150. *Id.* at 1.

151. *See id.* at 1–2.

152. *Id.* at 2.

153. *See* Draft National Security Action Memorandum, Strategic Guidelines for 1967 in Vietnam (Dec. 10, 1966), in 4 FRUS, *supra* note 24, at 922, 923.

life.”¹⁵⁴ President Johnson, who was sent the draft by Rostow on December 10, commented that “[i]t’s good.”¹⁵⁵

In early January 1967, the Embassy issued a “progress report” on the CA and its work.¹⁵⁶ It stated that the “final draft will undoubtedly have shortcomings. The [anti]-Communist provisions may suffer from [a] lack of subtlety, but will probably be much less objectionable than might have been expected.”¹⁵⁷ On January 13, in a telegram conveying their views on the CA’s first substantive draft, Deputy Ambassador William J. Porter and the Embassy expressed satisfaction that the draft SVN constitution did not mention pro-communist neutralism and opined that the anti-communist provisions and related language in the document should be acceptable to the U.S. government.¹⁵⁸

Despite this hopeful forecast, worries about the ideological ban and its effect upon national reconciliation continued to animate U.S. policymakers.¹⁵⁹ Indeed, the very next day after the Embassy in Saigon issued its positive appraisal of how the CA handled the anti-communism article, the Department of State cabled the Embassy on the subject.¹⁶⁰ Though Washington largely agreed with the Embassy’s analysis, it was still not totally happy with the CA’s performance in this regard: “[B]earing in mind our objectives with regard to national reconciliation, we believe it would be desirable to replace [‘]communist[’] with [‘]external[’] to describe aggression in [the] Article”¹⁶¹

On January 20, 1967, instead of following the U.S. advice on the issue, the CA overwhelmingly adopted a stronger anti-communism article than had appeared in the first draft constitution.¹⁶² It read as follows: “1) The Republic of Viet-Nam opposes Communism in every form. 2) Every activity designed to propagandize . . . or carry out . . . Communist [sic] is prohibited.”¹⁶³ In reporting this development, Lodge and the Embassy stressed that they had repeatedly counseled CA delegates to opt for less sweeping language when dealing with communism in the SVN constitution and had laid out different wording options which they might choose.¹⁶⁴ Despite having argued that

154. *Id.*

155. *See id.* at 922 n.1.

156. *See* Telegram from Saigon to Secretary of State (Jan. 6, 1967) (on file with NARA).

157. *Id.* at 2.

158. *See* Telegram from Saigon to Secretary of State (Jan. 13, 1967) (on file with NARA).

159. *See* Telegram from Secretary of State Rusk to Saigon (Jan. 14, 1967) (on file with NARA).

160. *See id.* at 3.

161. *Id.*

162. *See* Telegram from Saigon to Secretary of State (Jan. 20, 1967) (on file with NARA).

163. *Id.* at 3.

164. *See id.*

excess in this area might harm the chances of national reconciliation, Lodge and the Embassy staff were forced to admit that most CA members cherished their anti-communist ideals and probably would have favored even stronger anti-communist language than that finally chosen.¹⁶⁵

Labeling the CA's move as a "most unfortunate development," the State Department asked the Embassy to offer promptly any solution it might devise.¹⁶⁶ The telegram revealed that the Department was seriously considering trying to convince the ruling generals in the Directorate to use the Directorate's controversial veto power to block the anti-communism article, a move that under normal circumstances U.S. officials would find highly unpalatable.¹⁶⁷ The response from Lodge and the other Embassy officials painted a grim picture from the point of view of changing or eliminating the ideological condemnation in the SVN constitution.¹⁶⁸ The Embassy reminded Washington of its previous assessment that there was strong desire in the CA to adopt an even harsher anti-communist provision in the constitution, and the Embassy warned that, if anything, the ruling generals in the Directorate were more disposed towards a harsher position than the CA.¹⁶⁹ Lodge expressed the hard judgment of the Embassy as follows: "At this stage, we do not see any alternative but to accept [the] wording in its present form."¹⁷⁰ Even sympathetic CA delegates had communicated to U.S. officials that there was simply no way to convince the constitution-drafting body to drop its stance on the anti-communism article.¹⁷¹ Lodge ended the Embassy's message on an emphatic note:

We appreciate [the Department's] concern[,] but as we have said this is [an] issue on which both [the] government and [the] CA appear quite inflexible. We have discussed [the] matter thoroughly with [a] number of key deputies and find no disposition to open [the] question again. Directorate will almost certainly be even more rigid. Therefore, we see no real value in raising [the] issue with them. In fact[,] such [a] discussion might well raise suspicion [of] our motives and prove damaging [to] our ability [to] influence them on other aspects [of the] national reconciliation issue.¹⁷²

This reversal for U.S. policy occurred, as Lodge had indicated, despite the vigorous efforts by U.S. officials to convince the SVN leaders

165. *See id.* at 3–4.

166. Telegram from Secretary of State Rusk to Saigon (Jan. 20, 1967) (on file with NARA).

167. *See id.* at 1–2.

168. *See* Telegram from Saigon to Secretary of State (Jan. 23, 1967) (on file with NARA).

169. *See id.* at 1.

170. *Id.*

171. *See id.*

172. *Id.* at 2.

of the merits of the U.S. government's position on the anti-communism article.¹⁷³ On January 19, 1967, the day before the CA adopted the stronger language, Dr. Gisbert Flanz, a professor of politics at New York University brought in by the Embassy to serve as a constitutional expert after having performed similar duties for South Korea,¹⁷⁴ engaged in a dinner conversation on the constitution with four CA deputies and a GVN minister.¹⁷⁵ At the January 19 dinner, Flanz offered a number of reasons why the anti-communism provision was both unnecessary and potentially harmful.¹⁷⁶ He referenced the Korean experience, where the South Koreans had been involved in a mortal struggle with communism but had the self-confidence to draft their constitution without mentioning their ideological foe.¹⁷⁷ Flanz also raised the idea that a direct discussion of the communists in the constitution might well grant them more dignity than they deserved and would certainly have deleterious consequences for SVN's reputation in the world.¹⁷⁸

Several days later, Unger tried his hand at persuasion.¹⁷⁹ In speaking with two CA delegates and a former GVN prime minister, he again touched on how the anti-communism article would hurt the SVN's reputation, both in America and globally, and how it would

173. See Memorandum of Conversation, Draft Constitution (Jan. 19, 1967) (on file with NARA); Telegram from Saigon to Secretary of State (Jan. 26, 1967), *supra* note 27.

174. See Telegram from Saigon to Secretary of State (Aug. 8, 1966) (on file with NARA). On July 28, 1966, Prime Minister Ky indicated his interest in having the United States identify a constitutional expert for the GVN. See Telegram from Saigon to Secretary of State (July 28, 1966) (on file with NARA). At another point, a CA delegate explained how the CA would have to bring in an expert to aid in the actual writing of the constitution and intimated that help "from our American friends" would be appreciated in this regard. Telegram from Saigon to Secretary of State (Sept. 21, 1966), at 3 (on file with NARA). On November 29, Unger contacted the U.S. embassy in France and asked for information on any French or Vietnamese person living in Paris who might be able to serve as a constitutional expert in SVN. See Letter from Dean to Unger (Dec. 2, 1966) (on file with NARA). On December 2, the embassy sent Washington a number of potential candidates, with brief descriptions and evaluations of their views of the war effort in Vietnam. See *id.* U.S. government officials were not the only Americans who concerned themselves with the SVN constitution. On August 29, Albert Blaustein, a law professor and law librarian at Rutgers University, wrote to Rusk inquiring about the books available to the CA and offering some suggestions on the appropriate bibliography. See Letter from Blaustein to Secretary of State Rusk (Aug. 29, 1966) (on file with NARA). The Office of the Legal Adviser at the Department of State responded shortly thereafter, assuring Blaustein that a considerable number of relevant works were available to SVN leaders. See Letter from Feldman to Blaustein (Sept. 13, 1966), *supra* note 73. Among other measures, Vietnamese translations of the *Federalist Papers* were apparently to be distributed as an aid to the constitution-making process. See *id.* at 2.

175. See Memorandum of Conversation (Jan. 19, 1967), *supra* note 173.

176. See *id.* at 2.

177. See *id.*

178. See *id.*

179. See Telegram from Saigon to Secretary of State (Jan. 26, 1967), *supra* note 27.

prove an obstacle to national reconciliation.¹⁸⁰ As the Embassy had suggested might occur, Unger was forced to clarify the U.S. position on reconciliation and assuage SVN fears that such a policy would be overly indulgent to the communist enemy.¹⁸¹ However, while the CA representatives approached by Flanz and Unger were somewhat agreeable to the U.S. policy, the CA as a whole remained intractable on the issue.¹⁸²

Despite these discouraging developments, the U.S. government persisted in its efforts to see national reconciliation realized in SVN.¹⁸³ In a February 18 cable to Saigon, the Department of State warned Ambassador Lodge and the Embassy staff that the next danger to avoid was a strong denunciation of communism in the constitution's preamble, which U.S. officials concluded would exacerbate the harm caused by the anti-communism article.¹⁸⁴ Switching into damage-control mode on the provisions outlawing communism, the Department instructed the Embassy to push for a major declaration on national reconciliation to be paired with the promulgation of the SVN constitution.¹⁸⁵ Beyond this, if the CA was determined to include the denunciation of communism in the preamble, Washington hoped for an affirmation of national reconciliation in the same part of the document.¹⁸⁶

The Embassy responded promptly to the Department's directions.¹⁸⁷ Encouraged by the positive SVN reaction to the Embassy's soundings, the Department provided three possible formulations of a statement on national reconciliation in the constitution:

- A. The provisions of this Constitution shall be applied in a spirit of good will and National Reconciliation that will contribute to the restoration of peace and the re-integration of the nation by guaranteeing full civil and political rights, including the right to run for elected office, and to engage in political activity, to all those who renounce the use of force against the nation and are prepared to abide by the nation's constitution.
- B. The provisions of this Constitution shall be applied in a spirit of good will and National Reconciliation so as to ensure that all elements of the nation who wish to help construct a new Viet Nam will be able to participate in the peaceful, democratic

180. *See id.* at 1–2.

181. *See id.* at 2.

182. *See id.* at 2–3; Memorandum of Conversation (Jan. 19, 1967), *supra* note 173, at 2.

183. *See* Telegram from Katzenbach to Saigon (Feb. 18, 1967) (on file with NARA).

184. *See id.* at 1.

185. *See id.*

186. *See id.* at 1–2.

187. *See* Telegram from Saigon to Secretary of State (Feb. 21, 1967) (on file with NARA).

processes of the state on a basis of full equality irrespective of ideology or past associations.

- C. The provisions of this Constitution shall be applied in a spirit of good will and National Reconciliation that will foster the development of a democratic society open to all persons of every race, religion, and political philosophy who are prepared to pursue their political objectives by peaceful and democratic means in accordance with the provisions of this Constitution.¹⁸⁸

Washington made clear, however, that it remained opposed to any anti-communist language in the preamble and that, of the three alternatives, it favored the strongest one that the Embassy could get the SVN leadership to accept.¹⁸⁹

By March 10, the Department of State had reason to hope that a GVN proclamation on national reconciliation would be delivered on the date Washington desired—the date of the constitution's promulgation.¹⁹⁰ This prompted U.S. policymakers to renew their urging that the SVN constitution's preamble contain an affirmation of national reconciliation as robust as possible.¹⁹¹ The Embassy responded that its personnel had been making the U.S. government's case for the inclusion of such positive language to members of both the CA and the Directorate, but had not given out the State Department's detailed textual proposals on national reconciliation.¹⁹²

As Lodge explained in the confidential telegram,

We have consistently avoided giving either the government or CA deputies any suggestions on specific wording to be included in the constitution. Our feeling has been that it is better if the CA puts the ideas we favor into the constitution in purely Vietnamese style and form. Th[is] method also conceals our hand more effectively.¹⁹³

In the Embassy's assessment, there was good reason to believe that a pro-national reconciliation statement would be inserted into the preamble, though to SVN leaders it was apparently hardly the highest priority.¹⁹⁴ Again, the SVN opposition to national reconciliation seemed to stem in part from fears that the United States itself was about to weaken its stance on communism and fail to guarantee adequately the independence of SVN.¹⁹⁵

188. *Id.* at 1–2.

189. *See id.* at 1.

190. *See* Telegram from Department of State to Saigon (Mar. 11, 1967) (on file with NARA).

191. *See* Telegram from Secretary of State Rusk to Saigon (Mar. 11, 1967) (on file with NARA).

192. *See* Telegram from Saigon to Secretary of State (Mar. 13, 1967) (on file with NARA).

193. *Id.* at 1.

194. *See id.* at 2.

195. *See id.*

B. Elected Province Chiefs

Though the anti-communism article was probably the constitutional issue most frequently addressed in the telegraphic traffic between Washington and the Embassy in Saigon, there were certainly other provisions in the SVN basic law about which U.S. policymakers worried. One was the matter of electing chiefs for the provinces, South Vietnam's main political subdivisions.¹⁹⁶ In laying out its policy proposals for the SVN constitution on September 4, 1966, the Embassy had endorsed as a non-essential goal the election of local governmental bodies, with the proviso that the specifics of such elections be left to the legislature.¹⁹⁷ In general, the development of local political power and participation was indeed an objective that the U.S. government wished to further.¹⁹⁸

However, by December 5, U.S. officials were reconsidering the extent to which they wanted to promote the principle of local government.¹⁹⁹ In a secret memorandum, Robert H. Miller, head of the State Department's Vietnam Working Group, acknowledged that "[s]elf-government of reasonably sizeable urbanized places would appear an important goal to be realized."²⁰⁰ However, he wondered whether the CA's proposal to have province chiefs and mayors elected by popular vote would falter in practice.²⁰¹ Specifically, Miller worried that such an arrangement could weaken the GVN's administrative system and worsen the already strained relationship between civilians and military personnel in the rural areas of SVN.²⁰² As a potentially viable alternative, he suggested that the GVN appoint mayors and province chiefs with the input of municipal and provincial councils that had been democratically elected.²⁰³

Similar concerns were voiced in a December 9 cable to the Embassy, where the Department of State asked, "Would not elected province and district chiefs lead to [a] serious breakdown of centralized administrative channels between [the] GVN and [the] provinces and by default place on [the] military [the] entire burden of holding [the] administration together?"²⁰⁴ While Washington admitted that it

196. SVN had forty-four provinces. See Lewy, *supra* note 35, at 44–45.

197. See Telegram from Saigon to Secretary of State (Sept. 4, 1966), *supra* note 25, at 4.

198. See Memorandum from Miller to Unger, Constitutional Issues for Discussion by the Political Working Group, Tuesday, December 6 (Dec. 5, 1966) (on file with NARA).

199. See *id.* at 4–5.

200. *Id.* at 4.

201. See *id.* at 4–5.

202. See *id.* at 5.

203. See *id.*

204. Telegram from Katzenbach to Saigon (Dec. 9, 1966), at 2 (on file with NARA).

might be beneficial to place the aim of electing province and district chiefs into the constitution for purely aspirational purposes, it nevertheless maintained that it would be better for the CA to focus on the more realistic goal of widening the role of the provincial and municipal councils.²⁰⁵

The Embassy agreed with the Department's analysis on the issue of elected province chiefs.²⁰⁶ While assuring Washington that the Embassy would counsel the CA to reject such a proposal, Deputy Ambassador Porter also tried to calm fears by pointing out that the SVN president could always handle the problem through his emergency powers.²⁰⁷ The Embassy had to report honestly that there was widespread support among CA delegates for constitutional provisions for local autonomy and decentralized power, though it opined that this understandable desire could be adequately fulfilled by articulating a non-specific guarantee of local self-government in the SVN constitution.²⁰⁸

Although there were numerous deputies who also worried about the provision, the general sentiment in favor of local self-government in the CA resulted in the December 1966 approval by a fair majority of the principle of elected province chiefs.²⁰⁹ Reacting to this, the Embassy offered the Department of State a more detailed discussion of the pitfalls of such an institution, at least during wartime.²¹⁰ It also related some of the SVN fears on this point, including that the communist insurgents could elect one of their own in certain provinces and essentially capture legal authority in those areas.²¹¹ Embassy officials did not, however, believe it was possible any longer to convince the CA to strike the elected province chief provision entirely from the

205. *See id.*

206. *See* Telegram from Saigon to Secretary of State (Dec. 13, 1966) (on file with NARA).

207. *See id.* at 1.

208. *See id.*

209. *See* Telegram from Saigon to Secretary of State (Dec. 22, 1966) (on file with NARA).

210. *See id.* at 2-3. Porter and the Embassy staff argued that

[o]ne of the basic problems here has always been building ties and increasing communication between rural areas and [the] central government. Electing province chiefs would tend [to] stimulate [the] conflict between [the] central government and [the] provinces, encourage regional separatism, tend to further reduce [the] often deficient central control of local administration, and multiply [the] difficulties of getting consistent and coordinated implementation of national policies in fields such as revolutionary development. There is also the immediate problem of security and the need to ensure coordination between provincial authorities and the military.

Id. at 3.

211. *See id.* at 2.

document.²¹² Instead, in their cable to Washington, Porter and the Embassy proposed the following strategy:

In all our contacts with [the] deputies we are counseling that [the] constitution could make it clear that [the] provision for elected province chiefs is [a] principle which can be fully implemented only in peacetime, that it is subject to modification or postponement as required by the security situation, and that it is to be implemented by future legislation when the situation permits.²¹³

On December 23, the State Department registered its full agreement with this recommendation.²¹⁴

However, in January 1967, U.S. officials continued to try to get the CA to strike the democratic election of province chiefs from the SVN constitution.²¹⁵ Displaying a considerable knowledge of history, Roche (the president's special consultant) proposed the following solution to the province chief issue in a secret memorandum to Unger:

[T]here are ways out of the squabble over election of Province Chiefs. The best bet would be to have the President nominate three candidates and the Provincial Council choose one. Or—as in the 14th Century English system of choosing shire reeves—have the provincial authorities nominate three and the President pick one. (In either case, the selecting authority could turn down all three and ask for a new panel.) There is a French precedent for this. A prefect has the right to fire an elected mayor but he cannot replace him. The commune then holds a new election and hopefully sends up another candidate. Occasionally (in Communist dominated communes) a stalemate has developed, but by and large the system has an effective deterrent capacity.²¹⁶

The Department of State duly passed on the suggestion to the Embassy for its use in talking with CA delegates.²¹⁷

212. *See id.* at 3.

213. *Id.* at 2.

214. *See* Telegram from Unger to Saigon (Dec. 23, 1966) (on file with NARA). Though it actively tried to change the provision on elected province chiefs, the U.S. government did try to have an open mind towards the issues involved. *See* Telegram from Saigon to Secretary of State (Jan. 6, 1967), *supra* note 156, at 2 ("Similarly, while we do not agree with direct election of province chiefs at this time, we recognize local government provisions outlined by [the] CA are also intended to solve [a] serious problem—the need for more responsive government and greater popular participation in government.").

215. *See* Telegram from Secretary of State Rusk to Saigon (Jan. 7, 1967) (on file with NARA); Memorandum from Roche to Unger (Dec. 29, 1966) (on file with DDRS); Memorandum of Conversation (Jan. 19, 1967), *supra* note 173, at 3.

216. Memorandum from Roche to Unger (Dec. 29, 1966), *supra* note 215, at 1–2. In early January 1967, Roche offered an assessment of the draft SVN constitution for Rostow and, among other problems, flagged the issue of elected province chiefs. *See* Editorial Note, in 5 FRUS, *supra* note 33, at 30 n.2.

217. *See* Telegram from Secretary of State Rusk to Saigon (Jan. 7, 1967), *supra* note 215.

In his January 19 conversation with the SVN leaders, Flanz argued that the election of province chiefs, while laudable in theory, was inappropriate when the nation was fighting a war.²¹⁸ He reiterated the view, held by the U.S. government from the beginning, that the CA ought to opt for a generalized affirmation of the principle of local self-government over a detailed treatment of the subject.²¹⁹ Flanz also tried to explain that village chief elections, which had apparently been recently introduced by the GVN, were much easier to conduct than province chief elections.²²⁰ The CA representatives at the dinner seemed to agree with Flanz, but they themselves admitted that the four delegates were frequently in the minority during CA deliberations, especially on matters like elected province chiefs.²²¹ However, the U.S. efforts seemed to pay off substantially when on March 10, the CA approved an article under which the initial province chiefs would be appointed by the first president elected under the constitution during his first term in office.²²² The Embassy expressed relief that the province chief elections about which U.S. policymakers had worried would not occur for up to four years.²²³

C. *Executive Powers/Declarations of Emergency*

From the outset, the U.S. government wanted to ensure that the constitution granted the SVN executive sufficient authority, especially during wartime. The issue of emergency powers figured prominently in the initial set of telegrams on U.S. policy towards the SVN constitution between the Department of State and the Embassy in September 1966.²²⁴ U.S. officials continued to discuss various aspects of emergency powers during December, as the CA was actively engaged in writing the provisions of the new constitution.²²⁵

218. See Memorandum of Conversation (Jan. 19, 1967), *supra* note 173, at 3.

219. See *id.*

220. See *id.*

221. See *id.*

222. See Telegram from Saigon to Secretary of State (Mar. 11, 1967), at 1 (on file with NARA).

223. See *id.* at 1-2.

224. See Telegram from Saigon to Secretary of State (Sept. 4, 1966), *supra* note 25, at 1-3; Telegram from Ball to Saigon (Sept. 23, 1966), *supra* note 23, at 1-2.

225. See Telegram from Saigon to Secretary of State (Dec. 13, 1966), *supra* note 206, at 1 ("Also, emergency powers [have] not yet [been] defined by [the] CA, but we believe [the] provisions for emergency powers will make it possible to use military on active duty in civil administrative and other jobs as [the] situation requires."). While U.S. policymakers were concerned that the SVN executive would lack the proper imperatives during wartime, they also did not wish to give the executive such expansive emergency powers that a dictatorship became a possibility. See Telegram from Katzenbach to Saigon (Dec. 15, 1966) (on file with NARA).

Before the Embassy and the Department of State offered comprehensive analyses of the draft SVN constitution, there was already unease in the telegraphic traffic about the emergency provisions.²²⁶ On January 9, 1967, Porter reported that the draft article on the national assembly gave responsibility for declaring an emergency or curfew to the legislature.²²⁷ If the CA did not change this scheme of its own accord, he promised that the Embassy would advise the body to give these prerogatives to the executive.²²⁸ Porter expressed some hope that it would not be necessary for the United States to get involved in this matter.²²⁹

When the CA produced a first draft, the issues of emergency powers and presidential authority were at the forefront of U.S. concerns about the document.²³⁰ In a confidential cable to Washington, Porter wrote,

[The] [d]raft's most objectionable feature is Article 39 which gives the National Assembly excessive authority with respect to international relations and declaring [an] emergency. Powers granted to [the] president by Article 78 enable him to declare [an] emergency only when [the] National Assembly "cannot be convened in time". And even then he has only three days to submit [the] declaration to [the] Assembly for approval. These two articles need re-working to restore to [the] chief executive normal authority with respect to international relations and emergency powers.²³¹

He assured the Department of State that the Embassy would make precisely this case in its discussions with the CA and the GVN.²³²

The Department fully concurred with the assessment offered by Porter and the Embassy on executive authority and emergency powers.²³³ It specifically stressed that the SVN legislature could not be allowed to interfere substantially with any executive move to open negotiations with the enemy or peace talks to end the war.²³⁴ Like Embassy officials in Saigon, Washington wanted to see the constitution grant the executive more flexibility when dealing with emergen-

226. See Telegram from Saigon to Secretary of State (Jan. 9, 1967) (on file with NARA).

227. See *id.* at 1.

228. See *id.*

229. See *id.* at 1-2.

230. See Telegram from Saigon to Secretary of State (Jan. 13, 1967), *supra* note 26, at 1.

231. *Id.*

232. See *id.* On January 25, the Embassy re-confirmed its position and its pledge: "[T]he President should have the normal powers with respect to emergencies and foreign affairs. We are using our influence to help bring about the necessary changes to that end." Telegram from Vietnam to Secretary of State (Jan. 19, 1967), in 5 FRUS, *supra* note 33, at 46, 48 n.6.

233. See Telegram from Secretary of State Rusk to Saigon (Jan. 14, 1967), *supra* note 159, at 1-2.

234. See *id.* at 1.

cies.²³⁵ However, with respect to both foreign affairs and emergency powers, the Department wanted to strike a proper balance between executive and legislative authority, not to deny the National Assembly its legitimate institutional rights.²³⁶ Worries about how the SVN constitution handled the issue of emergency powers were expressed by other parts of the Johnson Administration as well.²³⁷

Flanz laid out the U.S. government's position on emergency powers during his January 19 talk with members of the CA and GVN.²³⁸ He stressed that it was imperative that the executive be able to declare emergencies if SVN authorities were to handle crises competently.²³⁹ Flanz argued that the constitution, as then written, vitiated governmental effectiveness during national emergencies.²⁴⁰ He advocated changing the document so that the president was authorized to declare states of emergency, which would last for fifteen days before National Assembly review, no matter whether the legislature was convened at the outset of the emergency.²⁴¹ After the fifteen days, according to Flanz, a two-thirds majority vote should be required to counter the executive's declaration.²⁴² While the CA delegates in attendance at the dinner acknowledged some validity in Flanz's contentions, they explained how prominent a fear of dictatorship was in the minds of numerous CA representatives.²⁴³ Reacting sympathetically, Flanz reiterated the established U.S. policy that the executive's emergency powers should not be dangerously broad.²⁴⁴

D. Majority Requirement for Elections

Another constitutional issue, which emerged later than the ones previously discussed but came to have real significance to the Johnson Administration, was that of the majority or substantial plurality requirement in SVN elections.²⁴⁵ On December 28, 1966, a meeting, which included members of the Vietnam Working Group and a special consultant to President Johnson, was held to discuss the electoral and

235. *See id.* at 2.

236. *See id.* at 1-2.

237. *See* Telegram from Vietnam to Department of State (Jan. 10, 1967), in 5 FRUS, *supra* note 33, at 29, 30 n.2.

238. *See* Memorandum of Conversation (Jan. 19, 1967), *supra* note 175, at 1-2.

239. *See id.* at 1.

240. *See id.* at 1-2.

241. *See id.* at 2.

242. *See id.*

243. *See id.*

244. *See id.*

245. *See* Memorandum for the Record, Discussion on Electoral and Political Party Laws Which Would Assist Political Coalescence in Viet-Nam (Dec. 28, 1966) (on file with DDRS).

political party laws in SVN.²⁴⁶ Richard Scammon, former director of the U.S. Census Bureau, reviewed the possible responses to a presidential election in which no one candidate netted a majority of the votes cast.²⁴⁷ He emphasized the need in such situations for SVN to hold a run-off election for the two top vote-getters.²⁴⁸ If a subsequent election were not possible, Scammon advocated having the SVN voters rate the various presidential candidates on the ballot rather than merely vote for one of them.²⁴⁹ Scammon and Roche, while accepting the idea of permitting a big number of candidates in the election, stressed that either a run-off election or a ratings scheme must be used so that the winner be required to gain more than 50% of the vote.²⁵⁰

In its review of the draft constitution, the Department of State noted that the document was silent on whether the president and vice-president must receive an absolute majority in the popular election.²⁵¹ In the Department's judgment, "[w]hile [the] provision to this effect could probably be left to [the] election law, we believe it is important that [the] Chief of State be required to obtain [an] absolute majority of [the] vote and it may be most appropriate to ensure this in [the] Constitution itself."²⁵² On January 18, Washington sent its thanks to the Embassy for already trying to convince SVN leaders to adopt a system that mandated that a president receive an absolute majority in the election.²⁵³ As with all of the major issues of concern to U.S. policymakers, the issue of an absolute majority requirement in presidential elections came up during Flanz's January 19 dinner discussion.²⁵⁴

The U.S. government showed a similar interest in the elections for the legislature.²⁵⁵ In a February 2 priority cable to the Embassy, the Department of State conveyed its observation that, under the CA's proposed electoral scheme with its "single-member constituency system," candidates for the lower house of representatives could win election frequently with a relatively small percentage of the vote.²⁵⁶ If

246. *See id.*

247. *See id.* at 1-2.

248. *See id.* at 1.

249. *See id.* at 1-2.

250. *See id.* at 2.

251. *See* Telegram from Secretary of State Rusk to Saigon (Jan. 14, 1967) (on file with NARA).

252. *Id.* at 3.

253. *See* Telegram from Secretary of State Rusk to Saigon (Jan. 18, 1967) (on file with NARA).

254. *See* Memorandum of Conversation (Jan. 19, 1967), *supra* note 175, at 2.

255. *See* Telegram from Secretary of State Rusk to Saigon (Feb. 2, 1967) (on file with NARA).

256. *See id.* at 1.

this part of the SVN constitution went unchanged, Washington worried that the communist insurgents could easily gain National Assembly seats with small but regimented groups of voters in the countryside.²⁵⁷ It therefore recommended that legislative representatives "should be required through some device to obtain at least [a] minimum plurality such as 40 percent or more."²⁵⁸ Again, run-off elections were floated as a good way to handle such situations.²⁵⁹ While the Department thought it would be best if its proposals were placed directly into the constitution, other U.S. officials suggested that it might be too late for such an alteration to the text and that therefore the Embassy should seek to include the substantial plurality requirement in the election law.²⁶⁰

On February 7, 1967, Lodge and the Embassy replied straightforwardly that "[w]hile [the] single-member constituency technique has disadvantages, we believe that [the] opportunity for changing or significantly altering this constitutional provision has passed."²⁶¹ They contended, however, that the election law would probably prevent insurgents being elected through a comprehensive pre-election vetting process and other measures.²⁶² According to the Embassy officials in Saigon, though this was not necessarily the case for presidential run-offs, SVN leaders were likely to see any run-off elections for the lower chamber as unreasonable and a waste of funds.²⁶³ This assessment did not affect the continuing Embassy efforts to push for a substantial plurality or absolute majority requirement for presidential elections.²⁶⁴

The Department of State accepted that the window of opportunity to advance its goal about elections to the legislature had closed.²⁶⁵ It was skeptical, though, of the efficacy of a screening process to eliminate Vietcong candidates and pressed for the substantial plurality requirement to be written into the future election law to address adequately the communist insurgent threat.²⁶⁶ As the Department admitted candidly, the "[m]ain purpose of [the] adequate plurality requirement is to ensure that no candidate can be elected with [a] small minority of [the] total vote and to avoid [the] close-knit, well organ-

257. *See id.* at 2.

258. *Id.*

259. *See id.*

260. *See id.*

261. *See* Telegram from Saigon to Secretary of State (Feb. 7, 1967) (on file with NARA).

262. *See id.*

263. *See id.*

264. *See id.*

265. *See* Telegram from Katzenbach to Saigon (Feb. 18, 1967) (on file with NARA).

266. *See id.* at 1.

ized VC minority [from] exploiting [the] situation."²⁶⁷ If the SVN leaders rejected the concept of the run-off election, despite its value in guaranteeing a substantial plurality, U.S. officials offered a variation on the rating system as a possibility.²⁶⁸

V. OTHER U.S. SUGGESTIONS AND CRITICISMS

Per their agreed upon strategy, U.S. policymakers focused their influence and powers of persuasion on those aspects of the SVN constitution that they deemed essential.²⁶⁹ The issues that seemed to receive the most attention from the Johnson Administration were covered in Part IV of this Article.²⁷⁰ However, as has been indicated in Part III, these were by no means the only constitutional matters discussed by the U.S. government.²⁷¹ Indeed, in 1966 and 1967, U.S. officials generated a vast amount of commentary on the evolving constitution in SVN, offering suggestions on and engaging in analysis of both critical and non-critical areas of the document. If a goal was not considered primary by U.S. decision makers, this did not mean that it was discarded but instead that it was only to be pursued if the primary U.S. goals had already been achieved.²⁷²

On October 10, 1966, the Department of State raised with the Embassy the issue of the treatment of land and labor in the SVN constitution.²⁷³ The Department did not want to attempt to solve SVN's myriad land problems with provisions in the constitution.²⁷⁴ Rather, Washington realized that the CA could not address the woes of the landless peasantry without also mentioning the urban proletariat in the document.²⁷⁵ Therefore, U.S. officials were "inclined to favor [the] inclusion of [a] general statement in [the] 'bill of right' section of [the] constitution establishing [the] right of [a] laborer, rural and urban, to reasonable security in his work and to [a] fair return for labor performed."²⁷⁶

267. *Id.*

268. *See id.* at 1-2.

269. *See* Telegram from Saigon to Secretary of State (Sept. 4, 1966), *supra* note 25, at 1; Telegram from Ball to Saigon (Sept. 23, 1966), *supra* note 23, at 1.

270. *See supra* Part IV.

271. *See supra* Part III.

272. *See* Telegram from Saigon to Secretary of State (Sept. 4, 1966), *supra* note 25, at 3.

273. *See* Telegram from Secretary of State Rusk to Saigon (Oct. 10, 1966) (on file with NARA).

274. *See id.*

275. *See id.*

276. *Id.*

The Embassy shared the State Department's desire to have the SVN constitution broadly articulate a land and labor policy, though Lodge and the staff were of the opinion that the inclusion of any such language was strictly a secondary U.S. government goal.²⁷⁷ There were already some positive indications that land and labor interests would receive some form of protection in the constitution.²⁷⁸ The Embassy promised that it would lobby for the Department's suggestion when it could, but stressed that it would not press the matter unless it seemed that the CA was making an absolute mess of the issue.²⁷⁹

However, this U.S. goal would in fact run into serious resistance from SVN leaders.²⁸⁰ On November 29, the CA declined to "commit[] [the nation] to [the] basic principle of ownership by cultivators of [the] land they farm[,]” opting instead for a weaker pledge.²⁸¹ Though it acknowledged the bitter opposition engendered by the proposal, in its communication to the Embassy, Washington stressed the "desirability of [a] more specific statement on land reform both in order to obtain [the] commitment of future governments to [an] active land reform program and in terms of [the] image of [the] constitution internationally.”²⁸²

In October 1966, the Department of State also considered the question of religion in the constitution.²⁸³ This issue involved individual rights, the protection of which had been identified as critical goal by the U.S. government.²⁸⁴ Washington wanted the document to protect personal rights of worship and to prevent governmental discrimination on the basis of religion.²⁸⁵ However, it emphatically also wished to avoid a situation in which individual religions claimed unique privileges in the SVN constitution.²⁸⁶ U.S. officials "hope[d] that CA delegates could resist [the] attempts by the extremist Buddhists, Front of All Religions, and others to obtain special constitutional treatment

277. See Telegram from Saigon to Secretary of State (Oct. 12, 1966) (on file with NARA).

278. See *id.* at 1.

279. See *id.* at 2.

280. For an indication of the difficulty involved in actually getting land reform into the constitution, see Telegram from Saigon to Secretary of State (Dec. 6, 1966) (on file with NARA). The copy located in NARA is, unfortunately, incomplete.

281. See *id.* at 1.

282. Telegram from Katzenbach to Saigon (Feb. 18, 1967), *supra* note 26, at 3.

283. See Telegram from Secretary of State Rusk to Saigon (Oct. 10, 1966) (on file with NARA).

284. See Telegram from Saigon to Secretary of State (Sept. 4, 1966), *supra* note 25, at 3.

285. See Telegram from Secretary of State Rusk to Saigon (Oct. 10, 1966), *supra* note 273, at 1.

286. See *id.*

which would perpetuate the present projection of religious blocs into direct political action, thus impeding [the] development of viable, broadly based political parties."²⁸⁷ In the Department's judgment, as long as the constitution provided for freedoms of speech, assembly, and publication, institutional religions would not need any specific mention in the document.²⁸⁸ The Embassy did not think that Washington's main worry about religion in the constitution would materialize and, on October 13, reported that "[a]t this time we expect that [the] Assembly will draft [a] section on religion, probably in [the] bill of rights, which will be acceptable to us."²⁸⁹

In a December 9 cable, the Department of State again worried about the rights and liberties of religious believers:

With regard to [the] Assembly's wording on [the] role of religion in political activity, we are concerned about [the] clause that "religions are not allowed to use political power". This statement appears at best ambiguous. Could not a government in power use it as a weapon to harass a religious group under [the] guise that that religion was attempting to influence government policies or personnel? Presumably what [the] Assembly wishes to prohibit is [a] religious group [from] acting as [a] political party; however, [the] provision as approved by [the] Assembly could be interpreted as prohibiting any influence by religious groups on political groups or parties. This appears unrealistic and, as stated above, subject to misinterpretation and abuse. You may wish to point this possibility out to deputies in your conversations with them, suggesting appropriate rewording when [the] final draft constitution is being considered.²⁹⁰

In its response, the Embassy registered its agreement with the Department's views and expressed its confidence that satisfactory language on this point could be found.²⁹¹

On January 12, 1967, U.S. officials in Saigon provided Washington with a copy of the CA's initial draft of the constitution.²⁹² In the following two days, both the Embassy and the Department of State offered analyses of the document.²⁹³ Among other things, Porter and the Embassy personnel suggested that the draft article discussing the

287. *Id.* at 1-2.

288. *See id.* at 2.

289. Telegram from Saigon to Secretary of State (Oct. 13, 1966) (on file with NARA).

290. Telegram from Katzenbach to Saigon (Dec. 9, 1966), *supra* note 204, at 2-3.

291. *See* Telegram from Saigon to Secretary of State (Dec. 13, 1966), *supra* note 206, at 1. The controversial provision preventing religions from exercising political power was in fact in the rights section of the constitution. *See* Memorandum from Miller to Unger (Dec. 5, 1966), *supra* note 198, at 1. For Miller's reaction to the CA proposal, *see id.* at 1-2.

292. *See* Telegram from Saigon to Secretary of State (Jan. 12, 1967) (on file with NARA).

293. *See* Telegram from Saigon to Secretary of State (Jan. 13, 1967), *supra* note 26; Telegram from Secretary of State Rusk to Saigon (Jan. 14, 1967), *supra* note 159.

national security council might be enhanced by a short statement of the purpose and composition of that body.²⁹⁴ The Department had comments on a number of draft articles, including those setting up an inspectorate, governing the time the legislature was given to consider proposed statutes, and dealing with presidential powers over legislation.²⁹⁵ In a follow-up to its January 14 review, the Department added that its "general concern with Art. 118 is that taken together with Articles 100 and 120, [the] Supreme Court is given excessive authority to suppress political parties on [the] basis of policy and program. This could be interpreted as [being] inconsistent with [the] concept of national reconciliation."²⁹⁶ On January 23, the Embassy gave its response to Washington and offered further analysis on the draft SVN constitution.²⁹⁷ It is important to note that both the Department and the Embassy expressed an overall favorable judgment of the draft constitution.²⁹⁸

As has been seen, during his January 19 dinner conversation, Flanz articulated many of the U.S. government's most pressing concerns about the SVN constitution.²⁹⁹ One area upon which he touched was the judiciary.³⁰⁰ Flanz doubted whether enough qualified personnel could be found to complete the Supreme Court's various tasks.³⁰¹ He also questioned the utility of the High Judicial Council as it was set up by the CA.³⁰² Referencing the French experience, Flanz counseled that the CA not get bogged down trying to distinguish between separation of function and separation of powers.³⁰³ Instead, he argued, the constitution-drafters ought to focus on devising a practicable and effective system of checks and balances.³⁰⁴

On March 17, the Department of State issued an exhaustive critique of the SVN constitution, though Department officials intended for this document to be used as an aid to the CA as it cleaned up its final

294. See Telegram from Saigon to Secretary of State (Jan. 13, 1967), *supra* note 26, at 2.

295. See Telegram from Secretary of State Rusk to Saigon (Jan. 14, 1967), *supra* note 159, at 2, 4.

296. Telegram from Secretary of State Rusk to Saigon (Jan. 18, 1967), *supra* note 253, at 2.

297. See Telegram from Saigon to Secretary of State (Jan. 23, 1967) (on file with NARA).

298. See Telegram from Saigon to Secretary of State (Jan. 13, 1967), *supra* note 26, at 1; Telegram from Secretary of State Rusk to Saigon (Jan. 14, 1967), *supra* note 162, at 1; see also Memorandum from Komer, Action Program to Promote a Favorable Political Evolution in Saigon (Jan. 12, 1967) (on file with DDRS) ("The CA process is moving along, and the draft constitution [is] not bad.").

299. See Memorandum of Conversation (Jan. 19, 1967), *supra* note 173.

300. See *id.* at 3.

301. See *id.*

302. See *id.*

303. See *id.* at 1.

304. See *id.*

version rather than as a major statement of U.S. disapproval.³⁰⁵ In examining the section on rights, the Department noted that it did not provide the right of confrontation or a guarantee against double jeopardy and ex post facto laws.³⁰⁶ It also suggested that the section on censorship should read, "[C]ensorship will be abolished. Other press regulations will be prescribed by law."³⁰⁷

When discussing the articles covering the legislature, Department officials counseled that the rules of parliamentary procedure should be the product of tradition, not constitutional edict.³⁰⁸ The Department also remarked that "[p]erhaps it is the clear intent of the CA to do so, but we note an imbalance that while only an absolute Assembly majority suffices to override a presidential veto, a two-thirds Lower House majority is necessary to override Upper House objections to a bill. . . ."³⁰⁹ It opined that the fact that the constitution allows for one chamber to remain in session while the other has been forced to adjourn may create friction between the two bodies.³¹⁰ The Embassy replied to this review on March 21.³¹¹

VI. COMPARING THE SVN CONSTITUTION WITH U.S. GOVERNMENT GOALS

The final version of the SVN constitution, promulgated on April 1, 1967, shows that U.S. policymakers were largely successful in achieving their objectives for the document but failed in several key respects.³¹² As the United States had wanted, the preamble contained much aspirational language and a statement of the nation's central aims:

Confident that the patriotism, indomitable will, and unyielding traditions of the people will assure a radiant future for our country;

Conscious that after many years of foreign domination, followed by the division of our territory, dictatorship and war, the people of Viet-Nam must take responsibility before history to perpetuate those hardy traditions and at the same time to welcome progressive

305. See Telegram from Secretary of State Rusk to Saigon (Mar. 17, 1967) (on file with NARA). Unlike much U.S. commentary on the SVN constitution, Washington's March 17 cable went into minute detail. See *id.* For example, the Department pointed out that "Article 30, Clauses 3 [&] 4 . . . seem inconsistent with Article 32, Clauses 3 and 5, since synchronization of election schedules of the two houses appears to be unworkable." *Id.* at 2.

306. See *id.* at 1.

307. *Id.* at 2.

308. See *id.* at 3.

309. *Id.*

310. See *id.* at 4.

311. See Telegram from Saigon to Secretary of State (Mar. 21, 1967) (on file with NARA).

312. See CURRENT DOCUMENTS, *supra* note 30, at 897-909.

ideas in order to establish a republican form of government of the people, by the people and for the people whose purpose is to unite the people, unite the territory and assure independence, freedom, and democracy with justice and altruism for the present and future generations;

We, 117 Deputies of the National Constituent Assembly representing the people of Viet-Nam, after debate, approve this Constitution.³¹³

Also in accord with U.S. wishes were the provisions on minorities.³¹⁴ Article 2(1) established equality for the SVN citizenry, without regard to sex, political party affiliation, religion, or ethnicity.³¹⁵ It also promised that “[m]inority compatriots shall receive special support so that they can achieve the same rate of progress as the population as a whole.”³¹⁶ Article 24 pledged the government to respect minority traditions and to give them their own courts for cases involving minority customs and habits.³¹⁷ It also stipulated that “[a] law shall prescribe special rights in order to assist minority compatriots.”³¹⁸ Finally, in Articles 97 and 98, the CA set up an ethnic council to provide recommendations to the authorities on ethnic-related issues.³¹⁹

U.S. government goals were also met by a robust treatment of citizen rights in Chapter II of the SVN constitution.³²⁰ Article 15(1) guaranteed the right to work and the right to receive just compensation for one’s labor.³²¹ Chapter II also established as official governmental policy the promotion of property ownership by citizens and the special support of the poor.³²² Article 21 committed SVN to “raising the standard of living of rural citizens, and especially helping farmers to have farmland.”³²³ Article 9 assured religious liberty for the SVN people, but made clear that “[n]o religion is recognized as the State religion. The State is impartial in the development of religions.”³²⁴

313. *Id.* at 897.

314. *See id.* at 897, 899, 907–08.

315. *See id.* at 897.

316. *Id.*

317. *See id.* at 899.

318. *Id.*

319. *See id.* at 907–08. The CA did not squarely address the question of minority representation in the National Assembly, though the generous protections granted minorities in the constitution might well have led a future SVN government to take up this cause. *See id.* at 897, 899, 907–08.

320. *See id.* at 897–99.

321. *See id.* at 898–99.

322. *Id.* at 899.

323. *Id.*

324. *See id.* at 898.

The U.S. vision for the SVN executive was not disappointed.³²⁵ While U.S. officials had recommended a presidential system, the president/prime minister scheme ultimately adopted by the CA was also considered acceptable by the U.S. government.³²⁶ The CA seemed to have satisfied the U.S. requirement that in such a hybrid system, the cabinet not be subject to unreasonable pressure from the legislature.³²⁷ The constitution entrusted the president with setting national policy while it charged the prime minister with leading the government and South Vietnam's administrative agencies.³²⁸ The president was to select the prime minister and, with the advice of the prime minister, was then to appoint the other ministers.³²⁹ Article 67(2) stipulated, "The Prime Minister is responsible before the President for the execution of national policy."³³⁰ As U.S. officials had recommended, the CA restricted the president to two four-year terms.³³¹

Much to the relief of U.S. policymakers, Article 64 gave the president the prerogative to declare states of emergency, which would not be subject to National Assembly review for at least twelve days.³³² Once this period was over, the legislature could accept, change, or totally repudiate the president's declaration.³³³ Article 65 provided that during wartime, "when it is impossible to organize elections, the President, with the approval of two-thirds of the total membership of the National Assembly, has the right to prolong the terms of some of the elected bodies of the country and to appoint some province chiefs."³³⁴ While the legislature apparently had power over the initiation of peace talks, the president was charged with representing South

325. *See id.* at 903–05.

326. *See id.* at 903–04.

327. *See id.* at 901. Article 42 provided that

- (1) The National Assembly has the right to recommend the replacement of part or all of the government by a two-thirds majority vote of the total number of Representatives and Senators.
- (2) The recommendation is binding unless the President has special reasons for rejecting it.
- (3) In the event of rejection by the President, the National Assembly has the right to vote final approval of the recommendation by a three-quarters majority vote of the total number of Representatives and Senators. This recommendation by the National Assembly is binding from the day it is voted.

Id.

328. *See id.* at 904.

329. *See id.*

330. *Id.*

331. *See id.* at 903.

332. *See id.* at 904.

333. *See id.*

334. *Id.*

Vietnam in international relations.³³⁵ Importantly, Article 60 designated the SVN president as commander-in-chief of the SVN armed forces.³³⁶ The constitution, as U.S. officials had hoped, established a national security council and an armed forces council, bodies that presumably would harness military ambitions and talents for the public good.³³⁷

While U.S. policymakers were able to attain many of their objectives for the SVN constitution, on three of the four crucial issues discussed in Part IV of this Article, the U.S. government either had to accept a compromise or was not able to get what it wanted at all.³³⁸ Perhaps the most significant defeat was Article 4, which despite all of the U.S. efforts read: "(1) The Republic of Viet-Nam opposes Communism in all forms. (2) Every activity designed to propagate or implement Communism is prohibited."³³⁹ While the preamble did not make any mention of communism, neither did it say anything specific about national reconciliation.³⁴⁰ However, because the document did not explicitly ban pro-communist neutralism, it was not, from the U.S. perspective, as damaging to the cause of national reconciliation as it might have been.³⁴¹

While U.S. officials had at one point hoped not only for an absolute majority requirement in presidential elections but also for some sort of substantial plurality requirement in legislative elections as well, the final version of the SVN constitution contained neither.³⁴² Articles 31(1) and 52(1), which governed the election of the president, vice-president, and members of the lower house, contained nothing about the percentage of the vote necessary for victory.³⁴³ Article 33(1) on election to the upper house did mention "list voting" and "plurality" but had no indication that a *substantial* plurality was required or that voters would rate their choices.³⁴⁴

The U.S. government achieved a partial success on the question of elected province chiefs.³⁴⁵ In the end, the CA did articulate a general principle of local self-government.³⁴⁶ Articles 71 and 72 provided for

335. *See id.* at 901, 904.

336. *See id.* at 904.

337. *See id.* at 904, 907.

338. *See supra* Part IV.

339. CURRENT DOCUMENTS, *supra* note 30, at 897.

340. *See id.*

341. *See id.* at 897-909.

342. *See id.* at 900, 903.

343. *See id.*

344. *See id.* at 900.

345. *See id.* at 904-05, 909.

346. *See id.* at 904-05.

elected province chiefs.³⁴⁷ However, Article 75 allowed for presidential removal of province chiefs "if they violate the Constitution, laws of the nation, or national policy[.]" a device which presumably could address the problem of Vietcong capture.³⁴⁸ Also comforting to U.S. policymakers was the fact that Article 65 gave the president a limited ability to appoint province chiefs during wartime and that Article 114 permitted the first president elected under the constitution to pick all province chiefs during his first term.³⁴⁹

Despite these shortcomings, the U.S. government's reaction to the end of the constitution-creating process in SVN was not negative and, at times, was in fact enthusiastic.³⁵⁰ For example, in a secret cable to Saigon on March 18, 1967, the Department of State expressed its view that the "[c]ompletion by [the] CA of its work on [the] constitution is most welcome news and you are to be congratulated on your efforts quietly to support the process."³⁵¹ Earlier that day, the Embassy had sent the more sober view to Washington that the National Assembly was given more power by the constitution than the United States would have hoped, but that overall the document was acceptable from the U.S. perspective.³⁵² In a personal telegram to President Johnson on March 15, Ambassador Lodge expressed a similar conclusion.³⁵³ When discussing the matter with Prime Minister Ky, Lodge used more stirring language.³⁵⁴ As he reported the conversation in a telegram to Washington,

I told him that this was no time to be stressing minor defects. The constitutional convention could sit for ten years and would still not produce a perfect document. Our constitution is not perfect. We had amended it many times. They could amend their own constitution in the future. The point to remember was that [the] government under this constitution would lead Viet-Nam up onto a new plateau. The constitution provided an opportunity to take the first step. If they did not take that first step, they would be back in the same old squirrel's cage of coups and conspiracy.³⁵⁵

347. *See id.* at 905.

348. *See id.*

349. *See id.* at 904, 909.

350. *See* Telegram from Saigon to Secretary of State (Mar. 18, 1967) (on file with NARA); Telegram from Secretary of State Rusk to Saigon (Mar. 18, 1967) (on file with NARA); Telegram from Lodge to President Johnson (Mar. 15, 1967), *supra* note 71.

351. *See* Telegram from Secretary of State Rusk to Saigon (Mar. 18, 1967), *supra* note 350, at 1.

352. *See* Telegram from Saigon to Secretary of State (Mar. 18, 1967), *supra* note 350, at 3.

353. *See* Telegram from Lodge to President Johnson (Mar. 15, 1967), *supra* note 71, at 2.

354. *See* Telegram from Saigon to Secretary of State (Mar. 25, 1967) (on file with NARA).

355. *Id.* at 1-2.

While Lodge's remarks in this context should perhaps be taken with a grain of salt, there is little doubt that, as Part II of this Article demonstrated, U.S. policymakers viewed the transition to constitutional government in SVN—regardless of whatever individual defects the constitution might have contained—as a vital development in the war effort.³⁵⁶ They reconfirmed this judgment at the Guam meetings in March 1967 after the U.S. government knew what the final form of the document would be.³⁵⁷

VII. ASSESSING U.S. POLICY TOWARDS THE SVN CONSTITUTION

While critics are undoubtedly right that the United States made a number of mistakes in Vietnam, U.S. conduct towards the creation of the SVN constitution of 1967 does not seem to be one of them. Certainly, charges of heavy handedness in the matter, such as those advanced by Laird, do not seem justified. At the outset, U.S. policymakers made a deliberate decision to seek to influence only those aspects of the SVN constitution they considered vital and to leave the rest of the drafting process in the hands of SVN leaders. While the final SVN constitution touched on a large number of topics, the documentary record suggests that the Johnson Administration focused its attention and influence on a relatively small set of issues. Though U.S. officials did produce a substantial body of constitutional observations and commentary, the U.S. government emphatically did not seek to correct every aspect of the SVN constitution that it found problematic.

Perhaps most damning to Laird's position is the fact that even when the United States brought its influence to bear, it did not always get what it wanted. Indeed, in several key respects, the SVN constitution promulgated on April 1, 1967, ran counter to U.S. plans for the document. It may be that, as a theoretical matter, the creation of a constitution is a strictly internal matter for a state and that no foreign power should have anything to do with the process. However, it is hard to imagine that any country investing huge amounts of money and indeed, even fighting a war in another nation as the United States was then doing in Vietnam, would make no attempt whatsoever to influ-

356. See *supra* Part II.

357. See Memorandum for the Record (Mar. 20, 1967), in 5 FRUS, *supra* note 33, at 268, 272; Memorandum for the Record, Working Notes on U.S. Delegation Session of Guam Conference (Mar. 21, 1967), in 5 FRUS, *supra* note 33, at 274, 280. This view was expressed again after the constitution's promulgation by the new U.S. ambassador in Saigon, Ellsworth Bunker. See Telegram from Vietnam to the Department of State (May 30, 1967), in 5 FRUS, *supra* note 33, at 455, 455.

ence the drafting of the nation's constitution. When considering the question of U.S. interference, it is worth noting the encounter that Lodge had in April 1967 with Dr. Phan Quang Dan, a CA delegate and prominent SVN civilian leader.³⁵⁸ Lodge recounted his conversation with Dan in a highly classified telegram for President Johnson:

Noting that under both the Japanese and the French, the Vietnamese had simply received orders reflecting the desires of the colonial governors, he remarked how completely different the American way had been, saying that we did not give orders, but had genuinely sought to help them and advise them when they wanted help and advice. Citing the Constitution as an example, he said that it was truly a Vietnamese document and not a "dictated" Constitution from the Americans as some critics had alleged. In Dan's opinion, we had been wise not to try to dictate what language should be in the Constitution. He said: "You have not been in evidence; you have not made statements, but you have had great influence." He added that for a country as powerful as the United States, it was better that our influence not be exercised directly.³⁵⁹

The U.S. government genuinely sought to promote democracy and constitutionalism in SVN, which the SVN people seemed to want considering the opposition to the Diem autocracy still present in their minds. When U.S. officials deviated from these principles, such as when they lobbied for the appointment rather than the election of province chiefs, it was in the interest of winning a struggle to which both the CA and the GVN were fully committed. Reasonably enough, almost all of America's most important goals for the SVN constitution were related to winning the war. U.S. officials argued strenuously against the anti-communism article because they feared it would hinder the peaceful reintegration of communist insurgents into a non-communist SVN. The U.S. government opposed the election of province chiefs because of concerns about the effect such an institution might have on the successful prosecution of the war in the SVN countryside. Similarly, U.S. officials pushed the idea of a substantial plurality requirement for elections because of worries about Vietcong takeover of legislative seats. Finally, it is clear that the type of executive promoted by the United States, with its powers and control over the military, was well-calculated to fight the enemy effectively without courting too closely the dangers of dictatorship and its attendant instability. In taking this war-centered approach to the constitution, U.S. policy in Vietnam differed in important ways from its policy in other instances in which the United States sought to influence the drafting

358. See Telegram from Lodge to President Johnson (Apr. 5, 1967) (on file with DDRS).

359. *Id.* at 2.

of another nation's constitution. For example, when the Bonn Parliamentary Council drafted West Germany's basic law after the Second World War, U.S. policy was almost exactly the opposite, with the United States promoting various devices, including an emphasis on federalism in the document, to prevent Berlin from again being able to fight a war efficiently.³⁶⁰

Because SVN fell to its enemies in 1975, the SVN constitution of 1967 is unlikely ever to be held up as a model of U.S. constitution-building the way that the post-World War II West German and Japanese documents are. Yet, in many ways, this is simply an unfair instance of, to use a colloquialism, "nothing succeeds like success." The U.S. government policy towards the SVN constitution seems an appropriate and legitimate one. The goals of the Johnson Administration for the document were reasonable, and the flexibility and soft touch exhibited by U.S. officials when dealing with SVN constitutional issues ought not to be forgotten. One could make the case that in fact, if the United States continues actively to influence foreign constitutions, there is much to emulate in its SVN constitutional policy.

However, none of this changes the fact that the U.S. embassy in Saigon, from which so much constitutional analysis originated, was occupied by North Vietnamese troops less than a decade after the promulgation of the SVN constitution. Perhaps, then, the most important lesson for U.S. decision makers from the episode is that designing a constitution is but one part of the overall process of building a healthy state. Regardless of how good the SVN constitution was or how nuanced the policy U.S. officials had towards the document, SVN was still conquered by its enemy eight years after the document's creation. Much more is needed for a successful foreign policy.

360. See Mattei Ion Radu, *German Lessons for Iraq and Beyond*, 35 S.U. L. REV. 373 (2008).