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The Vietnam War: The President versus the Constitution

by Francis D. Wormuth

A LIFE-AND-DEATH MATTER

True dialogue is the conversation of minds. Most "social" conversations only parody true dialogue. They are usually alternate monologues. Respect for "good manners" compels me to keep silent while the other speaks, but permits me to assume that he speaks nonsense. It allows me, while smiling appreciatively, to compose my own next monologue. "Good manners" compel me to be tolerant of fools; true dialogue requires me to assume that the fault is mine when another seems to speak nonsense. True dialogue requires me to listen harder and more imaginatively; to assume that what appears to be nonsense may be an unfamiliar and fresh truth. I can most honor and most quickly understand that truth if I assume that it exists and put it gently but rigorously to the question. The best questions to put will therefore be courteous and ironic, though never sarcastic.

Societies which live under democratic institutions are committed to reason rather than violence in their common search for justice, freedom, peace, and order. This common search requires continuous public debate. When this debate becomes violent, denunciatory or sarcastic, it is failing dangerously. When it becomes courteous, it acknowledges the right of every man to speak and the duty of every man to listen. When the public debate also produces ironical questions, such questions invite every speaker to give his reasons. For though opinions may decide elections, only opinions which are validated by reasons make good public policy; and reasons are validated by the right questions.

To raise the relevant questions and to give reasons which will stand up under further question is to engage in dialogue. Without such dialogue, justice fails, freedom withers, peace is broken, and even public order collapses. Dialogue, therefore, is not a mere ornament of a democracy but a matter of life and death.

—Stringfellow Barr

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The Vietnam War: The President versus the Constitution

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I

The Text of the Constitution

Defying the critics of his Vietnamese adventure in a speech in Omaha on June 30, 1966, President Lyndon B. Johnson said: "The American people have chosen only one man to decide." Walter Lippmann very properly protested that this was "a claim to arbitrary power" which offends "the prevailing principle in the whole constitutional system."[1]

Nevertheless, the State Department has officially asserted that the President has the power to initiate war on his sole authority. In a memorandum submitted to the Senate Committee on Foreign Relations on March 8, 1966, it argued that President Johnson was under no obligation to consult Congress before attacking North Vietnam on February 7, 1965; but as an act of supererogation he had obtained the permission of Congress in the Tonkin Gulf Resolution of August 10, 1964.[2]

This is a matter of the greatest moment. Does the Constitution authorize a single man to commit the whole nation to the hazards and the hecatombs of modern war? Or, if the Constitution assigns this power to the Congress, has Congress the right to abdicate decision, transferring its authority and its responsibility to a single man? Behind the legal question lies a political question—the question of the nature of the political order established by the framers of the Constitution, and the subsequent evolution of that political order.

"An elective despotism was not what we fought for," said Thomas Jefferson.[3] In arguing that the President should not have the power to make treaties on his sole authority, Alexander Hamilton used words of broader application:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.[4]

Without design, but as a natural consequence of their experience with institutions and their stock of political ideas, the members of the Constitutional Convention produced a governmental structure which paralleled the British. Best known accounts of the British structure were those of Locke and Montesquieu.

In his *Two Treatises of Government*, John Locke had said that there were three powers of government, the legislative, the executive, and the federative. Federative power was the power over foreign relations—"the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth."[5] At English law these topics were royal prerogatives, and Locke, following English practice on this question, attributed both the executive power and the federative power to the King.

The Baron de Montesquieu, in his account of the English constitution in *The Spirit of the Laws*,[6] recognized three powers of government: "the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law." The third he then subdivided into executive power proper and the power of judging. He too followed English constitutional theory by assigning the executive power in foreign affairs as well as that in domestic matters to the King.

The framers of the United States Constitution were persuaded of the need for unity and energy in the execution of the laws, and after some debate agreed to entrust this function to a President. But they departed sharply from the British model by denying to the President almost all features of the federative power. He might make treaties only with the consent of two-thirds of the Senate; he might appoint ambassadors with the consent of the Senate. It was for Congress to regulate commerce with foreign nations; to raise and support armies (but, in order to prevent the President from establishing a military dictatorship, "no appropriation of money to that use shall be for a longer term than two years"); to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling the militia of the states into the service of the United States; to provide for organizing, arming, and disciplining the militia; and to exercise exclusive legislative authority over "forts, magazines, arsenals, dry docks, and other needful buildings."

Only one of the powers in foreign affairs mentioned in the Constitution was vested by the framers in the President alone. The President was to be "commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States." Does this give him the power to initiate war?

The draft proposals introduced in the Constitutional Convention on August 6, 1787 contained the provision that the legislature of the United States should have the power "to make war." In the debate on August 17,[7] Charles Pinckney objected that the two houses could not act with expedition and proposed that the power be given to the Senate. Pierce Butler suggested that the power be given to the President; this drew from Elbridge Gerry the rejoinder that he "never expected to hear in a republic a motion to empower the executive alone to declare war." James Madison and Gerry moved "to insert *'declare,'* striking out *'make'* war; leaving to the Executive the power to repel sudden attacks." Roger Sherman agreed that the executive "should be able to repel and not to commence war"; he thought " 'make' better than 'declare' the latter narrowing the power too much." George Mason "was against giving the power of war to the Executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging, rather than facilitating war; but for facilitating peace. He preferred *'declare'* to 'make.' " The change of language was adopted by a vote of eight states to one. On September 5 the Convention unanimously agreed to add to the clause the words "grant letters of marque and reprisal."[8] The assignment to Congress of the power to "make rules concerning captures on land and water," which rounds out the war clause, had been agreed to unanimously on August 17.[9]

The framers merely replaced the verb "make" in the list of powers of Congress in Article I of the Constitution with the verb "declare." They did not insert in the list of powers of the President in Article II: "He shall have the power to make war." Yet the State Department has attempted thus to revise the Constitution. In its memorandum of March 8, 1966, it said:

At the Federal Constitutional Convention in 1787, it was originally proposed that Congress have the

power "to make war." There were objections that legislative proceedings were too slow for this power to be vested in Congress; it was suggested that the Senate might be a better repository. Madison and Gerry then moved to substitute "to declare war" for "to make war," "leaving to the Executive the power to repel sudden attacks." It was objected that this might make it too easy for the Executive to involve the nation in war,* but the motion carried with but one dissenting vote.

In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Vietnam would endanger the peace and safety of the United States.

Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior Congressional authorization, starting with the "undeclared war" with France (1798-1800). . . .

The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.[10]

It would be difficult to find a bolder or more childish attempt at deception. It is not probable but certain that the attack Madison and Gerry had in mind was an attack upon the United States. When they attributed to the President a power to repel a sudden attack upon the United States, they did not impute to him a discretionary right to choose between war and peace, or the right to make a judgment concerning the security of the United States. Their motion was not intended to recognize any power in the President to institute a state of war; it recognized that foreign countries are able to institute a state of war. When a foreign country attacks the United States, war exists, and the President as commander-in-chief may and must make—that is, wage—the war. Alexander Hamilton thus explained the clause:

"The Congress shall have the power to declare war"; the plain meaning of which is, that it is the peculiar and exclusive duty of Congress, *when the nation is at peace,* to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only *to go to war.* But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact *already at war,* and any declaration on the part of Congress is nugatory; it is at least unnecessary.[11]

Apparently Madison and Gerry, when they used the expression "sudden attack," contemplated that the President would refer the problem to Congress at an early date. This is in keeping with the division of functions between the President and Congress; of the two, Congress is the policy-making organ. On the other hand, in war the enemy may be the effective policy-making organ: he can introduce a state of war, regardless of what the President or Congress desires. It is then for the President to wage the war. As we shall see, the scope of his powers and the role of Congress in the case of sudden attack were an issue between Jefferson and Hamilton in 1801[12] and again in the *Prize Cases* in 1863.[13]

The Constitution recognizes that the power to initiate war is lodged in two places: in Congress, and in a foreign enemy. It recognizes no such power in the President. The power of decision must be given to some single authority. There may arise circumstances under which the commander of a Polaris submarine believes that the peace and safety of the United States require him to launch atomic missiles at the Soviet Union without pausing to consult his commander-in-chief or the Congress. Whether he is right or wrong —if these words have any meaning in such a setting— he is not legally authorized to take such a decision. There may arise circumstances in which the commander-in-chief judges that the peace and safety of the United States require him to initiate hostilities without consulting Congress. These need not be limited to attacks by one foreign state upon another

*There was no such objection and no such discussion.—F.D.W.

foreign state; indeed, this is one of the less probable occasions. But our legal order does not commit the question of the measures appropriate to protect the peace and safety of the United States to the judgment of the commander-in-chief any more than it commits it to the judgment of the commander of a Polaris submarine; it commits it to Congress. Until Congress takes action the United States cannot legally initiate hostilities.

Of course this may mean a missed opportunity, just as denying the power to make war to a submarine commander, or to a seaman on the submarine, may mean a missed opportunity. Those who desire a government which affords such opportunities to a single man are free to seek an amendment to the Constitution which transfers the war power to the President. But if in 1787 it was the wiser course to entrust the decision as to war and peace to a broadly representative body rather than to the judgment of a single man, the greater hazards of the modern world seem to make it all the more important to retain this check on an impetuous executive.

The State Department's argument about a sudden attack is offered as a justification for President Johnson's action in making an undeclared war in Vietnam. It appears, then, according to the State Department, that on an altogether unspecified date North Vietnam made a sudden attack upon South Vietnam which directly imperiled the security of the United States, and that this unidentified attack occurred in unnamed circumstances of such urgency that the President had no opportunity to ask Congress to declare war. This does not agree with President Johnson's own version of the facts. In his annual message to Congress in 1966 he said that the "sudden attack" of North Vietnam upon South Vietnam to which he responded in 1965 had begun in 1959: "Then little more than six years ago North Vietnam decided upon conquest, and from that day to this soldiers and supplies have moved from north to south in a swelling stream that is swallowing up the remnants of revolution in aggression."[14] To be sure, he asserted that the tempo of the sudden attack had increased in 1965. "Swiftly increasing numbers of armed men from the North crossed the borders to join forces that were already in the South. Attack and terror increased, spurred and encouraged by the belief that the United States lacked the will to continue and that their victory was near."[15] But Johnson cited no circumstance of extreme urgency that made it impossible for him to consult Congress before he attacked North Vietnam on February 7, 1965. His war upon North Vietnam was not provoked by a military emergency threatening the security of the United States which could not wait for Congressional action. Even by the standard of the State Department's generous definition of the powers of the President, Johnson usurped the war power of Congress.

But the State Department does not rest solely on its novel interpretation of the Constitution. It ekes this argument out with four other arguments, equally unsubstantial. It asserts that historic practice supplies 125 precedents for the President's action; that the Southeast Asia Collective Defense Treaty authorizes it; that the Tonkin Gulf Resolution authorizes it; and that Congress has ratified it by passing appropriation acts.[16] First we will review the precedents on hostile military action and the relevant judicial and legislative decisions; then we will examine the legal consequences of the Treaty and the Resolution and the law on ratification by appropriation.

II

Wars Authorized or Ratified

The original understanding and subsequent views as to the significance of the constitutional assignment of the power to make war to Congress are best shown by a review of the cases in which Congress has authorized or ratified military action by the President, and the court decisions associated therewith; of the cases in which the President has referred the question of using force in external affairs to the Congress and Congress has refused to act; of the cases in which the executive has refused to employ armed force without Congressional authorization; and of the cases in which Presidents have used the armed forces abroad without Congressional authorization. The first three classes of cases will supply a standard to judge the fourth.

Even before the adoption of the Constitution, American law recognized that it was possible to wage war at different levels. In 1782 the Federal Court of Appeals, the prize court established under the Articles of Confederation, observed:

The writers upon the law of nations, speaking of the different kinds of war, distinguish them into perfect and imperfect: A perfect war is that which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility. The imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals.[1]

The framers of the Constitution accepted this conception and assigned the power to initiate both perfect and imperfect war to Congress, which was "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Our first war was a naval war with France, 1798-1801. The State Department memorandum of 1966, in its attempts to supply precedents for executive initiation of war, calls this an "undeclared war" undertaken "without obtaining prior Congressional authorization."[2] This is altogether false. The fact is that President Adams took absolutely no independent action. Congress passed a series of acts which amounted, so the Supreme Court said, to a declaration of imperfect war; and Adams complied with these statutes.

As a result of French interference with American shipping, Congress suspended commercial intercourse with France,[3] denounced the treaties with

France,[4] established a Department of the Navy[5] and a Marine Corps,[6] augmented the navy,[7] and provided for raising an army in case of need.[8]

The Congress enacted a number of statutes that provided for belligerency. An act of May 28, 1798 recited that French vessels had recently captured vessels and property of United States citizens on and near the coast, and authorized the President to instruct the commanders of United States naval vessels to seize as a prize "any such armed vessel which shall have committed or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations on the vessels belonging to citizens thereof," and also to recapture American vessels taken by the French.[9] An act of June 25, 1798 authorized any American-owned merchant vessel to resist search, restraint, or seizure by a French vessel, to capture any French ship making such an attempt as a prize, and to retake any American-owned vessel captured by the French.[10] On June 28, 1798, Congress passed further prize legislation for "public armed vessels."[11] On July 9, 1798, Congress enacted that the President might instruct public armed vessels to make prizes of armed French vessels on the high seas, and that he might grant commissions to owners of private armed ships to capture armed French vessels and to recapture American vessels.[12] An act of March 3, 1799 provided that if the President should find that American seamen impressed on the ships of the enemies of France and captured by the French were maltreated, he must cause "the most rigorous retaliation" to be inflicted on French prisoners.[13] The naval war founded on these acts was ended by treaty in 1801.

This episode raised the questions whether Congress might declare an "imperfect" war, or only "perfect" war, and whether the determination of the scope of imperfect war lay with Congress.

The first case was *Bas* v. *Tingey*,[14] decided in 1800. The commander of the *Ganges*, a vessel of the United States Navy, filed a libel for salvage against the *Eliza*, which he had rescued from the French. The claim was founded on an act of 1799. The owners of the *Eliza* defended on the ground that the United States was not at war, France was not an enemy, and the act was inapplicable.

The Supreme Court unanimously held for the libellant. Justice Washington wrote the most extended opinion:

It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go [no] further than to the extent of their commission. Still, however, it is a public war, because it is an external contention by force between some members of the two nations, authorized by the legitimate powers. It is a war between two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrains the general power.

Now, if this be the true definition of war let us see what was the situation of the United States in relation to France. In March, 1799, Congress had raised an army, stopped all intercourse with France; dissolved our treaty, built and equipped ships of war; and commissioned private armed ships; enjoining the former, and authorizing the latter, to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to re-capture armed vessels found in their possession. Here, then, let me ask, what were the technical characters of an American and French armed vessel, combating on the high seas, with a view the one to

subdue the other, and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and was authorized by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy. . . .

What then is the evidence of legislative will? In fact and law we are at war: an American vessel fighting with a French vessel, to subdue and make her prize, is fighting with an enemy, accurately and technically speaking: and if this be not sufficient evidence of the legislative mind, it is explained in the same law.[15]

Congress had established a state of imperfect war.

Justice Chase said:

Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in object, in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli,* forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.

What then is the nature of the contest subsisting between America and France? In my judgment it is a limited, partial war. Congress has not declared war in general terms; but Congress has authorized hostilities on the high seas by certain persons in certain cases.[16]

Justice Paterson agreed:

The United States and the French republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations: and this modified warfare is authorized by the constitutional authority of our country. It is a war *quoad hoc.* As far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations. It is a maritime war, a war at sea for certain purposes. . . . It is therefore a public war between the two nations qualified, on our part, in the manner prescribed by the constitutional organ of our country.[17]

Chief Justice John Marshall was not yet on the bench when *Bas* v. *Tingey* was decided, but he had an opportunity to discuss the war in *Talbot* v. *Seeman*[18] in 1801. Upholding the right of a United States ship of war to take a prize, he said:

The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial war, in which case the laws of war, so far as they actually apply to our situation, must be noticed.[19]

The third case is *Little* v. *Barreme,*[20] decided in 1804. The non-intercourse act of February 9, 1799 authorized the seizure within American waters of vessels owned or hired by residents of the United States which after March 1 should trade with any French territory, and also authorized the President to instruct the commanders of public armed ships to seize on the high seas any American vessel "bound to or sailing to any port or place within the territory of the French republic, or her dependencies." President Adams instructed naval commanders to seize American vessels "bound to or from French ports." Captain Little captured a Danish brigantine, the *Flying Fish,* which was bound from the French port of Jeremie to the Danish island of St. Thomas. In the course of the chase the captain of the *Flying Fish,* apparently in the erroneous belief that he was exposed to capture under American law, threw overboard the ship's log and other papers. He had prepared a false document to the effect that he had been forced into Jeremie by French ships. In the belief that the vessel was American, Captain Little took it into Boston as a prize.

In the district court for Massachusetts Judge Lowell ordered the vessel and cargo to be restored to the owner, but refused to award damages for the unlawful seizure. The actions of the captain of the *Flying Fish* in destroying his papers and in preparing a written excuse were suspicious and constituted reasonable cause for the seizure. "If a war of a common nature had existed between the United States and France, no question would be made but the false

papers found on board, the destruction of the log-book and other paper, would be a sufficient excuse for the capture, detention and consequent damages." In a state of war, neutrals owe certain duties; they "shall destroy none of their papers, nor shall carry false papers, under the hazard of being exposed to every inconvenience resulting from capture, examination, and detention; except the eventual condemnation of the property." "It does not appear to me to be material what is the nature of the war, general, or limited. Nothing can be required of neutrals but to avoid duplicity."[21]

On appeal the circuit court awarded $8,504 damages against Captain Little, and the Supreme Court affirmed. Chief Justice Marshall wrote the opinion of the Court:

It is by no means clear that the President of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the act, which declares that such vessels may be seized, and may be prosecuted in any district where the seizure shall be made, obviously contemplates a seizure within the United States, and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing to, a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port. Of consequence, however strong the circumstances may be, which induced Captain Little to suspect the *Flying Fish* to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her had she been really American.[22]

Since the President's instructions collided with the act of Congress, they were illegal, and could neither justify the seizure nor excuse Captain Little from damages.

The Supreme Court has from the beginning held that contemporaneous legislative interpretations of the Constitution are highly persuasive as to its meaning.[23] Here we have not only legislative but judicial judgments that Congress may initiate action short of general war, that the initiation both of general war and of action short of general war belongs to Congress, and that it is for Congress to prescribe the dimensions of the war.

The war with France was ended in 1801; in the same year began a limited war with Tripoli. The Bashaw of Tripoli was dissatisfied with the size of the annual tribute from the United States and after various acts of harassment he declared war on the United States on May 14, 1801. On May 21, 1801, before he learned of this, President Jefferson wrote the Bashaw that he was sending a "squadron of observation" to the Mediterranean "to superintendent the safety of our commerce, and to exercise our seamen in martial duties"; "we mean to rest the safety of our commerce on the resources of our own strength and bravery in every sea."[24] The ships were instructed not to initiate hostilities, but two Tripolitan ships were blockaded in Gibraltar. Being attacked by the *Tripoli*, Captain Sterrett of the *Enterprise* reduced that ship to a shambles; then he disarmed and released it. In his first annual message to Congress on December 8, 1801, Jefferson observed:

To this state of general peace with which we have been blessed, one only exception exists. Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean, with assurances to that power of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary. The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean

was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers having fallen in with and engaged the small schooner *Enterprise* . . . was captured, after a heavy slaughter of her men, without the loss of a single one on our part. . . . Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.[25]

The Congress responded by passing on February 6, 1802 an act[26] which authorized the President "fully to equip, officer, man and employ such of the armed vessels of the United States as may be judged requisite by the President of the United States, for protecting effectually the commerce and seamen thereof on the Atlantic Ocean, the Mediterranean and adjoining seas"; to instruct the commanders of these vessels to "subdue, seize, and make prize of all vessels, goods and effects, belonging to the Bey of Tripoli, or to his subjects . . . ; and also to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require." He might also commission privateers.

Alexander Hamilton made a violent attack on Jefferson's legal theory. He focused his argument on the release of the *Tripoli:*

"The Congress shall have power to declare war"; the plain meaning of which is, that it is the peculiar and exclusive province of Congress, *when the nation is at peace,* to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only *to go to war.* But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact *already at war,* and any declaration on the part of Congress is nugatory; it is at least unnecessary. . . .

Till the Congress should assemble and declare war, which would require time, our ships might, according to the hypothesis of the message, be sent by the President to fight those of the enemy as often as they should be attacked, but not to capture and detain them; if beaten, both vessels and crews would be lost to the United States; if successful, they could only disarm those they had overcome, and must suffer them to return to the place of common rendezvous, there to equip anew, for the purpose of resuming their depredations on our towns and our trade.[27]

The war with Tripoli was ended by treaty in 1805. The War of 1812 was our first general war and was initiated by a formal declaration by Congress.

From the time of the Louisiana purchase there had been friction with the Spanish authorities in Florida; and pirates and smugglers based in Florida were a vexation. In 1811 President Madison obtained a secret act of Congress authorizing him to take possession of Florida if local consent could be obtained or if another foreign power attempted to occupy it.[28] In 1812 General George Matthews seized Amelia Island, but the President repudiated this action on the ground that neither of the contingencies specified in the statute had occurred. However, he did not withdraw the troops from Florida until 1813. In that year Madison obtained another secret act under which General Wilkinson seized disputed territory, Mobile and the portion of Florida west of the Perdido river.[29]

In 1815 Algiers attacked American shipping in the Mediterranean and President Madison obtained a declaration of limited war.[30] This was copied almost verbatim from the declaration against Tripoli. Commodore Decatur quickly won the war and a treaty of peace was concluded.

By an act of March 3, 1839,[31] Congress resolved: That the President of the United States be, and he hereby is, authorized to resist any attempt on the part of Great Britain to enforce, by arms, her claim to exclusive jurisdiction over that part of Maine which is in dispute between the United States and Great

Britain; and for that purpose, to employ the naval and military forces of the United States and such portions of the militia as he may deem it advisable to call into service.

The act further provided that if actual invasion of the United States should occur, or if in the opinion of the President there was imminent danger of invasion "before Congress can be convened to act upon the subject, the President be, and he is hereby, authorized if he deem the same expedient, to accept the services of volunteers not exceeding fifty thousand. . . ." And, in the event of war with Great Britain or invasion or imminent danger of invasion, the President was authorized to employ the naval force of the United States and to build or procure vessels on the Great Lakes "as he shall deem necessary to protect the United States from invasion from that quarter."

The war with Mexico, which lasted from 1846 to 1848, is particularly interesting. After the annexation of Texas the territory between the Nueces and the Rio Grande was in dispute with Mexico. It was held by Mexico, and President Polk sent in an army which in two battles destroyed the Mexican forces. On May 13, 1846, Congress instituted a general war by a declaration which recited that Mexico had initiated the war. But in 1847 both houses began to inquire into the circumstances that had produced the war.[32] On January 3, 1848, the House by a vote of 85 to 81 resolved that the war had been "unnecessarily and unconstitutionally begun by the President of the United States."[33] The war was concluded by a treaty a few months later.

President Polk produced the war and Congress recognized the *fait accompli* by declaring war. Nevertheless, the vote of reproof demonstrates the understanding of the House—a perfectly correct understanding—that the President has no right to initiate war. And it makes it clear that when the President obliges the Congress to declare war this ratification does not exculpate him for his illegal action.

In a letter to his friend Herndon, Representative Abraham Lincoln defended his vote for the resolution:

> Let me first state what I understand to be your position. It is that if it shall become necessary to repel invasion, the President may, without violation of the Constitution, cross the line and invade the territory of another country, and that whether such necessity exists in any given case the President is the sole judge. . . .
>
> . . . Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such a purpose, and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much power as you propose. . . .
>
> The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood.[34]

In 1853 an American naval vessel, the *Water Witch,* was navigating a tributary of the Rio de la Plata under license from Argentina. It was in waters allegedly common to Paraguay and Argentina but was on the Paraguayan side of the river. Paraguay had closed its waters to foreign ships of war, and a Paraguayan fort shelled the *Water Witch,* which returned the fire. In his annual message to Congress of December 8, 1857, President Buchanan revived this grievance, and also reported that Paraguay had seized the property of citizens of the United States. He announced his intention to demand redress for these two wrongs, and asked Congress to authorize him to use "other means in the event of a refusal."[35] By joint resolution of June 2, 1858, he was authorized to "adopt such measures and use such force as, in his judgment, may be necessary and advisable, in the event of a refusal of just satisfaction by the government of Paraguay."[36] Several ships of war were sent

and the difficulties with Paraguay were, as Buchanan said in his annual message of December 19, 1859, "satisfactorily adjusted" by commissioners without resorting to violence.[37]

In a message to Congress on January 28, 1861, President Buchanan reported a series of resolutions passed by the legislature of Virginia with a view to resolving the issue between North and South.[38] Virginia proposed that a conference of states be held in Washington, and that in the meantime the states which had seceded and the President should agree to abstain from all acts of violence. Buchanan applauded the plan, but said he could not make the agreement proposed:

However strong may be my desire to enter into such an agreement, I am convinced that I do not possess the power. Congress, and Congress alone, under the war-making power, can exercise the discretion of agreeing to abstain "from any and all acts calculated to produce a collision of arms" between this and any other government. It would therefore be a usurpation for the Executive to attempt to restrain their hands by an agreement in regard to matters over which he has no constitutional control. If he were thus to act, they might pass laws which he should be bound to obey, though in conflict with his agreement.

Under existing circumstances, my present actual power is confined within narrow limits. It is my duty at all times to defend and protect the public property within the seceding States so far as this may be practicable, and especially to employ all constitutional means to protect the property of the United States and to preserve the public peace at this seat of the Federal Government. If the seceding States abstain "from any and all acts calculated to produce a collision of arms," then the danger so much to be deprecated will no longer exist. Defense, and not aggression, has been the policy of the Administration from the beginning.

Thus Buchanan clearly adopted the position Jefferson had taken at the inception of the war with Tripoli. The war power belongs entirely to Congress, and the President is its servant. Until Congress acts, the President must confine himself to repelling attacks.

President Lincoln took the Hamiltonian view. He had statutory power to call up the militia, but he had no statutory authority to issue his two proclamations of April 19 and April 27, 1861 for the blockade of Southern ports. These were issued on the theory that a state of general war already existed by virtue of the Southern attacks on federal property; in a general war, the commander-in-chief may use any means of belligerency permitted by the international law of war. On July 4, 1861, he asked the special session of Congress to ratify his actions, "whether strictly legal or not,"[39] and on August 6 Congress declared that his orders to the army and navy and his calling up militia and volunteers "are hereby approved and in all respects legalized and made valid . . . as if they had been issued and done under the previous express authority and direction of the Congress."[40]

The question of the legality of the seizure of prizes under the Presidential proclamations before Congress acted came before the Supreme Court in the *Prize Cases*[41] in 1863. Four Justices upheld the blockade. Justice Grier for the majority asserted that war could exist without declaration: "war is that state in which a nation prosecutes its right by force."

By the Constitution, Congress alone has the power to declare a national or foreign war. . . . The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander in chief of the armed services and the militia of the several States when called into actual service. He has no power to initiate or declare a war against a foreign nation or domestic State. . . .

If war be made by invasion from a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. Whether the hostile party be a foreign invader, or States organized in rebellion, it is nonetheless an act of war, even if the declaration be "unilateral."[42]

The need for a blockade was a question for the judgment of the President:

Whether the President in fulfilling his duties, as commander in chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.[43]

Then Justice Grier pointed to the Congressional ratification: "Without admitting that such an act was necessary, it is plain that if the president had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, . . . the ratification has operated to perfectly cure the defect."[44] The law of due process was not at that time well developed, or the Court might have noticed that a retroactive validation of a confiscation of ships for action legal when undertaken was a taking of property without due process of law.

Justice Nelson wrote the opinion for the three dissenters. A blockade was possible only when a state of public war existed at the law of nations, and "a war cannot lawfully be commenced on the part of the United States without an act of Congress."[45] The President had had statutory authority to call out the militia to suppress the insurrection, but "the president had no authority or power to set on foot a blockade under the law of nations or the Constitution until Congress acted."[46]

So angry were the three dissenting Justices that Justice Catron took the unusual step of writing to counsel for the libellees, the day after his argument, asking for a copy to be included in the official report of the decision, and expressing his own opinion informally:

It is idle to disguise the fact that the claim set up to forfeit these ships and cargoes, *by the force of a proclimation* [*sic*], is not founded on constitutional power, but on a power assumed to be *created* by Military necessity. *Necessity* is an old plea—old as the reign of Tibereas [*sic*]; its limits should be looked for in Tacitus. It is the commander's will. The End, we are told is to crush the Rebellion; that the whole means are at the Presd'ts discretion and that he is the sole Judge in the Selection of the means to accomplish the End. This is a rejection of the Constitution with its limitations.[47]

Surely this is an overstatement. The majority claimed nothing more than Hamilton had maintained against Jefferson—that when the United States is attacked the President is a commander-in-chief in a state of general war at international law until Congress acts.

In 1871 three American steamships were seized by one of two belligerent factions which were contending for control of the government of Venezuela. One was voluntarily surrendered; the other two were yielded up on demand of the commander of the U.S.S. *Shawmut*. On June 17, 1890, Congress passed a resolution which became law without the President's signature.[48] It authorized the President to take "such measures as in his judgment may be necessary to promptly obtain indemnity . . . and to secure this end he is authorized to employ such means or exercise such power as may be necessary." The matter was arbitrated and an indemnity of $150,000 was awarded to the United States.

In 1886 Spain acknowledged a debt to the heirs of a naturalized American citizen, Antonio Maximo Mora, for property losses during the Ten Years War in Cuba; but no payment was made. On March 2, 1895, Congress passed a "Joint Resolution Calling on the President to take such measures as he may deem necessary to consummate the agreement";[49] the text recited "That the President be, and he is hereby, requested to insist upon the payment of the sum agreed upon." It is not clear that the use of force was contemplated. The State Department collected the sum, according to the *New York Sun*, "by a process closely suggesting blackmail": there was a threat of American interference in Cuba.[50]

The Spanish-American War was initiated by a joint resolution signed by the President on April 20, 1898.[51] The resolution was an ultimatum to Spain to withdraw from Cuba and relinquish its authority over the island; the President was directed to use the land and naval forces to carry the resolution into effect. Spain replied by severing diplomatic relations and initiating hostilities, and on April 25 Congress passed an act declaring that a state of war with Spain had existed since April 21, 1898.[52]

Woodrow Wilson refused to recognize the government of President Huerta of Mexico and raised the embargo on the export of arms and munitions to Mexico. On April 9, 1914, a squad of the Mexican Army arrested eight men from the American whaling ship *Dolphin* and paraded them through the streets of Tampico. They were released as soon as the Mexicans encountered a superior officer. But Wilson seized upon this episode as a pretext for striking a blow at Huerta. Wilson demanded that Huerta order a salute of honor to United States naval vessels; Huerta refused to do this unless the United States simultaneously paid tribute to Mexico. On April 20 the President asked Congress for permission to "use the armed forces of the United States in such ways and to such an extent as may be necessary to obtain from General Huerta and his adherents the fullest recognition of the right and dignity of the United States, even amidst the distressing conditions now unhappily prevailing in Mexico."[53] On April 21 American forces occupied Vera Cruz. On April 22 the two houses passed a resolution which disavowed any purpose "to make war on Mexico" but asserted that the President "is justified in the employment of the armed forces to enforce his demands for unequivocal amends for affronts and indignities committed against the United States."[54] This amounted to a ratification, and Wilson continued to occupy Vera Cruz for seven months.

Both the First and Second World Wars were declared by Congress at the request of the respective Presidents.

III

Presidential References to Congress

In establishing the early and general understanding as to where the authority resides to use armed force abroad, it is instructive to examine the cases in which Presidents have referred the question as to whether such action should be taken to Congress, or have asked Congress for authority, and Congress has failed to authorize hostile actions. Most of these have not been proposals for general war; several of them have not even been proposals for limited war. It is not even the case that they all involved what was known at international law as acts of war, for classical international law recognized types of forceful redress by an injured state which a wrongdoer had no legal right to resent. Nevertheless, in all the following cases the President conceded that the monopoly of Congress over the declaring of war gave Congress the exclusive right to decide on the adoption of lesser military measures as well.

The first occasion was a proposal of President Jefferson. In a special message to Congress on December 6, 1805, he described the dispute with Spain over the boundary between Louisiana and Florida, and the course of conduct adopted by Spain:

That which they have chosen to pursue will appear from the documents now communicated. They authorize the inference that it is their intention to advance on our possessions until they shall be repressed by an opposing force. Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided. I have barely instructed the officers stationed in the neighborhood of the aggressions to protect our citizens from violence, to patrol within the borders actually delivered to us, and not to go out of them but when necessary to repel an inroad or to rescue a citizen, or his property; and the Spanish officers remaining at New Orleans are to depart without further delay. . . .

The present crisis in Europe is favorable for pressing such a settlement, and not a moment should be lost in availing ourselves of it. Should it pass unimproved, our situation would become much more difficult. Formal war is not necessary—it is not probable it will follow; but the protection of our citizens, the spirit and honor of our country require that force should be interposed to a certain degree. It will probably contribute to advance the object of peace.

But the course to be pursued will require the command of means which it belongs to Congress exclusively to yield or to deny. To them I communicate

every fact material for their information and the documents necessary to enable them to judge for themselves. To their wisdom, then, I look for the course I am to pursue, and will pursue with sincere zeal that which they shall approve.[1]

In his annual message to Congress on December 7, 1824, President James Monroe described the activities of pirates who put out from the Cuban shore, plundered American shipping, and fled again to the safety of Spanish territory:

It is presumed that it must be attributed to the relaxed and feeble state of the local governments, since it is not doubted, from the high character of the governor of Cuba, who is well known and much respected here, that if he had the power he would promptly suppress it. Whether those robbers should be pursued on the land, the local authorities be made responsible for these atrocities, or any other measure be resorted to to suppress them, is submitted to the consideration of Congress.[2]

The Senate asked for further information, and Monroe sent a special message on January 13, 1825. He proposed three expedients: "one by pursuit of offenders to the settled as well as the unsettled parts of the island from whence they issue, another by reprisal on the property of the inhabitants, and a third by the blockade of the ports of those islands." Probably neither Spain nor the local government of Cuba would resent such action. "It is therefore suggested that a power commensurate with either resource be granted to the Executive, to be exercised according to his discretion and as circumstances may imperiously require."[3] Congress took no action. The problem was resolved by United States naval commanders who on their own initiative pursued the pirates ashore and destroyed their bases.

By treaty in 1831 the French government agreed to satisfy American claims dating back to the Napoleonic wars, but in 1834 this still had not been done. In his annual message on December 9 of that year, President Jackson asked for the power to exact reprisals from French shipping and property if the French Chambers failed to vote the money at their next session.[4] The Senate by resolution unanimously rejected this request. Since this proposal was one for the delegation of the war power to the President, it will be considered at greater length in Chapter VIII.

On April 29, 1848, President James K. Polk reported to Congress an offer from the Governor of Yucatan to transfer the "dominion and sovereignty of the peninsula" to the United States in return for assistance against the Indians, who were "waging a war of extermination against the white race." Similar offers had been made to Spain and Great Britain. Polk said that he did not intend to propose the acquisition of sovereignty over the territory, but the United States could not afford to allow Spain or Great Britain to acquire it either:

I have considered it proper to communicate the information contained in the accompanying correspondence, and I submit it to the wisdom of Congress to adopt such measures as in their judgment may be expedient to prevent Yucatan from becoming a colony of any European power, which in no event could be permitted by the United States, and at the same time to rescue the white race from extermination or expulsion from their country.[5]

It appears that President Polk may have already employed the United States Navy in Yucatan.[6] Congress took no action.

On February 28, 1854, the American ship *Black Warrior* was seized in Havana, allegedly for violation of harbor regulations. On March 10 the House of Representatives asked for information. On March 15 President Franklin Pierce sent a special message, together with a report from the Secretary of State. Pierce said that he had demanded indemnity from Spain:

In case the measures taken for amicable adjustment of our difficulties with Spain should, unfortunately, fail, I shall not hesitate to use the authority and means which Congress may grant to insure the observance of our just rights, to obtain redress for injuries received, and to vindicate the honor of our flag.

In anticipation of that contingency, which I earnestly hope may not arise, I suggest to Congress the

propriety of adopting such provisional measures as the exigency may seem to demand.[7]

On August 1 Pierce replied to a resolution of inquiry from the Senate that "nothing has arisen since the date of my former message to 'dispense with the suggestions therein contained touching the propriety of provisional measures by Congress.' "[8] But on December 4 he held out hope of an amicable settlement as a result of a change of ministers in Spain,[9] and on December 31, 1855, he reported to Congress:

Spain has not only disavowed and disapproved the conduct of the officers who illegally seized and detained the steamer *Black Hawk* at Havana, but has also paid the sum claimed as indemnity for the loss thereby inflicted on citizens of the United States.[10]

President James Buchanan must have been the most frustrated President in our history. On December 8, 1857,[11] December 6, 1858,[12] February 18, 1859,[13] and December 19, 1859,[14] he requested authority to use the land and naval forces to protect transit over the Isthmus of Panama if need should arise. On February 18, 1859[15] and December 19, 1859,[16] he asked for the power to enforce redress in case American ships were confiscated in Latin-American harbors. These requests were refused on the ground that compliance would involve the delegation of the war power of Congress, and they will therefore be treated at greater length in Chapter VIII.

On December 6, 1858, Buchanan reported that hostile Indians in northern Mexico raided over the border, committing depredations on settlers and arresting the settlement of Arizona:

I can imagine no possible remedy for these evils and no mode of restoring law and order on that remote and unsettled frontier but for the Government of the United States to assume a temporary protectorate over the northern portions of Chihuahua and Sonora, and to establish military posts within the same; and this I earnestly recommend to Congress.[17]

He repeated the proposal in his message of December 19, 1859.[18] In the same message he recommended sending an expeditionary force into Mexico to obtain redress from a rebel government which had killed several American citizens.[19]

These requests, too, were rejected by Congress.

Aside from Jefferson, no President has been so explicit on the war power as Buchanan:

The executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It cannot legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks. It would have no authority to enter the territories of Nicaragua even to prevent the destruction of the transit and to protect the lives and property of our own citizens on their passage. It is true that on a sudden emergency of this character the President would direct any armed force in the vicinity to march to their relief, but in doing this he would act upon his own responsibility.[20]

Since Buchanan no presidential request for authorization to use force has been rejected. This is in part because in the last hundred years Presidents adopted the policy of executive usurpation.

IV

Presidential Refusals to Act

On a number of occasions the executive authority has refused to employ armed force abroad because Congress had not authorized it, and a certain evidentiary value attaches to the statements made in these cases.

In view of the current contention, which we shall examine in Chapter VII, that the President may make an executive commitment and thereby invest himself with the war power, it is interesting to see what legal effect the authors of our first and most famous commitment, the Monroe Doctrine, attributed to that declaration. In his seventh annual message, on December 2, 1823, President James Monroe told the Congress and the world:

With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.[1]

On July 1, 1824, José Maria Salazar, the minister of Colombia to the United States, told Secretary of State John Quincy Adams that he had authentic information that the French plenipotentiary to Colombia was instructed to inform the Colombian government that France would recognize the independence of Colombia only if it instituted a king, Bolívar or another; the threat of French aggression was implicit. Adams asked Salazar to present his views in writing, and on July 2 the minister addressed to him a communication which expressed the satisfaction of his government with the announcement of the Monroe Doctrine and inquired "In what manner the Government of the United States intends to resist on its part any interference of the Holy Alliance for the purpose of subjugating the new Republics or interfering in their political forms?"[2]

Adams took the matter to the President, and on July 7 summarized in his diary the cabinet discussion on Salazar's note: "The Colombian republic to maintain its own independence. Hope that France and the Holy Allies will not resort to force against it. If they should, the power to determine our resistance is in Congress. The movements of the Executive will be as heretofore expressed. I am to draft an answer."[3] But apparently this was a tentative disposition of the question, for on August 2 President Monroe wrote to James Madison describing the problem and commenting: "The subject will of course be weighed thor-

oughly in giving the answer. The Executive has no right to compromit the nation in any question of war, nor ought we to presume that the people of Columbia [*sic*] will hesitate as to the answer to be given to any proposition which touches so vitally their liberties."[4] On August 6 Adams replied to Salazar: "You understand that by the Constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government."[5] Apparently the French threat was empty, for nothing more transpired.

In 1848 Secretary of State Buchanan wrote to the Commissioner to Hawaii of a proposal to collect claims by force:

But if the claim were never so just, if it had been a case in which this Government were bound officially to interfere and if the amount due the claimant had been acknowledged by the Hawaiian Government, the President could not employ the naval force of the United States to enforce its payment without the authority of an act of Congress. The war-making power alone can authorize such a measure.[6]

In 1851 Secretary of State Daniel Webster rejected a proposal that the United States participate in a dispute between France and Hawaii:

In the first place, I have to say that the war-making power in this Government rests entirely with Congress; and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws. By these no power is given to the Executive to oppose an attack by one independent nation on the possessions of another. We are bound to regard both France and Hawaii as independent states, and equally independent, and though the general policy of the Government might lead it to take part with either in a controversy with the other, still, if this interference be an act of hostile force, it is not within the constitutional power of the President; and still less is it within the power of any subordinate agent of government, civil or military.[7]

This statement is particularly interesting in view of the current claim of the State Department that a "sudden attack" by one foreign nation upon another confers upon the President the right to intervene if he feels that the security of the United States is threatened.

In 1857 Secretary of State Cass wrote to the British Foreign Secretary, Lord Napier, explaining the American refusal to join in the Anglo-French expedition against Peking:

This proposition, looking to a participation by the United States in the existing hostilities against China, makes it proper to remind your lordship that, under the Constitution of the United States, the executive branch of this Government is not the war-making power. The exercise of that great attribute of sovereignty is vested in Congress, and the President has no authority to order aggressive hostilities to be undertaken.

Our naval officers have the right—it is their duty, indeed—to employ the forces under their command, not only in self-defense, but for the protection of the persons and property of our citizens when exposed to acts of lawless outrage, and this they have done both in China and elsewhere, and will do again when necessary. But military expeditions into the Chinese territory cannot be undertaken without the authority of the National Legislature.[8]

Congress, as previously noted, rejected President Buchanan's four requests for power to police the Panama Isthmus. In 1860 the American Atlantic & Pacific Steamship Canal Company asked for executive action to enforce certain claims against Nicaragua. On March 3 Secretary of State Cass wrote to the Secretary of the Company:

You seem to suppose that the defence of the rights of our country or its citizens, and the avowal that their violation will justify the employment of force, commits the Executive in your case to resort to it, and you accordingly call for the application of "the armed force" of the United States for the protection of your rights in Nicaragua.

The employment of the national force, under such circumstances, for the invasion of Nicaragua is an act of war, and however just it may be, it is a measure which Congress alone possesses the constitutional

power to adopt. The President has in three [*sic*] separate messages brought to the attention of that body this subject of the employment of force for the protection of our citizens. . . . But these appeals to Congress have produced no result. . . .

Cases may occur where the circumstances may justify the employment of our naval or military forces, without special legislative provision, for the protection of our citizens from outrage, but it is not necessary to examine the extent or limit of this right, because the principle is inapplicable in your case, where you demand a forcible interposition with the Nicaraguan Government, in order to give effect to the contract to which you refer.[9]

When in 1876 a United States naval officer asked permission to seize a quantity of silver belonging to a United States citizen, which had been taken by a Mexican official, Acting Secretary of State Hunter wrote:
The President is not authorized to order or approve an act of war in a country with which we are at peace, except in self-defense. This is a peculiarity of our form of government, which at times may be inconvenient, but which is believed to have proved and will in future be found in the long run to be wise and essential to the public welfare.[10]

Julio R. Santo, a naturalized citizen of the United States of Ecuadorean origin, was imprisoned in Ecuador on account of alleged participation in a political uprising. The U.S.S. *Wachusett* was despatched to Ecuador on May 1, 1881, but Secretary of State Bayard wrote to the consul-general at Guayaquil that its mission was one of peace and good-will, to achieve a mutually honorable solution:
The purpose of her presence is not to be deemed minatory; and resort to force is not competently within the scope of her commander's agency. If all form of redress, thus temperately but earnestly solicited, be unhappily denied, it is the constitutional prerogative of Congress to decide and declare what further action should be taken.[11]

In 1911 the Ambassador to Mexico informed President Taft that "President Diaz was on a volcano of popular uprising," "in which case he feared that the 40,000 or more American residents in Mexico might be assailed, and that the very large American investments might be injured or destroyed." Accordingly, President Taft assembled troops in Texas and California, and ships at Galveston and San Diego, and instructed the Chief of Staff:

It seems my duty as Commander in Chief to place troops in sufficient number where, if Congress shall direct that they enter Mexico to save American lives and property, an effective movement may be promptly made. . . .

The assumption by the press that I contemplate intervention on Mexican soil to protect American lives or property is of course gratuitous, because I seriously doubt whether I have such authority under any circumstances, and if I had I would not exercise it without express congressional approval. Indeed, as you know, I have already declined, without Mexican consent, to order a troop of Cavalry to protect the breakwater we are constructing just across the border in Mexico at the mouth of the Colorado River to save the Imperial Valley, although the insurrectos had scattered the Mexican troops and were taking our horses and supplies and frightening our workmen away. My determined purpose, however, is to be in a position so that when danger to American lives and property in Mexico threatens and the existing Government is rendered helpless by the insurrection, I can promptly execute congressional orders to protect them, with effect.[12]

V

Unauthorized Presidential Actions

The 1966 State Department memorandum attaches importance to the fact that "Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the 'undeclared war' with France (1798-1800)." These precedents are supposed to justify President Johnson's action in committing more than a half million troops in South Vietnam and attacking North Vietnam.

Three collections of precedents have been published. In 1912 the Solicitor for the State Department, J. Reuben Clark, published a memorandum entitled *Right to Protect Citizens in Foreign Countries by Landing Forces*. An appendix listed forty-one episodes. The study was republished in 1934; a Supplemental Appendix added a considerable number of later cases under the headings of China, Cuba, Dominican Republic, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, France (in 1914 six men from the U.S.S. *Tennessee* were stationed as guards at the Embassy in Paris for one week), and Smyrna.[1] In 1928 Milton Offutt's *The Protection of Citizens Abroad by the Armed Forces of the United States*[2] was published. Offutt estimated that "The armed forces of the United States have been landed on foreign soil for the protection of the lives and property of American citizens living abroad on more than one hundred occasions during the past hundred and fifteen years."[3] In 1945 a former Assistant Secretary of State, James Grafton Rogers, published *World Policing and the Constitution*.[4] In an appendix he listed 149 cases or clusters of cases. In not more than a dozen or two of these, he said, had Congress authorized "the employment of guns or men." "In all the other affairs listed, running to well over a hundred, the Executive alone has assumed responsibility."[5] It may be added that in the great majority of these cases there was no collision of hostile forces and no bloodshed.

In a number of the cases compiled by these authors the President reported the action to Congress; sometimes he offered a justification. In other cases he did not report. In still other cases the action was taken by naval officers on their own initiative; only very infrequently were these actions ever reported to Congress.

It is possible to classify the cases of executive action into several types. They are presented here in what is more or less an order of increasing gravity.[6]

In several cases the executive authority has apparently felt justified in taking unauthorized action because the foe was politically unorganized. The assumption has been that war can exist only between states. The first such case President Jackson reported in his fourth annual message on December 4, 1832:

An act of piracy having been committed on one of our trading ships by the inhabitants of a settlement on the west coast of Sumatra, a frigate was dispatched with orders to demand satisfaction for the injury if those who committed it should be found to be members of a regular government, capable of maintaining the usual relations with foreign nations; but if, as was supposed and as they proved to be, they were a band of lawless pirates, to inflict such a chastisement as would deter them and others from like aggressions. This last was done, and the effect has been an increased respect for our flag in those distant seas and additional security for our commerce.[7]

There were other punitive attacks on Sumatra in 1838 and 1839. In 1840, 1855, and 1858 retaliatory attacks were made in the Fiji Islands. In 1841 there was a raid on Drummond Island in the Pacific and on Samoa. In 1843 there were raids on the West African coast. In 1867, in Formosa, there was an unsuccessful pursuit of natives who were in effect independent of the official government of the island.

The most important case in this category was the bombardment of Greytown, Nicaragua, in 1854. The mouth of the San Juan River was the eastern terminus of one of the routes across the Isthmus. Great Britain claimed a protectorate over the "Mosquito Coast," and under a charter from the Mosquito King a company of American and European adventurers set up a transit company to conduct travelers over the Isthmus. In 1852, with the consent of the Mosquito King and under the patronage of the British consul, this group established the sovereign state of Greytown. A rival enterprise, the Accessory Transit Company, held a charter from the Nicaraguan government and enjoyed the patronage of the United States government; it had its seat directly across the river in Punta Arenas. Inevitably friction arose. During a visit in May of 1853 Captain Hollins of the U.S.S. *Cyane* temporarily placed a marine guard on property of the Accessory Transit Company which had been ordered to be cleared by the Greytown authorities. After his departure there occurred various incidents; in the course of one of them the American Minister to Central America suffered a slight cut from a bottle thrown by a member of a Greytown mob. The Secretary of the Navy ordered Hollins to return and obtain redress for the damages suffered by the Accessory Transit Company and an apology for the attack upon the Minister. His instructions were ambiguous. The people of Greytown "should be taught that the United States will not tolerate these outrages, and that they have the power and the determination to check them. It is, however, very much to be hoped that you can effect the purposes of your visit without a resort to violence and destruction of property and loss of life. The presence of your vessel will, no doubt, work much good. The Department reposes much in your prudence and good sense."[8]

Upon his arrival on July 12, 1854, Captain Hollins demanded an indemnity of $24,000 for the Accessory Transit Company, an apology for the attack on the Minister, and assurances of good behavior. Greytown did not comply, and on July 13 Hollins shelled the town intermittently throughout the day, and at four o'clock he sent a party ashore to burn what remained of the town. He reported: "The execution done by our shot and shell amounted to the almost total destruction of the buildings; but it was thought best to make the punishment of such a character as to inculcate a lesson never to be forgotten by those who have for so long a time set at defiance all warnings, and satisfy the whole world that the United States have the power and determination to enforce that reparation and respect due to them as a Government in whatever quarter the outrages may be committed."[9]

This episode is frequently paraded today as an illustration of the constitutional powers of the President. It was not so regarded at the time. The leading study of the affair reports:

Hollins's action met with strong condemnation from the American press and people. The New York *Times* was particularly bitter, and, assuming that the action was directed or approved by the government, intimated that the terms of the Clayton-Bulwer treaty had been broken, and denounced President Pierce for a violation of the Constitution of the United States, on the ground that Congress alone could declare war. The *Times* was an opposition paper, but the best elements of the Democrats themselves felt that they could not honestly defend the deed. The fact that resolutions from both houses of Congress, asking for the correspondence upon the subject, with a copy of Hollins's instructions, were carried by a large majority and in spite of administrative opposition was indicative of the general disapprobation of the country.[10]

The Minister to Great Britain, James Buchanan, assured the British government that Hollins' action was unauthorized and would be disavowed by the United States.[11] Secretary of State Marcy, however, saw no way of repudiating Hollins' act; at the same time, he dared not indorse it, and so when the British Ambassador approached him he said that he could not express an opinion because the matter was under the consideration of the government.[12] Both the Senate and the House demanded information on the bombardment. In the meantime, France, the German Confederation, and Nicaragua demanded indemnification for the destruction of the property of their nationals.

On August 8 Marcy wrote to Buchanan: "The occurrence at Greytown is an embarrassing affair. The place merited chastisement, but the severity of the one inflicted exceeded our expectations. The government will, however, I think, stand by Capt. Hollins."[13] The government had no choice. To admit the impropriety of Hollins' action, which was more or less warranted by his instructions, would put the administration in a hopeless position in domestic politics and would oblige it to satisfy the foreign claims.

President Pierce finally broke the official silence in his annual message to Congress on December 4, 1854. He brazened the matter out. After a tendentious and highly colored report of the events which were alleged to justify the destruction of Greytown, he undertook to remove the action from the category of war by denying the status of an organized society to Greytown and representing the community as a band of outlaws or pirates:

> Justice required that reparation should be made for so many and such gross wrongs, and that a course of insolence and plunder, tending directly to the insecurity of the lives of numerous travelers and of the rich treasure belonging to our citizens passing over this transit way, should be peremptorily arrested. Whatever it might be in other respects, the community in question, in power to do mischief, was not despicable. It was well provided with ordnance, small arms, and ammunition, and might easily seize on the unarmed small boats, freighted with millions of property, which passed almost daily within its reach. It did not profess to belong to any regular government, and had, in fact, no recognized dependence on or connection with anyone to which the United States or their injured citizens might apply for redress or which could be held responsible in any way for the outrages committed. Not standing before the world in the attitude of an organized political society, being neither competent to exercise the rights nor to discharge the obligations of a government, it was, in fact, a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages depredating on emigrant trains or caravans and the frontier settlements of civilized states.[14]

This riot of language bore no relation to fact. There had been no complaint whatever that Greytown plundered or abused travelers. Neither the $24,000 at stake between Greytown and the Accessory Transit Company nor the insult to the American Minister involved any act of piracy or depredation. Pierce therefore supplemented his analogy to piracy with an analogy to acts of reprisal by European states:

> If comparisons were to be instituted, it would not be difficult to present repeated instances in the history of states standing in the very front of modern civilization where communities far less offending and more defenseless than Greytown have been chastized with

much greater severity, and where not cities only have been laid in ruins, but human life has been recklessly sacrificed and the blood of the innocent made profusely to mingle with that of the guilty.[15]

But Pierce was not able to offer any precedent in which the United States had inflicted injury on such a scale without an act of Congress.

This is the most famous case of unauthorized war-making by the executive in the nineteenth century. It is a precedent not to be imitated but to be avoided.

In cases of this class, the executive assumed that the use of force was not an exercise of the war power because the victim was not a formally organized state. The next stage of gravity is reached by limited incursions into the territory of an organized state which were not directed against the government of that state but against pirates or bandits who had taken shelter there. The undeclared Seminole War lasted from 1816 to 1818; General Jackson pursued the Seminoles into Florida and while there engaged the Spanish as well and hanged two British subjects: this last action touched off much criticism of the whole enterprise.

In 1817, on the orders of President Monroe, American forces attacked pirates and smugglers on Amelia Island in Spanish Florida. In 1822, 1823, 1824, and 1825, American commanders pursued pirates ashore in Cuba and destroyed their ships and bases. In 1827 naval vessels policing the waters about the Greek Islands not only destroyed piratical vessels at sea but twice landed in search of pirates. In 1857 Commodore Paulding arrested the filibusterer William Walker on Nicaraguan soil and returned him to Washington, where he was immediately released. President Buchanan confessed to Congress that Paulding's action had been improper, but insisted that he had acted with good intentions.[16] This extenuation provoked bitter criticism in Congress of Buchanan himself. In 1859 Captain Ford with fifty men pursued the bandit Cortino into Mexico. A large number of such pursuits occurred in the next fifty years; the latest occurred in 1916 when President Wilson sent a punitive force in pursuit of Pancho Villa. This force penetrated four hundred miles into Mexico and remained in that country several months; it engaged in hostilities with troops of the Mexican government. President Carranza protested against this invasion as a hostile act.

In a number of cases naval action has been taken against subordinate local authorities of a foreign state who had committed acts of hostility without the authorization of their national government. In 1863 occurred a naval engagement with ships of the Prince of Nagato of Japan in the straits of Shimonoseki; in 1864 an American ship participated in a successful allied attack on the Prince's forts on the shore. Conceivably the landing to protect citizens in Yokohama in 1868 could be brought under this heading. In 1871 forts in Korea which had shelled American ships were stormed and destroyed.

In still another class of cases, marines or sailors have been landed in order to protect United States citizens from a temporary threat of mob violence. In August of 1859 marines were landed in Woosung and Shanghai to protect citizens during a riot against foreigners. When the British shelled Alexandria, Egypt in 1882, causing fires and a breakdown of government, a force of 126 men was landed, primarily to protect the United States consulate; they were withdrawn the next day. There were a large number of such landings in China between 1911 and 1933, and considerable bodies of marines were stationed in various ports for long periods of time.

Mob violence usually has no political aspect; it is not an effort to overthrow the local government. The landing of American troops in time of revolution is another matter, for even undesignedly it may favor one side or the other. There have been a number of such landings. Sometimes they have been invited by the de jure government; sometimes they have been tolerated or indorsed; sometimes they have occurred over the objection of the de jure government; sometimes they have been welcomed by both parties. In 1852-1853, during a civil war in Argentina, there were several landings in Buenos Aires to protect citizens. In 1855 and 1858 there were landings in Uruguay in time of revolution, on the second occasion at

the request of the de jure government. There have been a large number of landings to protect American citizens and interests in the Caribbean. These began with concern to keep the Isthmus routes open, so that Nicaragua and Colombia were the scenes; after the Spanish-American War the protection of citizens and their investments during a revolution became a cause for intervention in all the Central American and Caribbean states.

A broadening pattern of intervention can be discerned. The first cases are landings to protect the consulate or a railroad station. Next we find marines garrisoning trains to insure their movement across the Isthmus. We find American forces policing towns during a revolution, receiving the custody of a town from a retreating force and turning it over to the other faction when it arrives. When Panama rebelled and seceded from Colombia in 1903 President Theodore Roosevelt interposed American forces to prevent the Colombian government from attacking the rebels and thus aided the revolution.

The device of the "neutral zone" appears to have been invented in 1904. During a rebellion in the Dominican Republic against the Morales government, which enjoyed the favor of Washington, Commander Dillingham landed American forces and announced that there could be no fighting in the city of Puerto Plata. The rebels, who held the city, marched out to fight, were defeated, and were required to throw down their arms when they re-entered the city. The Morales government triumphed.

The same device worked to the disadvantage of the legitimate government in Nicaragua in 1910. Commander Gilmer of the *Paducah* issued a proclamation to both sides that there should be no bombardment of or fighting in Bluefields; he would permit no more than one hundred armed men in the city to serve as police. President Madriz complained to President Taft that this action enabled the rebels to neglect their base in Bluefields and to concentrate their forces and defeat him. Secretary of State Knox replied: "The United States took only the customary step of prohibiting bombardment or fighting by either faction within the unfortified and ungarrisoned city of Bluefields, thus protecting the preponderating American and other foreign interests."[17] On a later occasion, when General Rivas of the Madriz forces threatened to shell ships which were supplying the rebels, Commander Hines warned him that if he did so he would attack him. Madriz was defeated and fled.

Sometimes intervention for the ostensible purpose of protecting citizens in time of revolution is quite naked military intervention on one side or the other. In 1874 there was a dispute over the succession to the throne of Hawaii. At the request of the Hawaiian Minister of Foreign Affairs, relayed by the United States Minister to Hawaii, Commander Belknap landed 150 men and a Gatling gun, took possession of the courthouse, and insured the installation of King David Kalakaua. This action for the protection of the rights of American citizens was undertaken against an American citizen, the dowager Queen Emma, who was the other claimant of the throne.

In 1893, desiring to overthrow Queen Liliuokalana, American residents in Hawaii asked the Minister for forces to protect their lives and property. A party was landed from the U.S.S. *Boston,* and on the next day the Queen was deposed. Sanford B. Dole was made president and the Minister agreed to institute a kind of protectorate; the American flag was run up over public buildings. President Cleveland repudiated the whole proceeding and the flag came down. Dole, however, continued as the president of a republic until the annexation of Hawaii by the United States in 1898.

In 1899 there was a dispute over the succession to the throne of Samoa. One claimant was favored by the United States and Great Britain, the other by Germany. Rear Admiral Kautz occupied the town of Apia and insured the installation of King Malietoa. There was sniping from the other faction; with British help Kautz suppressed the rebels.

Dr. Juan Bosch was elected President of the Dominican Republic in 1963 by 58 per cent of the vote in that country's first free election. He was not favored by Washington, and was overthrown by a military coup within a few months. On April 24, 1965 a portion of the army rebelled against the ruling military junta and called upon President Bosch to return.

By April 28 the junta was hard-pressed, and Colonel Benoit asked for American assistance on the ground that their defeat would be a victory for communism. He was told that "the United States would not intervene *unless he said that he could not protect American citizens present in the Dominican Republic.*"[18] He amended his plea and on the same day President Johnson announced:

The United States government has been informed that American lives are in danger. These authorities are no longer able to guarantee their safety and they have reported that the assistance of military personnel is now needed for that purpose. I have ordered the Secretary of Defense to put the necessary American troops ashore in order to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back to this country.[19]

To rescue these hundreds of Americans, 21,000 troops were landed and 9,000 more deployed on naval vessels off the shore. The troops were not withdrawn when the citizens were evacuated; they remained to insure that Bosch did not return and that his faction capitulated. This occurred.

Before intervening, President Johnson informed Congressional leaders "that United States Marines would be landed in Santo Domingo that night for the sole purpose of protecting the lives of Americans and other foreigners."[20] Senator Fulbright has written:

Four months later, after an exhaustive review of the Dominican crisis by the Senate Foreign Relations Committee in closed sessions, it was clear beyond reasonable doubt that although saving American lives may have been a factor in the decision to intervene on April 28, the major reason was a determination on the part of the United States government to defeat the rebel, or constitutionalist, forces whose victory at that time was imminent.[21]

One step further than intervening in a revolutionary situation is to attack the legitimate government of a foreign country in such a manner that the United States and that government are the only antagonists. In 1824 Commodore Porter of the *John Adams,* in reprisal for maltreatment of an American naval lieutenant, attacked the town of Foxardo in Puerto Rico and extorted apologies. He was recalled, courtmartialed, and suspended for six months, whereupon he resigned. In 1831, on orders of President Jackson, the U.S.S. *Lexington* rescued the crews of three sealing schooners who had been imprisoned by the military governor of the Falkland Islands.

In 1853 Martin Koszta, a native of Hungary who had declared his intention of acquiring American citizenship but had not yet taken out his "second papers," was seized in Smyrna and carried aboard the Austrian vessel *Hussar.* Captain Ingraham of the American sloop of war *St. Louis* learned of this, trained his guns on the *Hussar,* and demanded the release of Koszta. The two commanders agreed to consult with the French consul and the outcome was that Koszta was awarded to Ingraham. Subsequently the Austrian government complained of Ingraham's conduct and demanded the return of Koszta, but President Pierce rejected the complaint and Congress voted the Captain a gold medal.

In 1851 Captain Pearson of the sloop of war *Dale* extorted from the king of Johanna Island $1,000 as indemnity for the imprisonment of an American whaling captain by threatening to bombard the town. In 1854, during the Taiping rebellion, the Imperial forces in Shanghai conducted themselves badly toward foreigners, and American and British forces landed and routed the Chinese. In 1856 a force of sailors and marines stormed and razed the "barrier forts" at Canton.

For some reason Clark, Offutt, and Rogers have omitted one of the most famous of these episodes. In 1904 Ion Perdicaris, an American citizen, was kidnapped by a Moroccan bandit, Ahmed ibn-Muhammed Raisuli, and was held for ransom. President Roosevelt sent ships of war to Tangier, and Secretary of State John Hay sent to Sultan Abd-al-Aziz IV a terse telegram, "Perdicaris alive or Raisuli dead." The Sultan, threatened with war, paid the ransom.

Even before the establishment of the United Nations, the "pacific blockade" had dubious standing at international law. The United States was one of the states that recognized the validity under some circumstances of the pacific blockade, but it approved only

of the interdiction of vessels belonging to the blockaded state. But in 1962 President Kennedy, without a recourse to Congress, announced what he called a pacific blockade of Soviet shipping bound for Cuba. This was a threat to commit an act of war against the Soviet Union without consulting Congress.

An intervention for the protection of citizens against a mob is sometimes converted into a war with the government of the state which is invaded. At the time of the Boxer Rebellion in China in 1900, President McKinley sent forces, eventually 5,000 men, in what began as an allied effort to rescue citizens in Peking and ended as a war with the Imperial Government of China. China was obliged to sign a protocol, which was never submitted to the Senate, promising to pay an indemnity of $330,000,000, of which $24,000,000 was to be paid to the United States.

In the twentieth century a still more spectacular level of intervention in the affairs of foreign states was reached. This consisted in actually taking over and administering the governments of foreign states by unauthorized executive action. Haiti was occupied from 1915 to 1934; after the initial conquest the marines conducted an election and this yielded a government which legitimized the occupation by treaty. In 1916 President Wilson occupied the Dominican Republic, and this state was under direct military government until 1922, when a Dominican government was installed; the marines were withdrawn in 1924. From 1912 to 1925, and from 1928 to 1933, the United States maintained a dominating military presence in Nicaragua. In 1906 the government of Cuba was paralyzed by insurrection. Thereupon President Theodore Roosevelt appointed Secretary of War Taft provisional governor; soon he replaced him with the governor of the Canal Zone. Troops were sent in; the occupation lasted three years. Roosevelt relied upon the so-called Platt amendment, which had been incorporated in the Cuban constitution in 1902 and in a treaty between the United States and Cuba ratified in 1904:

The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.[22]

This brings up our last category of involvement, which might be called war by invitation. The Platt amendment did not authorize the President to intervene, but the United States; and in any case Cuba could not transfer the power of Congress to initiate military action to the President either by amending its constitution or by signing a treaty. But when an intervention is sanctioned by the law or government of the state invaded, the action looks less like war. And in some cases, of course, it is not war. In 1941 President Franklin D. Roosevelt occupied Greenland and Iceland by agreement with the local authorities, and in the same year he occupied Dutch Guiana by agreement with the Netherlands government-in-exile. Clearly he usurped the treaty power, but he did not usurp the war power, for there was no question of hostilities within these territories. In 1958 President Eisenhower landed troops in Lebanon "to protect American lives and by their presence there to encourage the Lebanese in defense of Lebanese sovereignty and integrity."[23] There was no military action and apparently no threat either to American citizens or to the Lebanese government; the fact seems to be that the government of Lebanon consented to the use of its territory as a staging area for possible action in Jordan.

The case is quite different with President Truman's intervention in the Korean war in 1950. He committed air and naval forces at the request of the South Korean government. Then he procured a vote of the Security Council of the United Nations appealing for action by members and he thereafter purported to act by authority of the United Nations. But Congress in enacting the United Nations Participation Act[24] in 1945 had stipulated that any agreement by which the United States supplied troops to the United Nations must be approved by Congress. Truman neither sought nor received any Congressional authorization

for a war which lasted three years and cost more than 140,000 casualties.

Similarly President Johnson has engaged in two wars in Vietnam. Presumably he is fighting the war in South Vietnam, which has already cost more than 120,000 casualties, at the invitation of the South Vietnamese government. The war against North Vietnam is justified by the various other arguments we are examining.

If war by invitation is constitutional, there is a new and easy formula for usurpation of the war power. It is only necessary for the executive to lodge a puppet government on foreign territory, recognize it, and then accept its invitation to send troops to suppress all opposition to the puppet government. This has been the history of the American intervention in South Vietnam. Apparently it was the plan that lay behind the invasion of Cuba in 1961. The Bay of Pigs was chosen as a landing point because it was relatively inaccessible from the rest of the island. An informed study reports that "Dulles and Bissell did not suggest that the Castro regime would topple the moment Artime's men hit the beach, but they did predict that there would be enough uprisings around the country so that the beachhead could be held and consolidated and so that the rebels could establish a government on Cuban soil which the United States then could recognize and support."[25] One supposes that the support would have taken the form of landings of marines and attacks from the air.

These are by no means all the cases in which the executive has committed American forces abroad or committed or threatened to commit acts of violence without Congressional authorization; but they illustrate all the types of cases and include the more important ones.

VI

The Unaided Power of the President

It is clear that the President has the power to repel a sudden attack upon the United States without waiting for authorization by Congress. In Chapters II, III, and IV we have reviewed official opinions concerning a great variety of proposals for hostilities; they add up to the proposition that when the United States takes the initiative in the use of military force, although for a limited objective, this is war and requires the approval of Congress. But to this general proposition it is sometimes said that there are two exceptions. These alleged exceptions embrace most of the cases of unauthorized action reviewed in Chapter V.

When the international law of war was taking form, there was a body of opinion which argued that neither intervention for the protection of citizens nor acts of reprisal were acts of war. International law is, to a degree, incorporated in American law. Therefore it has been argued that the President, under his power to execute the laws, may execute international law; that is, he may afford protection to citizens or may perpetrate acts of reprisal without Congressional authorization.[1]

J. Reuben Clark, the Solicitor of the State Department, who prepared the fullest study on the subject, distinguished between what he called "political intervention"—"an intervention by one power in the local affairs of another power"—and "interposition which is exercised solely for the protection of the citizens of the intervening state resident or domiciled within the non-protecting state." Apparently he assimilated acts of reprisal for injuries inflicted upon citizens to non-political interposition. Intervention was an act of war, and belonged to Congress; interposition was merely an execution of the laws and might be undertaken by the President.[2]

In fact, it is well settled that citizens have a constitutional right to protection at the municipal law of the United States. President Washington recognized this in his Neutrality Proclamation of 1793[3]; the Supreme Court recognized it as one of the rights of national citizenship in the *Slaughter-House Cases*[4] in 1873 and in *In re Neagle*[5] in 1890. The right to such protection is inherent in the idea of citizenship.

In the execution of the laws, the President may and should protect citizens from oppression in foreign countries. But in doing so he must observe constitutional limits. He may employ only those means which the Constitution places at his command. He could not, for example, impose a tax in order to rescue citizens, or make a treaty without the approval of the Senate in order to enlist foreign support in an effort

to rescue citizens. Has he the right to employ force to rescue citizens without authorization by Congress?

As Secretary of State, Henry Clay advised in 1827 that the navy might not use force to liberate American seamen unjustly imprisoned in a foreign port:

> The employment of force is justifiable in resisting aggressions before they are complete. But when they are consummated, the intervention of the authority of government becomes necessary if redress is refused by the aggressor.[6]

This seems reasonable. The right to resist aggression is analogous to the President's power to repel a sudden attack. It does not involve the initiation of hostilities. But to launch a rescue operation is to assume the initiative. We need not debate whether this is war at international law. It is clear that under the Constitution the power of Congress to declare war embraces limited war and very limited war—all recourse to force in international relations. It makes no difference that the President's purpose is to redress a wrong, and that redressing the wrong is permitted by international law. War is a sanction for redressing wrongs, but by the Constitution this sanction is entrusted only to Congress.

There is some authority to the contrary. In the last chapter we noted the rescue of Martin Koszta from an Austrian ship of war by Captain Ingraham of the *St. Louis*. President Pierce approved Ingraham's action in his annual message on December 5, 1853:

> After a careful consideration of the case I came to the conclusion that Koszta was seized without legal authority at Smyrna; that he was wrongfully detained on board of the Austrian brig of war; that at the time of his seizure he was clothed with the nationality of the United States, and that the acts of our officers, under the circumstances of the case, were justifiable, and their conduct has been fully approved by me, and a compliance with the several demands of the Emperor of Austria has been denied.[7]

In 1890, in *In re Neagle*,[8] the Supreme Court held that it was lawful for the President to assign a bodyguard for Justice Field, even though no act of Congress authorized it. Justice Miller said that it was the President's duty to take care that the laws be faithfully executed, and asked: "Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations and all the protection implied by the nature of the government under the Constitution?" In order to show that there are non-statutory rights which the President may and should protect, Justice Miller adverted to the case of Koszta, and asked: "upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?"

The proposition that dicta are unreliable because they raise problems which the court may not have thought through is vindicated here. Miller wished to show that there were rights which the executive might enforce without statutory authorization, and adduced the right of citizens to protection abroad. But he seemed also to approve of the means employed to protect this right, although that means involved an unauthorized threat of force. This issue was not germane to his argument.

Justice Miller pointed out that Congress had voted Captain Ingraham a gold medal. This does not seem to indicate a Congressional recognition that the field belongs to the executive so much as to constitute a legislative ratification of the action.

In one class of cases, the Constitution explicitly forbids the executive to use force for the protection of citizens without the authorization of Congress. Article I, Section 8 authorizes Congress "to define and punish piracies and felonies on the high seas, and offenses against the law of nations." On April 30, 1790, Congress passed the first act against piracy.[9] On March 3, 1819, the President was authorized and requested "to employ so many of the public armed vessels as, in his judgment, the services may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations."[10] And on December 20, 1822, Congress appropriated $160,000 for the suppression of piracy and to afford "effectual protection to the citizens and commerce of the United States."[11]

On at least two other occasions Congress has asserted its jurisdiction over the topic of the protection of citizens abroad. In 1856 Congress enacted that when a citizen of the United States should discover a deposit of guano on an island "not within the lawful jurisdiction of any other government" he might, with the approval of the President, occupy the island in the name of the United States. The act provided "That the President of the United States is hereby authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the said discoverer or discoverers or their assigns."[12]

In the nineteenth century, European states which did not recognize the rights of expatriation dealt with naturalized American citizens who returned to their birthplace as though they still owed the obligations of their original citizenship. In 1868 Congress affirmed the right of expatriation and enacted that naturalized citizens should receive the same protection abroad as native-born citizens, and

That whenever it shall be made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, it shall be the duty of the President to use such means, *not amounting to acts of war*, as he may think necessary and proper to obtain or effectuate such release, and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.[13]

Whatever one may think of the legality of unauthorized landings in foreign territory to protect citizens, the case for unauthorized executive reprisals in much weaker. Here it is not a question of averting injury, or of rescuing beleaguered citizens. A reprisal is a military act performed for the purpose of inflicting harm. The decision to perform such acts belongs to Congress.

In 1793 Secretary of State Thomas Jefferson wrote:

The making of a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought to precede; and when reprisal follows, it is considered an act of war, and never failed to produce it in the case of a nation able to make war; besides, if the case were important and ripe for that step, Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not with the executive.[14]

As we have seen, Presidents have several times asked Congress for authority to make reprisals, and sometimes Congress has authorized them—against Paraguay in 1857 and against Colombia in 1890. Wilson requested authority to make reprisal against Mexico in 1914 and then anticipated the Congressional action, which must be regarded as a ratification. Presidents Monroe, Jackson, and Buchanan requested the power to make reprisals and were denied it. In the committee report refusing Jackson's request, Henry Clay pointed out that "The framers of our Constitution have manifested their sense of the nature of this power, by associating it in the same clause with grants to Congress of the power to declare war, and to make rules concerning captures on land and water."[15]

Nevertheless, the bombardment of Greytown in 1854 is very frequently cited as evidence that the President possesses a native power of reprisal. We have seen that President Pierce defended Captain Hollins' action out of desperation rather than out of conviction. But the legality of the action was upheld by Justice Nelson of the Supreme Court while sitting on circuit in *Durand* v. *Hollins*[16] in 1860.

In vindicating the property rights of American citizens, Captain Hollins destroyed the property of Durand, an American citizen in Greytown, and Durand sued him for damages. Justice Nelson took an expansive view of the President's powers:

As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or its citizens. It is to him, also, the citizens abroad must look for

protection of person and of property and for the faithful execution of laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a department of state and a department of the navy.

Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not infrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.

I have said, that the interposition of the president abroad, for the protection of the citizen, must necessarily rest in his discretion; and it is quite clear that, in all cases where a public act or order rests in executive discretion neither he nor his authorized agent is personally civilly responsible for the consequences.[17]

This opinion has nothing to do with the case. It is an argument that the President must have power to act speedily to prevent harm to citizens abroad; he cannot wait to consult Congress. But what was involved in the bombardment of Greytown was not the protection of citizens but reprisal. There was no feature of urgency. The Secretary of the Navy gave Hollins his instructions. Congress could have done so as well.

We may suspect that Justice Nelson, as a partisan Democrat, was concerned to vindicate the action of a Democratic President. When he wrote the bitter dissenting opinion in the *Prize Cases*[18] in 1863, Justice Nelson expressed a very different opinion of the powers of a Republican President.

There was available a more plausible justification. President Pierce himself had asserted that the action was not war because Greytown was not a political community: it was "a piratical resort of outlaws." John Bassett Moore thought this a satisfactory argument. Denouncing Wilson's occupation of Vera Cruz as an act of war, he said:

The Greytown incident, which has often been cited to prove that such a proceeding would not be war or an act of war, can not properly be invoked as a precedent, since Greytown was a community claiming to exist outside the bounds of any recognized state or political entity, and the legality of the action taken against it was defended by President Pierce and Secretary Marcy on that express ground.[19]

Most of the State Department's 125 purported precedents for the Vietnamese War were interventions for the protection of citizens; a few were acts of reprisal and there were a few others. The mere fact that they occurred does not establish their legality. If this were true, the frequency with which banks are robbed would establish the legality of bank robbery. The analogy is worth pursuing. Just as a bank robber acts only when he thinks he can escape apprehension, so on most occasions when Presidents have usurped the war power there has been little likelihood of complaint or political retribution. Landings on the soil of states that had no navies, and acts of violence against defenseless distant ports, disturbed no domestic interest. They were more likely to produce applause than censure. "Perdicaris alive or Raisuli dead" evokes in Congressmen and citizenry that thrill of aggressive national pride which they seem to value more highly than they value constitutional government.

This is not to suggest that it is always morally discreditable to prefer other values to legal values. The tradition that prefers religious to legal values is very old. And, as Aristotle pointed out, because of the generality of legal rules their literal application may produce in marginal cases results which are inconsistent with the values of the legal order itself.

In these circumstances he recommended the abandonment of law for equity, to do what the lawgiver would have done "if he had known."[20] American law has no such formal alternative. Very often the solution in what are called hardship cases is to abandon the general rule and introduce a local rule which gives legal status to a value which was originally exterior to the formal legal order. This practice is commemorated in the maxim, "Hard cases make bad law."

In some cases the forcible intrusion of non-legal values into the legal order produces only a local asymmetry, unaesthetic but otherwise insignificant. But in other cases the incorporation of alien values may entail the surrender of basic values of the legal order. We are given to understand that this is the case with the protection of citizens abroad. Apparently the State Department believes that the only way to justify the landing of six sailors in a longboat to rescue a citizen is to concede that the President has a constitutional right to commit 525,000 men in a foreign war without the consent of Congress. Surely the State Department has made the wrong choice. If this is necessary in order to restrain the President, it is better to restrain the longboat. As Abraham Lincoln said, the possession of the war power by a single man was understood by the Constitutional Convention to be "the most oppressive of all kingly oppressions"; but the view of the State Department "destroys the whole matter, and places our President where kings have always stood."[21] The assignment of the war power to Congress is an essential feature of the political philosophy of the Constitution. The framers had learned from the history of Rome that the concentration of uncontrolled military power in the hands of a single man means the end of republican government.

In the past, the official apology for landings to protect citizens and for acts of reprisal has always been that they were not acts of war at international law and that the President in performing them was merely executing international or municipal law. On this theory, these cases are not precedents for President Johnson's engaging in what is undeniably war at international law in South Vietnam and North Vietnam. He is not making landings to protect citizens; nor is he engaging in measured acts of reprisal for injury to citizens.

But despite J. Reuben Clark, there is not even a persuasive legal case for unauthorized landings or acts of reprisal. The Constitution reserves to Congress the exclusive right to initiate hostilities. It is possible to account for the precedents without legalizing them. On various occasions, for reasons more or less appealing, executive officers have overstepped their authority. President Buchanan acknowledged that he had no inherent authority to make landings to protect citizens, but said that any President would in case of need do so "on his own responsibility."[22] Undoubtedly many naval commanders likewise acted on their own responsibility. Nor does our legal system necessarily leave them in the lurch. If the circumstances appear compelling, if the officer has acted in good faith and with good judgment, there is every likelihood that Congress will ratify his action.

J. Reuben Clark, who asserted that interposition for the protection of citizens was proper, believed that intervention, or interference with the internal political affairs of another state, was improper. On these principles, it seems that when an interposition grows to such magnitude as to involve collision with an army of the state which is invaded, interposition has passed into intervention, and even on Clark's principles the approval of Congress is needed. The American intervention in China at the time of the Boxer Rebellion, the Pershing expedition in pursuit of Pancho Villa, were war. And indeed a United States Circuit Court held that the Boxer invasion was war for the purposes of the Articles of War;[23] a Texas court held that the hostilities with Mexico were war for purposes of state criminal law;[24] a Pennsylvania court held that the Korean war was war in the meaning of the language of an insurance policy.[25] These are not decisions that the President has a right to make war. Clearly he has no such right. They are decisions that the President, when he represented himself as taking action less than war—as in the protection of American citizens or in reprisal—had in fact intruded on the authority of Congress and had made war.

In the twentieth century, as we have seen, there emerged a third occasion for participation in war abroad, war by invitation. The fact that the President is invited to send troops by what he recognizes as the legitimate government of a foreign state insures that we are not at war with that foreign state when he sends troops. But if the purpose of sending troops is to engage in combat with another government or local faction, we are at war with that government or that faction. The Korean War and the intervention in South Vietnam are the best examples of war by invitation.

The United States originally put troops in Vietnam at the invitation of the Emperor Bao Dai. In 1955 Diem, with American assistance,[26] ousted Bao Dai; Diem renewed the invitation. As a result of an American decision,[27] Diem was overthrown and murdered in 1963; the new government was presumed to have extended the invitation; and all the succeeding military dictatorships have been equally hospitable to their dangerous guest. Active participation of United States military forces in the fighting in South Vietnam appears to date from 1961. This too has been on the invitation of the successive Saigon regimes.

Very clearly an invitation to engage in combat from Premier Ky or President Thieu is no substitute for an act of Congress. No Vietnamese government can authorize President Johnson to engage in war in South Vietnam. But he has no other authority. He cannot pretend to be protecting citizens or vindicating their rights by reprisal.

In the case of the war with North Vietnam, there is not even an invitation. When on February 7, 1965, President Johnson launched air raids against North Vietnam, he relied on the theory of reprisal. The White House announcement of that date said that these were "retaliatory attacks" in response to specified injuries:

> Commencing at 2 a.m. on February 7th, Saigon time (1 p.m. yesterday, eastern standard time), two South Vietnamese airfields, two U.S. barracks areas, several villages, and one town in South Viet-Nam were subjected to deliberate surprise attacks. Substantial casualties resulted.
>
> Our intelligence has indicated, and this action confirms, that Hanoi has ordered a more aggressive course of action against both South Vietnamese and American installations.[28]

If the President's power to execute the laws of the United States includes a power of reprisal, it cannot include a power of reprisal for injuries done to the South Vietnamese. But the mention of reprisal was merely a pretext to prepare the way for escalation. Reprisal is a measured response to a specified injury. Johnson embarked upon a program of bombing which exceeds in intensity the bombing of Germany in the Second World War. The announced purposes of the bombing were to destroy the routes by which assistance passed to those fighting the Americans in South Vietnam, and goods in passage or likely to pass to South Vietnam; to destroy domestic facilities, so as to divert materials and labor to repair in North Vietnam and thus reduce the volume of assistance to South Vietnamese who were fighting Americans;[29] and to break the will of the North Vietnamese.[30] This is not reprisal; it is general war. Whatever one thinks of lesser actions, an enterprise on this scale can be authorized only by Congress.

There is another way of approaching the problem of the war power of the executive. If it can be shown that the President lacks the legal power to take action in foreign affairs which falls short of the use of armed force, it seems to follow that he has no power to engage in actual hostilities.

In 1793 President Washington issued a proclamation of neutrality in the current European war, and adjured all citizens to observe neutrality under penalty of prosecution.[31] On the theory that the law of nations required the neutrality of citizens of a neutral state, and that the President could by proclamation invoke the law of nations, Gideon Henfield was indicted for serving on a French privateer. Henfield was acquitted by the jury, and the legal theory was abandoned.[32] Much the same problem arose in *Gelston* v. *Hoyt*[33] in 1818. The President directed the collector and the surveyor of customs of New York to seize a vessel for violation of the Neutrality Act of 1794. But the statute permitted him to act only

through the land or naval forces; the Supreme Court held that executive seizure by civil authority was therefore illegal.

Retortion is the practice of peaceful retaliation, whereas reprisal is retaliation by force. A series of non-intercourse acts was passed during the Napoleonic wars, and in 1817,[34] 1818,[35], and 1820[36] Congress passed acts closing our ports to British ships because the British navigation acts restricted the carrying trade to British colonies in the western hemisphere to British vessels. The passage of these acts is clear evidence that non-amicable peaceful retaliation through the interruption of commerce belongs to Congress, and indeed there is a decision to that effect. In 1810 President Madison undertook by proclamation to revive the Non-Intercourse Act of 1809. Justice Story of the Supreme Court, sitting as circuit judge, held that this was an attempt to accomplish by executive action what could only be done by act of Congress; the President had no power to impose an embargo on trade.[37] Chief Justice Marshall indorsed this opinion.[38]

In 1870 President Grant asked Congress for authority to respond to Canadian maltreatment of American fishermen by suspending the laws authorizing the transit of goods in bond across the United States to Canada and, if necessary, excluding Canadian vessels from American waters.[39]

The fact that retortion is legal at international law does not authorize the President to practice it. If the power invoked for this purpose belongs to Congress, only Congress may undertake retortion. On the other hand, the President may use his own constitutional powers for the purpose of retortion. After an initial period of uncertainty, it became settled that the President may on his own authority interrupt diplomatic relations with a foreign state; and this has been done by way of retortion.[40]

It would be odd if the President were unable to take peaceful action authorized by international law, such as the invocation of neutrality and embargo, because these topics are assigned to Congress, and were empowered to take the greater step of initiating hostilities in reliance on international law. The initiation of hostilities belongs only to Congress.

On the whole question, it is impossible to improve on the words of the distinguished international lawyer John Bassett Moore, the author of *Moore's Digest:*

> There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, so long as he refrained from calling his action war or persisted in calling it peace.[41]

VII

SEATO and Other Commitments

The Southeast Asia Collective Defense Treaty[1] was ratified by the Senate in 1955. The other parties were Australia, France, New Zealand, Pakistan, the Philippines, Thailand, and Great Britain. It was to apply in "the general area of Southeast Asia, including also the entire territory of the Asian Parties, and the general area of the Southwest Pacific not including the Pacific area north of 21 degrees 30 minutes north latitude." By protocol the parties specified that the treaty should apply to Cambodia, Laos, "and the free territory under the jurisdiction of the State of Vietnam."

The purpose of a treaty is to raise an obligation at international law between the signatories. It need hardly be said that the obligations which we incurred in the SEATO treaty run only to the other signatories of the treaty. South Vietnam was not a party: indeed, the treaty does not recognize the existence of a state of South Vietnam, but only of a state of Vietnam, of which, at the Geneva Conference of 1954, the Hanoi government of Ho Chi Minh was accepted as the international spokesman.[2] The treaty therefore imposes no duty upon us toward the so-called state of South Vietnam. Three of the signatories to whom we are obligated under the treaty disapprove of or have refused to support the war in either South or North Vietnam. Four have made token commitment of troops for the war in South Vietnam: Australia and New Zealand, because they believe they are buying American protection in the event of a future war with mainland Asia; and the Philippines and Thailand, which are pensionary states of the United States. But none of these has joined in the attack on North Vietnam. It is not only the case that the war against North Vietnam does not discharge any legal obligation to any party to the SEATO Treaty: it is conducted completely outside the framework of the Southeast Asia Collective Defense Organization and without the support of any member of the Organization.

But the State Department has invented a dazzling new theory of the treaty power. Article VI of the Constitution provides that treaties, like the Constitution and acts of Congress, shall be "the supreme law of the land." The purpose of including this provision was to give assurance to foreign states that international obligations would be observed. But the State Department now contends that a treaty can work consequences in municipal law where no international obligation is involved. Thus a treaty becomes a piece of domestic legislation like an act of Congress, and the other parties to the treaty merely decorative supernumeraries.

Article IV, Section I of the SEATO Treaty provides that "each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any state or territory which

the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes." There was no consultation with the Southeast Asia Treaty Organization before President Johnson attacked North Vietnam on February 7, 1965. The position of the State Department is that the treaty authorizes independent decision and independent action by any signatory. Consequently it would be open to France to regard Johnson's activities as an "armed attack in the treaty area" and to "act to meet the common danger" under the aegis of the treaty. An interpretation of the treaty which makes it possible for the American action to be simultaneously legal and illegal is an odd interpretation.

Not only did President Johnson not consult SEATO; although the treaty requires that each signatory act "in accordance with its constitutional processes," he did not consult Congress either. The claim that the treaty relieves the President of the need to consult Congress was first advanced in 1966 in the State Department memorandum:

> Under Article VI of the United States Constitution, "all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Article IV, paragraph 1, of the SEATO treaty establishes as a matter of law that a Communist armed attack against South Vietnam endangers the peace and safety of the United States. In this same provision the United States has undertaken a commitment in the SEATO Treaty to "act to meet the common danger in accordance with its constitutional processes" in the event of such an attack.
>
> Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Vietnam is required, and that military measures against the source of Communist aggression in North Vietnam are necessary, he is constitutionally empowered to take those measures.[3]

The first difficulty with this argument is the assumption that the President and the Senate may use the instrumentality of a treaty to make war, depriving the House of Representatives of its voice. If this is true, the President and the Senate might make a treaty with Liberia, let us say, and then embark upon a war with any country in the world. This is to substitute Liberia for our House of Representatives.

Although a treaty made within the scope of the treaty-making power is equally with an act of Congress the supreme law of the land, it is clear that some powers are vested exclusively in Congress. The framers intended this to be true of the war power. Alexander Hamilton submitted a draft proposal to the Constitutional Convention which would have vested the power to make war in the Senate,[4] but the report of the committee of detail gave it to the Congress. When this clause came up for debate, Charles Pinckney suggested that the power should be given to the Senate—"It would be singular for one authority to make war, and another peace"—but he found no second.[5] As we have seen, the report of the committee was adopted with a change of the word "make" to "declare."

The question of the scope of the treaty power arose in the first decade of our constitutional history. The Jay Treaty with Great Britain was ratified by the Senate in 1795, but it was very unpopular. In 1796 it was argued in the House that the House of Representatives was legally bound to appropriate money to pay the British claims recognized as valid by the treaty. James Madison replied that on such a theory the President and the Senate might by treaty deprive the House of its voice in making war, which appeared to him unthinkable:

> Under a constitutional obligation with such sanctions to it, Congress, in case the President and Senate should enter into an alliance for war, would be nothing more than the heralds for proclaiming it.[6]

The House adopted a resolution drafted by Madison declaring that it was entitled to an independent judgment on all appropriations, and then voted money to satisfy the British claims.

In his argument Madison contended that a treaty

could not establish binding law on any topic on which Congress possessed legislative power. This is unquestionably too broad. Congress has the power to regulate commerce with foreign states, but treaties concerning commerce have been familiar since the beginning of our history, and appear to have been challenged only when they altered import duties.

But the right of the House of Representatives to participate in the making of appropriations is universally admitted. Sitting on circuit in 1852, Justice McLean of the Supreme Court said:

A treaty under the federal constitution is said to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of our government can be regarded as a law until it shall have all the sanctions required by the constitution to make it such. As well might be contended that an ordinary act of Congress, without the signature of the President, was a law, as that the treaty which engages to pay a sum of money is in itself a law.

And in such a case the representatives of the people and the States exercise their own judgments in granting or withholding the money. They act upon their own responsibility and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required.[7]

The House of Representatives again asserted its right when it appropriated money to complete the Alaska purchase in 1867. It was argued in the House that because action by the House was necessary the ratification of the treaty should have been made expressly conditional upon the consent of the House; and the admonition that some treaty provisions "cannot be carried into full force and effect except by legislation to which the consent of both Houses of Congress is necessary" was incorporated in the appropriation bill.[8]

Since the Constitution says that "All bills for raising revenue shall originate in the House of Representatives," it might appear to be even more clear that a tax cannot be imposed by treaty. And surely no one would suppose this possible in the case of internal revenue. But the issue has been debated with regard to treaties altering import duties.

The treaty of Ghent, which was negotiated with Great Britain in 1815, contained provisions for reduction of import duties. In the House of Representatives Cyrus King revived Madison's position, that "whenever a treaty or convention does, by any of its provisions, encroach upon any of the enumerated powers vested by the Constitution in the Congress of the United States, such treaty or convention, after being ratified, must be laid before Congress, and such provisions cannot be carried into effect without an act of Congress." King received support in the House, and the two houses created a conference committee to discuss differences. The committee members reported that

They are persuaded that the House of Representatives does not assert the pretension that no treaty can be made without their assent; nor do they contend that in all cases legislative aid is indispensably necessary, either to give validity to a treaty, or to carry it into execution. On the contrary, they are believed to admit, that to some, nay many treaties, no legislative sanction is required.

On the other hand the committee are no less satisfied that it is by no means the intention of the Senate to assert the treaty-making power to be in all cases independent of the legislative authority. So far from it, that they are believed to acknowledge the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations, or which might bind the nation to lay taxes, raise armies, to support navies, to grant subsidies, to create states, or to cede territory; if indeed this power exists in the government at all.[9]

On December 23, 1815 President Madison sent a message to Congress requesting that such legislative provisions as were necessary should be passed.[10] Debating the bill in the House on January 9, 1816, John Calhoun said:

The treaty making power has many and powerful limits; and it will be found, when I come to discuss what those limits are, that it cannot destroy the Constitution, or our personal liberty, or involve us, without the assent of this House, in war, or grant away our money.[11]

An act putting the treaty into effect was passed on March 1, 1816.[12]

On June 4, 1844, Rufus Choate, chairman of the committee on Foreign Relations of the Senate, reported against ratification of a reciprocity treaty with the German Zollverein:

The convention which has been submitted to the Senate changes duties which have been laid by law. . . . In the judgment of the Committee, the Legislature is the department of government by which commerce should be regulated and laws for revenue passed.[13]

In his annual message of December 3, 1844, President Tyler repeated his request for ratification of the treaty.[14] In February of 1845 the Committee again reported adversely and the treaty was never ratified.[15]

It is a little surprising to find the Senate taking this position. A treaty with Brazil which went into effect in 1829 contained a most-favored-nation clause, and other such treaties had been negotiated thereafter.[16]

In 1875 a treaty with Hawaii by which each country agreed to admit certain articles from the other free of duty was ratified. Article V recited that it should not come into effect "until a law to carry it into operation shall have been passed by the Congress of the United States of America."[17] An act putting the treaty into effect was passed on August 15, 1876. The treaty expired by its own terms at the end of seven years. In 1884 a seven-year extension was negotiated. This was approved by the Senate on January 20, 1887.[18] On January 22 Representative Wallace introduced in the House a resolution complaining that the treaty of renewal contained no provision requiring Congressional action and charging the Committee on the Judiciary with inquiring "how far the power conferred on the House by the Constitution of the United States to originate measures to lay and collect duties can be controlled by the treaty-making power under the said Constitution."[19] On March 3 J. Randolph Tucker submitted a lengthy report by the Committee. It proposed two resolutions. One declared that import duties could not be regulated by the treaty power; the other requested the President to withhold final action until Congress sanctioned the treaty.[20] Nevertheless, on November 7 the President announced ratification.

In 1902 Senator Cullom, Chairman of the Senate Committee on Foreign Relations, discussing proposed reciprocal trade treaties, pointed out that the House, despite its protests, had always made appropriations to carry out the stipulations of a treaty, "and I contend that it was bound to do this, at least as much as Congress can be bound to do anything when the faith of the nation has been pledged. And this appears to me to be the only case in which any action by the House is necessary, unless the treaty itself stipulates, expressly or by implication, for such Congressional action." The House then instructed the Committee on Ways and Means to investigate the question whether the President and the Senate, "independent of any action on the part of the House of Representatives, can negotiate treaties with foreign governments by which duties levied under an act of Congress for the purpose of raising revenue are modified or repealed, and report the result of such investigation to the House." It does not appear that a report was made.[21]

The question of the treaty power and import duties must remain for the time in the realm of unsettled questions.

In 1854 a treaty was negotiated with Venezuela which provided that if a citizen of either country should accept a commission in the service of a state at war with the other he should be treated as a pirate. But President Pierce did not submit the treaty to the Senate because the definition and punishment of piracy belonged to Congress.[22] And indeed one would suppose that no action can be made criminal by the treaty power without the assistance of an act

of Congress. Certainly such a thing has never been attempted.

The question of the scope of the treaty power has also been raised concerning other topics: the acquisition and the cession of territory, and the alienation of the public domain, for example. But those unresolved problems need not concern us. There emerges very clearly the proposition that the treaty power and the legislative powers of Congress are only in part concurrent. It is well known that treaties may deal with topics on which Congress has no delegated power to legislate. It is equally clear that Congress has exclusive legislative power on certain topics, and a treaty on such a topic does not have legal standing at municipal law; it cannot be put into effect without an act of Congress.

The general principle is that the treaty power cannot be used in such a way as to alter the constitutional distribution of powers. So the United States objected to the proposal for the creation of an international Prize Court because the Constitution does not permit appeals from decisions of the United States Supreme Court.[23] In *Reid* v. *Covert*[24] in 1957 the Supreme Court had before it an act of Congress which provided for the trial of civilian dependents of military personnel abroad, thus ousting the constitutional courts of their jurisdiction under Article III and depriving the dependents of their right to jury trial. The government justified the act as one necessary to carry out executive agreements with Great Britain and Japan which were treated as having the force of treaties. Justice Black said: "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[25]

Does the Constitution vest the war power exclusively in Congress? As we have seen, the Constitutional Convention expressly rejected the proposal that it be given to the President and the Senate. The German jurist Ernst Meier observed: "The Constitution gives Congress the right of declaring war; this right would be illusory if the President and the Senate could by treaty launch the country into a foreign war."[26] Apparently Francis Wharton and John Bassett Moore, two of our leading international lawyers, agreed with him.[27]

After reviewing the evidence, a former Assistant Secretary of State, James Grafton Rogers, concluded:

The Constitution says, therefore, in effect, "Our country shall not be committed formally to a trial of force with another nation, our people generally summoned to the effort and all the legal consequences to people, rights and property incurred until the House, Senate and the President agree."[28]

This does not mean that it is impossible for the President and the Senate to enter into a treaty of alliance. It does mean that when it is alleged that circumstances have arisen which under the treaty require the United States to go to war it is necessary for the two houses of Congress and the President, not for the President alone, or for that matter for the President and the Senate, to judge of those circumstances and to make the decision to go to war.

But suppose the law were otherwise: suppose the Senate might by treaty authorize the President to make war. The fact is that no word of the SEATO Treaty purports to do so. Nor was it in any way intimated to the Senate when it ratified the treaty that it involved a delegation of the power to make war in Southeast Asia. The treaty provides that in the event of an armed attack in the future each member is to act in accordance with its "constitutional processes." This clearly contemplates that when it is alleged that an armed attack has occurred the facts are to be laid before the two houses of Congress, and Congress, if it finds this proper, is to pass a joint resolution to be submitted to the President.

Nevertheless the State Department, completely without textual support, contends that the SEATO treaty, which was negotiated in 1954, delegates to any incumbent of the Presidency, in all perpetuity, the power to engage in war in Southeast Asia whenever he makes the appropriate findings. It gives him exclusive power to make these findings, and they are unchallengeable. He may take whatever action seems to him appropriate at that time. The State Department memorandum concedes that at the time the treaty was ratified it was not supposed that the United

States would engage in land warfare in Southeast Asia, and indeed Secretary of State Dulles gave assurances that this was not contemplated.[29] But things change in eleven years, and a new President is free to arrive at a new judgment.

If the Senate had really done this extraordinary thing, the SEATO treaty would clearly be unconstitutional. As we shall see in the discussion of the Tonkin Gulf Resolution, the two houses of Congress cannot delegate the power to make war to the President. Whether or not the Senate has the power to make war by treaty, it cannot delegate this power by treaty.

But the Johnson administration has advanced another argument, even more novel than that founded on the SEATO treaty. President Johnson has asserted that he has the right to make war in South Vietnam and on North Vietnam because three Presidents have made "commitments" to South Vietnam.

The State Department memorandum recites several commitments.[30] At the conclusion of the Geneva Conference of 1954, Under-Secretary Bedell Smith said that the United States would not use force to disturb the accords, and that it "would view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security." President Eisenhower promised that the United States would "not use force to disturb the settlement," but said that "any renewal of Communist aggression would be viewed by us as a matter of grave concern." In October, 1954, President Eisenhower offered economic assistance to help make South Vietnam "capable of resisting attempted subversion or aggression through military means." On May 11, 1957 President Eisenhower and President Ngo Dinh Diem issued a joint statement in which they spoke of "the large build-up of Vietnamese Communist military forces in North Vietnam" and "agreed that aggression or subversion threatening the political independence of the Republic of Vietnam would be considered as endangering peace and stability." On August 2, 1961, President Kennedy declared that "the United States is determined that the Republic of Vietnam shall not be lost to the Communists for lack of any support which the United States Government can render." On December 14, 1961, President Kennedy assured Diem that the United States was "prepared to help the Republic of Vietnam to protect its people and to preserve its independence."

These assurances fall short of a promise to engage in war. They could not have misled Diem or the Vietnamese, for the same Presidents stated that our assistance would not take the form of troops. It was deceptive of the State Department to omit these clarifying statements. On October 26, 1960, President Eisenhower congratulated Diem on "the fifth anniversary of the Republic of Viet-Nam" and concluded his message:

Although the main responsibility for guarding that independence will always, as it has in the past, belong to the Vietnamese people and their government, I want to assure you that for so long as our strength can be useful, the United States will continue to assist Viet-Nam in the difficult yet hopeful struggle ahead.[31]

The promise to "continue to assist" with economic aid and military instruction could not be construed as a promise to take over the principal military burden in a struggle in which the "main responsibility" lay with "the Vietnamese people and their government."

When President Johnson asserted that in making war he was fulfilling a commitment of President Eisenhower's, the former President felt obliged to make a public denial: "We said we would help that country. We were not talking about military programs but foreign aid."[32]

President Kennedy, on September 2, 1963, said: "In the final analysis it is their war, they are the ones who have to win it. We can help them, we can give them equipment, we can send our men out there as advisors, but they have to win it."[33]

On February 21, 1964, President Lyndon B. Johnson said: "The contest in which South Vietnam is now engaged is first and foremost a contest to be won by the government and people of that country."[34] On September 25, 1964, President Johnson said: "We don't want our American boys to do the fighting for Asian boys."[35] On September 28, 1964, he said: "What I have been trying to do with the situation

that I found, was to get the boys in Vietnam to do their own fighting. . . . So we are not going north and drop bombs."[36] On October 21: "We are not about to send American boys 9 or 10,000 miles away from home to do what Asian boys ought to do for themselves."[37]

The commitment of three Presidents to the Vietnamese people was identical with their commitment to the American people. It was to give aid short of war.

But the word commitment has more than one meaning. In the hearing of the Senate Foreign Relations Committee on February 17, 1966, Senator Hickenlooper asked: "When was the commitment made for us to actively participate in the military operations of the war as American personnel?" And General Maxwell Taylor replied: "Well, insofar as the use of our combat ground forces are [*sic*] concerned, that took place, of course, only in the spring of 1965. In the air, we had been participating more actively over 2 or 3 years."[38] Taylor did not misunderstand the question. He knew that Hickenlooper by "commitment" meant "pledge"; but Taylor knew of no pledge, although he had been personal military representative of President Kennedy, 1961-62, Chairman of the Joint Chiefs of Staff, 1962-64, and Ambassador to South Vietnam, 1964-65, and was currently Special Consultant to President Johnson on Vietnam. So he identified the only commitment he knew, the commitment of troops. On September 29, 1967, President Johnson enlarged his claim; his war was now to redeem "the commitment that three Presidents and a half a million of our young men have made."[39] The commitment of the half million young men was objective rather than subjective; they made no commitment, but they were committed by Johnson. In the President's Thanksgiving Day proclamation on November 9, 1967, the commitment became "a sacred promise";[40] on December 12, before the AFL-CIO Convention, President Johnson promised to "honor and respect our sworn commitments to protect the security of Southeast Asia."[41]

We have already established that the President has no right to commit, or to make a commitment to commit, a half million men to war. He has a limited power to make executive agreements with foreign states; this is in the area of administrative relationships which carry no general legal consequences—where the latter are involved, the treaty procedure must be used. But even a treaty cannot commit our nation to war.

In his annual message to Congress on January 11, 1944, President Franklin D. Roosevelt undertook to reassure "some suspicious souls who are fearful that Mr. Hull or I have made 'commitments' for the future": "I wish to say that Mr. Churchill, and Marshall Stalin, and Generalissimo Chiang Kai-shek are all thoroughly conversant with the provisions of our Constitution. And so is Mr. Hull. And so am I."[42] When the President pleads that he is fulfilling a Presidential military commitment, he is confessing that he is guilty of usurping power.

VIII

The Tonkin Gulf Resolution

On several occasions during the spring and summer of 1964, South Vietnamese vessels attacked islands and coastal areas of North Vietnam. On August 2 and August 4, according to the Johnson administration, North Vietnamese patrol boats attacked two American destroyers in the Gulf of Tonkin. The administration asserted that the presence of these vessels at the time of a South Vietnamese attack on North Vietnam was pure coincidence. They were not convoying the attacking vessels but were quite independently carrying out their duty of patrolling the high seas.[1] The American destroyers suffered no hits and were reported to have sunk at least three North Vietnamese patrol boats.

On August 4 President Johnson ordered air attacks on North Vietnamese naval installations by way of reprisal for these two attacks by patrol boats and on August 5 he sent a message to the Senate. The message recited that "Our purpose is peace"; "the United States intends no rashness, and seeks no wider war." But he requested the passage of a resolution like the Formosa Resolution "to give convincing evidence to the aggressive Communist nations, and to the world as a whole, that our policy in Southeast Asia will be carried forward—and that the peace and security of the area will be preserved."[2] Senator Fulbright promptly introduced the Tonkin Gulf Resolution. The process of Congressional enactment was completed on August 10.[3]

After reciting that, as a part of a campaign of aggression that the Communist regime in North Vietnam was waging against its neighbors and the nations joined with them in defense of their freedom, North Vietnamese vessels had deliberately and repeatedly attacked United States naval vessels in international waters, and that the United States desired only that the peoples of southeast Asia "should be left in peace to work out their own destinies in their own way," the resolution said "That the Congress approves and supports the determination of the President, as Commander in Chief, to take all measures necessary to repel any armed attack against the forces of the United States and to prevent further aggression," and that "the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force" to assist Cambodia, Laos, South Vietnam, Australia, New Zealand, Pakistan, the Philippines, Thailand, and the Asian possessions of Great Britain and France to maintain their freedom if requested to do so. The language is vague, but it is very broad. The resolution did not initiate a war, but it authorized the President to initiate war "as the President determines"—that is, in his uncontrolled discretion. Senator Cooper asked

Senator Fulbright, the sponsor of the resolution: "looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?" And Fulbright replied: "That is the way I would interpret it."[4]

Two years later Fulbright had reason to complain: "I feel that I was led into the Tonkin Gulf Resolution. I should have been more intelligent, more farseeing, more suspicious."[5] "Each time Senators have raised questions about successive escalations of the war, we have had the blank check of August 7, 1964 waved in our faces as supposed evidence of the overwhelming support of the Congress for a policy in Southeast Asia which in fact has been radically changed since the summer of 1964."[6]

The Tonkin Gulf Resolution is indeed a blank check. But our Constitution does not permit Congress to issue blank checks to determine policy; Congress must make the determination itself. In an early decision Chief Justice Marshall wrote:

It will not be contended, that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. . . . The line has not been sharply drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details.[7]

Clearly the war power is legislative. As we mentioned in Chapter III, Congress refused one request of President Jackson, and six requests of President Buchanan, for discretionary power to use force on the ground that the war power cannot be delegated.

In 1831 the payment by France of outstanding claims for injuries to American shipping during the Napoleonic wars was agreed upon by treaty, but Louis Philippe was unable to persuade his legislature to vote the money. In his annual message to Congress on December 9, 1834, President Andrew Jackson said: "I recommend that a law be passed, authorizing reprisals upon French property, in case provision shall not be made for the payment of the debt at the approaching session of the French Chambers."[8] On the same day Representative Claiborne complained in the House:

If this power be conferred upon him, it will be virtually conferring upon the President unconstitutional power--a power to declare war. . . . Gentlemen have read history to little effect, if they are ready to clothe a single individual with the power of making war.[9]

On January 5, 1835, Albert Gallatin wrote to Edward Everett:

In every case, particularly when hostilities are contemplated, or appear probable, no government should commit itself as to what it will do under certain future contingencies. It should prepare itself for every contingency – launch ships, raise men and money, and reserve its final decision for the time when it becomes necessary to decide and simultaneously to act. The proposed transfer by Congress of its constitutional powers to the Executive, in a case which necessarily embraces the question of war or no war, appears to me a most extraordinary proposal, and entirely inconsistent with the letter and spirit of our Constitution, which vests in Congress the power to declare war and grant letters of marque and reprisal.[10]

On January 6, 1835, Henry Clay presented a report for the Senate Committee on Foreign Relations, and on the basis of this report the Senate unanimously rejected Jackson's request:

Reprisals do not of themselves produce a state of public war; but they are not infrequently the immediate precursor of it. When they are accompanied with an authority, from the Government which admits them, to employ force, they are believed invariably to have led to war in all cases where the nation against which they are directed is able to make resistance. . . .

Reprisals so far partake of the character of war, that they are an appeal from reason to force; from negotiation, devising a remedy to be applied by the common consent of both parties, to self-redress, carved out and regulated by the will of one of them; and, if resistance be made, they convey an authority to subdue it, by the sacrifice of life, if necessary.

The framers of our Constitution have manifested

their sense of the nature of this power, by associating it in the same clause with grants to Congress of the power to declare war, and to make rules concerning captures on land and water. . . .

In the first place the authority to grant letters of marque and reprisal being specially delegated to Congress, Congress ought to retain to itself the right of judging of the expediency of granting them under all the circumstances existing at the time when they are proposed to be actually issued. The committee are not satisfied that Congress can, constitutionally, delegate this right. It is true that the President proposes to limit the exercise of it to one specified contingency. But if the law be passed as recommended, the President might, and probably would, feel himself bound to execute it in the event, no matter from what cause, of provision not being made for the fulfillment of the treaty by the French Chambers, now understood to be in session. . . . Congress ought to reserve to itself the constitutional right, which it possesses, of judging of all the circumstances by which such refusal might be attended; of hearing France, and of deciding whether, in the actual posture of things as they may then exist, and looking to the condition of the United States, of France, and of Europe, the issuing of letters of marque and reprisal ought to be authorized, or any other measure adopted.[11]

Jackson was very unhappy with this action, and blamed the Senate for his failure to obtain immediate satisfaction; but the matter was adjusted by negotiation in 1836. Perhaps this was better than war.

In his first annual message on December 8, 1857,[12] President James Buchanan described the interest of the United States in "the freedom and security of all the communications across the isthmus" of Panama, and the danger that these communications might be interrupted either by invasions of American filibusterers—these were the days of William Walker—"or by wars between the independent States of Central America." He also recited the irrelevant circumstance of the American guarantee of the neutrality and sovereignty of New Granada or Colombia. "Under these circumstances I recommend to Congress the passage of an act authorizing the President, in case of necessity, to employ the land and naval forces to carry into effect this guaranty of neutrality and protection. I also recommend similar legislation for the security of any other route across the Isthmus in which we may acquire an interest by treaty." No action was taken, and Buchanan renewed his request in his message of December 6, 1858. The routes over the Isthmus were "of incalculable importance" to the United States; they were a highway in which Nicaragua and Costa Rica had "little interest when compared with the vast interests of the rest of the world. Whilst their rights of sovereignty ought to be respected, it is the duty of other nations to require that this important passage shall not be interrupted by the civil wars and revolutionary outbreaks which have so frequently occurred in that region."

Under these circumstances I earnestly recommend to Congress the passage of an act authorizing the President, under such restrictions as they shall deem proper, to employ the land and naval forces of the United States in preventing the transit from being obstructed or closed by lawless violence, and in protecting the lives and property of American citizens traveling thereupon, requiring at the same time that these forces shall be withdrawn the moment the danger shall have passed away. Without such a provision our citizens will be constantly exposed to interruption in their progress to lawless violence.

A similar necessity exists for the passage of such an act for the protection of the Panama and Tehuantepec routes.[13]

The Senate Committee on Foreign Relations reported a bill but no action was taken. On February 18, 1859 President Buchanan sent a special message repeating his request. Not only was there interruption of peaceful transit over the Isthmus; the continual revolutions produced successive confiscations of American property in Central American harbors:

As one or the other party has prevailed and obtained possession of the ports open to foreign commerce, they have seized and confiscated American vessels and their cargoes in an arbitrary and lawless manner and exacted money from American citizens by forced loans and other violent proceedings to enable them to carry on hostilities. The executive governments of Great Britain, France, and other countries, possess-

ing the war-making power, can promptly employ the necessary means to enforce immediate redress for similar outrages upon their subjects. Not so the executive government of the United States.

If the President orders a vessel of war to any of those ports to demand prompt redress for outrages committed, the offending parties are well aware that in case of refusal the commander can do no more than remonstrate. He can resort to no hostile act. . . . The remedy for this state of affairs can only be supplied by Congress, since the Constitution has confided to that body alone the power to make war. Without the authority of Congress the Executive cannot lawfully direct any force, however near it may be to the scene of the difficulty, to enter the territory of Mexico, Nicaragua, or New Granada for the purpose of defending the persons and property of American citizens, even though they may be violently assailed whilst passing in peaceful transit over the Tehuantepec, Nicaragua, or Panama routes. He cannot, without transcending his constitutional power, direct a gun to be fired into a port or land a seaman or marine to protect the lives of our countrymen on shore or to obtain redress for a recent outrage on their property. . . .

In reference to countries where the local authorities are strong enough to enforce the laws, the difficulty here indicated can seldom happen; but where this is the case and the local authorities do not possess the physical power, even if they possess the will, to protect our citizens within their limits recent experience has shown that the American Executive should itself be authorized to render this protection. Such a grant of authority, thus limited in its extent, would in no just sense be regarded as a transfer of the war-making power to the Executive, but only as an appropriate exercise of that power by the body to whom it belongs. . . .

I therefore earnestly recommend to Congress, on whom the responsibility exclusively rests, to pass a law before their adjournment conferring on the President the power to protect the lives and property of American citizens in the cases which I have indicated, under such restrictions and conditions as they may deem advisable.[14]

Senator Seward made a speech directly challenging the message; his argument on the delegation of the war power is today fully applicable to the Tonkin Gulf Resolution:

It was thought, seventy years ago, that it was a great improvement, conducive to peace, essential to the permanent stability of republican institutions, that the Executive should be destitute of the power to make war, and that this last final remedy for national grievance should never be resorted to in any case without the deliberate consent and determination of the nation itself. . . . The President of the United States now regrets that those nations living under arbitrary forms of government are safer than we are who live under this, as we thought, improved system.

But, sir, I am unable to understand the logic which brings the President of the United States to the conclusion that this application to us will not be a surrender of the war-making power. He tells us that it would not be a surrender of the war-making power; but that we should be making war ourselves. Could anything be more strange and preposterous than the idea of the President of the United States making hypothetical wars, conditional wars, without any designation of the nation against which war is to be declared; or the time, or place, or manner, or circumstance of the duration of it, the beginning or the end; and without limiting the number of nations with which war may be waged? No, sir. When we pass this bill we do surrender the power of making war or preserving peace, in each of the States named, into the hands of the President of the United States.[15]

Neither house acted on the President's proposal.

In his third annual message, on December 19, 1859, Buchanan made a last futile request. He asked for a law to permit him to police the Isthmus and also "to employ the naval force to protect American merchant vessels, their crews and cargoes, against violent and lawless seizure and confiscation in the ports of Mexico and the Spanish American States when these countries may be in a revolutionary condition." He argued that such a law would not involve an unconstitutional delegation of the war power:[16]

The chief objeetion urged against the grant of this authority is that Congress by conferring it would vio-

late the Constitution; that it would be a transfer of the war-making, or strictly speaking, the war-declaring, power to the Executive. If this were well founded, it would, of course, be conclusive. A very brief examination, however, will place this objection at rest.

Congress possesses the sole and exclusive power under the Constitution "to declare war." They alone can "raise and support armies" and "provide and maintain a navy." But after Congress shall have declared war and provided the force necessary to carry it on the President, as Commander-in-Chief of the Army and Navy, can alone employ this force in making war against the enemy. This is the plain language, and history proves that it was the well-known intention of the framers, of the Constitution.

It will not be denied that the general "power to declare war" is without limitation and embraces within itself not only what writers on the law of nations term a public or perfect war, but also an imperfect war, and, in short, every species of hostility, however confined or limited. Without the authority of Congress the President cannot fire a hostile gun in any case except to repel the attacks of an enemy. It will not be doubted that under this power Congress could, if they thought proper, authorize the President to employ the force at his command to seize a vessel belonging to an American citizen which had been illegally and unjustly captured in a foreign port and restore it to its owner. But can Congress only act after the fact, after the mischief has been done? Have they no power to confer upon the President the authority in advance to furnish instant redress should such a case afterwards occur? Must they wait until the mischief has been done, and can they apply the remedy only when it is too late? To confer this authority to meet future cases under circumstances strictly specified is as clearly within the war-declaring power as such an authority conferred upon the President by act of Congress after the deed had been done. In the progress of a great nation many exigencies must arise imperatively requiring that Congress should authorize the President to act promptly on certain conditions which may or may not afterwards arise.

And Buchanan appealed to the precedent of the *Water Witch*. To obtain redress for the shelling of the *Water Witch* and the satisfaction of certain outstanding claims of American citizens against Paraguay, Congress had on June 2, 1858 by joint resolution authorized the President "to adopt such measures and use such force as in his judgment may be necessary and advisable in the event of a refusal of just satisfaction by the Government of Paraguay."

"Just satisfaction" for what? For "the attack on the United States steamer *Water Witch*" and "other matters referred to in the annual message of the President." Here the power is expressly granted upon the condition that the Governmcnt of Paraguay shall refuse to render this "just satisfaction." In this and other similar cases Congress have conferred upon the President power in advance to employ the Army and Navy upon the happening of contingent future events; and this most certainly is embraced within the power to declare war.

Now, if this conditional and contingent power could be constitutionally conferred upon the President in the case of Paraguay, why may it not be conferred for the purpose of protecting the lives and property of American citizens in the event that they may be violently and unlawfully attacked in passing over the transit routes to and from California or assailed by the seizure of their vessels in a foreign port? To deny this power is to render the Navy in a great degree useless for the protection of the lives and property of American citizens in countries where neither protection nor redress can be otherwise obtained.

The case of the *Water Witch* was contingent legislation of a sort. Congress had authorized the President to make war unless Paraguay averted the war by submission—for that was what "just satisfaction" meant. But it was not a precedent for Buchanan's request. In the case of the *Water Witch*, the occasion for war was in the past. Congress had determined that the shelling of the *Water Witch* was a *casus belli*, and that the use of force against Paraguay was feasible and in accord with the national interest under existing circumstances. But in his request for power to police the Isthmus routes and foreign harbors

Buchanan was asking that the President be authorized to determine on future occasions whether circumstances as yet unknown constituted a *casus belli,* and whether under these circumstances it was desirable or prudent to use force. He was asking Congress to grant him the power of decision for war or peace.

Suppose, on the other hand, that Congress should pass genuine contingent legislation requiring rather than permitting the President to go to war when specified events occurred in the future. Henry Clay had considered it a peculiarly unfortunate feature of Jackson's proposal for reprisal on French shipping that the President might interpret the legislation as mandatory. He might feel obliged to go to war when stated events occurred, regardless of the circumstances. According to Clay, the Constitution requires that Congress itself appraise the immediate circumstances before the nation voluntarily enters into a state of war. Therefore Congress could not authorize war with France without hearing what France had to say as to the reasons for the failure to pay the claims, and without deciding that "in the actual posture of things as they may then exist," including the contemporary state of international politics, and in particular the attitude of Great Britain, a limited war was the wisest course of action.

Clay's argument went beyond the rule against the delegation of legislative power. He argued, in effect, that Congress itself cannot make a declaration of war which is to come into effect upon the occurrence of stipulated facts in the future, because war is an enterprise in which all the contemporary circumstances must be weighed.

Almost from the beginning of our history, in the exercise of other powers than the war power, Congress has passed laws that are to come into effect when a given state of affairs exists, and has authorized the President to determine the existence of the relevant facts and to invoke the law by proclamation. But there is a world of difference between contingent legislation in the exercise of the power over interstate and foreign commerce and a contingent declaration of war. In the first case, a rule of conduct for citizens is established by Congress and is called into play by the President. This takes place within a legal order shaped and controlled by Congress itself. Under these circumstances, Congress can foretell the consequences of the delegation and is genuinely determining the policy to be applied. In the second case, the invocation of a conditional declaration of war changes the legal status of the nation itself. It changes the status and relations of the nation in an international order whose significant details, perhaps even its major outlines, change from month to month or day to day. The posture of international affairs in the future cannot be known to Congress at the time the resolution is passed. If Congress makes a contingent declaration of war, it is not determining policy for the future; it is casting dice. Henry Clay's ultimate position was that Congress is authorized to declare only present and not future wars. Surely this is what the framers intended.

Unless one considers the secret resolution of 1811 to fall in that category,[17] Congress has never passed a declaration of war contingent upon the occurrence of specified future events. In recent years, however, it has passed no less than four laws purporting to give the President the option of making war on future occasions. These are clearly uncontrolled delegations of the war power.

Article 43 of the United Nations Charter provides for agreements between the Security Council and member states by which the latter are to promise to supply armed forces for military action ordered by the Security Council to maintain or restore international peace and security. The United Nations Participation Act, passed by Congress in 1945, authorized the President to negotiate such an agreement with the Security Council. If it should be confirmed by Congress by act or joint resolution, "The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under Article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein."[18] The act does not say that the President must make the force available. It seems to assume that he may do so or fail to do so as he thinks best. If he chooses to do so, he need

not seek the approval of Congress. This is indisputably a delegation of the power to make war.

Champions of the United Nations are likely to resent this criticism. But the Constitution does not forbid support for the United Nations. It merely says that it is for Congress rather than for the President to afford that support, and that Congress may not transfer to the President the duty of determining when support should be afforded.

Secretary of State John Foster Dulles was responsible for two other delegations. In 1955 President Eisenhower requested what has come to be known as the Formosa Resolution. After cursory hearings and limited debate, Congress resolved "That the President of the United States be and he hereby is authorized to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, this authority to include the securing and protecting of such related positions and territories of that area now in friendly hands and the taking of such other measures as he judges to be required or appropriate in assuring the defense of Formosa and the Pescadores."[19] Dulles was also responsible for the passage of the Middle East Resolution of March 9, 1957. The resolution recited the determination of the United States to preserve "the independence and integrity of the nations of the Middle East" and provided:

To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any nation or group of nations requesting assistance against armed aggression from any country controlled by international communism. . . .[20]

The Tonkin Gulf Resolution is the fourth attempt of Congress to transfer its constitutional responsibility to the President.

Let us assume that Henry Clay was wrong, and that Congress has the power to declare future wars which are contingent upon the President's finding of appropriate facts recited in the resolution. These delegations do not meet the tests which courts apply to legislative delegations in other areas.

Problems of two sorts have arisen in connection with domestic legislation. In the case of contingent legislation, the Congress itself enacts the provisions of a law which is to come into effect upon the occurrence of recited circumstances, and the President invokes the law when those circumstances occur. In the case of delegation of the rule-making power, Congress recites a general policy to be pursued, and authorizes the President to make detailed rules putting that policy into effect.

A good deal of discretion can be allowed to the President in finding the facts. In *Field* v. *Clark*, in 1892,[21] the Court upheld a grant of power to the President to remove certain foods and hides from the free list in the case of an exporting nation levying duties on our goods which "he may deem to be reciprocally unequal and unreasonable"; upon such a finding, duties recited in the statute were to attach:

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution. The act of October 1, 1890, in the particulars under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. . . . Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. . . . He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

Delegation of the rule-making power was upheld in *United States* v. *Grimaud* in 1911.[22] The Supreme Court upheld an act authorizing the Secretary of Agriculture to make rules concerning public forests and forest reservations "to regulate their occupancy and use, and to preserve the forests thereon from destruction." The Court stated the controlling considerations:

In the nature of things it was impracticable for Congress to provide general regulations for these

various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power.

These cases make the relationship unmistakable. Congress is the principal, the President is the agent. If Congress determines the general policy to be pursued, it may authorize the President to determine the facts which call the Congressional policy into play, or to make detailed rules which apply the policy established by Congress to particular sets of facts.

But Congress may not pass contingent legislation without specifying the circumstances in which it is to be invoked, nor may it authorize the President to make rules on a topic without supplying standards to guide him. To do either of these things would be to attempt to delegate legislative power.

The first situation was presented in 1935 in *Panama Refining Company* v. *Ryan*.[23] The National Recovery Act of 1933 authorized the President to forbid the interstate transportation of petroleum produced in excess of the amount permitted to be produced by state law in the state of production, and the Panama Refining Company bought an action to enjoin the enforcement of a Presidential order. The Court said:

Section 9 (c) is brief and unambiguous. It does not attempt to control the production of petroleum and petroleum products within a state. It does not seek to lay down rules for the guidance of state legislators or state offices. It leaves to the states and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority by reference to the basis or extent of the state's limitation of production. Section 9 (c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in areas of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.[24]

Justice Cardozo dissented on the theory that the recitation of the purposes of the act supplied a standard to govern the President. But he joined in the unanimous decision in *Schechter Poultry Company* v. *United States*[25] in the same year that the delegation of code-making authority to the President in the National Recovery Act was unconstitutional. The only standard to guide the President was that the codes "tend to affectuate the policy of this title." The policy itself was stated as a number of happy outcomes, including industrial recovery, increased consumption, improvement of the condition of labor, and the conservation of natural resources. Surely Chief Justice Hughes was right in saying that Congress had authorized the President to approve as law whatever codes appeared to him to be "wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1."[26] Surely Justice Cardozo was right in calling this a delegated power "unconfined and vagrant."[27]

Three cases decided during the Second World War upheld acts of Congress which authorized administrative rule-making. For our purposes it is decisive that the Court applied to these statutes, which were passed under the war power, the orthodox tests which govern the delegation of legislative power in domestic affairs.

On March 21, 1941, Congress authorized the President or a designated agent to establish military zones and to prescribe the terms on which any person should "enter, remain in, leave, or commit any act in such a zone"; violation of such an order was made criminal. Hirabayashi ignored a curfew for persons of Japanese origin established by the commanding general of the Pacific Coast zone. The language of the delegation seems to be excessively broad, but in a troubled and confused opinion Chief

Justice Stone reduced it to constitutional dimensions.[28] All that was involved was a curfew order, and Congress had been "advised that curfew orders were among those intended, and was advised also that regulation of citizen and alien Japanese alike was contemplated."[29] Since Congress had contemplated the issuance of a curfew order when it passed the statute, Stone apparently felt that it had discharged its duty of fixing policy.[30]

The Emergency Price Control Act of 1942, which was also adopted under the war power, was challenged twice on the theory that it unlawfully delegated legislative power. Each time the Court applied the traditional formula and found it to be satisfied.

The first case, *Yakus* v. *United States*,[31] was a prosecution for selling at a price in excess of that fixed by the Administrator of the Office of Price Administration under authority granted in the act. Chief Justice Stone held that Congress had discharged the legislative function, as it must do, and had left to the Administrator only the task of applying its policy:

> Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. . . .
>
> The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price-fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. Compare Marshall Field and Co. v. Clark. . . .
>
> The Act is unlike the National Industrial Recovery Act of June 16, 1933, . . . considered in A.L.A. Schechter Poultry Company v. United States. . . .[32]

The act also authorized the Administrator to fix maximum rents under certain circumstances. In *Bowles* v. *Willingham*[33] Justice Douglas wrote the opinion upholding this feature of the act:

> The considerations which support the delegation of authority under this Act over commodity prices (Yakus v. United States) are equally applicable here. The power to legislate which the Constitution says shall be vested in Congress (Art. 1 §1) has not been granted to the Administrator. Congress in §1 (a) of the Act has made clear its policy of waging war on inflation. In §2 (b) it has defined the circumstances when its announced policy is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense. . . .
>
> There is no grant of unbridled administrative discretion as appellee argues. . . .[34]

The test acknowledged and applied in all these cases is not satisfied by the Formosa Resolution, the Middle East Resolution, or the Tonkin Gulf Resolution. These resolutions do not say: If the President finds that aggression has occurred, he shall make war. The Formosa Resolution says: If Formosa and the Pescadores are attacked, the President is "authorized to employ the Armed Forces"—that is, he is to go to war or not—"as he deems necessary." The Middle East Resolution says: If the President shall find that aggression has occurred, there is to be war "if the President determines the necessity thereof." The Tonkin Gulf Resolution says: "Aggression has occurred, and there is likely to be future aggression; there shall or shall not be war, "as the President determines," of such character and in such parts of Southeast Asia as the President shall determine. In none of the three cases could it be said of the President, in the language of *Field* v. *Clark*, above, that "He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." Congress did not express a will as to war or peace. Not only the language of the resolutions but the debates show beyond doubt that Congress intended to transfer the power of decision to the President. This was an illegitimate purpose, and the resolutions are void.

Almost no one would wish to revise these resolutions by eliminating Presidential discretion and making war perfectly automatic upon the occurrence of a future event. This could appeal only to the admirers of Herman Kahn's Doomsday Machine, which is to be set irrevocably to blow up the earth

when the Soviet Union violates one or another ultimatum.[35] Henry Clay was perfectly right when he said that the decision for war must be taken contemporaneously with the declaration of war, in the light of current circumstances. But he was right also in saying that the decision for war must be taken by Congress, to whom alone the Constitution gives the responsibility for evaluating the occasion and the circumstances and for making the fateful choice.

All this seems pellucidly clear, but it is necessary to consider one eccentric Supreme Court opinion, *United States* v. *Curtiss-Wright Export Corporation*,[36] decided in 1937, for there the Court did in fact say that the rule against the delegation of legislative power does not apply in foreign affairs. The case did not involve the war power, but the power over foreign commerce; and the cases decided under the war power reviewed above, which held that the rule against delegation applies in this area, were subsequent to the *Curtiss-Wright* case. But since *Curtiss-Wright* dealt with the problem of delegation, and in a startling manner, it should be considered.

In 1934 Congress passed a joint resolution authorizing the President, if he should find that the prohibition of the sale of arms in the United States to the belligerents in the Gran Chaco war would contribute to the restoration of peace, to prohibit such sale by proclamation. Violation of the prohibition was made a crime. Curtiss-Wright was indicted for conspiring to sell arms to Bolivia; it demurred to the indictment, arguing that the resolution unconstitutionally delegated legislative power to the President.

The resolution might have been sustained as contingent legislation: Congress had specified both the purpose of Presidential action and the means. But Justice Sutherland, who wrote the majority opinion, wished to introduce a cherished theory into constitutional law. Whether or not the joint resolution would have been invalid if its operation were internal, he said, it was not "vulnerable to attack under the rule that forbids a delegation of the lawmaking power" because its purpose was "to affect a situation entirely external to the United States, and falling within the category of foreign affairs."

This was because sovereignty was of two sorts, external and internal. At the Revolution the external sovereignty of the British crown passed to the United States; internal sovereignty passed to the several states. By adopting the Constitution, the several states transferred a portion of their internal sovereignty to the Union, but the Constitution had no effect upon the external sovereignty which the Union already possessed; therefore the constitutional rule against the delegation of legislative power could not apply to exercises of external sovereignty.

The notion that "the states severally never possessed international powers" would have surprised the signers of the Declaration of Independence, for that document reads:

We therefore, the representatives of the United States of America, in General Congress, assembled, . . . do . . . solemnly publish and declare, that these united colonies are, and of right ought to be free and independent states; . . . and that as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.

Sutherland's theory is not only historically but theoretically unsound. The notion that sovereignty can come in two parts is absurd, for the reason Sutherland himself gives: "A political society cannot endure without a supreme will somewhere." As Hans Kelsen puts it, a coherent legal order must derive from a single *Grundnorm*;[37] to use another figure, it must rise pyramidally to a single apex. For us, the *Grundnorm* is the Constitution, and even for Justice Sutherland, for he says that external sovereignty remained in the Union "save in so far as the Constitution in express terms qualified its exercise." The Constitution entirely qualified its exercise. It created the several organs of national government and assigned powers to each. It apportioned the powers of "external sovereignty"—treaties and war and foreign commerce. War and foreign commerce it assigned to Congress in Article I of the Constitution, which begins with the words which forbid the delegation of Congressional power: "The legislative power herein granted shall be vested in a Congress."

But even if Sutherland's reasoning would hold water the *Curtiss-Wright* case would not be a precedent for the Tonkin Gulf Resolution. The joint resolution involved in the *Curtiss-Wright* case did not give the President a choice. If he found that a prohibition on the sale of arms would help restore peace, he was required to proclaim the prohibition. The Tonkin Gulf Resolution, after stating the objective, provides for action only at the President's option. Nothing in Sutherland's opinion in the *Curtiss-Wright* case suggests that when the Congress has specified the goal the President is free to pursue it or not as he chooses.

Quite aside from this, the foundation has been cut from under the *Curtiss-Wright* case, as well as the few other cases which look in the same direction. The notion of extra-constitutional legal power was always nonsense, and it was decisively rejected by the Supreme Court in *Reid* v. *Covert*[38] in 1957. Holding that the allocations of power in the Constitution—in this case, Article III, assigning judicial power to the constitutional courts—and the prohibitions of the Constitution—in this case, the Sixth Amendment, guaranteeing jury trial in criminal cases—invalidated an act of Congress which provided for trial by court martial of civilian dependents of military personnel abroad, Justice Black said: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."[39]

As we have said, the joint resolution in the *Curtiss-Wright* case was passed under the commerce power. In *Kent* v. *Dulles*,[40] decided in 1958, another delegation of rule-making power in the field of foreign commerce was held to be an impermissible delegation on the principle of *Panama Refining Company* v. *Ryan*.

In 1926 Congress had provided that "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe." In 1952 the Secretary of State, acting under Presidential authorization, made the issuance of a passport conditional upon the satisfaction of tests as to political belief and affiliation. Rockwell Kent refused on principle to take an oath as to present or past membership in the Communist party and was denied a passport. The majority of the Supreme Court held that the Secretary's rules were not authorized by Congress. If Congress delegates power, "the standards must be adequate to pass scrutiny by accepted tests. *Panama Refining Co.* v. *Ryan.*" Where a constitutional right, such as that to travel, is involved, delegations will be construed narrowly. So construed, the statute can be taken to authorize rules only on the two topics with which Congress was familiar in 1926: citizenship and criminality. To save the statute, the delegation must be interpreted to be confined to these topics. Therefore Acheson's rules were invalid. It does not disturb our argument that in 1965, in *Zemel* v. *Rusk*,[41] the Court discovered that Congress in 1926, or at any rate at the reenactment of the passport legislation of 1952, had contemplated executive rule-making on three subjects rather than two. The third was the prohibition of travel to designated areas. The delegation was therefore held to be valid as to this third topic. The majority did not disagree with the principles, but only disputed the relevance, of Justice Black's dissent: "For Congress to attempt to delegate such an undefined law-making power to the Secretary, the President, or both, makes applicable to this 1926 Act what Mr. Justice Cardozo said about the National Industrial Recovery Act: 'This is delegation running riot. No such plenitude of power is susceptible of transfer."

The attempt of Congress to transfer its power and responsibility to make war to the President is constitutionally unauthorized and destroys the political system envisaged by the framers.

IX

Ratification and Delegation by Appropriation

On February 7, 1965, President Johnson began his air attacks on North Vietnam. Then he began to move substantial bodies of troops into South Vietnam, a commitment which has not reached its end with 525,000 men. It would have been politically imprudent to take these momentous actions without making some gesture toward Congress. On May 4, he asked Congress to appropriate another $700,000,000 "to meet mounting military requirements in Vietnam."

This is not a routine appropriation. For every Member of Congress who supports this request is also voting to persist in our effort to halt Communist aggression in South Vietnam. Each is saying that the Congress and the President stand united before the world in joint determination that the independence of South Vietnam shall be preserved and Communist attack will not succeed.[1]

If President Johnson had sought Congressional support in any other way, it would have been necessary to draft a bill which stated what he was authorized to do. The bill would have gone to the Foreign Relations and Armed Services Committees, and these would have been obliged to review the policy proposed in the bill. They would have canvassed alternatives. The two houses would have debated the concrete recommendations of the President. Congress would have played its constitutional role in the exercise of the war power.

But as it was, Congress left the determination of policy, the question of war and peace, the scope of limited war, the choice between limited war and general war—even the choice of adversary—entirely in the hands of the President, where it had already undertaken to place all these decisions by the Tonkin Gulf Resolution. The only change was that it enlarged his choice by giving him $700,000,000 to spend in doing whatever he should decide to do.

Nevertheless, an act of Congress was passed. This enabled the State Department in its justificatory memorandum to boast: "The appropriation act constitutes a clear endorsement and approval of the actions taken by the President."[2]

This suggests that the act was viewed as a ratification of past actions of the President. Where there is doubt as to the validity of executive action already

completed Congress may, unless there is some constitutional obstacle to retroactive legislation, lend the necessary legislative authority to such action by ratification. An illustration is afforded by the act of August 6, 1861, in which Congress provided

That all the acts, proclamations and orders of the President of the United States after the fourth of March, eighteen hundred and sixty-one, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.[3]

William Howard Taft considered Wilson's occupation of Vera Cruz an act of war, and illegitimate in that it occurred before Congress had given the necessary authority, but said that the resolution which passed on the following day was "full and immediate ratification."[4]

It is possible to ratify executive actions of dubious validity by means of an appropriation act, but the standards of ratification are rather exacting.

The most generous decision is that in *Brooks* v. *Dewar*[5] in 1941. Instead of issuing term permits for the use of public grazing lands at reasonable fees based on the individual values of the permits, as the law required, the Secretary of the Interior had made a practice of issuing temporary licenses at a uniform fee. Congress, with full knowledge of this practice, had acted on the disposal of the revenue from the licenses. The Court held that this was ratification.

In *Isbrandtsen-Moller Co.* v. *United States*,[6] in 1937, the Court held that an executive order by which the President abolished the Shipping Board and transferred its functions to the Department of Commerce had been ratified by three successive appropriations acts "all of which make appropriations to the Department of Commerce for salaries and expenses to carry out the provisions of the shipping act as amended and refer to the executive order."

In *Fleming* v. *Mohawk Co.*,[7] in 1947, the Court held that when the President had consolidated agencies and Congress had appropriated funds for the use of the consolidated agencies this was "confirmation and ratification of the action of the Chief Executive."

In *Ex parte Endo*,[8] in 1944, Justice Douglas, writing the opinion of the Court, denied that an appropriation act ratified all the activities it supported. Without statutory authority, the Relocation Authority had adopted the policy of detaining citizens of Japanese origin whose loyalty had been satisfactorily established in relocation centers if they would not agree to go to an approved place of residence upon release. In a habeas corpus action the Authority contended that Congress had ratified this policy by appropriating funds for the continued operation of the relocation centers. Justice Douglas said:

It is argued . . . that there has been Congressional ratification of the detention of loyal evacuees . . . through the appropriation of sums for the expenses of the Authority. . . . It is pointed out that the regulations and procedures of the Authority were disclosed in reports to the Congress and in Congressional hearings. . . . Congress may of course do by ratification what it might have authorized. . . . And ratification may be effected through appropriation acts. . . . But the appropriation must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump sum appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program.[9]

Justice Roberts concurred in the result, but he asserted that Congress had actually ratified the practice of detaining loyal citizens. He complained of the test applied by Douglas:

The decision now adds an element never before thought essential to congressional ratification, namely, that if Congress is to ratify by appropriation any part of the programme of an executive agency the bill must include a specific item referring to that portion of the programme.[10]

Quite possibly Justice Roberts was indignant that the Court relied on a proposition about ratification because he wished to press on to what he considered

the central issue, the detention of citizens in violation of the due process clause. In any case, Douglas seems to have the better of it. There can be no ratification without an identification of what is being ratified. In the *Isbrandtsen-Moller* case, the executive order that was being ratified was identified in the act. In the *Fleming* case, Congress identified the consolidated agencies by name. It is true that in *Brooks* v. *Dewar* Congress made no explicit reference to the administrative practice that was being ratified. But in disposing of the revenue from that practice it did single out the practice and authorize its continuance.

In his message of May 4, 1965 asking for a supplementary appropriation, President Johnson described several things he had done in recent months. He had increased the armed forces in South Vietnam to 35,000; he had sent marines and airborne troops to two important areas; he had enormously increased the helicopter activity in South Vietnam; he had increased the number of sorties against North Vietnam from 160 in February to more than 1,500 in April; he had begun strike sorties in South Vietnam, and in March and April there were more than 3,200 of these. And, no doubt as a balancing measure to the strike sorties, he had sent the Deputy Surgeon General of the Army to assist in formulating "an expanded progam of medical assistance for the people of South Vietnam."

But he did not ask for ratification of these concrete actions:

> I do not ask complete approval for every phase and action of your Government. I do ask for prompt support of our basic course: resistance to aggression, moderation in the use of power, and a constant search for peace. Nothing will do more to strengthen your country in the world than the proof of national unity which an overwhelming vote for this appropriation will clearly show. To deny and delay this means to deny and delay the fullest support of the American people and the American Congress to those brave men who are risking their lives for freedom in Vietnam.[11]

In short, he asked for two things. The first was $700,000,000:

> The additional funds I am requesting are needed to continue to provide our forces with the best and most modern supplies and equipment. They are needed to keep an abundant inventory of ammunition and other expendables. They are needed to build facilities to house and protect our men and supplies.[12]

The second request was for a vote of confidence.

On May 7, President Johnson signed into law a joint resolution of less than a hundred words which authorized the Secretary of Defense, "upon determination by the President that such action is necessary in connection with military activities in southeast Asia," to transfer $700,000,000 from unappropriated funds to any existing military account.[13]

It was said in *Ex parte Endo* that to constitute a ratification "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." The joint resolution of May 7 contained no other language than that authorizing the transfer of funds. It did not purport to alter the legal status of any past event. In view of this fact, and of President Johnson's denial that he asked "complete approval for every phase and action of your Government," it is hard to see how the appropriation can be read as a ratification of any particular action. The joint resolution had legal effect as an appropriation measure. It had no other legal effect.

Of course it had extralegal significance. President Johnson said that a vote for the appropriation was also a vote "to persist in our effort to halt Communist aggression in South Vietnam." This latter vote would not grant authority but would strike a posture. It would announce that "the Congress and the President stand united before the world"; it would be "proof of national unity." The striking of postures is not an exercise of the legislative power of Congress; it cannot take the place of the words "Be it enacted."

Suppose, however, that we supply the words "Be it enacted," and that we further interpret into the resolution the entire statement of purpose in the President's message. Suppose we assume that the resolution authorizes the President to accomplish these purposes: halting Communist aggression, preserving the independence of South Vietnam, "resistance to aggression, moderation in the use of power, and a

constant search for peace." Do these words prescribe a definite course of action? Do they supply standards to guide the President? Do they specify the means which he is to employ? Clearly a resolution cast in these terms would be another attempt at the delegation of legislative power, which is forbidden by the Constitution.

When a supplementary defense appropriation bill came before the Senate in 1967, certain Senators attempted to forbid further escalation of the war by amendment to the bill. From a legal point of view, the administration was ill-advised to oppose the amendment, for by accepting limits to Presidential action it could easily have obtained a Congressional mandate for action within those limits. But the administration preferred to retain the whole war power in the President's hands. Accordingly, in the amendment which emerged from debate in the two houses and from conference committee and which passed both houses on March 8 Congress declared neither for war nor for peace. As before, it left the conduct of affairs entirely in the hands of the President, who might either abandon the war or further escalate it into a war with China without violating the amendment:

The Congress hereby declares:

(1) Its firm intentions to provide all necessary support for members of the armed forces of the United States fighting in Viet Nam;

(2) its support of efforts being made by the President of the United States and other men of good will throughout the world to prevent an expansion of the war in Viet Nam and to bring that conflict to an end through a negotiated settlement which will preserve the honor of the United States, protect the vital interests of this country, and allow the people of South Viet Nam to determine the affairs of that nation in their own way; and

(3) its support for the convening of the nations that participated in the Geneva Conferences or any other meeting of nations similarly involved and interested as soon as possible for the purpose of pursuing the general principles of the Geneva accords of 1954 and 1962 and for formulating plans for bringing the conflict to an honorable conclusion.[14]

The first paragraph is not an exercise of the war power of Congress. It does not instruct the President to prosecute the war; it is merely a statement of the intention of Congress, which of course is not legally binding, to pass other appropriation acts if he does. Nor does it appear that the second and third paragraphs have any legal effect. The most general principle of the Geneva accords of 1954 was the agreement upon the unification of the north and south zones of Vietnam by nationwide elections.[15] The announced purpose of the Johnson administration in waging war is the establishment of an independent South Vietnam. But even if the implied indorsement of unification in the third paragraph did not conflict with the second paragraph, it could not be argued that Congress by approving the Geneva accords—which, incidentally, forbade the introduction of foreign troops into Vietnam[16]—had forbidden the President to prosecute the war. The words are merely precatory. In the amendment Congress resolutely maintained its position of interested bystander. It refused to discharge its constitutional duty of determining whether there should be war or peace. Representative Bates was quite right when he said of the amendment: "It is almost innocuous. It is barely a pious preachment."[17]

Clearly a majority of the Congressmen are happy to leave matters in this posture. They prefer that the President take the decisions; this spares them a responsibility to which they feel unequal. But in a republican form of government they must bear that responsibility. And there is every likelihood that the task will be better discharged by the collective judgment of the two houses after full debate than by the private resolution of a single man.

The President has no inherent constitutional power to engage in war. Whatever one thinks of the scope of his right to protect citizens or to practice reprisal for injuries to citizens, neither of these is involved in Vietnam. The Senate has no power to authorize war by treaty, nor does the SEATO treaty purport to do so. Congress cannot delegate the war power. The Tonkin Gulf Resolution is unconstitutional because it affronts the most fundamental principle of the divi-

sion of powers in our constitutional system. Nor can this fundamental principle be avoided by passing appropriations.

Although executive war-making is illegal, it is practiced; and ultimately practice makes the law. And the transfer of the war power to the executive will draw other powers with it. If we continue to follow the easy downward course of executive aggrandizement, our republican institutions will become as unsubstantial as those of imperial Rome. But perhaps this was our destiny. When the United States embarked upon a course of imperialism with the Spanish-American War, the distinguished political scientist John W. Burgess warned that this meant the end of constitutional government:

There is nothing now to prevent the Government of the United States from entering upon a course of conquest and empire. . . . We are by no means a peaceably inclined people. . . . In fact, besides being belligerent and boastful, we are restless, nervous, and at times hysterical. We have just the qualities to answer the call of a Napoleon in the Presidency.[18]

Footnotes

I

1. *Newsweek*, July 18, 1966, p. 17. At a press conference on August 18, 1967, President Johnson said that he had asked for the Tonkin Gulf Resolution because it was "thought desirable": "We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we are doing. . . . We think we are well within the grounds of our constitutional responsibility." *U.S. Commitments to Foreign Powers*, Hearings before Senate Committee on Foreign Relations, 90th Cong., 1st Sess. (1967), p. 126. Before the Senate Committee on Foreign Relations, in response to a question by the chairman, Senator Fulbright—"Would the President, if there were no resolution, be with or without constitutional authority to send U.S. soldiers to South Vietnam in the numbers they are there today?"—Under Secretary of State Katzenbach said: "It would be my view, . . . Mr. Chairman, that he does have that authority." *Ibid.*, p. 141.
2. The text is to be found in *Congressional Record*, Vol. 112, No. 43 (March 11, 1966), pp. 5274-5279, and in *Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy towards Vietnam (Flanders, N.J.: O'Hare Books, 1967), pp. 113-130. It will be cited as *Memorandum* from the latter source.
3. *Notes on Virginia* (1784), Query 13, par. 4.
4. *Federalist*, No. 75.
5. *Second Treatise* (1690), ch. 12-13, § 145.
6. Nugent trans. (1748), Book XI, ch. 6.
7. Charles C. Tansill, ed., *Documents Illustrative of the Union of the American States* (Washington: Government Printing Office, 1927), pp. 561-2.
8. *Ibid.*, p. 665.
9. *Ibid.*, p. 558.
10. *Memorandum*, pp. 123-4.
11. No. 1 of "Lucius Crassus" (Dec. 17, 1801), in Richard B. Morris, ed., *Alexander and the Founding of the Nation* (New York: Dial Press, 1957), p. 526.
12. Below, Chapter 2.
13. Below, Chapter 2.
14. Fred L. Israel, ed., *The State of the Union Messages of the Presidents, 1790-1966* (New York: Chelsea House, Robert Hector, 1966), Vol. 3, p. 3178.
15. *Ibid.*, p. 3179.
16. *Memorandum*, pp. 124-7.

II

1. Miller v. The Ship Resolution, 2 Dall. 19.
2. *Memorandum*, in *Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy towards Vietnam (Flanders, N.J.: O'Hare Books, 1967), p. 124.
3. 1 Stat. 565 (June 13, 1798); 1 Stat. 613 (Feb. 9, 1799).
4. 1 Stat. 578 (July 7, 1798).
5. 1 Stat. 553 (Apr. 27, 1798); 1 Stat. 709 (Mar. 2, 1799).
6. 1 Stat. 594 (July 11, 1798); 1 Stat. 729 (Mar. 2, 1799).
7. 1 Stat. 547 (Mar. 27, 1798); 1 Stat 552 (Apr. 27, 1798); 1 Stat. 595 (July 11, 1798); 1 Stat. 556 (May 4, 1798); 1 Stat. 569 (June 22, 1798); 1 Stat. 576 (July 6, 1798); 1 Stat. 556 (May 4, 1798); 1 Stat. 621 (Feb. 25, 1799).
8. 1 Stat. 558 (May 28, 1798); 1 Stat. 569 (June 22, 1798); 1 Stat. 604 (July 16, 1798); 1 Stat. 725 (Mar. 2, 1799). See also 1 Stat. 549 (Apr. 7, 1798); 1 Stat. 552 (Apr. 27, 1798); 1 Stat. 554 (May 3, 1798); 1 Stat. 555 (May 4, 1798); 1 Stat. 604 (July 16, 1798).
9. 1 Stat. 561.
10. 1 Stat. 572, extended 2 Stat. 39 (Apr. 22, 1800).
11. 1 Stat. 574.
12. 1 Stat. 578.
13. 1 Stat. 743.
14. 4 Dall. 37.
15. Id. at 40-42.
16. Id. at 43.
17. Id at 45-46.
18. 1 Cranch, 1.
19. Id. at 28.
20. 2 Cranch, 170.
21. Id. at 173-4.
22. Id. at 177-8.
23. Stuart v. Laird, 1 Cranch, 299, 308 (1803); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884); The Laura, 114 U.S. 411, 416 (1885).
24. Glenn Tucker, *Dawn Like Thunder* (Indianapolis: Bobbs-Merrill, 1963), p. 135.
25. James D. Richardson, ed., *Messages and Papers of the Presidents, 1789-1908* (Washington: Bureau of National Literature and Art, 1908), Vol. 1, pp. 326-7.
26. 2 Stat. 129.
27. No. 1 of "Lucius Crassus" (Dec. 17, 1801), in Richard B. Morris, ed., *Alexander Hamilton and the Founding of the Nation* (New York: Dial Press, 1957), p. 526.
28. 3 Stat. 471 (Jan. 15, 1811).
29. 3 Stat. 472 (Feb. 12, 1813).
30. 3 Stat. 230 (Mar. 3, 1815).
31. 5 Stat. 355.
32. Richardson, *op. cit.*, Vol. 4, pp. 519, 565, 568-9.
33. *Congressional Globe*, 30th Cong., 1st Sess. (Jan. 3, 1848), p. 95.
34. Arthur B. Lapsley, ed., *The Writings of Abraham Lincoln* (New York: Putnam's, 1905), Vol. 2, pp. 51-2.
35. Richardson, *op. cit.*, Vol. 5, p. 449.
36. 11 Stat. 370.
37. Richardson, *op. cit.*, p. 560.
38. *Ibid.*, pp. 661-2.
39. *Ibid.*, p. 662.
40. 12 Stat. 326.
41. 2 Black, 635.
42. Id. at 668.
43. Id. at 670.
44. Id. at 671.
45. Id. at 693.
46. Id. at 698.
47. *The Legal Historian*, Vol. 1 (1958), pp. 51-2.
48. 26 Stat. 674.
49. 28 Stat. 975.
50. Joseph E. Wisan, *The Cuban Crisis as Reflected in the New York Press* (New York: Octagon Books, 1965), p. 87.
51. 30 Stat. 738.
52. 30 Stat. 364.
53. *Congressional Record*, Vol. 51, Pt. 7, 63d Cong., 2d Sess., p. 6988.
54. 38 Stat. 770.

Footnotes

III

1. James D. Richardson, ed., *Messages and Papers of the Presidents, 1789-1908* (Washington: Bureau of National Literature and Art, 1908), Vol. 1, pp. 389-90.
2. *Ibid.*, Vol. 2, p. 258.
3. *Ibid.*, p. 279.
4. *Ibid.*, Vol. 3, p. 106.
5. *Ibid.*, Vol. 4, p. 583.
6. *Ibid.*, p. 584.
7. *Ibid.*, Vol. 5, p. 235.
8. *Ibid.*, p. 246.
9. *Ibid.*, p. 278.
10. *Ibid.*, p. 336.
11. *Ibid.*, p. 447.
12. *Ibid.*, pp. 516-7.
13. *Ibid.*, p. 539.
14. *Ibid.*, p. 569.
15. *Ibid.*, p. 539.
16. *Ibid.*, p. 569.
17. *Ibid.*, p. 514.
18. *Ibid.*, p. 568.
19. *Ibid.*, pp. 567-8.
20. *Ibid.*, p. 516.

IV

1. James D. Richardson, ed., *Messages and Papers of the Presidents, 1789-1908* (Washington: Bureau of National Literature and Art, 1908). Vol. 2, p. 218.
2. W. S. Robertson, "South America and the Monroe Doctrine, 1824-1828," *Political Science Quarterly*, Vol. 30 (1915), p. 89.
3. *Ibid.*, p. 90.
4. John Bassett Moore, *Digest of International Law* (Washington: Government Printing Office, 1906), Vol. 6, p. 446.
5. Robertson, *op. cit.*, p. 91.
6. Moore, *op. cit.*, Vol. 7, p. 163.
7. *Loc. cit.*
8. *Ibid.*, p. 164.
9. *Ibid.*, pp. 165-6.
10. *Ibid.*, p. 167.
11. *Ibid.*, p. 109.
12. Third Annual Message, in Fred L. Israel, ed., *The State of the Union Messages of the Presidents, 1790-1966* (New York: Chelsea House, Robert Hector, 1966), Vol. 3, pp. 2447-8.

V

1. *Right to Protect Citizens in Foreign Countries by Landing Forces*, Memorandum of the Solicitor for the Department of State, October 5, 1912, Third Revised Edition with Supplemental Appendix up to 1933 (Washington: Government Printing Office, 1934).
2. Baltimore: Johns Hopkins Press, 1928.
3. *Ibid.*, p. 1.
4. Boston: World Peace Foundation, 1945.
5. *Ibid.*, p. 79.
6. Most of the cases are to be found in one or more of the three books cited. Usually Offutt's account is the fullest.
7. James D. Richardson, ed., *Messages and Papers of the Presidents 1789-1908* (Washington: Bureau of National Literature and Art, 1908), Vol. 2, p. 596.
8. John Bassett Moore, *Digest of International Law* (Washington: Government Printing Office, 1906), Vol. 7, pp. 113-4.
9. *Ibid.*, p. 114.
10. Mary W. Williams, *Anglo-American Isthmian Diplomacy* (New York: Russell & Russell, 1965), pp. 179-80.
11. *Ibid.*, p. 181.
12. *Loc. cit.*
13. *Loc. cit.*
14. Richardson, *op. cit.*, Vol. 5, p. 282.
15. *Ibid.*, p. 284.
16. Richardson, *op. cit.*, Vol. 5, p. 466.
17. Offutt, *op. cit.*, pp. 106-107.
18. J. William Fulbright, *The Arrogance of Power* (New York: Random House, 1966), p. 89. (Italics in original.)
19. Richard P. Stebbins, ed., *Documents on American Foreign Relations, 1965* (New York: Harper & Row, 1966), p. 234.
20. Fulbright, *op. cit.*, p. 49.
21. *Loc. cit.*
22. *Papers Relating to the Foreign Relations of the United States*, 85th Cong., 3d Sess., Doc. No. 1 (1905), p. 244.
23. Message to Congress, *Congressional Record*, Vol. 104, Pt. 11 (July 15, 1958), pp. 13767-8. In his Ninth Annual Message, Jan. 12, 1961, President Eisenhower said: "Our Government responded to the request of the friendly Lebanese Government for military help, and promptly withdrew American forces as soon as the situation was stabilized." Fred L. Israel, ed., *The State of the Union Messages of the Presidents, 1790-1966* (New York: Chelsea House, Robert Hector, 1966), Vol. 3, p. 3109.
24. 27 U.S.C. 287d; 59 Stat. 621 as amended 63 Stat. 735 (1949).
25. Andrew Tully, *CIA: The Inside Story* (New York: Morrow, 1962), p. 249.

VI

1. *Right to Protect Citizens in Foreign Countries by Landing Forces* (1912; Washington: Government Printing Office, 1934), pp. 44-48; Milton Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Baltimore: Johns Hopkins Press, 1928), p. 5.
2. *Op. cit.*, pp. 38-40.
3. James D. Richardson, ed., *Messages and Papers of the Presidents 1789-1908* (Washington: Bureau of National Literature and Art, 1908), Vol. 1, p. 156.
4. 16 Wall. 36.
5. 135 U.S. 1.
6. John Bassett Moore, *Digest of International Law* (Washington: Government Printing Office, 1906), Vol. 7, p. 163.
7. Richardson, *op. cit.*, Vol. 5, p. 210.
8. 135 U.S. 1.
9. 1 Stat. 112.
10. 3 Stat. 510.
11. 3 Stat. 720.
12. 11 Stat. 119.
13. 15 Stat. 223. (Italics supplied.)

14. Moore, *op. cit.*, Vol. 7, p. 123.
15. *Ibid.*, p. 127.
16. 8 Fed. Cas. 111.
17. Id. at 112. In 1868 a French subject who had suffered loss in the destruction of Greytown brought an action against the United States in the Court of Claims. That Court ruled that it lacked jurisdiction. "The claimant's case must necessarily rest upon the assumption that the bombardment and destruction of Greytown was illegal and not justified by the law of nations. And hinging upon that, it will be readily seen that the questions raised are such as can only be determined between the United States and the governments whose citizens it is alleged have been injured by the injurious acts of this government. They are international political questions, which no court of this country in a case of this kind is authorized or empowered to decide." Perrin v. United States 4 Ct. Cl. 543 (1868).
18. 2 Black, 635, 682 (1863).
19. "The Control of the Foreign Relations of the United States," in *The Collected Papers of John Bassett Moore* (New Haven: Yale University Press, 1944), Vol. 5, p. 196.
20. *Nicomachean Ethics*, v, 10.
21. Above, p. 00.
22. Richardson, *op. cit.*, Vol. 5, p. 516.
23. Hamilton v. McClaughry, 136 Fed. 445 (C.C.D. Kan. 1905).
24. Arce v. State, 83 Tex. Crim. R. 292, 202 S.W. 951 (1918).
25. Beley v. Pennsylvania Mutual Life Ins. Co., 373 Pa. 231, 95 A.2d 202 (1953).
26. Joseph Buttinger, *Vietnam: A Dragon Embattled* (New York: Praeger, 1967), Vol. 2, pp. 880-81 and accompanying notes.
27. For an incomplete but adequate documentation of American responsibility for the coup, see Anthony T. Bouscaren, *The Last of the Mandarins: Diem of Vietnam* (Pittsburgh: Duquesne University Press, 1965), chap. 9. See also Jean Lacouture, *Le Vietnam entre deux paix* (Paris: Editions du Seuil, 1965), pp. 95-101.
28. The announcement is reproduced in *Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy towards Vietnam (Flanders, N.J.: O'Hare Books, 1967), p. 151.
29. Among other statements, consider that of General Harold Johnson, Army Chief of Staff, on the CBS News television program on August 12, 1967 in defense of the bombing that it slows up supplies to the South but "More importantly, it creates a disruption" so that the enemy is obliged to spend more effort in supplying the people of North Vietnam.
30. This is called "bringing the enemy to the conference table." The conference contemplated is one which will eventuate in the capitulation of North Vietnam, a state with which, purportedly, we are not at war. This means there can be no conference until the enemy is ready to accept Johnson's terms. The long record of evasion of discussions and of outright lies to the American public about North Vietnamese proposals to negotiate on the part of the Johnson administration is documented in Edward S. Herman and Richard B. DuBoff, *America's Vietnam Policy: The Strategy of Deception* (Washington: Public Affairs Press, 1966) and Franz Schurman, Peter Dale Scott, and Reginald Zelnik, *The Politics of Escalation in Vietnam* (Boston: Beacon Press, 1966).
31. *Supra*, note 3.
32. See the discussion in Bernard Schwartz, *Commentary on the Constitution of the United States* (New York: Macmillan, 1963), Vol. 2, p. 174.
33. 3 Wheat. 246.
34. 3 Stat. 351.
35. 3 Stat. 432.
36. 3 Stat. 612.
37. The Orinoco, 18 Fed. Cas. 830 (C.C. Mass. 1812).
38. Schwartz, *op. cit.*, p. 182.
39. Richardson, *op. cit.*, Vol. 7, p. 104.
40. A rather more doubtful case occurred in 1855. The Chinese government admitted a claim for injuries to a citizen of the United States but refused to pay. The United States minister to China was instructed to withhold customs duties in his hands to the amount of the claim, and this was done. John Bassett Moore, *Digest of International Law*, Vol. 7, p. 106.
41. "The Control of the Foreign Relations of the United States," p. 196.

VII

1. *United States Treaties and Other International Agreements* (Washington: Government Printing Office, 1955), Vol. 6, Pt. 1, pp. 82-88. The treaty is reproduced in *Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy towards Vietnam (Flanders, N.J.: O'Hare Books, 1967), pp. 152-4.
2. Both the Saigon government of Bao Dai and the Hanoi government were represented at the Geneva Conference. Between 1949 and 1954 the French had made seventeen ambiguous statements to the effect that Vietnam was an independent state; on June 4, 1954, a treaty with Saigon to this effect was initialed, but it was never signed, ratified, or implemented. Bernard B. Fall, *Viet-Nam Witness, 1953-66* (New York: Praeger, 1966), p. 56; Fall, *The Two Viet-Nams* (2d ed.; New York: Praeger, 1967), pp. 222-3. Bao Dai had been appointed by the French and had no other support; realistically viewed, he was a colonial representative of the French, and so they continued to treat him. On July 20, 1954, the French and the Hanoi government, as the two interested parties—the French did not even consult Saigon—signed the "Agreement on the Cessation of Hostilities in Vietnam." This agreement provided for a cease-fire and the withdrawal of the forces of "the People's Army of Vietnam" to a northern zone and of those of the French Union to a southern zone in order to prevent the resumption of hostilities; it provided for enforcement of the cease-fire by the French commander-in-chief and the commander-in-chief of the People's Army of Vietnam. But the regrouping zones were to endure only until "the general elections which will bring about the unification of Vietnam." On July 21, Anthony Eden, who presided, presented to the Geneva Conference a "Final Declaration." Among other things, this Declaration indorsed the Franco-Vietnamese armistice agreement and recognized "that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or

Footnotes

territorial boundary." It provided for general elections in July, 1956 for the unification of Vietnam; these were to be supervised by the International Supervisory Commission which was to be created under the armistice agreement. France, Great Britain, the People's Republic of China, the Soviet Union, Cambodia, Laos, and the Hanoi government orally announced their acceptance of the Declaration. Under Secretary Bedell Smith said that the United States was not prepared to join in the Declaration but said that the United States would not disturb the agreements by force or the threat of force, and that it favored the unification of countries divided against their will by free elections supervised by the United Nations. On August 23, 1965, Secretary Rusk said that this statement "in effect embraced those agreements on behalf of the United States." Edward S. Herman and Richard B. DuBoff, *America's Vietnam Policy: The Strategy of Deception* (Washington: Public Affairs Press, 1966), p. 16n. Only Tran Van Don of Saigon denounced the settlement as "catastrophic and immoral." The documents are reproduced in *Vietnam and International Law,* pp. 137-50. The history is reviewed in Joseph Buttinger, *Vietnam: A Dragon Embattled* (New York: Praeger, 1967), Vol. 2, pp. 824-44. It was not until October 26, 1955 that Diem officially ousted Bao Dai, ending the the French tie and making South Vietnam (or all of Vietnam, as he claimed) "independent." The SEATO treaty, which was signed September 8, 1954, could involve no obligation to a state which came into existence more than a year later.

3. *Memorandum,* in *Vietnam and International Law,* p. 124.
4. Charles C. Tansill, ed., *Documents Illustrative of the Union of the American States* (Washington: Government Printing Office, 1927), pp. 979-88.
5. *Ibid.,* pp. 561-2.
6. Quoted by Edward S. Corwin, *The President: Office and Powers* (New York: New York University Press, 1940), p. 401.
7. Turner v. American Baptist Missionary Union, 2 McLean, 344 (1952).
8. Chandler P. Anderson, "The Extent and Limitations of the Treaty-Making Power under the Constitution," *American Journal of International Law,* Vol. 1 (1907), p. 650.
9. *Ibid.,* p. 649.
10. James D. Richardson, ed., *Messages and Papers of the Presidents* (Washington: Bureau of National Literature and Art, 1908), Vol. 1, p. 570.
11. Quoted in Henry St. George Tucker, *Limitations on the Treaty-Making Power* (Boston: Little, Brown, 1915), p. 215.
12. 3 Stat. 255.
13. Quoted in Tucker, *op. cit.,* p. 221.
14. Richardson, *op. cit.,* Vol. 4, pp. 339-40.
15. Tucker, *loc. cit.*
16. William N. Malloy, compiler, *International Acts, Protocols and Agreements between the United States and Other Powers* (Washington: Government Printing Office, 1910), Vol. 1, p. 134.
17. Malloy, *op. cit.,* pp. 915-9.
18. *Ibid.,* pp. 919-20.
19. Tucker, *op. cit.,* pp. 342-3.
20. Tucker, *op. cit.,* pp. 342-79.
21. Anderson, *op. cit.,* pp. 650-51.
22. *Ibid.,* p. 654.
23. Bernard Schwartz, *Commentary on the Constitution of the United States* (New York: Macmillan, 1963), Vol. 2, p. 137.
24. 354 U.S. 1.
25. Id. at 16.
26. John Bassett Moore, *Digest of International Law* (Washington: Government Printing Office, 1906), Vol. 5, §737.
27. *Loc. cit.*
28. James Grafton Rogers, *World Policing and the Constitution* (Boston: World Peace Foundation, 1945), p. 35.
29. *Memorandum,* p. 124.
30. *Ibid.,* pp. 119, 121.
31. *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1960-61* (Washington: Office of the Federal Register, 1961), p. 808.
32. *The New York Times,* August 18, 1965.
33. *The New York Times,* Sept. 3, 1963.
34. *Ibid.,* Feb. 21, 1964.
35. *Ibid.,* Sept. 26, 1964.
36. *Ibid.,* Sept. 28, 1964.
37. *Ibid.,* Oct. 21, 1964.
38. *Supplemental Foreign Assistance Fiscal Year 1966—Vietnam,* Hearings before the Senate Committee on Foreign Relations, Pt. 1 (1966), p. 450.
39. *Weekly Compilation of Presidential Documents,* Vol. 3, No. 40 (Oct. 9, 1967), p. 1372.
40. *Ibid.,* No. 45 (Nov. 13, 1967), p. 1540.
41. *Ibid.,* No. 50 (Dec. 18, 1967), p. 1740.
42. Fred L. Israel, ed., *The State of the Union Messages of the Presidents, 1790-1966* (New York: Chelsea House, Robert Hector, 1966), Vol. 3, p. 2876.

VIII

1. *Congressional Record,* Vol. 110, Part 14, 88th Cong., 2d Sess. (Aug. 5, 1964), p. 18402-403.
2. *Ibid.,* p. 18132.
3. 78 Stat. 384 (1964).
4. *Congressional Record,* p. 18409.
5. *The New York Times,* Nov. 24, 1966.
6. *The Arrogance of Power* (New York: Random House, 1966), p. 51.
7. Wayman v. Southard, 10 Wheat. 1 (1825).
8. James D. Richardson, ed., *Messages and Papers of the Presidents, 1789-1908* (Washington: Bureau of National Literature and Art, 1908), Vol. 3, p. 106.
9. *Congressional Globe,* 23d Cong., 2d Sess. (Dec. 9, 1834), p. 23.
10. John Bassett Moore, *Digest of International Law* (Washington: Government Printing Office, 1906), Vol. 7, pp. 127-8.
11. *Ibid.,* pp. 126-7.
12. Richardson, *op. cit.,* Vol. 5, p. 447.
13. *Ibid.,* pp. 516-7.
14. *Ibid.,* pp. 539-40.
15. *Congressional Globe,* 35 Cong., 2d Sess. (Feb. 18, 1859), p. 1120.
16. Richardson, *op. cit.,* pp. 569-70.
17. 3 Stat. 471 (Jan. 15, 1811).
18. 22 U.S.C. 287d; 59 Stat. 621 (1945) as amended 63 Stat. 735 (1949).
19. 69 Stat. 5.
20. 71 Stat. 5.
21. 143 U.S. 649.
22. 220 U.S. 506.
23. 293 U.S. 388.
24. Id. at 415.
25. 295 U.S. 495.
26. Id. at 535.
27. Id. at 551.
28. Hirabayashi v. United States, 320 U.S. 81 (1943).
29. Id. at 91.
30. On the other hand, there is perplexing language which seems to echo the Curtiss-Wright case, which is discussed below, note 36: "The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have

constitutional authority to impose the curfew restriction here complained of." Id. at 91-2. And Stone silently alters the law of separability in the field of delegation of legislative power. The earlier cases had implicitly held that one could not give effect to an overbroad statute within the range of Congressional intention; it was void on its face. But here Stone enforces a rule made under a confessedly excessive delegation because the promulgation of the rule was contemplated by Congress at the time the act was passed.

31. 321 U.S. 414 (1944).
32. Id. at 423.
33. 321 U.S. 503 (1944).
34. Id. at 514.
35. *On Thermonuclear War* (Princeton: Princeton University Press, 1960), pp. 145-9.
36. 299 U.S. 304.
37. See Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1945).
38. 354 U.S. 1.
39. Id. at 5-6.
40. 357 U.S. 116.
41. 381 U.S. 1.

IX

1. *Congressional Record,* Vol. 111, Pt. 7, 89th Congress, 1st Sess. (May 4, 1965), p. 9282.
2. *Memorandum,* in *Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy towards Vietnam (Flanders, N. J.: O'Hare Books, 1967), p. 127.
3. 12 Stat. 326.
4. *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1925), p. 96.
5. 313 U.S. 354, 361.
6. 300 U.S. 139, 147.
7. 331 U.S. 111, 116.
8. 323 U.S. 283.
9. Id. at 303n.
10. Id. at 309.
11. *Congressional Record,* p. 9284.
12. *Ibid.,* p. 9283.
13. 79 Stat. 109.
14. *Congressional Quarterly Weekly Report,* Vol. 25, No. 10 (Mar. 10, 1967), p. 337.
15. "Agreement on the Cessation of Hostilities in Vietnam, July 20, 1954," Article 14 (a): "Pending the general elections which will bring about the unification of Vietnam, the conduct of civil administration in each regrouping zone shall be in the hands of the party whose forces are to be regrouped there [*i.e.,* the Vietminh and the French] by virtue of the present Agreement." *Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy towards Vietnam (Flanders, N. J.: O'Hare Books, 1967), p. 140.

    "Final Declaration of the Geneva Conference, July 21, 1954," para. 5: "The Conference recognizes that the essential purpose of the agreement relating to Vietnam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary." Para. 6: "The Conference declares that, so far as Vietnam is concerned, the settlement of political problems, effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot. In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July, 1956, under the supervision of an international commission composed of representatives of the Member States of the International Supervisory Commission, referred to in the agreement on the cessation of hostilities." *Ibid.,* pp. 148, 149.
16. "Agreement on the Cessation of Hostilities in Vietnam, July 20, 1954," Article 16: "With effect from the date of entry into force of the present Agreement, the introduction into Vietnam of any troop reinforcements and additional military personnel is prohibited." Article 17 (a): "With effect from the date of entry into force of the present Agreement, the introduction into Vietnam of any reinforcements in the form of all types of arms . . . is prohibited." Article 18: "With effect from the date of entry into force of the present Agreement, the establishment of new military bases is prohibited throughout Vietnam territory." Article 19: "With effect from the date of entry into force of the present Agreement, no military base under the control of a foreign State may be established in the regrouping zone of either party; the two parties shall ensure that the zones assigned to them do not adhere to any military alliance and are not used for the resumption of hostilities or to further an aggressive policy." *Ibid.,* pp. 141-3.

    "Final Declaration of the Geneva Conference, July 21, 1954," para. 4: "The Conference takes note of the clauses in the agreement on the cessation of hostilities in Vietnam prohibiting the introduction into Vietnam of foreign troops and military personnel as well as all kinds of arms and munitions." Para. 5: "The Conference takes note of the clauses in the agreement on the cessation of hostilities in Vietnam to the effect that no military base under the control of a foreign power may be established in the regrouping zones of the two parties. . . ." *Ibid.,* p. 148.
17. *Congressional Quarterly Weekly Report* (Mar. 10, 1967), p. 373.
18. *The Reconciliation of Government With Liberty* (New York: Scribner's, 1915), p. 373.

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