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HOW THE PEACE WAS LOST: IGNORING THE PRESIDENTIAL OATH IN 1964 AND 2002-2003

KENNETH MICHAEL WHITE

ABSTRACT: According to the text of the United States Constitution, the power to declare and fund war is vested in Congress, while the power to execute the war is vested in the President. Thus, in order to prosecute an offensive war the President must first get permission from Congress. What mechanism keeps the President from dishonestly making the case for war in order to get congressional war powers? The presidential oath. Comparing the beginning of the Vietnam War in 1964 with the beginning of the Iraq War in 2002-2003 from a common perspective reveals how both President Johnson and President Bush knowingly used suspect information to lobby Congress during a congressional election cycle in order to gain congressional war powers. If war powers are not gained “faithfully,” i.e., honestly and in good faith as required by the oath of office, then any congressional authority gained by the executive is unconstitutional and therefore illegal. Presidents cannot profit from a wrong.

INTRODUCTION

ON FEBRUARY 16, 2001, while George W. Bush, President of the United States (U.S.), attended a news conference in Mexico hosted by Vicente Fox, President of Mexico, a distinct difference between the two men became apparent when reporters asked questions about Iraq.¹ President Fox hesitated to make a declaration regarding Iraq saying: “this is not the meeting in which decisions or details are going to be reached, because they do not belong in the power of—the executive power, as

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¹Bush, George. W. February 16, 2001. News Conference with President Vicente Fox of Mexico in San Cristobal, Mexico.

such, because they have to have the participation of other groups.”² When another reporter asked about the then recent bombing of Iraq by U.S. military forces in the “no-fly zone,” President Fox repeated his deference to comity: “I do not have a position or a statement on that topic, specifically because this will be done through the Ministry of Foreign Affairs in the future.”³

Contrarily, President Bush showed no hesitation at the news conference to refer to executive prerogative regarding Iraq. Bush said:

In answer to part B of your question, the United States is engaged in the Middle East and the Persian Gulf. We will remain so. A routine mission was conducted to enforce the no-fly zone, and it is a mission about which I was informed and I authorized. But I repeat, it is a routine mission, and we will continue to enforce the no-fly zone until the world is told otherwise.⁴

The clear impression here is that President Bush has the authority to authorize the use of military force in the no-fly zone in Iraq, and he will continue to make similar decisions until “the world is told otherwise.” Presumably, Bush alone will do the telling. This unilateral view of foreign affairs that disregards input from legislative and international sources is a dramatically different view of foreign affairs than the one the Framers of the U.S. Constitution envisioned.

On July 12, 2001, President Bush declared “Captive Nations Week” to mark the successful transition to democracy by many world nations, and to raise awareness about countries like “Afghanistan, Burma, Cuba, Iraq, and Sudan” that deny freedom to their people.⁵ This proclamation was repeated one year later on July 17, 2002.⁶ On October 16, 2002, after political pressure from the Bush Administration regarding the threat posed by Iraq, Congress authorized President Bush to use military force in Iraq “as he deems necessary and appropriate” to enforce United Nations resolutions.⁷ The sole authority of when to go to war with Iraq had thus been delegated by Congress to President Bush.

On October 23, 2002, President Bush took this authority and continued to rally support for an invasion of Iraq by declaring “United

²Ibid.

³Ibid.

⁴Ibid.

⁵Bush, George W. July 12, 2001. *Proclamation 7455 Captive Nations Week, 2001.*

⁶Bush, George W. July 17, 2002. *Proclamation 7577 Captive Nations Week, 2002.*

⁷U.S. Cong. October 16, 2002. 107 P.L. 243. *Authorization for Use of Military Force Against Iraq Resolution of 2002.* §3(a).

Nations Day, 2002.”⁸ Though the United Nations is a world body that includes 191 member states, Bush only mentioned by name one foreign country: Iraq was presented as a “particular” threat to the “civilized world.”⁹ Bush continued to present Iraq as a threat in subsequent proclamations. On December 9, 2002, Bush proclaimed “Human Rights Day, Bill of Rights Day, and Human Rights Week, 2002.”¹⁰ In a statement that foreshadowed the invasion, Bush said, “And I hope the people of Iraq will soon realize their own dreams of peace and freedom.”¹¹ Bush’s next executive order on the subject came after the invasion of Iraq, which took place in March 2003.¹² Why Bush chose March 2003 to actually invade Iraq is less interesting than why he sought the authority to invade Iraq during the 2002 congressional elections and why he used discredited intelligence to argue Iraq posed an imminent threat. Did Bush act in good faith when presenting Iraq as an imminent threat during the congressional elections of 2002?

The answer to this question about Bush and the similar one that follows about Johnson is approached from the common perspective. This methodology assumes that reasoning bolstered by relevant empirical evidence is enough to sustain a political argument about America, even though reasonable minds can disagree and argue differently. This ancient way of discussing politics is admittedly different—nay, completely opposite—than the usual way of modern social science. Where modern social science demands an appeal to previously acceptable appeals, the methodology employed here makes no such demands, except in the sense that the only historical or relative appeal that matters where it counts is the appeal to *The Declaration of Independence*. This is the kind of paper that might have been written “[a]bout a generation ago, [when] an American diplomat could still say that ‘the natural and the divine foundation of the rights of man . . . is self-evident to all Americans.’”¹³ In other words, this paper carries the weight of not exact science but of inexact opinion—the eternal thing an ordinary, reasonable, and prudent individual uses to decide the most important matters on Earth: life, liberty, and the pursuit of happiness.

⁸Bush, George W. October 23, 2002. *Proclamation 7614 United Nations Day, 2002*.

⁹Ibid.

¹⁰Bush, George W. December 9, 2002. *Proclamation 7634 Human Rights Day, Bill of Rights Day, and Human Rights Week*.

¹¹Ibid.

¹²Bush, George W. March 20, 2003. *Executive Order 13290 Confiscating and Vesting Certain Iraqi Property*.

¹³Strauss, Leo. 1965. *Natural Right and History*. University of Chicago Press at 1.

Before the question of these rights and President Bush and Iraq in 2002–2003, there was the same question regarding President Lyndon B. Johnson and Vietnam in 1964. On August 2, 1964, in the Gulf of Tonkin, just off the north coast of Vietnam, communist commandos attacked the U.S. destroyer *Maddox*.¹⁴ President Johnson responded the next day by increasing the U.S. presence in the area and instructing the Navy to attack and destroy any subsequent aggressive force it meets.¹⁵ On August 4, 1964, President Johnson announced that U.S. ships in the Gulf of Tonkin area [the *Maddox* and the *Turner Joy*] were attacked, and because of these “renewed hostile actions” he ordered a bombing raid on certain North Vietnamese targets that were suspected of being responsible.¹⁶ President Johnson subsequently sought and received authorization from Congress on August 7, 1964 to “take all necessary measures to repel any armed attack against the forces of the U.S. and to prevent further aggression.”¹⁷

The Pentagon Papers, an internal military report (released to the public by *The New York Times* and U.S. Senator Mike Gravel), details the history of the Defense Department’s decision-making in Vietnam and suggest that the first attack on the *Maddox* was not unprovoked and the second attack on both the *Maddox* and the *Turner Joy* may not have occurred. Regarding the first attack on August 2nd, the North Vietnamese “admitted retaliation for an attack by South Vietnamese boats on two North Vietnamese islands.”¹⁸ The retaliation was apparently a response to covert U.S. offensive programs in North Vietnam respectively called “OPLAN 34A” and the “provocative” DESOTO patrols, which “the *Maddox* and the *Turner Joy* had been doing when attacked.”¹⁹ The second alleged attack on August 4th is suspected of being nothing more than bad weather and nerves on the part of U.S. sailors (“shooting at flying fish”).²⁰

Congress later rescinded the Gulf of Tonkin Resolution in January of 1971.²¹ Part of the reason for this action was that the official start of

¹⁴Johnson, Lyndon B. August 4, 1964. Remarks to the Nation about Attacks in the Gulf of Tonkin.

¹⁵Johnson, Lyndon B. August 3, 1964. Instruction to the Navy following Gulf of Tonkin attack.

¹⁶Johnson. August 4.

¹⁷U.S. Congress. August 7, 1964. H.J. RES 1145.

¹⁸*The Pentagon Papers*. 1971. at 329.

¹⁹Ibid.

²⁰See note 79 infra.

²¹U.S. Cong. January 12, 1971. HR15628. *Termination of Southeast Asia Resolution*.

the Vietnam War proffered by the Johnson administration left something to be desired. I posit that that something is truth. Section A of this article will argue that the Framers conceived of an honest federal government, especially with regard to foreign relations. Section B will argue that the presidential oath creates a positive duty to be honest with foreign nations. Section C will argue that President Johnson violated his oath in 1964 when advocating for the Gulf of Tonkin Resolution.

Section D will contrast Johnson's leadership in the Vietnam War with Bush's leadership in the Iraq War. Before Iraq was invaded in March of 2003, President George W. Bush said in January, in his *State of the Union Address*, that Saddam Hussein had then recently sought materials to create a nuclear bomb.²² Bush said, "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."²³ This claim garnered much controversy "since most government experts familiar with the statement believed it to be unsupportable."²⁴ After the invasion of Iraq, the White House retracted the statement, and the media reported that Bush blamed the bad intelligence on the Central Intelligence Administration, reporting that Bush said: "it was the CIA's fault."²⁵ Bush's attempt to avoid responsibility for a scandal by blaming a department raises more than just the wisdom of the decision of the Framer's to establish a unitary executive, it also raises the issue of the constitutional oath and requirement of good faith and suggests a parallel between President Johnson in 1964 and President Bush in 2002-2003.²⁶

Section E will address the effect of the oath to "faithfully" execute the office of president. Assuming *arguendo* the presidential oath was violated when advocating for a congressional delegation of war powers, what then is the effect of such a breach? Was the delegation unconstitutional as soon as Congress delivered it; when the breach became known by preponderance of evidence; or not at all? I argue here that the delegation is unconstitutional the moment of the breach. The fatal flaw is in the failure to follow the constitutional process—in this case, the

²²Bush, George W. January 28, 2003. *The State of the Union Address*.

²³Ibid.

²⁴Duffy, Michael, and James Carney. July 21, 2003. "A Question of Trust: The CIA's Tenet takes the fall for a flawed claim in the State of the Union, but has Bush's credibility taken an even greater hit?" *Time*.

²⁵Isikoff, Michael, and Tamara Lipper. July 21, 2003. "A Spy Takes the Bullet: The Bushies blamed CIA director George Tenet for the faulty-Iraq-intel firestorm. Now his career is on the line." *Newsweek*.

²⁶See Jeffrey K. Tulis. 1987. *The Rhetorical Presidency*. Princeton Press at 18.

oath—because regardless of which branch a misfeasance or a malfeasance comes from, the result is the same: an unconstitutional act produces unconstitutional fruit.²⁷ Only when a result follows a constitutional process can that result be properly considered constitutional.²⁸ As the common law maxim goes, one may not profit from a wrong.²⁹

Section F of this article will conclude that Bush, like Johnson in 1964, violated his oath to “faithfully execute” the office of President of the U.S. by hyping the threat posed by an enemy to gain the congressional authority to take the country to war. Accordingly, comparisons between the Vietnam War and the Iraq Invasion are not unwarranted or without basis. There is good reason to compare the two affairs, especially in the context of analyzing executive honesty. The importance of comparing the events is the maxim: those who fail to study history are doomed to repeat it.

SECTION A: THE FRAMERS AND EXECUTIVE HONESTY

The Declaration of Independence is not a document unconscious of truth.³⁰ Thomas Jefferson appealed expressly to a “candid world” to judge whether the King of Great Britain committed serious enough offenses to warrant revolution. Jefferson said that it was merely a “decent respect to the opinions of mankind” that required the Framers to “declare the causes” of “the separation.”³¹ In addition to a declaration of the “self-evident” nature of “truths” like natural rights, *The Declaration of Independence* also stands for the principle that the U.S. should approach foreign policy honestly. Jefferson also said that when the “political bands” that connected early Americans to Great Britain were thrown off, what remained was a “separate and equal station to which the laws of nature and of nature’s God entitle them.”³² Once America revolted against England, America became an independent nation living in a state of nature with England and other nations.

John Locke, America’s philosopher, also described a similar situation in his *Second Treatise of Government*.³³ Locke spoke of a power of

²⁷See *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

²⁸See *INS v. Chadha*, 462 U.S. 476 (1983).

²⁹For more on the common law maxim that “no man shall profit by his own wrong” see *Bradley v. Fox*, 129 N.E.2d 699 (1955).

³⁰Jefferson, Thomas. 1776. *The Declaration of Independence*.

³¹*Ibid.*

³²*Ibid.*

³³Locke, John. [1689] 1988. *Two Treatises of Government*.

government called “natural” or “federative.”³⁴ This power contains those governmental authorities that today are called foreign affairs, e.g., “power of war,” “peace,” “leagues and alliances,” and “all the transactions with all persons and communities without [or not part of] the commonwealth.”³⁵ Locke said that this federative or natural power is usually held by one branch of government, though he explained that they are actually held concurrently as legislative and executive authority before a government vests them officially in any branch or branches. Key here is Locke’s point that when it comes to foreign relations with other governments, the people are one nation:

For though in a commonwealth the members of it are distinct persons still in reference to one another, and as such are governed by the laws of society; yet in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of nature with the rest of mankind.³⁶

According to Locke, the state of nature too often falls into a state of all out war because people in the state of nature do not consult reason enough to solve their disputes.³⁷ This poses a problem for the hypothesis that truth should matter in foreign affairs. If Locke is correct to argue that nations are in a state of nature with other nations, and if it is true that the state of nature is almost always a state of war (where there is no truth, if truth is the first casualty of war), then is there any ground that would require an executive to be truthful towards other nations? The first President, George Washington, shows that such ground exists.

George Washington set the precedent for executive honesty.³⁸ In his *Inaugural Address*, he spoke of an established “truth,” “an indissoluble union between virtue and happiness.”³⁹ In his *Farewell Address* Washington expanded on his understanding of executive honesty.⁴⁰ After explaining that America’s future happiness lie in its federal system of government invigorated with the principles of comity and moral virtue, Washington recommended the U.S. “[o]bserve good faith and justice towards all nations.”⁴¹ His words:

³⁴Ibid. at 411.

³⁵Ibid.

³⁶Locke at 411.

³⁷Ibid.

³⁸Washington, George. 1789. *First Inaugural Address*.

³⁹Ibid. at 53.

⁴⁰Washington, George. 1796. *Farewell Address*.

⁴¹Ibid. at 221.

The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little political connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop.⁴²

Washington thus concluded his presidency with the same appeal for honesty in foreign affairs that Jefferson made when writing The Declaration of Independence. Washington offered himself “to the world” though the “discharge of [his] official duties” as an example of his faith in the correctness of a principled government.⁴³ Washington claimed for himself and for the country: “honesty is always the best policy.”⁴⁴

According to Herbert J. Storing, George Washington was a “model of what a republican executive ought to be.”⁴⁵ Part of this model is Washington’s moral virtue and commitment to honesty. During the constitutional convention Benjamin Franklin suggested the country would always have “a sufficient number of wise and good men to undertake and execute well and *faithfully* the Office.”⁴⁶ Although Franklin was in principle suggesting that a president not be paid a salary, his motion was accepted, suggesting the delegates agreed with Franklin about the end (a faithful executive) and only disagreed with him as to the means of achieving that end (it was ultimately determined by the delegates that a president would be paid a salary).

Franklin epitomized Washington or *visa versa* to the extent both believed the pursuit of happiness is a pursuit of moral virtue, but Franklin counseled nevertheless there would always be a number of people “who have need of honest instruments for the management of their affairs.”⁴⁷ Washington and Franklin are not the only Framers to presume “honest instruments” like the Constitution. Thomas Jefferson also echoed this principle in his *First Inaugural Address*.⁴⁸ Eluding to the Lockean notion of the state of nature between nations, Jefferson called for “guidance and support” to lead the country prudently “in a troubled

⁴²Ibid. at 222.

⁴³Ibid. at 223.

⁴⁴Ibid.

⁴⁵Storing, Herbert J. 1969. *Introduction*. In Charles Thach, *Creation of the Presidency*.

⁴⁶Madison, James. June 2, 1787. *Records of the Federal Convention*. (italics added).

⁴⁷Franklin, Benjamin. 1996. *The Autobiography of Benjamin Franklin*. Dover Thrift Edition at 71.

⁴⁸Jefferson, Thomas. 1801. *First Inaugural Address*.

world.”⁴⁹ When listing expressly just what the U.S. government can and should do, Jefferson made “honest friendship with all nations” a priority.⁵⁰

Though not a Framer, Lincoln is also a model of a republican executive like Washington and Jefferson. The Framers counseled fairness and candor to would-be external enemies whereas Lincoln did the same to would-be internal enemies. In the first sentence of his *First Inaugural Address*, Lincoln referenced the presidential oath.⁵¹ He went on to tell the South: “I take the official oath today, with no mental reservations, and with no purpose to construe the Constitution or laws, by any hypercritical rules.”⁵² Lincoln claimed the oath to “faithfully execute the office” imposes the “simple duty” to “constitutionally defend and maintain [the nation] . . . [and] in doing this there needs to be no bloodshed or violence . . . unless it be forced upon the national authority.”⁵³ Lincoln thus saw a distinction between his personal moral view on slavery and the legal view imposed by the law and the oath, such that the oath for Lincoln required fairness; non-aggression; and a faithful execution of the laws that is non-cognizant of private preferences.⁵⁴

That the Framers of the Constitution recognized the need for honest statesmen was apparent to Lincoln and also to the dissenters of the constitutional convention, the Anti-Federalists. Patrick Henry found the Constitution to be “horribly frightful” because as he said:

It is on a supposition that your American governors shall be honest, that all the good qualities of this government are founded; but its defective and imperfect construction puts it in their power to perpetrate the worst of mischiefs, should they be bad men; and, sir, would not all the world, from the eastern to the western hemisphere, blame our distracted folly in resting our rights upon the contingency of our rulers being good men, without a consequent loss of liberty!⁵⁵

Note Henry’s concern for world opinion, suggesting a consensus on this matter at the time. Henry’s main point of course was that the Constitution was impractical because it *requires* a person like

⁴⁹Ibid. at 322.

⁵⁰Ibid. at 323.

⁵¹Lincoln, Abraham. March 4, 1861. *First Inaugural Address*.

⁵²Ibid. (italics added).

⁵³Lincoln, Abraham. April 4, 1864. *Letter to Albert G. Hodges*.

⁵⁴Lincoln said he only imposed his views on the South after it had started aggressions and even then only when an “indispensable necessity had come.” (See Ibid.).

⁵⁵Henry, Patrick. June 5, 1788. *Speech Against Ratification*.

Washington or Lincoln to work properly. Without that moral virtue, that commitment to honesty, then the President of the U.S. turns from a peaceful executive with enumerated authority into, in the words of George Clinton, “the generalissimo of the nation.”⁵⁶

How did the Constitution address the charge of the Anti-Federalists and ensure that at least the Chief Executive of the nation would act in good faith? The answer is the oath of office.

SECTION B: THE CONSTITUTION AND EXECUTIVE HONESTY

The Constitution is best viewed as a contract. It is a social contract, representing a free people’s placement of their natural authority into the hands of a federal and limited, republican government for the purpose of securing for the future a government of efficiency, justice, peace, defense, general welfare, and liberty.⁵⁷ By its terms, the Constitution establishes contractual requirements to serve in office. In legislative departments, citizens of seven years who are older than 25 may serve in the House of Representatives for the State in which he/she lives if elected.⁵⁸ Senators need be 30 years old and citizens for at least nine years and living in the State they represent and inhabit.⁵⁹ The President, however, has the strictest requirements for office that includes age and citizenship standards (35 years old and natural born citizen), but also an oath:

I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.⁶⁰

The key word is “faithfully.” The President of the U.S., in order to be President, must exercise the office—that is, all of the powers and duties—in good faith.⁶¹ As Lincoln said, “I could not take office without taking the oath.”⁶² The Constitution requires good faith, and if it is not delivered then the Constitution has been violated. Important for the

⁵⁶Clinton, George. November 8, 1787. “Fourth Essay of ‘Cato.’” *The New York Journal*.

⁵⁷Preamble, U.S. Const.

⁵⁸U.S. Const., Art. I., §2.2.

⁵⁹U.S. Const., Art. I., §3.3.

⁶⁰U.S. Const., Art. II., §5 and §8.

⁶¹For a discussion of the powers and duties of the executive, see Joseph M. Bessette and Gary J. Schmitt. 1998. “What Does ‘High Crimes and Misdemeanors’ Mean?”

⁶²Lincoln. April 4.

purpose of this article, is the meaning of good faith in a negotiation, for the lawmaking process is a kind of negotiation between the executive and the legislative branches, and the executive is a kind of lawyer–like, most of all, a prosecutor–fairly subject to the profession’s ethical obligations.⁶³ But even if one concedes that the President has a duty to lobby Congress in good faith, what exactly does that mean?

The *Restatement (Second) of Contracts* prescribes for all contracts a duty of good faith and fair dealing: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.”⁶⁴ Note that the rule distinguishes between performance and enforcement. In a sense, this is understood to mean that the duty to perform a contract in good faith once established is distinct from the duty to fairly negotiate a contract not yet formed—the performance obligation is a higher, more stringent standard than the negotiation requirement.⁶⁵ Thus, it is generally thought that the ethical obligation during negotiation requires less adherence to veracity compared to the duty to be honest once a contract has been formed.

In the context of the President of the U.S., this distinction of good faith between the negotiation and performance context is moot. The constitutional requirement of executive good faith is by nature of the office. According to the Constitution an executive cannot exercise executive authority except in good faith; therefore, the act of “negotiating” with Congress to turn a bill into law is not a distinction with any difference when it comes to the duty of good faith. As Lincoln argued, *anything* an executive decides to do must be done honestly.⁶⁶

To address the criticism, however, even in practice the distinction between the duty to negotiate the terms of a contract fairly and the duty to exercise good faith once a contract has formed does not destroy the obligation to be honest. According to the *Model Rules* that govern lawyers’ professional responsibility, rule 4.1 and its comments prohibit an attorney from making a “false” statement of a “material” fact during a negotiation.⁶⁷ This distinction is called the puffing rule. It is okay to “puff” about unimportant details, but it is not okay to lie about the important ones. Some may argue that what is “important” or “material” is, like beauty: only in the eye of the beholder and, thus, the distinction

⁶³See Scalia’s dissent in *Morrison v. Olson*, 487 U.S. 654 (1988) (Scalia compares a president to a prosecutor, which, if a true analogy, makes holding the president to the ethical standard of attorneys reasonable).

⁶⁴*Restatement (Second) of Contracts*, §205.

⁶⁵See *Texaco v. Pennzoil*, 729 S.W.2d 768 (1987).

⁶⁶Lincoln. April 4.

⁶⁷*American Bar Association Model Rules of Professional Conduct*, Rule 4.1.

will inevitably give rise to endless conflicting opinions on what assertions by an executive require the strict scrutiny test for truth. I doubt the Framers would accept this position.

The Framers—who, themselves, relied on the common perspective—were certainly aware that reasonable people could disagree on things if given the liberty to form their own opinions.⁶⁸ But the Framers did not disagree as to the most important things themselves. For example, as shown above both Franklin and Washington were in complete agreement that happiness is moral virtue, not simply whatever a beholder claims it to be. Also, *The Declaration of Independence* identifies “self-evident” truths, which is impossible from a non-common perspective. Furthermore, the Framers would not have signed *The Declaration of Independence* if they could not agree on the most important things—after all, those signatories who signed that document did so under the penalty of death. The Framers were not historicists or relativists. With this disposition in mind, what is material is discernable from the common perspective. If going to war is material, then what remains is the question of Johnson and Bush’s honesty regarding their respective presidential campaigns for war.

SECTION C: PRESIDENT JOHNSON AND EXECUTIVE HONESTY

Before Lyndon B. Johnson took office after being sworn in upon John F. Kennedy’s assassination, Dwight D. Eisenhower occupied the office of the President. When Eisenhower gave his farewell address he spoke of an association with Congress consistent with comity.⁶⁹ He said: “Our people expect their President and the Congress to find essential agreement on issues of great moment.”⁷⁰ Like Washington, Eisenhower offered himself as an exemplar of principle. Eisenhower said: “In this final relationship, the Congress and the Administration have, on most vital issues, cooperated well, to serve the national good rather than mere partisanship.”⁷¹ Eisenhower placed a premium on working with

⁶⁸See Madison, James. 1787. “Essay 10.” *The Federalist Papers*.

⁶⁹Eisenhower, Dwight D. January 17, 1961. *Farewell Address*.

⁷⁰*Ibid.*

⁷¹*Ibid.* (Eisenhower warned that the country faced a new “crisis”: “This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every State house, every office of the Federal government.” The influence of this “military-industrial complex,” whether “sought or unsought,” exists and will “persist” into the future. The possible influence the military establishment had on Johnson’s decision to seek a “blank check” for the Vietnam War is not addressed here, although it is worth noting that *The*

Congress, not against it, on important matters, and the question is whether Johnson followed his example.⁷²

Johnson first spoke to the nation about the Gulf of Tonkin on August 3, 1964.⁷³ The announcement took less than 100 words, the substance of the statement was that the U.S. military would continue to patrol the north coast of Vietnam and would destroy any force that attacked it.⁷⁴ Left out of this short speech were some material facts: (1) the U.S. had given aid to South Vietnamese commandos who previously attacked “two North Vietnamese islands,” and (2) the patrols were considered “provocative” even by U.S. military standards.⁷⁵ The failure to present these facts means the public did not have the information required to conclude that the was at least an equal aggressor in Vietnam at the time.

If Johnson cared that his August 3rd statement left out material facts, he did not make up for it by giving the American people the full account of what was known about the Gulf of Tonkin affair the next day. On August 4, 1964, Johnson spoke to the nation again, this time on national television. In his first sentence, Johnson invoked his “duty” as “President and Commander in Chief” to tell the public about “renewed hostile actions against U.S. ships on the high seas in the Gulf of Tonkin” that required Johnson “to order the military forces of the United States to take action in reply.”⁷⁶

Whether Johnson thought the second attack happened is debated, with some suggesting that at the time Johnson thought the attack occurred. Assuming *arguendo* this is so, what to make of the statement that “today,” on August 4th, Johnson “ordered” the military to “take action in reply”? Johnson ordered military action on August 3rd, as shown above, not August 4th. On August 4th, the commanders of the ships in the Gulf of Tonkin understood that they were authorized to destroy any attackers because of the August 3rd order. Johnson appears to be confusing the August 2nd attack with the August 4th incident.

Johnson went on to say:

Pentagon Papers acknowledge that the Kennedy administration was pursuing a policy of withdrawal prior to his assassination and the Johnson administration reversed this policy shortly after taking office in the summer of 1964. See *The Pentagon Papers* at 458).

⁷²It is also a question whether Bush followed Eisenhower’s admonishment to vindicate comity.

⁷³Johnson. August 3.

⁷⁴*Ibid.*

⁷⁵*The Pentagon Papers* at 329.

⁷⁶Johnson. August 4.

The initial attack on the destroyer Maddox, on August 2, was repeated today by a number of hostile vessels attacking two U.S. destroyers with torpedoes. The destroyers and supporting aircraft acted at once on the orders I gave after the initial act of aggression. We believe at least two of the attacking boats were sunk. There were no U.S. losses.⁷⁷

Explicating this statement leads to the following. Johnson says an attack occurred on August 2nd. He says an attack also occurred on August 4th in the same sentence. In the next sentence he says he gave orders to respond “after the initial act of aggression.” Johnson says that the initial act of aggression occurred on August 2nd, but in his language it is unclear whether he is referring to the August 2nd attack or the August 4th attack when he says: “two of the attacking boats were sunk.” It is unclear when the sinking occurred. In reality, U.S. ships damaged three North Vietnamese boats on August 2nd (one sank), but no boats were damaged on August 4th. This reality is not clear from Johnson’s speech, though it was known at the time.

Johnson’s obfuscation of the facts on a matter of starting a war is a breach of the oath to “faithfully” execute the office.⁷⁸ Scholarship shows that there is no question Johnson played fast and loose with the facts to sell the Gulf of Tonkin Resolution.⁷⁹ Critics might suggest that though Johnson could have been clearer there is no material breach. In my opinion, the material/non-material distinction does not matter for determining whether Johnson violated his oath, as explained above, but to address the criticism consider the following

After framing the debate in the minds of soon-to-be voters by going over the collective head of Congress on August 4th, President Johnson addressed Congress directly on August 5, 1964.⁸⁰ Again referring to “further deliberate attacks” on U.S. interests, Johnson requested from Congress “a resolution expressing the unity and determination of the

⁷⁷Ibid.

⁷⁸It is not that rhetoric, by itself, is a breach of the oath to “faithfully” execute the office, but rather the breach comes from that kind of rhetoric done to hide or distort material facts during the deliberation of a decision to move the country from peace to war.

⁷⁹See Hearden, Patrick J. 1991. *The Tragedy of Vietnam*. (A few days after the August 4 “attack” Johnson is quoted as saying, “Hell, those dumb, stupid sailors were just shooting at flying fish,” at 109. Johnson also said he liked the Gulf of Tonkin Resolution because, “Like grandma’s nightshirt, it covered everything,” at 110).

⁸⁰Johnson, Lyndon B. August 5, 1964. *Message to Congress on Gulf of Tonkin Resolution*.

United States in supporting freedom and in protecting peace in south-east Asia.”⁸¹ Johnson said, “America keeps her word,” invoking the principle of honesty to suggest that the country was duty bound to authorize him to exercise complete military authority in Vietnam because of a prior treaty.⁸²

Johnson did not explain, however, how the U.S.’s treaty obligations in Vietnam included compliance in coups and other clandestine military operations.⁸³ This is, perhaps, not hard to understand if one considers the rhetorical fantasy Johnson was creating at the time, going so far as to claim: “We have no military, *political*, or territorial ambitions in the area.”⁸⁴ This appears almost ridiculous today, in the sense that *everything* the U.S. government did/does in Vietnam or elsewhere is “political” by definition.

Johnson framed the debate to eliminate discourse, yet ironically he promised a “free” congressional deliberation.⁸⁵ He said:

I have been given encouraging assurance by these leaders of both parties that such a resolution will be promptly introduced, freely and expeditiously debated, and passed with overwhelming support. And just a few minutes ago I was able to reach Senator Goldwater and I am glad to say that he has expressed his support of the statement that I am making to you tonight.⁸⁶

Johnson cannot be sincere, however, because the obvious effect of bringing the resolution to Congress during an election cycle was that it pressured members to disregard their duty to deliberate. The full energy of the office (the bully-pulpit) was brought to bear on Congress, and there is no doubt Johnson approved of bringing the Gulf of Tonkin Resolution to Congress during the most sensitive political moment in politics, i.e., a political campaign. The day after he promised free deliberations, Johnson explained why he saw positive signs of endorsement on August 4th, even though no deliberation had yet taken place. Johnson said:

The events of this week would in any event have made the passage of a Congressional Resolution essential. But there is an additional reason for doing so at a time when we are entering on three months of political campaigning. Hostile nations must understand that in such a

⁸¹Ibid.

⁸²Southeast Asia Collective Defense Treaty (Manila Pact). September 8, 1954.

⁸³See *The Pentagon Papers*.

⁸⁴Johnson. August 5. (italics added).

⁸⁵Johnson. August 4.

⁸⁶Ibid.

period the United States will continue to protect its national interests, and that in these matters there is no division among us.⁸⁷

Johnson implies that patriots would vote for this bill while traitors would not, which is hardly rhetoric conducive to open and honest deliberation. To his credit, Johnson claimed to appreciate the gravity of his request, describing it as a “solemn responsibility” and the result of his “considered conviction.”⁸⁸ The problem, however, is that Johnson claimed that the attacks in the Gulf of Tonkin were “unprovoked.”⁸⁹ This is the material breach of Johnson’s oath, for it suggests the U.S. is clearly in the moral position in the Vietnam War—as a defender, not an aggressor—and that was not true. *The Pentagon Papers* reveal Johnson’s position as false when he delivered it, as the U.S. ships that were “attacked” were expressly conducting what were considered to be “provocative” patrols even by U.S. standards.⁹⁰

White House attorneys argued in a memorandum created for Johnson in June 1964 that the President of the U.S. had the unilateral authority to send military forces to Vietnam.⁹¹ The memorandum suggests that the bases for Johnson to act unilaterally and send forces to Vietnam are (1) an act of Congress (Foreign Assistance Act of 1961 and subsequent amendments) and (2) the Constitution. The commander-in-chief clause is cited as giving Johnson the authority to send troops to Vietnam (before the Gulf of Tonkin Resolution). Tellingly, the oath of office is absent from the legal analysis, suggesting it was not on the minds of the White House counsel to ensure the exercise of the commander-in-chief authority, whatever that may be, is done “faithfully” and consistent with the example set by the Framers. They missed part of the controlling law, in my opinion, by not accounting for the good faith requirement of the presidential oath.

Johnson’s failure to appreciate his oath of office may have led in part to Congress’ later decision to rescind the Gulf of Tonkin Resolution in 1971.⁹² Consider the *Congressional Record for the Senate* on March 23, 1970:

⁸⁷Johnson. August 5.

⁸⁸Ibid.

⁸⁹Johnson. August 5.

⁹⁰*The Pentagon Papers* at 329.

⁹¹Rusk, Dean. June 29, 1964. Memorandum for the President. Declassified on December 29, 1977.

⁹²HR15628.

The Tonkin Resolution on Vietnam was a fraud, and while that became clearer later, it might have been clearer at the time if the right questions had been pressed, if Congress had not closed its eyes out of misplaced deference to the President and waved him down a wrong road.⁹³

Norman Solomon, a writer and syndicated columnist, described the “free” debate over the Gulf of Tonkin Resolution as “an invitation to stand up and salute the flag, and anybody who refused to do so was attacked as a, was essentially treated as, a pariah, attacked as somebody who lacked requisite patriotism and military resolve.”⁹⁴ Senator Wayne Morse, one of only two dissenters in the entire Congress to the Gulf of Tonkin Resolution, said during an interview, “I am pleading that the American people be given the facts about our foreign policy.”⁹⁵ To which Peter Lisagor replied, “You know the American people cannot formulate and execute foreign policy.”⁹⁶ Senator Morse decried this position: “the American people [can] follow the facts if you’ll give them . . . we’re not giving the American people the facts.”⁹⁷

History proves Morse right: Johnson was not telling the American people the truth. This failure was a violation of the presidential oath and it made the Gulf of Tonkin Resolution unconstitutional. Though Congress later appropriated funds to support the troops in Vietnam after it became known that Johnson misled the country, this in no way saves the constitutionality of the Gulf of Tonkin Resolution. While a Senator, Lincoln voted against the Mexican War, yet he voted for supplying the troops.⁹⁸ He said, “That vote affirms that the war was unnecessarily and unconstitutionally commenced by the President . . . [it] has nothing to do in determining my votes on the question of supplies.”⁹⁹ According to Lincoln, an executive can unconstitutionally force the nation into war and later coerce Congress to support the bad decision because of the need to protect deployed soldiers. Such support should not be construed, however, to make constitutional the unconstitutional request for war.

⁹³Congressional Record. Senate. March 23, 1970 at 8741.

⁹⁴National Radio Project. October 13, 1999. “#41-99 War Stories: The Gulf of Tonkin and Wayne Morse.” *Making Contact*.

⁹⁵Ibid.

⁹⁶Ibid.

⁹⁷Ibid.

⁹⁸Lincoln, Abraham. February 1, 1848. *Letter to William H. Herndon*.

⁹⁹Ibid.

The Pentagon Papers show the August 4th attack in the Gulf of Tonkin was disputed and, most importantly, that the attack was not unprovoked. Johnson thus violated his oath when he called for war before it was “forced upon the national authority.”¹⁰⁰ Whether an executive can bully Congress during an election cycle with bad information to gain unfettered military power is a question that seems to answer itself. The question is of course very relevant today, as the U.S. military fights in Iraq pursuant to a law based on now unsupportable claims of weapons of mass destruction. To gain the authority to invade Iraq, the Bush Administration used discredited intelligence to advocate that Iraq was an imminent threat and pressured Congress during an election cycle to authorize President Bush to have sole discretion of when to use force against Iraq, which presents a striking parallel between the Gulf of Tonkin and the current Iraq war.

SECTION D: PRESIDENT BUSH AND EXECUTIVE HONESTY

President Bush’s claim in his 2003 *State of the Union Address* about the nuclear ambitions of Saddam Hussein and Iraq, which were part of a systematic campaign to present Iraq as an imminent threat to the country, eventually led to the indictment of I. Lewis Libby, a.k.a., “Scooter Libby,” former Assistant to the President of the U.S., Chief of Staff to the Vice President of the U.S., and Assistant to the Vice President for National Security Affairs. At the time of this writing, Libby resigned his position in the White House to defend himself against charges of obstruction of justice, making false statements to government officials, and perjury.¹⁰¹ Whether Libby will be found guilty and/or whether other parties in the White House or elsewhere will or should also face indictment or impeachment is not the focus here. Libby’s indictment does, however, relate to President Bush’s duty to act in good faith, especially when arguing the nation should go to war, and it is informative.

The indictment lists the facts of the case as follows. First, President Bush said in his *State of the Union Address* on January 28, 2003, “The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.”¹⁰² Second, the *New York Times* published an article casting serious doubt on the veracity of Bush’s claim.¹⁰³ Third, Libby asked for information about the source for

¹⁰⁰Lincoln. March 4.

¹⁰¹*U.S. v. I. Lewis Libby*. “Indictment.” U.S. District Court for the District of Columbia. Grand Jury sworn in on October 31, 2003.

¹⁰²*Ibid.* at 3.

¹⁰³*Ibid.*

the article, which turned out to be Joseph Wilson a “former career State Department official who had held a variety of posts, including United States Ambassador.”¹⁰⁴

Fourth, there was top-level discussion about Wilson in the Office of the Vice President.¹⁰⁵ Fifth, Libby learned in early June that Wilson’s wife worked at the CIA and was involved in sending her husband on a fact-finding trip about Bush’s State of the Union statement.¹⁰⁶ Sixth, when more media stories about Bush’s inaccurate statement were published Libby began to express “displeasure that CIA officials were making comments to reporters critical of the Vice President’s office.”¹⁰⁷ Libby then spoke with a reporter and criticized the CIA for “selective leaking” and disclosed the identity of Wilson’s wife.¹⁰⁸

Seventh, Wilson wrote an Op-Ed article and granted interviews with the media in which he was critical of Bush’s claim in the State of the Union and suggested that the Bush Administration understood the words were false *when delivered*.¹⁰⁹ Eighth, after Wilson’s Op-Ed article and media appearances the Bush Administration began collecting more information about Wilson and his wife, and met with reporters who then published the identity of Wilson’s wife as part of an effort to respond to Wilson’s allegation that Bush lied during his *State of the Union Address*.¹¹⁰ Because Wilson’s wife was a “classified” employee of the CIA an investigation into the leak of her name was begun on or about September 26, 2003, which eventually led to the indictment of Libby in October of 2005.¹¹¹

Wilson was not the only critic of the Bush Administration’s presentation of the threat posed by Iraq. After the invasion of Iraq had occurred, the Senate conducted an investigation of the prewar intelligence since it had become virtually certain that the threat posed by Saddam Hussein and Iraq were overstated by Bush and others.¹¹² Regarding the claim that Iraq had stockpiles of weapons of mass

¹⁰⁴Ibid.

¹⁰⁵Ibid. at 4.

¹⁰⁶Ibid. at 4-5.

¹⁰⁷Ibid. at 5.

¹⁰⁸Ibid. at 6.

¹⁰⁹Ibid.

¹¹⁰Ibid. at 7-8.

¹¹¹Ibid. at 8.

¹¹²U.S. Senate. December 2002. 107-351. *Report on the U.S. Intelligence Community’s Prewar Intelligence Assessments on Iraq*.

destruction, the investigator in charge of looking for them flatly stated: “I don’t think they existed.”¹¹³ The Senate agreed, and in its report on prewar intelligence concluded: “The assessment that Iraq ‘is reconstituting its nuclear program’ was not supported by the intelligence provided to the Committee.”¹¹⁴

The Special Counsel, Patrick J. Fitzgerald, was assigned to investigate the leak of Wilson’s wife on December 30, 2003.¹¹⁵ Fitzgerald was given “all the authority of the Attorney General” to investigate “the alleged unauthorized disclosure of a CIA employee’s identity.”¹¹⁶ In the process of his investigation Fitzgerald subpoenaed reporters who were involved. In so doing, Fitzgerald had to address the First Amendment’s freedom of the press provision and the requirement that he only seek information from reporters on the basis of good faith.¹¹⁷

Good faith in the context of the decision of the Special Counsel to subpoena reporters to testify before a Grand Jury is different from the good faith requirement of an executive discussed above. The issue of good faith arises when reporters are called by a prosecutor to testify before a Grand Jury, because reporters rely on confidential sources for stories and if reporters were forced to disclose the identity of their sources the reporters may not get any sources for fear of public reprisal. The U.S. Supreme Court held in *Branzburg v. Hayes* that reporters do not have a qualified privilege not to testify because of the need for truth in constitutional proceedings.¹¹⁸ The Special Counsel in this case argued that even if such a qualified privilege existed, it ought not apply in this case because the prosecutor is not acting in bad faith, i.e., not seeking to “harass” the press by subpoenaing reporters.¹¹⁹

In this context, good faith is not a matter of veracity, but intention. If the standard of good faith is veracity, as I argue, then Bush has not met the mark by virtue of the indictment, i.e., there is enough evidence for a reasonable person to conclude the White House was involved in the leaking of a CIA operative to discredit an Iraq War critic.¹²⁰ But even

¹¹³Kay, David. February 2, 2004. “Perspectives.” *Newsweek*.

¹¹⁴U.S. Senate. *Report on U.S. Intelligence*.

¹¹⁵Comey, James B. December 30, 2003. Letter to Patrick J. Fitzgerald.

¹¹⁶*Ibid.*

¹¹⁷Fitzgerald, Patrick J. Special Counsel. February 15, 2005. Press Release.

¹¹⁸See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹¹⁹See Fitzgerald, Patrick J. February 15, 2005. *Brief of the United States*. United States Court of Appeals for the District of Columbia. Nos. 04-3138, 04-3139, 04-3140.

¹²⁰See Tulis at 185-86.

if the standard of good faith is harassment, not veracity, then Bush still does not meet the mark as Bush brought the issue of authorizing the use of force in Iraq to Congress during the 2002 election cycle.¹²¹ This parallels the kind of congressional harassment displayed by Johnson in 1964 with the Gulf of Tonkin Resolution. What other purpose, other than political pressure, i.e., harassment, could there have been to seek war powers during a congressional election? The fact that Bush did not actually invade Iraq until March 2003 suggests the purpose in October 2002 was akin to Johnson's purpose in 1964: gain war powers by unnecessarily playing fast and loose with the facts during a congressional election cycle.

Even more on point, the Bush Administration clearly acted to "harass" Wilson by outing his wife's name. If the administration had simply attempted to debate the merits of the nuclear ambitions of Iraq with Wilson, that might not have been a breach of the duty of good faith under the harassment standard; however, the administration brought the bully pulpit to bear on the family of a political critic. Going after family members for political purposes is harassment by any reasonable standard. What else other than harassment could have been intended by discussing the identity of Wilson's wife publicly? Whether the standard is veracity, as I prefer, or harassment, President Bush by either measure violated his oath to "faithfully execute the office of the President of the United States" by presenting Iraq as an imminent threat to gain war powers based on discredited intelligence and mishandling sensitive information for the purposes of political mud-slinging.

SECTION E: THE CONSTITUTIONAL CONSEQUENCE OF EXECUTIVE DISHONESTY

If one considers the relationship between the executive and the legislature as a kind of marriage, then one can see how a child (a law) produced by deceit becomes illegitimate. In this sexist sense, Johnson and Bush made Congress a cuckold. A more modern way to say the same thing is to refer to the maxim that one cannot profit from a wrong.¹²² It is proper to view the congressional delegations of war powers as a profit for Johnson and Bush, respectively, because each received what he had been asking for before: authorization to start a war. Their profit, however, should be seen as an unconstitutional gain because it came from a breach of the covenant of good faith. Con artists have as much title to

¹²¹U.S. Cong. October 16, 2002. 107 P.L. 243. Authorization for Use of Military Force Against Iraq Resolution of 2002. at §3(a).

¹²²See note 28, *supra*.

their swindled goods as Johnson had constitutional authority to start the Vietnam War and Bush had authority to start the Iraq War. In short: neither Johnson nor Bush had the constitutional authority to do what they did. The constitutional oath requires good faith, but Johnson and Bush acted in bad faith—their breaches, which were material, were about going to war. As Leo Strauss said, “A decent society will not go to war except for a just cause.”¹²³

SECTION F: CONCLUSION

That neither Johnson nor Bush had a just cause is taken for granted from the common perspective. With the benefit of hindsight, the lives lost in Vietnam and those being lost in Iraq are the product of uncertain ends and dubious beginnings. The only clear benefactor in both cases is the military-industrial complex that Eisenhower warned against. Eisenhower’s warning to remain steadfast against the unwarranted intrusion of military authority in the ordinary course of daily life should not be discounted or forgotten. I have argued here that the cost of the intrusion, “whether sought or unsought,” has been the presidential oath in Article II of the U.S. Constitution. It is self-evident from this common perspective that history can only be the basis of progress when those people in the present are informed enough to steer their leaders towards proper future ends. To the extent Johnson and Bush have been permitted to violate their respective constitutional oaths without constitutional rebuke, Congress and the courts are accomplices to the violation and will be judged accordingly by posterity.

¹²³Strauss at 140.