Cold War Paradox: The United States and the South Korean constitutions of 1948 and 1988

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The “Lessons of Vietnam”: A Correction

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As with many aspects of the Vietnam War, there is confusion surrounding the U.S. policy towards the South Vietnamese constitution of 1967. Some critics, like former Secretary of Defense Melvin Laird, have contended that U.S. participation in the creation of the document was hopelessly heavy-handed. This portrayal, in turn, feeds into the larger narrative of the relationship between the United States and South Vietnam as one where Washington simply issued orders that were mindlessly obeyed by the illegitimate, puppet government in Saigon. The truth is rather more complex. American policymakers certainly had a set of goals for the South Vietnamese constitution, but they entered the constitution-making process with the intention of being as flexible as possible. While U.S. officials did stress the American position on elements of the constitution that they considered essential, there were not many articles that fit this description and for the most part the United States let the South Vietnamese leaders draft the document as they saw fit. Moreover, even when the American embassy interjected with the United States government’s views, this did not mean that Washington got what it wanted. The U.S. undoubtedly made many mistakes in Vietnam, but the evidence suggests that the position it adopted towards the South Vietnamese constitution was not one of them.

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

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apply the lessons of Vietnam to the Iraq War. He took American policymakers to task for failing to establish a legitimate government in South Vietnam (“SVN”), cautioning that the United States must not repeat this fundamental mistake in Iraq. Bolstering his words of warning, Laird contended that, far from succeeding in their goal of developing valid authority in Saigon, U.S. officials may actually have worsened the problem. In support of his charge that the United States kept South Vietnam as a “puppet,” 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.”

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

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4 See id. at 34-35.
5 See id. at 35.
6 Id.
8 See DALE VAN ATTA, WITH HONOR: MELVIN LAIRD IN WAR, PEACE, AND POLITICS (2008).
9 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, 6 J. MIL. Hist. 113, 115 (1992) (noting Norman Graebner’s conclusion that the “Saigon government was an ‘artificial entity’”).
Looking to past events for help with present decision-making has a strong pedigree.\textsuperscript{11} During the Cuban Missile Crisis, John F. Kennedy famously consulted \textit{The Guns of August}, Barbara Tuchman’s classic account of the outbreak of the First World War,\textsuperscript{12} while Lyndon B. Johnson seems to have been heavily affected in his own choices about Vietnam by the experience of Munich 1938.\textsuperscript{13} Though the benefits of looking to the past for guidance can be easily overstated, the practice has its place in analysis.\textsuperscript{14} However, in order for the “lessons learned” to have any actual utility, the history of the event being studied must be correctly described.\textsuperscript{15} A reconsideration of Washington, Saigon, and the 1967 SVN constitution will be consequently beneficial.

There are additional reasons to undertake such a review. Despite the immense amount of academic literature on America in Vietnam, the particular topic this article will explore has apparently received little attention.\textsuperscript{16} While there is some material on related issues, there does not seem to be one piece of scholarship that focuses solely on American policy towards the

\textsuperscript{11} \textit{See Jeffrey Record, Making War, Thinking History: Munich, Vietnam, and Presidential Uses of Force from Korea to Kosovo} (2002).
\textsuperscript{15} \textit{See} Gerhard L. Weinberg, \textit{Munich after 50 Years}, 67 Foreign Aff. 165 (Fall 1988); Lewis Sorley, \textit{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.”).
South Vietnamese constitution of 1967. Even William Conrad Gibbons’s magisterial treatment does not give the matter substantial attention.

The subject covered here also raises the issue of constitution-building, specifically when the United States government (“USG”) 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. This area of inquiry has received considerable coverage in both legal and historical academic forums, though perhaps not enough, particularly considering that the American government has shown little willingness to abandon the policy in question.

However, the experience of the USG and the 1967 SVN constitution is apparently absent from these studies as well. Presenting the actual American 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,

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like Laird, who seek to portray the relationship between the U.S. and SVN as simply one of a dominant power dictating commands to its client state.  

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. American policymakers considered the drafting of a constitution and the transition to a representative constitutional government in SVN major goals. Before the South Vietnamese Constituent Assembly (“CA”) began work, U.S. officials had a set of core principles they wished the SVN constitution to contain. During the drafting process, the USG monitored the CA’s activities and analyzed the form that the constitution was taking. In speaking with CA delegates, Saigon embassy

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24 See Telegram from Ball to American Embassy Saigon (“Saigon”) (Sept. 23, 1966) (on file with the U.S. National Archives and Records Administration (“NARA”), Record Group (“RG”) 59, Central Foreign Policy Files, 1964-1966, Box 2937, Folder “Pol 15-5 Constitution Viet S 1/1/64”). [NARA Box 2937-5].


26 See Telegram from Saigon to SecState (Sept. 4, 1966) (located in NARA Box 2937-5, supra note x).

27 See Telegram from Saigon to SecState (Dec. 12, 1966) (on file with the NARA, RG 59, Central Foreign Policy Files, 1964-1966, Box 2936, Folder “Pol 15 Viet S 10/1/66”) [NARA Box 2936]; Telegram from Saigon to SecState (Jan. 13, 1967) (on file with the NARA, RG 59, Central Foreign Policy Files, 1967-1969, Box 2769, Folder “Pol 15-5 Viet S 1/1/67”) [NARA Box 2769-1]; Directorate of Intelligence, Intelligence Memorandum, South Vietnam’s Constituent Assembly: A Preliminary Appraisal (Oct. 25, 1966) (located in DDRS, supra note x); Telegram from Katzenbach to Saigon (Feb. 18, 1967) (located in NARA Box 2769-1, supra note x) (“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.”).
personnel and other USG representatives made the case for including those provisions deemed essential by American policymakers and rejecting the ones adjudged truly problematic.\textsuperscript{28} However, U.S. officials refused to seek to influence those portions of the constitution not considered vital by Washington.\textsuperscript{29} Moreover, they recognized that the USG could not obtain some of its wishes for the document, even if they were viewed as very important.\textsuperscript{30} Indeed, the SVN constitution promulgated on April 1, 1967 contradicted American plans in several vital respects.\textsuperscript{31} “Flexible Response” was the name chosen by the Kennedy and Johnson administrations for their national security policy.\textsuperscript{32} As has been correctly noted, in important ways U.S. practice in Vietnam did not live up to the theoretical goals of this defense strategy.\textsuperscript{33} However, in describing American policy towards the drafting and promulgation of the 1967 SVN constitution, the term “flexible response” does seem to be merited.

\textbf{I. Constitutional Government in SVN as a Major U.S. Objective}

American officials considered the creation of a constitution and the transition to constitutional government to be top priorities for the Johnson administration’s policy towards
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. A series of coups and attempted coups in Saigon culminated in the June 12, 1965 toppling of the civilian leadership by the SVN military. A group of officers took control of the government of South Vietnam (“GVN”) and established a military directorate, with Nguyen Cao Ky as prime minister and Nguyen Van Thieu as chief of state.

From early on in the U.S. war effort, a rectification of this state of affairs was viewed by American officials as very important. On February 7 and 8, 1966, representatives of the USG and GVN met at Honolulu for the purpose of discussing the non-military aspects of the war. 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. At the Honolulu conference, the SVN leaders assured the USG of their intention to establish democratic government in their country, while the American representatives in turn confirmed their support for open and honest elections in SVN.

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36 See GUENTER LEWY, AMERICA IN VIETNAM 49 (1980).
38 See Telegram from Saigon to SecState (Nov. 22, 1965) (located in NARA Box 2937-5, supra note x).
39 See Telegram from Department of State to American Embassy in Korea (Feb. 5, 1966), in FRUS, 1966, supra note x, at 214.
40 See FRUS, 1966, supra note x, at 215.
The GVN promised to select an advisory council that was truly representative of the country’s people to draft a constitution. The delegates charged the U.S. Embassy in Saigon (“Embassy”) with monitoring the advisory council appointment process. The representatives agreed that both the GVN and the Embassy were responsible for seeing that these constitutional plans came to fruition. The summit participants wanted to have the SVN constitution and popular referendum on the document completed by the end of 1966. According to the conclusions and goals reached at Honolulu, elections for a government based on this constitution were to follow. However, though American policymakers certainly considered these political objectives important, President Johnson stressed at the meetings that the U.S. did not wish the GVN to move faster towards constitutionalism than would be prudent or to alter its thinking on the subject.

In a March 2, 1967 letter to Secretary of State Dean Rusk, 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.” In that same month, top American and South Vietnamese leaders met at Guam. 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. He also shared his opinion on how happy he was to observe a democratic polity being constructed and stressed how

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42 See id.
43 See id.
44 See id. at 247, 250
45 See id. at 250.
46 See id.
47 See id. at 251.
50 See id.
eager the U.S. was to help in the project. Johnson’s emphasis on a democratic constitution and free elections established the tone and theme for the day’s proceedings.

Secretary Rusk was in full agreement with the president on the importance of establishing democratic constitutionalism in SVN. In December 1966, Rusk met with Thieu, Ky, and the GVN’s foreign minister Tran Van Do. He stressed to them how critical it was to have a problem-free transition to a constitutional government. 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. 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[.]

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.

Sub-cabinet officials shared the concern that SVN make the shift to constitutional democracy. On February 21, 2006, 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 Johnson and Rusk. In it, Rostow recommended that the USG help organize a multi-country

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51 See id. at 272.
52 See id. at 268.
53 See Telegram from Rusk to Department of State (Dec. 11, 1966), in FRUS, 1966, supra note x, at 925.
54 See id.
55 See id. at 927.
56 See id.
57 Telegram from SecState to Ambassador (Saigon), supra note x.
58 See id.
59 See Action Memorandum from Rostow to Rusk, A Political Proposal for Viet Nam: Putting the Democracy Building Council on the Road (Feb. 21, 1966) (located in NARA Box 2937-5, supra note x).
60 See id.
educational trip on constitutional and political issues for those tasked with drafting the SVN constitution. As one of the “significant purposes” the journey might serve, he listed the following: “the 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.”

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[].” After the Ky regime did survive the spring 1966 political emergency to which Rostow referred, he recommended the issuing of a high-level USG statement indicating happiness with the forward movement toward constitutional democracy that had occurred in SVN. In January 1967, Rostow communicated to Johnson how important it was that agreement be reached on the constitution among the different SVN leaders.

Similar views were held by others in the Johnson administration. In a top secret memorandum of 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.” In Harriman’s prediction, the realization of constitutional government in Saigon would bolster in significant ways the global position of both the GVN and

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61 See id.
62 Id.
63 Memorandum from Rostow to Johnson (Apr. 5, 1966), in FRUS, 1966, supra note x, at 329.
65 See Memorandum from Rostow to Johnson (Jan. 10, 1967), in FRUS, 1967, supra note x, at 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 Johnson (Feb. 20, 1967), in FRUS, 1967, supra note x, at 198-99 (emphasis added).
66 See Memorandum from Harriman to Johnson and Rusk, supra note x, at 726.
67 Id.
the USG. 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 USG’s chief Vietnam priorities for that year. In January 1967, General Maxwell Taylor, special consultant to the president and former ambassador to Saigon, reported on his recent visit to SVN. He wrote “Although I have mentioned the favorable progress towards constitutional government, success in this field is so critical that all remaining problems related to it should be watched closely to assure timely resolution.”

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 tempered by hard-nosed realism. While American 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 Communists competently. Similarly, while this article will show that in practice the USG respected South Vietnamese independence in the creation of their

68 See id.
69 Komer to Katzenbach, supra note x.
70 See Letter from Taylor to Johnson (Jan. 30, 1967), in FRUS, 1967, supra note x, at 64.
71 Id. at 72.
72 See Memorandum from Rostow to Rusk and McNamara, Breaking Tri Quang’s Momentum (Apr. 9, 1966), in FRUS, 1966, supra note x, at 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) (located in DDRS) (noting that while “new Constitution for Viet Nam probably will contain beautiful and profound precepts, these precepts will have to be honored by the government and the people, if these precepts are to live.”); Telegram from Lodge to Johnson (Mar. 15, 1967) (located in DDRS).
73 See Memorandum from Taylor to Johnson, Current Situation in South Viet-Nam (Apr. 12, 1966), in FRUS, 1966, supra note x, 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 Rusk, supra note x (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, supra note x.
basic law to a considerable extent, the public and private statements of American officials on this point were not always consistent.  

II. Initial U.S. Vision and Plans for the SVN Constitution

Before the CA began its drafting work, the USG already had identified a number of provisions it considered indispensable in an SVN constitution. 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

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74 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) (located in NARA Box 2937-5, supra note x). Similarly, in a January 22, 1967 discussion with CA deputies, Deputy Assistant Secretary of State Leonard S. Unger asserted that American policymakers understand that writing of SVN constitution is a Vietnamese concern and incumbent upon the Vietnamese people to craft a suitable document. See Saigon to SecState, supra note x. However, though he had a humble tone in doing so and offered reasons why, 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 Johnson, General Taylor described the present U.S. goal as establishing a stable regime in Saigon that could fight the Communists effectively and moving SVN towards constitutional democracy. See Memorandum from Taylor to Johnson, supra note x, at 341. In that communication, Taylor opined that “The 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 American 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” than one that had been seized by the Communists. See Notes of Meeting (Apr. 4, 1966), in FRUS, 1966, supra note x, at 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 (Nov. 10, 1966), in FRUS, 1966, supra note x, at 820. At the same time, the USG was wary of accusations of interventionism. See Memorandum from Taylor to Johnson, supra note x, 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 Rusk, supra note x (“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 Department of State, Political Tactics in Vietnam over next few months (Apr. 1, 1966) (located in 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 Johnson, supra note x, 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 Department of State to Embassy in Vietnam (Mar. 30, 1966), in FRUS, 1966, supra note x, at 312, 313 (“We face the fact that we ourselves cannot succeed except in support of the South Vietnamese.”).

75 See Telegram from Saigon to SecState, Sept. 4, 1966, supra note x.
and Constitutional Assembly in South Viet-Nam.” Washington sent a copy of this paper to the Embassy’s personnel for information purposes and guidance.

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

According to the paper, American policymakers wanted the CA elections to be held on schedule, by September 15, 1966, and all South Vietnamese groups not actively participating in the Communist insurgency to be fairly represented in the constitution-drafting body. 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 in both American and global eyes. The Principles directed American 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. 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.” The USG hoped to employ the CA election process as a tool for educating and involving the

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76 See FRUS, 1966, supra note x, at 388 n.1.
77 See Telegram from Department of State to Embassy in Vietnam (May 25, 1966), in FRUS, 1966, supra note x, at 403.
78 See id.
79 See id.
80 Id.
81 See id.
82 See id. at 403-04.
83 See id. at 404.
84 Id.
South Vietnamese people in democracy. 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 South Vietnamese politics.

At the beginning of September 1966, Ambassador Lodge, expressing the opinions of the whole Embassy, cabled Rusk with a concrete statement of both the chief U.S. goals for the SVN constitution and the flexible approach they advocated the USG adopt towards the drafting process. Lodge explained that these recommendations for the document were a fusion of the Vietnam Planning Group’s paper on the SVN constitution, views elicited from prominent South Vietnamese on what the constitution should contain, and the Embassy’s own thinking on the subject. However, before going into specific elements the U.S. 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 own [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. 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.

The first requirement for the South Vietnamese constitution articulated in the telegram was that it provide for a powerful and secure executive. Given the political and cultural realities they perceived in SVN, Lodge and the other Embassy officials argued for a presidential system. However, they were willing to consent to the president-prime minister hybrid found in

85 See id.
86 See id.
87 See Telegram from Saigon to SecState, Sept. 4, 1966, supra note x.
88 See id. at 1.
89 Id.
90 See id.
91 See id. at 1-2. Lodge and the Embassy justified their claim as follows:
South Korea, provided that the SVN cabinet could not be exposed to excessive legislative pressure.\textsuperscript{92} Apparently, the former version of the executive had received the most support from South Vietnamese leaders canvassed by the Embassy, though the latter had garnered serious attention as well.\textsuperscript{93}

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.\textsuperscript{94} They concluded that, among other requirements, the SVN president must be the nation’s commander-in-chief, as under the U.S. constitution.\textsuperscript{95} The cable expressed the American 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.”\textsuperscript{96}

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.\textsuperscript{97} Consequently, they recommended that the constitution contain broad emergency powers for the SVN president, including the ability to suspend the legislature and to promulgate orders that are legally binding

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We favor 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.
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\textit{Id.}
\textsuperscript{92} See id. at 2.
\textsuperscript{93} See id.
\textsuperscript{94} See id. at 2-3.
\textsuperscript{95} See id. at 2.
\textsuperscript{96} Id.
\textsuperscript{97} See id.
if they involve matters relating to war.\textsuperscript{98} 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.\textsuperscript{99} 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.\textsuperscript{100} Lodge and the Embassy were frankly worried about the potential susceptibility of the SVN legislature to "terroristic pressure."\textsuperscript{101}

The cable contained two final major U.S. goals for the SVN constitution.\textsuperscript{102} 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.\textsuperscript{103} 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 South Vietnamese are fighting.\textsuperscript{104} 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 U.N. Declaration on Human Rights.\textsuperscript{105}

They also judged it vital that the South Vietnamese constitution adequately protect SVN’s ethnic minorities.\textsuperscript{106} 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

\textsuperscript{98} See id.
\textsuperscript{99} See id.
\textsuperscript{100} See id. at 2-3.
\textsuperscript{101} See id. at 3.
\textsuperscript{102} See id.
\textsuperscript{103} See id.
\textsuperscript{104} See id.
\textsuperscript{105} See id.
\textsuperscript{106} See id.
respected and that minorities would be equitably represented in the national legislature. Lodge and the Embassy staff mused on ways that the document could assure a minority voice in government: reserving seats in the legislature for the ethnic minorities or selecting an upper chamber with a narrow set of responsibilities that would advocate minority and other special interests. They were confident, however, that the CA could devise a formula on this point that would be agreeable to the SVN minorities.

Having articulated a constitutional floor, Lodge and the other Embassy officials spelled out several other features of the document that the U.S. should try to influence if the essentials of USG constitutional policy were assured. They recommended that the amendment process for the SVN constitution be fairly easy and even that potentially the document be subject to comprehensive review five years after ratification. Lodge and the Embassy wanted it to be quite hard under the constitution to remove either the president or a member of the legislature. 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.”

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. The cable also contained some suggestions for how the SVN constitution should handle the judiciary. Despite the long history of judicial review in American jurisprudence, Lodge and the Embassy emphatically rejected such a power for the

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107 Id.  
108 See id.  
109 See id.  
110 See id. at 3-4.  
111 See id. at 3.  
112 See id.  
113 Id.  
114 See id. at 4.  
115 See id.
South Vietnamese lower courts.\textsuperscript{116} 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.”\textsuperscript{117} 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.\textsuperscript{118}

Washington responded favorably to the policy laid out by Lodge and the Embassy.\textsuperscript{119} A September 23, 1966 telegram from the Department of State stated “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 process, and resist [the] temptation to try to press our views on every detail.”\textsuperscript{120} The cable, drafted by officials at the Department’s Vietnam Working Group and sent under Under Secretary of State George W. Ball’s name, affirmed that the recommendations offered by Lodge and the Embassy on the SVN constitution, the future in-depth comments they pledged 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.\textsuperscript{121}

The State Department expanded upon the analysis sent from Saigon on September 4 on two issues of importance to the USG.\textsuperscript{122} As to the emergency powers, the Department concurred that the SVN president should have extensive authority during war crises.\textsuperscript{123} However, it, like Lodge and the Embassy, wanted the language to be drafted precisely so as to prevent exploitation

\textsuperscript{116} See id.  
\textsuperscript{117} Id.  
\textsuperscript{118} See id.  
\textsuperscript{119} See Telegram from Ball to Saigon, Sept. 23, 1966, supra note x.  
\textsuperscript{120} Id. at 1.  
\textsuperscript{121} See id.  
\textsuperscript{122} See id. at 1-3.  
\textsuperscript{123} See id. at 1.
by the executive.\textsuperscript{124} While the Department acknowledged the potential merit in the proposals put forth by Saigon to make it difficult to exercise legislative force during a national emergency,\textsuperscript{125} it added “[a]nother possibility might be to [a] set 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.”\textsuperscript{126}

The September 23 cable to the Embassy also raised a subject that would evolve into the USG’s single greatest problem with the CA’s drafting work: the anti-Communism article.\textsuperscript{127} The Department expressed the issue as follows:

Hopelessly, [the] constitution about to be drafted will be [a] 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 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.\textsuperscript{128}

Washington acknowledged that it was hard to convince South Vietnamese to reason in any other way than that which would forthrightly criminalize their mortal enemy, the Communists.\textsuperscript{129} However, the Department urged that U.S. officials must attempt to persuade the South Vietnamese of the considerable benefits of magnanimity in this area.\textsuperscript{130} Well before the CA began serious drafting work, the USG had a clear idea of the shape it wished the SVN

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{124}] See id.
\item[\textsuperscript{125}] See id. at 1-2.
\item[\textsuperscript{126}] Id. at 2.
\item[\textsuperscript{127}] See id. at 2-3.
\item[\textsuperscript{128}] Id. at 2.
\item[\textsuperscript{129}] See id. at 3.
\item[\textsuperscript{130}] See id.
\end{itemize}
\end{footnotesize}
constitution to take and what provisions it considered indispensable to American policy in Vietnam.  

III. Major Issues of Concern to the U.S.

A. The Anti-Communism Provision and National Reconciliation

No issue would more vex U.S. officials in conducting their policy towards the South Vietnamese constitution in 1966-67 than that of the anti-communism article.  

131 See FRUS, 1967, supra note x, at 30 n.2 (revealing CA wrote substantive articles of SVN constitution in November and December 1966).

132 See infra notes x-x.

133 See Telegram from Ball to Saigon, Sept. 23, 1966, supra note x.

134 See Telegram from Katzenbach to Saigon (Oct. 28, 1966) (located in NARA Box 2937-5, supra note x).

135 See id. at 1-2.

136 See id. at 2.

137 See Telegram from Saigon to SecState (Nov. 4, 1966) (located in NARA Box 2937-5, supra note x).

138 See id. at 1.

139 See id. at 1-2.

132 As has been discussed, this matter was already on the Department of State’s radar on September 23, 1966.  

The Department again raised the issue in an October 28 telegram to Saigon.  

134 In response to a draft GVN 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.  

135 The telegram advocated making the USG’s position on the anti-communism article clear early-on to both the GVN and significant CA delegates, before the problem metastasized.  

136 The Department asked for a reaction to these concerns from the Embassy and received one on November 4.  

137 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.”  

138 The successful banning of both categories from the CA elections was apparently often cited by South Vietnamese as a precedent.  

139 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 the related term of neutralism.\textsuperscript{140}

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.”\textsuperscript{141} The telegram from Saigon contained two alternative ideas for constitutional language.\textsuperscript{142} 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.\textsuperscript{143} The second suggestion granted the South Vietnamese 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.\textsuperscript{144}

The realistic warning given by Lodge and the Embassy foreshadowed the long struggle in which the United States would engage to achieve its highly valued goal of national reconciliation against the dangers of sweeping anti-Communist language in the SVN constitution.\textsuperscript{145} By November, other areas of the USG were also worried about the anti-Communist article.\textsuperscript{146} 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.\textsuperscript{147} Ambassador Harriman recommended that American policymakers watch the constitution-making process in SVN

\begin{footnotes}
\item[140] See id. at 2.
\item[141] Id. at 2.
\item[142] See id.
\item[143] See id.
\item[144] See id.
\item[145] See infra notes x-x.
\item[146] See Memorandum of Meeting (Nov. 10, 1966), supra note x, at 820.
\item[147] See id. at 820, 824.
\end{footnotes}
carefully and voiced his concerns to the other attendees about the provision banning Communists and neutralists.\(^{148}\) He stated plainly that the U.S. should “not permit” the South Vietnamese government to draft a document that contradicted the guarantees that had been made as to national reconciliation.\(^{149}\) 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 USG could support.\(^{150}\) There was general agreement among the meeting’s participants that the U.S. must take steps to see national reconciliation go forward, both in the SVN constitution and in the decrees and programs of the GVN.\(^{151}\)

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.\(^{152}\) In unmistakable language, the Department stated that “it [is] of [the] utmost importance that the Constitution create no institutional obstacles to [a] ‘national reconciliation’ program and that it represent a clear democratic alternative to communism.”\(^{153}\) 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 South Vietnamese people and the global community.\(^{154}\) 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 have truly renounced Communism.\(^{155}\)

\(^{148}\) See id. at 820, 824-25.
\(^{149}\) See id. at 820.
\(^{150}\) See id. at 825.
\(^{151}\) See id. at 825-26.
\(^{152}\) See Telegram from Rusk to Saigon (Nov. 11, 1966) (located in NARA Box 2937-5, supra note x).
\(^{153}\) Id. at 1.
\(^{154}\) See id. at 1-2.
\(^{155}\) See id. at 2.
By December 1966, this thinking on the anti-Communism article seems to have represented the general consensus of American policymakers. A draft National Security Action Memorandum (“NSAM”) called for the U.S. to “[e]nsure that [the] new [SVN] Constitution is consistent with [the] reintegration of VC into the national life.”

President Johnson, who was sent the draft by Rostow on December 10, commented that “It’s good.”

In early January 1967, the Embassy issued a “Progress Report” on the CA and its work. 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.” 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 the opinion that the anti-Communist provisions and related language in the document were acceptable to the USG.

Despite this hopeful forecast, worries about the ideological ban and its effect upon national reconciliation continued to animate American policymakers. Indeed, the very next day after Saigon issued its positive appraisal of how the CA handled the anti-Communism article, the Department of State cabled the Embassy on the subject. 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

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157 Id. at 923.
158 See id. at 922 n.1.
159 See Telegram from Saigon to SecState (Jan. 6, 1967) (on file with the NARA, RG 59, Central Foreign Policy Files, 1967-1969, Box 2762, Folder “Pol 15 Viet S 1/1/67”) [NARA Box 2762].
160 Id. at 2.
161 See Telegram from Saigon to SecState (Jan. 13, 1967) (located in NARA Box 2769-1, supra note x).
162 See Telegram from Rusk to Saigon (Jan. 14, 1967) (located in NARA Box 2769-1, supra note x).
163 See id. at 3.
reconciliation, we believe it would be desirable to replace [“communist”] with [“external”] to describe aggression in [the] Article[.].”

On January 20, 1967, instead of following the American advice on the issue, the CA overwhelmingly adopted a stronger anti-Communism article than had appeared in the first draft constitution. 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.” 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. Despite having made the argument about how excess in this area might harm chances of national reconciliation, Lodge and the Embassy staff were forced to admit that most CA members cherish their anti-Communism and probably would have favored even stronger anti-Communist language than that finally chosen.

Labeling the CA’s move as a “most unfortunate development,” the Department asked the Embassy to offer promptly any solution it might devise. The telegram revealed that the Department was seriously considering trying to convince the Directorate to use its controversial veto power against the anti-Communism article, a move that under normal circumstances American officials would find highly unpalatable. The response from Lodge and the other Embassy officials painted a grim picture from the point of view of changing or eliminating the

164 Id.
165 See Telegram from Saigon to SecState (Jan. 20, 1967) (located in NARA Box 2769-1, supra note x).
166 Id. at 3.
167 See id.
168 See id. at 3-4.
169 See Telegram from Rusk to Saigon (Jan. 20, 1967) (located in NARA Box 2769-1, supra note x).
170 See id. at 1-2.
ideological condemnation in the SVN constitution. The Embassy reminded Washington of its previous assessment, that there was much desire in the CA to adopt an even harder posture in the constitution, and warned that if anything the ruling generals were more disposed towards such a position than the CA. 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.” Even sympathetic CA delegates had communicated to American officials that there was simply no way to convince the constitution-drafting body to drop its stance on the anti-Communism article. 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.

This reversal for U.S. policy occurred, as Lodge had indicated, despite the vigorous efforts by American officials to convince the South Vietnamese leaders of the merits of the USG’s position on the anti-Communism article. On January 19, 1967, the day before the CA adopted the stronger language, Dr. Gisbert Flanz engaged in a dinner conversation on the constitution with four CA deputies and a GVN minister. Flanz, of New York University, had been brought in by the Embassy to serve as a constitutional expert after having performed similar duties for South Korea. At the January 19 dinner, Flanz offered a number of reasons why the USG should not accept the anti-Communism article.

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171 See Telegram from Saigon to SecState (Jan. 23, 1967) (located in NARA Box 2769-1, supra note x).
172 See id. at 1.
173 Id.
174 See id.
175 Id. at 2.
176 See Memorandum of Conversation (Jan. 19, 1967) (located in NARA Box 2769-1, supra note x); Telegram from Saigon to SecState (Jan. 26, 1967), supra note x.
177 See Memorandum of Conversation (Jan. 19, 1967), supra note x.
178 See Telegram from Saigon to SecState (Aug. 8, 1966) (on file with the U.S. National Archives and Records Administration ("NARA"), Record Group ("RG") 59, Central Foreign Policy Files, 1964-1966, Box 2935, Folder
The anti-Communism provision was both unnecessary and potentially harmful. He referenced the Korean experience, where the South Koreans had been involved in a mortal struggle with Communism but had had the self-confidence to draft their constitution without mentioning their ideological foe. Flanz also raised the idea that a direct discussion of the Communists in the constitution might well grant them more dignity than they deserve and would certainly have deleterious consequences for SVN as concerned world opinion.

Several days later Unger tried his hand at persuasion. In speaking with two CA delegates and a former GVN prime minister, he again touched on how the anti-Communism article would hurt SVN in American, and especially global, eyes and how it would prove an obstacle to national reconciliation. As the Embassy had suggested might occur, Unger was forced to clarify the U.S. position on reconciliation and assuage South Vietnamese fears that such a policy would be overly indulgent to the Communist enemy. However, while the CA

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“Pol 15 Viet S 6/1/66”). [NARA Box 2935]. On July 28, 1966, Prime Minister Ky indicated his interest in having the U.S. identify a constitutional expert for the GVN. *See* Telegram from Saigon to SecState (Jul. 28, 1966) (located in NARA Box 2935, *supra* note x). 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. *See* Telegram from Saigon to SecState (Sept. 21, 1966) at 3 (located in NARA Box 2935, *supra* note x). On November 29, Unger contacted the U.S. embassy in France and asked for information on any French or Vietnamese living in Paris who might be able to serve as a constitutional expert in SVN. *See* Letter from Dean to Unger (Dec. 2, 1966) (located in NARA Box 2937-5, *supra* note x). 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.* USG officials were not the only Americans who concerned themselves with the South Vietnamese 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 Rusk (Aug. 29, 1966) (located in NARA Box 2937-5, *supra* note x). 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 x. Among other measures, Vietnamese translations of The Federalist Papers were apparently to be distributed as an aid to constitution-making process. *See id.* at 2.

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180 *See id.*
181 *See id.*
182 *See* Telegram from Saigon to SecState (Jan. 26, 1967), *supra* note x.
183 *See id.* at 1-2.
184 *See id.* at 2.
representatives approached by Flanz and Unger were somewhat agreeable to the American policy, the CA as a whole remained intractable on the issue.\textsuperscript{185}

Despite these discouraging developments, the USG persisted in its efforts to see national reconciliation realized in SVN.\textsuperscript{186} 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.\textsuperscript{187} 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.\textsuperscript{188} 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.\textsuperscript{189}

The Embassy responded promptly to the Department’s directions.\textsuperscript{190} Encouraged by the positive South Vietnamese 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 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

\textsuperscript{185} See id. at 2-3; Memorandum of Conversation (Jan. 19, 1967), supra note x, at 2.
\textsuperscript{186} See Telegram from Katzenbach to Saigon (Feb. 18, 1967) (located in NARA Box 2769-1, supra note x).
\textsuperscript{187} See id. at 1.
\textsuperscript{188} See id.
\textsuperscript{189} See id. at 1-2.
\textsuperscript{190} See Telegram from Saigon to SecState (Feb. 21, 1967) (located in NARA Box 2769-1, supra note x).
objectives by peaceful and democratic means in accordance with the provisions of this Constitution.\textsuperscript{191}

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 South Vietnamese leadership to accept.\textsuperscript{192}

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, that of the constitution’s promulgation.\textsuperscript{193} This prompted American policymakers to renew their urging that the SVN constitution’s preamble contain an affirmation of national reconciliation as robust as possible.\textsuperscript{194} The Embassy responded that they had been making the USG’s case for the inclusion of such positive language to members of both the CA and the Directorate, but had not given out the Department’s detailed textual proposals on national reconciliation.\textsuperscript{195}

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.”\textsuperscript{196} 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.\textsuperscript{197} Again, the South Vietnamese opposition to

\begin{footnotesize}
\textsuperscript{191} Id. at 1-2.
\textsuperscript{192} See id. at 1.
\textsuperscript{193} See Telegram from Department of State to Saigon (Mar. 11, 1967) (on file with the NARA, RG 59, Central Foreign Policy Files, 1967-1969, Box 2769, Folder “Pol 15-5 Viet S 3/1/67”) [NARA Box 2769-3].
\textsuperscript{194} See Telegram from Rusk to Saigon (Mar. 11, 1967) (located in NARA Box 2769-3, supra note x).
\textsuperscript{195} See Telegram from Saigon to SecState (Mar. 13, 1967) (located in NARA Box 2769-3, supra note x).
\textsuperscript{196} Id. at 1.
\textsuperscript{197} See id. at 2.
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national reconciliation seemed to stem in part from fears that the U.S. itself was about to weaken its stance on Communism and fail to guarantee adequately the independence of SVN.  

**B. Elected Province Chiefs**

Though the anti-Communism article was probably the constitutional issue most frequently addressed in the telegraphic traffic between Saigon and Washington, there were certainly other provisions in the SVN basic law about which American policymakers worried. One was the matter of electing chiefs for the provinces, South Vietnam’s main political subdivision. 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. In general, the development of local political power and participation was indeed an objective that the USG wished to further.

However, by December 5, U.S. officials were reconsidering the extent to which they wanted to promote the principle of local government. In a secret memorandum, Robert H. Miller, head of the State Department’s Vietnam Working Group, acknowledged that “Self-government of reasonably sizeable urbanized places would appear an important goal to be realized.” However, he wondered whether the CA’s proposal to have province chiefs and mayors elected by popular vote would falter in practice. Specifically, Miller worried that such an arrangement could weaken the GVN’s administrative system and worsen the already strained

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198 See id.
199 See infra notes x-x.
200 SVN had 44 provinces. See Lewy, supra note x, at 44-45.
201 See Telegram from Saigon to SecState (Sept. 4, 1966), supra note x, at 4.
202 See Memorandum from Miller to Unger, Constitutional Issues for Discussion by the Political Working Group, Tuesday, Dec. 6 (Dec. 5, 1966) (located in NARA Box 2937-5, supra note x).
203 See id. at 4-5.
204 Id. at 4.
205 See id. at 4-5.
relationship between civilians and military personnel in the rural areas of SVN. 206 As a potentially viable alternative, he suggested that the GVN appoint mayors and province chiefs with the input of municipal and provincial councils that have been democratically elected. 207

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?” 208 While Washington admitted that it 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. 209

The Embassy agreed with the Department’s analysis on the issue of elected province chiefs. 210 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. 211 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. 212

206 See id. at 5.
207 See id.
208 Telegram from Katzenbach to Saigon (Dec. 9, 1966) at 2 (located in NARA Box 2936, supra note x).
209 See id.
210 See Telegram from Saigon to SecState (Dec. 13, 1966) (located in NARA Box 2936, supra note x).
211 See id. at 1.
212 See id.
Though 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. 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. It also related some of the South Vietnamese 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. 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 document. Instead, in their cable to Washington, Porter and the Embassy proposed the following strategy: “In all out 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.” On December 23, the Department registered its full agreement with this recommendation.

213 See Telegram from Saigon to SecState (Dec. 22, 1966) (located in NARA Box 2936, supra note x).
214 See id. at 2-3. Porter and the Embassy staff argued that:

One 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.

215 See id. at 3.
216 See id. at 3.
217 Id. at 2.
218 See Telegram from Unger to Saigon (Dec. 23, 1966) (located in NARA Box 2936, supra note x). Though it actively tried to change the provision on elected province chiefs, the USG did try to have an open mind towards the issues involved. See Telegram from Saigon to SecState (Jan. 6, 1967), supra note x, at 2 (“Similarly, while we do not agree with direct election of province chiefs at this time, we recognize local government provisions outlined by
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. Displaying a considerable
knowledge of history, Roche 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.

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

In his January 19 conversation with the SVN leaders, Dr. Flanz argued that the election
of province chiefs, while laudable in theory, was inappropriate when the nation was fighting a
war. He reiterated the view, held by the USG 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. 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.
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

[the] CA are also intended to solve serious problem—the need for more responsive government and greater popular
participation in government.

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219 See Telegram from Rusk to Saigon (Jan. 7, 1967) (located in NARA Box 2769-1, supra note x); Memorandum from Roche to Unger (Dec. 29, 1966) (located in DDRS); Memorandum of Conversation (Jan. 19, 1967), supra note x, at 3.
220 Memorandum from Roche to Unger (Dec. 29, 1966), supra note x. 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 FRUS, 1967, supra note x, at 30 n.2.
221 See Telegram from Rusk to Saigon (Jan. 7, 1967), supra note x.
222 See Memorandum of Conversation (Jan. 19, 1967), supra note x, at 3.
223 See id.
224 See id.
matters like elected province chiefs. However, the U.S. efforts seemed substantially to pay off when on March 10 the CA approved an article under which province chiefs would be appointed by the first president elected under the constitution during his first term in office. The Embassy expressed relief that the province chief elections about which American policymakers had worried would not occur for up to four years.

C. Executive Powers/Declarations of Emergency

From the outset, the USG 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 South Vietnamese constitution between the Department of State and the Embassy in September 1966. 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.

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. 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. If the CA did not change this scheme of its own accord, he promised that the Embassy would advise the body to

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225 See id.
226 See Telegram from Saigon to SecState (Mar. 11, 1967) at 1 (located in NARA Box 2769-3, supra note x).
227 See id. at 1-2.
228 See supra notes x-x.
229 See Telegram from Saigon to SecState (Sept. 4, 1966), supra note x, at 1-3; Telegram from Ball to Saigon (Sept. 23, 1966), supra note x, at 1-2.
230 See Telegram from Saigon to SecState (Dec. 13, 1966), supra note x, 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 American 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) (located in NARA Box 2936, supra note x).
231 See Telegram from Saigon to SecState (Jan. 9, 1967) (located in NARA Box 262, supra note x).
232 See id. at 1.
give these prerogatives to the executive. Porter expressed some hope that it would not be necessary for the U.S. to get involved in this matter.

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

[The] draft’s most objectionable feature is Article 39 which gives the National Assembly excessive authority with respect to international relations and declaring emergency. Powers granted to president by Article 78 enable him to declare 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.

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

The Department fully concurred with the assessment offered by Porter and the Embassy on executive authority and emergency powers. 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. Like Embassy officials in Saigon, Washington wanted to see the constitution grant the executive more flexibility when dealing with emergencies. 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. Worries about how the SVN

233 See id.
234 See id. at 1-2.
235 See Telegram from Saigon to SecState (Jan. 13, 1967), supra note x, at 1.
236 Id.
237 See id. On January 25, the Embassy re-confirmed its position and its pledge: “the 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.” FRUS, 1967, supra note x, at 48 n.6.
239 See id. at 1.
240 See id. at 2.
241 See id. at 1-2.
constitution handled the issue of emergency powers were expressed by other parts of the Johnson administration as well. 242

Dr. Flanz laid out the USG’s position on emergency powers during his January 19 talk with members of the CA and GVN. 243 He stressed that it was imperative that the executive be able to declare emergencies if SVN authorities were to handle crises competently. 244 Flanz argued that the constitution, as then written, vitiated governmental effectiveness during national emergencies. 245 He advocated changing the document so that the president was authorized to declare states of emergency, which would last for 15 days before National Assembly review, no matter whether the legislature was convened at the outset of the emergency. 246 After the 15 days, according to Flanz, a two-thirds majority vote should be required to counter the executive’s declaration. 247 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. 248 Reacting sympathetically, Flanz reiterated the established U.S. policy that the executive’s emergency powers should not be dangerously broad. 249

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. 250 On December 28, 1966, a meeting, which included members of the Vietnam Working Group and a special consultant to Johnson, was held

242 See FRUS, 1967, supra note x, at 30 n.2.
243 See Memorandum of Conversation (Jan. 19, 1967), supra note x, at 1-2.
244 See id. at 1.
245 See id. at 1-2.
246 See id. at 2.
247 See id.
248 See id.
249 See id.
to discuss the electoral and political party laws in SVN. Richard Scammon, former director of the Census Bureau, reviewed the possible responses, whether articulated in the constitution or an election law, to a presidential election where no one candidate netted a majority of the votes. He pressed the need in such situations for SVN to hold a run-off election for the two top vote-getters. If a subsequent election were not possible, Scammon advocated having the South Vietnamese voters rate the presidential candidates. 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 ratings scheme must be used so that the winner be required to gain above 50% of the vote.

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. In the Department’s judgment, “While [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.” On January 18, Washington sent its thanks to the Embassy for already trying to convince South Vietnamese leaders to adopt a set-up which mandated that a president receive an absolute majority in the election. As with all of the major issues of concern to American policymakers, the issue of an absolute majority requirement in presidential elections came up during Dr. Flanz’s January 19 dinner discussion.

251 See id.
252 See id. at 1-2.
253 See id. at 1.
254 See id. at 1-2.
255 See id. at 2.
256 See Telegram from Rusk to Saigon (Jan. 14, 1967), supra note x, at 3.
257 Id.
258 See Telegram from Rusk to Saigon (Jan. 18, 1967) (located in NARA Box 2769-1, supra note x).
259 See Memorandum of Conversation (Jan. 19, 1967), supra note x, at 2.
The USG showed a similar interest in the elections for the legislature. 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. If this part of the South Vietnamese 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. 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.” Again, run-off elections were floated as a good way to handle such situations. While the Department thought it would be best if its proposals were placed directly into the constitution, U.S. officials allowed 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 electoral law.

On February 7, 1967, Lodge and the Embassy replied straightforwardly that “While [the] single-member constituency technique has disadvantages, we believe that [the] opportunity for changing or significantly altering this constitutional provision has passed.” They contended, however, that the electoral law would probably prevent Washington’s fears about Communist insurgents’ being elected from materializing through a comprehensive pre-election vetting process and other measures. According to the embassy officials in Saigon, though this was not necessarily the case for presidential run-offs, South Vietnamese leaders were likely to see

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260 See Telegram from Rusk to Saigon (Feb. 2, 1967) (located in NARA Box 2769-1, supra note x).
261 See id. at 1.
262 See id. at 2.
263 Id.
264 See id.
265 See id.
266 See Telegram from Saigon to SecState (Feb. 7, 1967) (located in NARA Box 2769-1, supra note x).
267 See id.
any run-off elections for the lower chamber as unreasonable and a waste of funds.\textsuperscript{268} This assessment did not affect the continuing Embassy efforts to push for a substantial plurality or absolute majority requirement for presidential elections.\textsuperscript{269}

The Department of State accepted that the window of opportunity to advance its goal about elections to the legislature had closed.\textsuperscript{270} It was skeptical, though, of the efficacy of a screening process to eliminate VC candidates and pressed for the substantial plurality requirement to be written into the future electoral law to address adequately the Communist insurgent threat.\textsuperscript{271} 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 organized VC minority [from] exploiting [the] situation.”\textsuperscript{272} If the South Vietnamese leaders rejected the concept of the run-off election, despite its being the most useful in guaranteeing a substantial plurality, U.S. officials offered a variation on the rating system as a possibility.\textsuperscript{273}

\textbf{IV. Other U.S. Suggestions and Criticisms}

Per their agreed upon strategy, American policymakers focused their influence and powers of persuasion on those aspects of the South Vietnamese constitution deemed essential.\textsuperscript{274} The issues that seemed to receive the most attention from the Johnson administration were covered in Part III of this article.\textsuperscript{275} However, as has been indicated in Part II, these were by no

\begin{itemize}
  \item \textsuperscript{268} See id.
  \item \textsuperscript{269} See id.
  \item \textsuperscript{270} See Telegram from Katzenbach to Saigon (Feb. 18, 1967) (located in NARA Box 2769-1, \textit{supra} note x).
  \item \textsuperscript{271} See \textit{id.} at 1.
  \item \textsuperscript{272} Id.
  \item \textsuperscript{273} See \textit{id.} at 1-2.
  \item \textsuperscript{274} See Telegram from Saigon to SecState (Sept. 4, 1966), \textit{supra} note x, at 1; Telegram from Ball to Saigon (Sept. 23, 1966), \textit{supra} note x, at 1.
  \item \textsuperscript{275} See \textit{supra} notes x-x.
\end{itemize}
means the only constitutional matters discussed by the USG.\textsuperscript{276} 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.\textsuperscript{277} 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 American goals had already been achieved.\textsuperscript{278}

On October 10, 1966, the Department of State raised the issue of the treatment of land and labor in the South Vietnamese constitution with the Embassy.\textsuperscript{279} It did not want to attempt to solve SVN’s myriad land problems with provisions in the constitution.\textsuperscript{280} Washington realized that the CA could not address the woes of the landless peasantry without also mentioning the urban proletariat in the document.\textsuperscript{281} Therefore, U.S. officials were “inclined to favor [the] inclusion of [a] general statement in [the] “bill of rights” 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 [his] labor performed.”\textsuperscript{282}

The Embassy shared the 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 USG goal.\textsuperscript{283} There were already some positive indications that land and labor interests would receive some form of protection in the constitution.\textsuperscript{284} The Embassy promised that it would lobby for the Department’s suggestion

\begin{itemize}
\item \textsuperscript{276} See \textit{supra} notes x-x.
\item \textsuperscript{277} See \textit{supra} notes x-x; see \textit{infra} notes x-x.
\item \textsuperscript{278} See Telegram from Saigon to SecState (Sept. 4, 1966), \textit{supra} note x, at 3.
\item \textsuperscript{279} See Telegram from Rusk to Saigon (Oct. 10, 1966) (located in NARA Box 2937-5, \textit{supra} note x).
\item \textsuperscript{280} See id.
\item \textsuperscript{281} See id.
\item \textsuperscript{282} Id.
\item \textsuperscript{283} See Telegram from Saigon to SecState (Oct. 12, 1966) (located in NARA Box 2937-5, \textit{supra} note x).
\item \textsuperscript{284} See id. at 1.
\end{itemize}
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.\textsuperscript{285}

However, this U.S. goal would in fact run into serious resistance from SVN leaders.\textsuperscript{286} 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.\textsuperscript{287} 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.”\textsuperscript{288}

In October 1966, the Department of State also considered the question of religion in the constitution.\textsuperscript{289} This issue involved individual rights, the protection of which had been identified as critical goal by the USG.\textsuperscript{290} Washington wanted the document to protect personal rights of worship and to prevent governmental discrimination.\textsuperscript{291} However, it emphatically wished to avoid a situation where individual religions claimed unique privileges in the South Vietnamese constitution.\textsuperscript{292} 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 which would perpetuate the present projection of religious blocs into direct political action, thus

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\textsuperscript{285} See id. at 2.
\textsuperscript{286} For an indication of the difficulty involved in actually getting land reform into the constitution, see Telegram from Saigon to SecState (Dec. 6, 1966) (on file with the U.S. National Archives and Records Administration (“NARA”), Record Group (“RG”) 59, Central Foreign Policy Files, 1964-1966, Box 2937, Folder “Pol 15-4 Administration of Government Viet S 1/1/64”). [NARA Box 2937-4]. The copy located in NARA Box 2937-4 is, unfortunately, incomplete.
\textsuperscript{287} See id. at 1.
\textsuperscript{288} See Telegram from Katzenbach to Saigon, supra note x, at 3.
\textsuperscript{289} See Telegram from Rusk to Saigon (Oct. 10, 1966) (located in NARA Box 2937-5, supra note x).
\textsuperscript{290} See Telegram from Saigon to SecState (Sept. 4, 1966), supra note x, at 3.
\textsuperscript{291} See Telegram from Rusk to Saigon (Oct. 10, 1966), supra note x, at 1.
\textsuperscript{292} See id.
\end{flushright}
impeding [the] development of viable, broadly based political parties.” 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. The Embassy did not think that Washington’s main worry about religion in the constitution would materialize and, on October 13, reported that “At 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.”

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.

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.

On January 12, 1967, American officials in Saigon provided Washington with a copy of the CA’s initial draft of the constitution. In the following two days, both the Embassy and the Department of State offered analyses of the document. Among several opinions offered by Porter and the Embassy personnel, they suggested that the draft article discussing the national

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293 Id. at 1-2.
294 See id. at 2.
295 See Telegram from Saigon to SecState (Oct. 13, 1966) (located in NARA Box 2937-5, supra note x).
296 See Telegram from Katzenbach to Saigon, supra note x, at 2-3.
297 See Telegram from Saigon to SecState (Dec. 13, 1966), supra note x, 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 x, at 1. For Miller’s reaction to the CA proposal, see id. at 1-2.
298 See Telegram from Saigon to SecState (Jan. 12, 1967) (located in NARA Box 2769-1, supra note x).
299 See Telegram from Saigon to SecState (Jan. 13, 1967), supra note x; Telegram from Rusk to Saigon (Jan. 14, 1967), supra note x.
security council might be enhanced by a short statement of the purpose and makeup of that body.  

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. In a follow-up to its January 14 review, the Department added that “Our 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.”

On January 23, the Embassy gave its response to Washington and offered further analysis on the draft South Vietnamese constitution. It is important to note that both the Department and the Embassy expressed an overall favorable judgment of the draft constitution.

As has been seen, during his January 19 dinner conversation, Dr. Flanz articulated many of the USG’s most pressing concerns with the South Vietnamese constitution. One area upon which he touched was the judiciary. Flanz doubted whether enough qualified personnel could be found to complete the Supreme Court’s various tasks. He also questioned the utility of the High Judicial Council as it was set up by the CA. Referencing the French experience, Flanz counseled that the CA not get bogged down trying to distinguish between separation of function

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300 See Telegram from Saigon to SecState (Jan. 13, 1967), supra note x, at 2.
301 See Telegram from Rusk to Saigon (Jan. 14, 1967), supra note x, at 2, 4.
302 Telegram from Rusk to Saigon (Jan. 18, 1967), supra note x, at 2.
303 See Telegram from Saigon to SecState (Jan. 23, 1967) (located in NARA Box 2769-1, supra note x).
304 See Telegram from Saigon to SecState (Jan. 13, 1967), supra note x, at 1; Telegram from Rusk to Saigon (Jan. 14, 1967), supra note x, at 1; see also Memorandum from Komer, Action Program to Promote a Favorable Political Evolution in Saigon (Jan. 12, 1967) (located in DDRS, supra note x) (“The CA process is moving along, and the draft constitution [is] not bad.”).
305 See Memorandum of Conversation (Jan. 19, 1967), supra note x.
306 See id. at 3.
307 See id.
308 See id.
and separation of powers. Instead, the constitution-drafters ought to focus on devising a practicable and effective system of checks and balances.

On March 17, the Department of State issued an exhaustive critique of the South Vietnamese constitution, though Department officials intended for this document to be used as an aid to the CA as it cleaned up its final version rather than as a major statement of U.S. disapproval. 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. It also suggested that the section on censorship should read: “censorship will be abolished. Other press regulations will be prescribed by law.”

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. 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…. 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. The Embassy replied to this review on March 21.

V. Comparing the South Vietnamese Constitution with USG Goals

309 See id. at 1.
310 See id.
311 See Telegram from Rusk to Saigon (Mar. 17, 1967) (located in NARA Box 2769-3, supra note x). 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.
312 See id. at 1.
313 Id. at 2.
314 See id. at 3.
315 Id.
316 See id. at 4.
317 See Telegram from Saigon to SecState (Mar. 21, 1967) (located in NARA Box 2769-3, supra note x).
The final version of the South Vietnamese constitution, promulgated on April 1, 1967, shows that American policymakers were largely successful in achieving their objectives for the document, but failed in several key respects. 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 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.

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

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318 See CURRENT DOCUMENTS, supra note x, at 897-909.
319 See id. at 897.
320 See id. at 897, 899, 907-08.
321 See id. at 897.
322 Id.
323 See id. at 899.
324 Id.
325 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.
USG goals were also met by a robust treatment of citizen rights in Chapter II of the SVN constitution.\textsuperscript{326} Article 15(1) guaranteed the right to work and the right to receive just compensation for one’s labor.\textsuperscript{327} Chapter II also established as official governmental policy the promotion of property ownership by citizens and the special support of the poor.\textsuperscript{328} Article 21 committed SVN to “raising the standard of living of rural citizens, and especially helping farmers to have farmland.”\textsuperscript{329} Article 9 assured religious liberty for the South Vietnamese people, but made clear that “No religion is recognized as the State religion. The State is impartial in the development of religions.”\textsuperscript{330}

The American vision for the South Vietnamese executive was not disappointed.\textsuperscript{331} 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 USG.\textsuperscript{332} 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.\textsuperscript{333} The constitution entrusted the president with setting national policy, while it charged the prime minister with leading the government and

\begin{itemize}
  \item[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.
  \item[2] The recommendation is binding unless the President has special reasons for rejecting it.
  \item[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.
\end{itemize}

\textit{Id.}
South Vietnam’s administrative agencies.334 The president was to select the prime minister and, with the advice of the prime minister, was then to appoint the other ministers.335 Article 67(2) stipulated: “The Prime Minister is responsible before the President for the execution of national policy.”336 As U.S. officials had recommended, the CA restricted the president to two four-year terms.337

Much to the relief of American 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.338 Once this period was over, the legislature could accept, change, or totally repudiate the president’s declaration.339 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.”340 While the legislature apparently had power over the initiation of peace talks, the president was charged with representing South Vietnam in international relations.341 Importantly, Article 60 designated the SVN president as commander-in-chief of the South Vietnamese armed forces.342 The constitution, as U.S. officials had hoped, established a national security council and an armed forces council, bodies which presumably would harness military ambitions and talents for the public good.343

334 See id. at 904.
335 See id.
336 Id.
337 See id. at 903.
338 See id. at 904.
339 See id.
340 Id.
341 See id. at 901, 904.
342 See id. at 904.
343 See id. at 904, 907.
While American policymakers were able to attain many of their objectives for the SVN constitution, on three of the four crucial issues discussed in Part III of this Article the USG either had to accept a compromise or was not able to get what it wanted at all.  

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.” While the preamble did not make any mention of Communism, neither did it say anything specific about national reconciliation. However, because the document did not explicitly ban pro-Communist neutralism, from the American perspective the constitution could have done more damage to the prospects for national reconciliation.

While U.S. officials had at one point hoped not only for an absolute majority requirement in presidential elections but some sort of substantial plurality requirement in legislative elections as well, in the final version of the South Vietnamese constitution they realized neither goal. 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. Article 33(1) on election to the upper house did mention “list voting” and “plurality,” but had no specification indicting that a substantial plurality was required or that voters would rate their choices.

The USG achieved a partial success on the question of elected province chiefs. The CA did in the end articulate a general principle of local self-government.

\[344\] See supra notes x-x.  
\[345\] CURRENT DOCUMENTS, supra note x, at 897.  
\[346\] See id.  
\[347\] See id. at 897-909.  
\[348\] See id. at 900, 903.  
\[349\] See id.  
\[350\] See id. at 900.  
\[351\] See id. at 904-05, 909.
provided for elected province chiefs.\textsuperscript{353} 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 VC capture.\textsuperscript{354} Also comforting to American 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.\textsuperscript{355}

Despite these shortcomings, the USG’s reaction to the end of the constitution-creating process in SVN was not negative and, at times, was in fact enthusiastic.\textsuperscript{356} For example, in a secret cable to Saigon on March 18, 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.”\textsuperscript{357} Earlier that day the Embassy had sent the more sober view to Washington that the National Assembly is given more power by the constitution than U.S. would have hoped, but overall the document is acceptable from the American perspective.\textsuperscript{358} In a personal telegram to President Johnson on March 15, Ambassador Lodge expressed a similar conclusion.\textsuperscript{359} When discussing the matter with Prime Minister Ky Lodge used more stirring language.\textsuperscript{360} As he reported the conversation in a telegram to Washington:

\begin{quote}
I told him that this was no time to be stressing [about] 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\end{quote}

\textsuperscript{352} See id. at 904-05.
\textsuperscript{353} See id. at 905.
\textsuperscript{354} See id.
\textsuperscript{355} See id. at 904, 909.
\textsuperscript{356} See Telegram from Saigon to SecState (Mar. 18, 1967) (located in NARA Box 2769-3, \textit{supra} note x); Telegram from Rusk to Saigon (Mar. 18, 1967) (located in NARA Box 2769-3, \textit{supra} note x); Telegram from Lodge to Johnson (Mar. 15, 1967), \textit{supra} note x.
\textsuperscript{357} See Telegram from Rusk to Saigon (Mar. 18, 1967), \textit{supra} note x, at 1.
\textsuperscript{358} See Telegram from Saigon to SecState (Mar. 18, 1967), \textit{supra} note x, at 3.
\textsuperscript{359} See Telegram from Lodge to Johnson (Mar. 15, 1967), \textit{supra} note x, at 2.
\textsuperscript{360} See Telegram from Saigon to SecState (Mar. 25, 1967) (located in NARA Box 2769-3, \textit{supra} note x).
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.361

While Lodge’s remarks can be taken with a grain of salt, there is little doubt that, as Part I of this Article demonstrated, American policymakers viewed the transition to constitution government in SVN—regardless of whatever individual defects the constitution might have contained—as a vital development in the war effort.362 They reconfirmed this judgment at the Guam meetings in March 1967, after the USG knew the document’s problems.363

VI. Assessing U.S. Policy towards the South Vietnamese Constitution

While critics are undoubtedly right that the U.S. made a number of mistakes in Vietnam, its conduct towards the creation of the South Vietnamese 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, American policymakers committed to seeking to influence only those aspects of the SVN constitution considered vital and to leaving the rest of the drafting process in the hands of South Vietnamese 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 USG emphatically did not seek to correct every aspect of the South Vietnamese constitution that it found problematic.

361 Id. at 1-2.
362 See supra notes x-x.
Perhaps most damning to Laird’s position is the fact that even when the U.S. brought its influence to bear, it did not always get what it wanted. Indeed, in several key respects, the South Vietnamese constitution promulgated on April 1 ran afoul of American 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 no foreign power should have anything to do with the process. However, it is hard to see any outside country eschewing this when it had the troops and money invested in South Vietnam that the U.S. did. 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. 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.

The USG genuinely sought to promote democracy and constitutionalism in SVN, which the South Vietnamese 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 South Vietnamese 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.

364 See Telegram from Lodge to Johnson (Apr. 5, 1967) (located in DDRS, supra note x).
365 Id. at 2.
into a non-Communist SVN. The USG 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 South Vietnamese countryside. Similarly, American officials pushed the idea of a substantial plurality requirement for elections because of worries about VC takeover of legislative seats. Finally, it is clear that the executive the USG promoted, with its powers and control over the military, was an ideal one for effectively fighting the enemy while avoiding the extremes of dictatorship and coup-heavy instability. In taking this war-centered approach to the constitution, the U.S. differed in its policy from some of the other times it sought to influence the drafting of a constitution. For example, when the Bonn Parliamentary Council drafted West Germany’s basic law after the Second World War, the U.S. sought to use various devices, including an emphasis on federalism in the document, to prevent Berlin from again being able to fight a war efficiently.\footnote{See Mattei Ion Radu, \textit{German Lessons for Iraq and Beyond}, 35 S.U. L. REV. 373 (2008).}

Because SVN fell to its enemies in 1975, the South Vietnamese 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 the colloquialism, nothing’s succeeding like success. USG policy towards the South Vietnamese constitution seems an appropriate and legitimate one. The goals of the Johnson administration for the document were arguably 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 U.S. continues actively to influence foreign constitutions, there is much to emulate in its South Vietnamese constitutional policy.

However, none of this changes the fact that the U.S. embassy in Saigon, from which so much constitutional analysis had 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 American 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 South Vietnamese 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.