

many hundreds or thousands" of casualties is hardly a phrase to be applied to a limited reprisal for an attack on two naval vessels.

But Professor Velvel's argument for treating the Tonkin Gulf Resolution as a nullity is inadmissible for a more fundamental reason, even without invoking Justice Jackson's sardonic comment that some would look to the text of a statute only when its legislative history is ambiguous.

The Congress which passed the Tonkin Gulf Resolution and similar legislative declarations lived in the shadow of the long, bitter, and frustrating campaign of Korea. Of course neither the President nor any member of the Congress wanted to repeat that experience if it could possibly be avoided. Of course they hoped that a firm manifestation of American will would persuade the North Vietnamese government and those who supported it to accept the repeated offers of negotiation and

example, he refers to an exchange between Senator Brewster and Senator Fulbright in these terms:

At 112 [110] Congressional Record 18403 Senator Brewster said that he "would look with great dismay on the landing of large land armies on the continent of Asia." He therefore asked Senator Fulbright if the Resolution would approve "the landing of large American armies in Vietnam or China." Senator Fulbright replied, "There is nothing in the resolution, as I read it, that contemplates it. I agree with the Senator that that is the last thing we would want to do." Senator Fulbright, speaking for the Senate Foreign Relations Committee, continued by stating that everyone he had heard agreed that the United States must not become involved in an Asian land war and that the purpose of the Resolution was to deter the North Vietnamese from spreading the war. Senator Fulbright admitted that the language of the Resolution would not prevent the President from escalating the war, but he clearly indicated that this was not the congressional intent. The intent did not contemplate vast escalation, but deterrence of it.

Velvel, *supra* note 90, at 473-74, in 2 FALK, *supra* note 23, at 651, 675-76.

What Senator Fulbright said, in his exchange with Senator Brewster about the use of the armed forces on the continent of Asia, is this:

There is nothing in the Resolution that, as I read it, contemplates it. I agree with the Senator that that is the last thing we would want to do. However, the language of the resolution would not prevent it. It would authorize whatever the Commander in Chief feels is necessary. It does not restrain the Executive from doing it. Whether or not that should ever be done is a matter of wisdom under the circumstances that exist at the particular time it is contemplated. . . .

110 CONG. REC. 18403 (1964) (emphasis added).

When President Johnson made his decision to send troops to Vietnam on a large scale in the spring of 1965, he sought and obtained another vote from Congress, through an appropriation bill accompanied by a message which said:

This is not a routine appropriation. For each 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.

Message of May 4, 1965, in SENATE COMMITTEE ON FOREIGN RELATIONS, BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM, 89th Cong., 1st Sess. 219 (Comm. Print rev. ed. 1965).

The Committee Reports and debates associated with this appropriation make it clear that the vote was indeed a reiteration and reaffirmation of the policy and of its implementation. Comparable debates, and votes, occurred in 1966 as well. These materials are magisterially reviewed in Moore & Underwood, *supra* note 50, at 15553-67.

compromise which the United States put forward, notably that contained in President Johnson's Baltimore speech of April 7, 1965.⁹² But these men knew too that of all human enterprises, recourse to military power is the least susceptible to easy prediction or control. It is always replete with nasty surprises, disappointments, and setbacks, campaigns that could not possibly have been anticipated when the initial decision to use force was undertaken. They knew too that solemn and public declarations of this order are addressed not only to the American people, but to those of the world at large, friendly and unfriendly governments alike, who are required to rely on what Congress does, not on the private fears and reservations of some of the men who voted for a text which said what it said.

Nor can the argument of deception be given any weight in evaluating the legal effect of legislation. Astute and worldly men who spoke and voted for SEATO, the Tonkin Gulf Resolution, and other legislative steps into the Vietnam War now claim that they were brainwashed, and that we should therefore treat public acts of the United States as if they never happened. Washington is a living society, not a series of closed enclaves labelled "legislative" and "executive." The atmosphere of that society consists of far more than formal messages and texts, testimony and votes. Congressmen and Senators live in a maze of information, rumor, speculation, and gossip, the product of continuous processes of consultation, leakage, and seepage between the executive and the legislative branches at all levels, as well as the table talk of journalists, ambassadors, and other regular and occasional members of the community—consultants, members of advisory committees, and so on. The key Congressmen and Senators responsible for the passage of the Tonkin Gulf and other Vietnam Resolutions knew what the executive branch knew when they voted. For some of these men to claim now that they were brainwashed is not only unseemly, but incredible.

As the basis for an argument that would justify the courts or anyone else in ignoring these Resolutions, the claim ranks with the historic efforts to treat the fourteenth amendment as a nullity because it was ratified by a number of state legislatures which met in the coercive presence of an army of occupation, and in some instances were elected by dubious and indeed fraudulent procedures. Many of these contentions are true, but a public act of the United States stands on its own

⁹² 1 PUBLIC PAPERS OF THE PRESIDENTS: LYNDON B. JOHNSON 394, 396 (1966).

foundations, officially and legally, and cannot be collaterally attacked on such grounds.

B. Undue Delegation of Legislative Authority

Professors Velvel, Wormuth, and Bickel advance another contention in their effort to exorcise the Tonkin Gulf Resolution and other legislation supporting the war in Vietnam. To them, the cycle of Presidential, Senatorial, and Congressional decisions with regard to Vietnam, regularly renewed over a period of more than sixteen years, is insufficient to satisfy what they regard as the unambiguous requirements of constitutional orthodoxy. Through a process of reasoning worthy of Justice Black in his most fundamentalist moments, they argue that, save for minor exceptions, hostilities can be authorized only by Congressional action *at the time they begin*, and then by delegations narrowly limited in scope. In their opinion, neither a treaty nor a congressional resolution can authorize a President to use force *in advance of the event*. Such provisions, they argue, unconstitutionally delegate legislative power to the President, because they are not suitably limited to the circumstances of the event which gave rise to the resolution—in the case of the Tonkin Gulf Resolution, the attack on American naval vessels in the Gulf of Tonkin.⁹³

The Javits Bill does not accept this theory. Indeed, to Professors Velvel, Wormuth and Bickel, the Javits Bill is as unconstitutional as the Tonkin Gulf Resolution itself.⁹⁴ For the Javits Bill concedes that an explicit and advance Congressional authorization of the President's use of force is constitutionally proper, provided it is voted after the passage of the Javits Bill and explicitly exempts the authorization from its restrictions or, if voted before the passage of the Javits Bill, is sufficiently "specific." As a practical matter, the sponsors of the Javits Bill could hardly embrace the Velvel-Wormuth-Bickel theory of delegation. If congressional resolutions or other acts, like those for Formosa, United Nations participation, the Middle East, Berlin, and the expansion of Castro's power, were nullities whose operative provisions had to be repeated every time a President wanted to put them into action, it would be impossible for Congress and the President to cooperate at all

⁹³ Velvel, *supra* note 90, at 478, in 2 FALK, *supra* note 28, at 651, 680; Wormuth, *supra* note 28, at 780-99; 1971 *Hearings*, *supra* note 1, at 549, 554-55, 560-63 (testimony of Alexander M. Bickel). "[T]he real answer to the Tonkin Gulf resolution is that if it authorized anything, beyond an immediate reaction, beyond its own factual context, it was an unconstitutionally broad delegation." *Id.* at 563.

⁹⁴ See testimony cited in note 93 *supra*.

in planning and formulating foreign policy in a way that would be credible.

Velvel, Wormuth, and Bickel discover the source of their rule in what they regard as the original intent of the men who gave Congress the power "to declare war," despite 182 years of opinion and practice to the contrary. The principle of full legislative control of the military power, they argue, precludes much Presidential discretion, and requires Congressional action only at the ritual moment, and then only in terms addressed to defined circumstances. Advance approval for the use of force they regard as a transfer to the President of a power Congress cannot yield even for a moment, even though it retains full authority to change the course of the nation thereafter by repealing, modifying, or reversing its policy, and the President's.

These scholars do not of course claim that Congressional support for the use of force by the President can be given only through a document labelled a "Declaration of War." Nor do they quite deny that the President has some inherent and independent power to use the force of the nation in aid of his conduct of foreign relations, as commander-in-chief of the armed forces, and as chief executive, charged with ensuring that the laws and treaties of the United States be faithfully executed. Without clarifying their views on these questions, however, and above all without considering the constitutional propriety of the Korean War, Wormuth and Bickel in particular conclude that the Tonkin Gulf Resolution, explicitly passed to reinforce and reiterate the policies of the SEATO Treaty, should be regarded as violating the principle they propose.

Actually, the Tonkin Gulf Resolution would appear to be beyond censure even under Bickel's extraordinary rule, since there had been some use of force by the United States in Vietnam, and Congress knew more was being considered at the time the Resolution was passed. Furthermore, the Tonkin Gulf Resolution would seem to contain suitably practical and defined standards to channel and confine the President's authority: it was addressed to what Congress and the President had found to be an "armed attack" by North Vietnam on South Vietnam within the meaning of the SEATO Treaty; and it could be terminated by Congress through a concurrent resolution, that is, without risk of veto. It is hard to conceive of a more precise or controlled "delegation" than one to help defeat a particular attack by one named state against another, pursuant to a policy already embodied in a Treaty.

More broadly, however, the Velvel-Wormuth-Bickel delegation

argument falls before a series of Supreme Court decisions going back at least to *Martin v. Mott*,⁹⁵ upholding standing delegations of discretion to the President in areas close to those of his independent constitutional responsibilities, and in areas of purely Congressional concern as well.

In advancing the argument that the Tonkin Gulf Resolution constitutes an unconstitutional delegation of Congress' power to declare war—which is assumed to include an equally unique power to authorize undeclared war—the commentators, especially Professor Bickel, place some reliance on *Kent v. Dulles*.⁹⁶ That important case considered the legality of denying a passport to Rockwell Kent on the ground that he was a member of the Communist Party. The basic statute on the subject goes back to 1856, and provides that "the Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify such passports." In modern times the passport has become an important facility of international travel, and indeed a 1952 statute purports to make it unlawful for a citizen to depart from or enter the United States without a valid passport.

The Supreme Court upheld Kent's right to a passport, in an opinion which did not reach the question of constitutionality. Starting with the premise that the right to travel was an aspect of liberty protected by the Fifth Amendment, the court hesitated to infer from a pattern of longstanding administrative practice, which it found ambiguous at best, a Congressional purpose to authorize so drastic a curtailment of the liberty of the citizen. Interpreting the statute to avoid constitutional doubts, the court concluded that it should not construe Congressional silence to permit the Secretary to deny passports to individuals on the basis of their political opinions or associations. "If we were dealing with political questions entrusted to the Chief Executive by the Constitution," the Court said, "we would have a different case."⁹⁷ *Kent v. Dulles*, the court wrote, was concerned only with the personal right of the citizen to travel:

If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. . . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. . . . Where activities or enjoyment, natural and often necessary to the well-being of an American citizen,

⁹⁵ 25 U.S. (12 Wheat.) 19 (1827).

⁹⁶ 357 U.S. 116 (1958). See 1971 *Hearings*, *supra* note 1, at 555.

⁹⁷ 357 U.S. 116, 129 (1958).

such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. . . . We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen. . . . We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here.⁹⁸

The limits of *Kent v. Dulles* were explored in *Zemel v. Rusk*,⁹⁹ considering the same statute, in the context of the same argument that Congress had acquiesced through silence in a long-standing pattern of administrative practice in construing and applying the passport act. *Zemel* dealt with the Secretary of State's refusal to validate a citizen's passport for travel to Cuba during 1962, a tense period in Cuban-American relations culminating in the Cuban Missile Crisis. In 1961 the Department of State had issued regulations requiring passports for travel to Cuba, and the specific endorsement of such passports by the Department before a citizen could travel to Cuba. Mr. Zemel said the purpose of his trip was "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen."¹⁰⁰

Reviewing the history of periodic restraints of travel to areas of war, pestilence, famine, or disorder since 1915—that is, both before and since the reenactment of the statute of 1856 in 1926—the Court upheld the Department's position. The issue of statutory construction in *Kent*, the court said, was "whether a citizen could be denied a passport because of his beliefs or associations."¹⁰¹ In *Zemel*, however, the issue before the court, as a question of both statutory interpretation and constitutional law, was whether the Secretary could refuse to validate a citizen's passport for travel to Cuba "because of foreign policy considerations affecting all citizens."¹⁰²

The Court concluded that the history of the problem justified the inference that the statute did delegate to the President an unreviewable discretion to restrict travel to areas where for reasons of foreign policy,¹⁰³ and indeed for weighty considerations of national security,¹⁰⁴ unlimited travel by citizens could "directly and materially interfere with the safety and welfare of the area or the Nation as a whole."¹⁰⁵

⁹⁸ *Id.*

⁹⁹ 381 U.S. 1 (1965).

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.* at 13.

¹⁰² *Id.*

¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.* at 16.

¹⁰⁵ *Id.* at 15-16.

In *Zemel*, unlike *Kent*, the Court was therefore required to pass on the constitutional validity of such a delegation of legislative authority. It said:

Finally, appellant challenges the 1926 Act on the ground that it does not contain sufficiently definite standards for the formulation of travel controls by the Executive. It is important to bear in mind, in appraising this argument, that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.

"Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 324.

This does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice. However, the 1926 Act contains no such grant. We have held, *Kent v. Dulles*, *supra*, and reaffirm today, that the 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions "which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Kent v. Dulles*, *supra*, at 128. So limited, the Act does not constitute an invalid delegation.¹⁰⁶

Thus, *Kent* and *Zemel* together would seem to confirm, not to challenge, the constitutional validity of the Tonkin Gulf Resolution.

The Courts have upheld other broad delegations of discretion to the President, including many in areas which are purely legislative in character and have no roots in one or another of the inherent powers of the Presidency: in the field of tariffs and of responsibility for banking, to take only two examples.¹⁰⁷ The distinction in *Zemel* between delega-

¹⁰⁶ *Id.* at 17-18.

¹⁰⁷ 19 U.S.C. §§ 181, 1336-38 (1970) (tariff statutes delegating to the President power over rates and duties); 12 U.S.C. §§ 95-95a (1970) (President's emergency powers over banks).

tions in the field of domestic and of foreign affairs is frequently made, and certainly the conduct of foreign affairs requires the flexibility of broad discretion. Still, it is hard to imagine a "delegation" more complete than that of *Martin v. Mott*, for example, involving the President's power to call out the militia whenever he deems it desirable to do so. Generally speaking, the reasonableness of a delegation should be considered in relation to the nature of the problem Congress was trying to resolve, and its freedom within broad limits to select means which might conceivably contribute to the end it sought to achieve.¹⁰⁸

No standard even reasonably close to the precedents and their reasoning provides support for the argument that the Tonkin Gulf Resolution can be treated as a nullity because it constitutes an unconstitutional delegation of legislative power. This cannot be the basis for Senator Fulbright's position that the war in Vietnam is "unconstitutional,"¹⁰⁹ since the Javits Bill, which he supports, contemplates the possibility that Congress and the President might well decide to use advance statutory authorizations for the use of armed force by the President.¹¹⁰

The argument of undue delegation fails for a deeper reason. It is at war with the "nature of things," those stubborn exigencies of the external world that Montesquieu rightly saw as the true source of law, the nature of things in the late eighteenth century and the nature of things now. The necessities of circumstance in dealing with the hurly-burly of the real world have produced a quite different pattern of practice since 1789, not less democratic than the model in the minds of Professors Bickel, Wormuth, and Velvel, but far more flexible, resourceful, and effective. To treat Resolutions like the Tonkin Gulf Resolutions as nullities would make it nearly impossible to associate Congress with the President in the articulation of an effective deterrent diplomacy. Such a rule would make foreign affairs even more exclusively the province of the President than is the case today.

In Marshall's classic words, echoing those of Hamilton in No. 23

See also Comment, *Federal Taxation and Economic Stability*, 57 YALE L.J. 1229, 1248-55 (1948).

¹⁰⁸ E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 369-73 (1940) (a compilation of the discretionary powers of the President in 1940). See also E. CORWIN, *supra* note 30, at 119-30; K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.00 (1970 Supp.); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561 (1947).

¹⁰⁹ WAR POWERS, *supra* note 1, at 27; Fulbright, *Congress, the President and the War Power*, 25 ARK. L. REV. 71, 72 (1971). See also testimony of Alexander Bickel in 1971 Hearings, *supra* note 1, at 566-77, 579.

¹¹⁰ S. 2956, 92d Cong., 2d Sess. § 3(4) (1972).

of *The Federalist*, the first rule in interpreting "those great powers on which the welfare of a nation essentially depends" is that

[i]t must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. . . .¹¹¹

Marshall had noted previously that

[t]he power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.¹¹²

What Marshall wrote about the power of Congress to charter a bank in *McCulloch v. Maryland* applies even more emphatically to the respective roles of the President and Congress in exercising the great powers of the nation abroad, powers whose constitutional contours derive as much from international law and international life as from the deliberately few words of the document of 1787.

The American nation which entered the family of nations in 1776 was endowed in its external relations with all the attributes of sovereignty. The written constitution which went into effect in 1789 must be read, Justice Frankfurter has said, to recognize in the national gov-

¹¹¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415-16 (1819.)

¹¹² *Id.* at 408.

ernment "the powers indispensable to its functioning effectively in the company of sovereign nations."¹¹³

The delegation theory of Professors Velvel, Wormuth, and Bickel would deny the President and the Congress the most ordinary and elementary tools for protecting the nation in a time of international turbulence. Under their rule, we should be the only nation on earth incapable of making a credible military treaty. Their rule would make it impossible firmly to delineate American interests in advance, and thus to deter and contain processes of expansion which Congress and the President deem threatening to national security. It would emasculate both Congress and the Presidency, and deprive even treaties like NATO of their weight and credibility.

The Constitution, Justice Goldberg once said, is not "a suicide pact."¹¹⁴ The war power, the Supreme Court has remarked, is the power to wage war successfully. So too, the power of the President and of the Congress over foreign relations is the power to wage peace successfully. There is nothing in the history of the war power and the foreign relations power, since President Washington's first term, to suggest that the United States may not seek to avert the danger of war by giving potential enemies of the nation a credible and effective warning in advance. *McCulloch v. Maryland* teaches that those who oppose the presumptive constitutional validity of the means Congress and the President together select as appropriate to protect the security of the nation face a nearly insuperable burden of proof.¹¹⁵

C. *The Political Question Doctrine*

It is sometimes claimed that the "political question" doctrine makes it impossible to reach final decisions—that is, "final" decisions by courts—on the constitutionality of procedures like those used by Presidents and Congress in Korea and Vietnam. This contention misconceives the political question doctrine. It is not, as some contend, a flexible and amorphous idea used by the Courts to avoid questions they do not wish to decide, although judges sometimes use it for this purpose. As Marshall made clear in *Marbury v. Madison*,¹¹⁶ the doctrine is something quite different: that courts cannot and should not pass on the

¹¹³ *Perez v. Brownell*, 356 U.S. 44, 57 (1958).

¹¹⁴ *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964).

¹¹⁵ 17 U.S. (4 Wheat.) 316, 409-11 (1918).

¹¹⁶ 5 U.S. (1 Cranch) 137 (1803).

propriety of decisions entrusted by the Constitution or the laws to the discretion of another branch of government.¹¹⁷

In *Marbury's* case, no court could have questioned the propriety of the President's decision to nominate Marbury rather than John Doe or Richard Roe; the Senate's vote in its absolute discretion to advise his appointment, and consent to it; or the President's final decision, having received a favorable vote from the Senate, to sign Marbury's commission, and have it sealed. The question became justiciable, the Court said, only because the political discretion of the President and the Senate was exhausted when the seal was affixed. At that moment, and not before, Marbury acquired a vested legal right, a property interest, in the office.

The question whether Marbury's right to the judgeship should be protected in court, the Court said, "far from being an intrusion into the secrets of the cabinet, . . . respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents."¹¹⁸

Like nearly all the intervening cases, *Powell v. McCormack*¹¹⁹ rests upon the same simple principle. The Court did not attempt to control the political decision of Congress to exclude Adam Clayton Powell, duly elected to membership in Congress. It carefully ruled, however, that while under the Constitution each House was indeed "the Judge of the Elections, Returns and Qualifications of its own members," the discretion of Congress over the admission of members could rest only on the grounds specified in the constitution—age, citizenship, residence, and election. Since it was conceded in this case that Powell met these

¹¹⁷ The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and the laws, submitted to the executive, can never be made in this court.

Id. at 169-70.

¹¹⁸ *Id.* at 170.

¹¹⁹ 395 U.S. 486 (1969).

constitutional qualifications, which were unalterable by the legislature, it followed that the vote excluding him was invalid.¹²⁰ The Court took exactly the same position in *Roudebush v. Hartke*: "Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question."¹²¹

By now many lower courts, faced with the complaint of young men about to be drafted into the armed forces, have passed upon the constitutionality of the war in Vietnam. Such plaintiffs surely have standing to raise the question, in the sense of a direct personal interest in the outcome of the litigation; the possibility that they may be killed or maimed in the course of military operations represents the most direct and most personal of all interests. I can imagine no civil right more profound, and more to be respected, than the right of a conscript to be assured that the war he is required to fight has been constitutionally authorized. All the courts which have passed upon the question have given these plaintiffs the answer Justice Story gave to the militiamen in *Martin v. Mott*: that whether the United States acts or does not act under a treaty; whether it decides to help or not to help a friendly government in measures of self-defense against a rebellion aided or instigated and organized from abroad; whether the President and Congress "declare" war, or choose the course of limited war—all are matters peculiarly within the discretion entrusted to the President, or to Congress, or to both, under our constitution and laws and, therefore "political" questions within the meaning of *Marbury v. Madison*.¹²² When Courts decide that the way in which the political arms of the government exercise such discretion is a "political question," they are not *abstaining* from a decision on its legality; on the contrary, they are deciding that the choices made were within the zone of discretion entrusted to the political branches of the government, and are therefore legal.

I should be the last to urge, as some have done, that the courts should refrain from decisions of this kind on the ground that it may be

¹²⁰ *Id.* at 518-22, 548-49.

¹²¹ 92 S. Ct. 804, 807 (1972). See Dionisopoulos, *A Commentary on the Constitutional Issues in Powell and Related Cases*, 17 J. PUB. L. 103 (1968); Henkin, *Viet-Nam in the Courts of the United States: "Political Questions,"* 63 AM. J. INT'L L. 284 (1969); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033 (1968).

¹²² See, e.g., *Orlando v. Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *United States v. Sisson*, 294 F. Supp. 511, 515, 520 (D. Mass. 1968), 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed for lack of jurisdiction*, 399 U.S. 267 (1970).

impractical and undesirable to have the courts pass on such difficult and sensitive problems.¹²³ On the contrary, I believe that many exercises of the military power do produce justiciable controversies, and that in such cases the courts should review the exercise of the war power by political authority to make sure it is kept within constitutional limits. I believe our national debate about Vietnam might well have been less confused and less poisonous if the Supreme Court, in a great opinion, had said what the lower courts have all said—and what I think any judge under the pressure of responsibility would necessarily conclude—that there is no constitutional basis for challenging the legality of the war in Vietnam. Men can reasonably debate whether the United States should have made the commitment of the SEATO Treaty, or honored its commitment when the Treaty was breached. They can argue about the strategy and tactics of the combat and diplomacy of the war in Indo-China. Equally, with Senator Cooper they can question whether a vote of Congress was necessary, in addition to a Treaty, to authorize the President to use the national force on a large scale in Vietnam. But when President and Congress pool all the war powers they possess, jointly and separately, what is there left to debate? It is difficult, at least for me, to discover any plausible basis for contending that the Vietnam War is unconstitutional, or even constitutionally doubtful.

D. "Necessary and Proper"

In the tense and cautious diplomacy of our present relations with the Soviet Union, as they have developed over the last twenty-five years, the authority of the President to set clear and silent limits in advance is perhaps the most important of all the powers in our constitutional armory to prevent confrontations that could carry nuclear implications. No shots have been fired between the armed forces of the United States and those of the Soviet Union; and the inhibition against firing the first shot has been an immensely powerful factor of restraint in the conduct of the cold war. The basic rule of cold war diplomacy, thus far, has been that the Soviet Union does not use force to challenge our presence, or what we clearly and privately inform them are our state interests, and

¹²³ See Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945), reprinted in E. ROSTOW, *THE SOVEREIGN PREROGATIVE* 193 (1962); H. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 11-13 (1961). Cf. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 69-70 (1962); T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 109-13, 116-21 (1970). The limits of presidential power in war have never been better analyzed than by Justice Curtis in his pamphlet *Executive Power* (1862), reprinted in II B. CURTIS, *A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D.* 306 (1879).

that we likewise do not use force to oppose hers. We did not intervene in East Germany, Hungary, or Czechoslovakia. They did not use their own force to oppose our actions in Berlin, in Yugoslavia, in Greece, in Korea, and in Vietnam. In resisting the Berlin Blockade, President Truman carefully chose the air lift, a method of action that would have required the Soviets to fire the first shot. President Kennedy sought to accomplish the same end in his handling of the Cuban Missile Crisis, cautiously choosing a limited naval blockade rather than air strike or invasion, the latter strongly urged upon him by Senator Fulbright and others.¹²⁴

The nature of the problem requires promptness of action, great flexibility in the choice of means, and freedom to shift, from hour to hour, in response to the exigencies of the diplomatic situation. It puts a decisive premium on establishing a deterrent presence, or a credible deterrent threat, before irrevocable steps have been taken, or decisions made.

The Javits Bill purports to abolish this power—essential to diplomacy, and to the process of avoiding war. It is a power which nearly every President has used, at least since 1794, when President Washington sent troops to drive Indians—perhaps supported by the British—from Western territories in dispute. And it is the diplomatic power the President needs most under the circumstances of modern life—the power to make a credible threat to use force in order to prevent a confrontation which might escalate.

I believe that an attempt by Congress to deprive the President of power so crucial to his duties as organ of the nation in the conduct of foreign relations is unconstitutional. It is as unconstitutional as a Presidential assumption of power deemed legislative, or as Congressional invasions of the President's much mooted power to remove subordinate officials of the Executive branch, or his pardoning power, or of the authority of the courts under Article III.¹²⁵

The Senate Foreign Relations Committee claims to have discovered new potentialities in the necessary and proper clause authorizing Congress to control the way in which "any Department or officer thereof"

¹²⁴ R. KENNEDY, *supra* note 12, at 32, 119.

¹²⁵ See, e.g., *Wiener v. United States*, 357 U.S. 349 (1958); *Reid v. Covert*, 354 U.S. 1 (1957); *Myers v. United States*, 272 U.S. 52 (1926); *Muskrat v. United States*, 219 U.S. 346 (1911); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); E. CORWIN, *THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION* (1927). This argument was the heart of the impeachment proceedings against President Andrew Johnson. See B. CURTIS, *supra* note 123, at 343.

exercises its functions. But the necessary and proper clause, impressive as it is, cannot be the source of a bootstrap doctrine, empowering Congress to abolish the principle of the separation of powers. Every piece of legislation has as its tacit predicate a Congressional finding that the statute or resolution is, in the view of Congress, "necessary and proper for carrying into Execution" one or another of the powers allocated to it in Article I, Section 8. Congress has been talking the prose (or poetry) of the necessary and proper clause since 1789.

IV. CONCLUSION

The Javits Bill and similar proposals represent the passionate conviction that the campaigns in Korea and Vietnam were a mistake. Many proponents of the Bill also contend that Korea and Vietnam were "Presidential" wars, and could have been avoided if only Congress had not been stripped of its rightful powers by the usurpations of overweening modern Presidents. We are therefore in the midst of a constitutional crisis, they tell us, a crisis which can be cured, and equilibrium in the constitutional order restored, only by the passage of a statute like the Javits Bill. Men like Senator Cooper and Senator Stennis, of course, do not accept this step in the argument. They know that Korea and Vietnam did not come about because the Presidency had arrogated Congress' powers over foreign policy; Congress fully supported those efforts when they were undertaken. But Senators Cooper and Stennis support the Javits Bill for another reason: they are trying to take advantage of the present state of opinion about Korea and Vietnam to establish certain Congressional prerogatives they have long urged in the perpetual conflict between Congress and the Presidency over their respective roles in making foreign policy. Their effort is addressed to the constitutional practice of Korea, not Vietnam. It represents Bricker's thesis that treaties are not self-executing, but require Congressional action before they become law.

The nation is in the midst of an important foreign policy crisis. It is not a constitutional crisis requiring a redefinition of the relationship between the President and the Congress, but an intellectual and moral crisis caused by a growing tension between what we do and what we think. The ideas that for twenty-five years have shaped American foreign policy, and the foreign policy of our Allies—the visions which dominated the minds of the delegates who met at San Francisco in 1945 to write the Charter of the United Nations—have suddenly lost their power to command. When the delegates met at San Francisco in 1945,

they saw Haile Selassie standing sadly before them, as he had stood in the Palace of the League of Nations ten years before, asking in vain for help against Mussolini's aggression. With equal shame they remembered China, which had also met silence when it besought the League to stop Japan. If the world had acted promptly, and in concert, would Japan have conquered Manchuria, and gone on to wage general war against China, and then against others? Would Italy have attacked harmless Ethiopia? Would Germany and Italy have made war against Spain, by sending arms and men to support Franco's revolution? Would the Rhineland have been occupied, Austria and Czechoslovakia invaded? In short, could the drive towards war have been stopped earlier, before its momentum became irresistible?

To the men of 1945, the answer to these questions was self-evident. World War II could have been prevented, they believed, if Britain, France, and the United States had acted against aggression, firmly, boldly, and above all in good time.

Today there is an outcry against these ideas. Something is wrong with the notion of small wars to prevent big ones, men say, if it produces consequences as ghastly as the campaigns in Korea and Vietnam. There must be a "new" foreign policy that could liberate us from the burdens we have had to bear since 1945.

This demand is the most conspicuous theme of a bellicose literature about how to achieve peace. It is conventional to describe that literature as a "Great Debate." Like many features of the conventional wisdom, the phrase is misleading. There is disagreement to spare in these books and articles, but little or no debate. Few of the protagonists read what their opponents write, or listen to what they say. Generally speaking, arguments are answered by epithets. The devotees of geopolitics, brooding about nuclear deterrence, dismiss their critics as amateurs, demagogues, journalists, dupes, or worse. Their critics return the compliment. Why should they waste time considering the ideas of fascists, war criminals, revisionists (or other lackeys of monopoly capitalism), or burnt-out cases whose minds were paralyzed in cold war postures twenty years ago?

In contemplating our national priorities, I can think of nothing we need more urgently than a genuine debate about what foreign policy is for. Until we come much closer to agreement on this central question, we shall have little opportunity to deal with the others.

Since 1945, there has been acute dissonance in the nation between what we thought and what we did in the name of foreign policy. While

neither the United States nor any other nation has ever dared contemplate the full-throated enforcement of the United Nations Charter—in Eastern Europe, for example—American policy has nonetheless been strongly influenced by the experience of the thirties, and by the ideas of the Charter. President Truman regarded the Korean War as atonement for the League's failure in Ethiopia. His point was underscored by the presence of Ethiopian troops in Korea. And the memory of Munich, and of President Wilson, is a living part of American consciousness.

Truman's view has not, of course, been universally accepted. The United States has offered many explanations for its foreign policy since the Truman Doctrine was announced in 1947: as the "containment" of "Communism," or of the Soviet Union, China, and Cuba; as the protection of "free nations" or of "the free world"; as the manifest destiny of a Great Power; or as the application of the oldest and most nearly instinctive policy in all politics—that of the balance of power.

Public opinion has not yet crystallized around any one of these competing principles as the proper compass for our foreign policy. Since 1945, the American government under five Presidents has felt compelled to act in a certain pattern, from Iran, Greece, and Turkey, to Berlin, Korea, the Middle East and Vietnam. But there is no harmony between this pattern of action, and widespread, and now perhaps prevailing views as to what American and Allied foreign policy ought to be.

The tension between public opinion and the behavior of government is much too great for safety. That tension has already destroyed the careers of two Presidents, Truman and Johnson; divided the nation; split the Democratic Party; and perhaps weakened the Presidency as well. It could have even more serious consequences, for it has given rise to uncertainty all over the world as to what the United States will do to protect its own security, and the security of nations it has undertaken to defend. Uncertainty of this order invites miscalculation, the kind of miscalculation which had led to so many catastrophes already during this brutal and tragic century. It is hardly hyperbole to conclude that the nation must reexamine its foreign policy before its foreign policy destroys the nation.

The real crisis of our foreign policy can be resolved only through a disciplined and scrupulous examination of what the nation must do, given the condition of world politics, to preserve the possibility of surviving as a democracy at home. That process will be difficult at best.

The relevant Congressional Committees, and Congress as a whole, should be leading the nation in a courteous and sustained debate, through which we could hope to achieve a new consensus about foreign policy, as vital, and creative, as that which sustained the line of policy which started with the Truman Doctrine, the Marshall Plan, NATO and its progeny, and the Point Four Program.

Instead, the Senate Foreign Relations Committee has chosen to escape from the demanding but manageable task of reality by retreating into the insoluble and dangerous realm of constitutional myth. No one could possibly write the statute the Javits Bill purports to be—a codification of what the Founding Fathers prudently left uncoded, the respective powers of Congress and the President in relation to the use of the national force. As George Ball pointed out in his persuasive testimony opposing the Javits Bill, the Bill

represents an attempt to do what the Founding Fathers felt they were not wise enough to do: to give precision and automatic operation to the kind of legislative-executive collaboration which they deemed essential to prevent the unrestricted use of American forces by the Executive acting in the pattern of monarch, while at the same time assuring him sufficient flexibility to defend the country against any threats that might suddenly appear.¹²⁶

In this time of trouble, almost as threatening to the nation as the Great European Wars of 1789-1815, we should not be diverted from the compelling task of rethinking foreign policy into a ritual purge of evil spirits, and an emasculation of the Presidency we have never needed more. The Javits Bill would turn the clock back to the Articles of Confederation, and destroy the Presidency which it was one of the chief aims of the men of Annapolis and Philadelphia to create.

¹²⁶ 1971 *Hearings*, *supra* note 1, at 621.

STATEMENT OF PROF. RAOUL BERGER, HARVARD UNIVERSITY LAW SCHOOL, CAMBRIDGE, MASS., IN RESPONSE TO STATEMENT OF PROFESSOR ROSTOW (MARCH 31, 1973)

Mr. Chairman, Prof. Eugene V. Rostow, who was scheduled to appear with me before your committee on March 15 but was prevented from doing so, has favored me with a copy of a statement he submitted for the record of your hearings on the war powers bills. There he takes issue with my published criticism of his article in the Texas Law Review.

Like Professor Rostow, I believe that "scholars and Members of Congress alike [must] adhere to the most scrupulous standards of responsibility in their discussion of the evidence * * *" (Rostow 408). It is in this light that I shall examine his statement, mindful of the remark by the distinguished physicist-mathematician, J. W. N. Sullivan, that the progress of science in large measure is due to the searching criticism to which competing theories are subjected. How much more important is such criticism when, as Professor Rostow justly states, the matter goes "to the essence of national safety." (Rostow 408.)

(1) Speaking in the context of the proposed war powers legislation which, by reaffirming Congress constitutional powers, would restrict the warmaking propensities of a President, Professor Rostow remarks:

As Hamilton pointed out long ago, the circumstances that may endanger the safety of the nation, and call for the use of national force, or the threat to use it, are "infinite," so that no constitutional shackles can wisely be imposed on the power to which the care of it is committed. (Rostow 395).

In the context of Professor Rostow's discussion the clear implication is that the powers of the President should not be shackled by the proposed legislation. My published critique pointed out that—

Hamilton was concerned there with the needed surrender by the states to the "federal government" of powers "essential to the common defense," not with a plea that Presidential war powers must not be shackled. Hamilton's argument for lodging power in the nation rather than the states is not convertible into an argument that power is to be vested in the President rather than in Congress. (RB 49).¹

To persist in manifest error after such criticism is to lose sight of Professor Rostow's own statement that in this area the "price of error is indeed death." (Rostow 408).

(2) Professor Rostow attaches great weight to the discussion before the Senate Foreign Relations Committee of the provision in article IV(1) of the Southeast Asia Collective Defense Treaty in 1954. After quoting a great slab of the 1954 hearings, he concludes:

Thus both the Senator and Secretary [Dulles] carefully avoided the view that we could act under paragraph 1 of Article IV only after a Congressional declaration of limited or unlimited war. (Rostow 402-405).

What Dulles so "carefully avoided" was squarely faced by the chairman of the committee, Senator Alexander Wiley.

¹ References are to Berger, "Warmaking by the President," 121 U. Pa. L. Rev. 29, 49 (1972, inserted by Senator Jacob Javits in the Congressional Record, Feb. 20, 1973, S2784).

The heart of article 4(1), in Dulles' words, "The agreement of each of the parties to meet the common danger 'in accordance with its constitutional processes' * * *" (Rostow 403), is duplicated in the treaty with Korea, which was discussed in the Senate debates by Chairman Wiley. In response to questions by Senators John Stennis and Arthur Watkins, he stated:

There is no question in my mind that the phrase "constitutional processes" means action by the Congress. I have said so 3 or 4 times in different ways. . . .²

Senator Watkins asked, "Congress would have to make the decision whether the United States would go to war or would not go to war?" Wiley replied, "The Senator is correct."³ The record is studded with such remarks by Wiley.⁴ The reason is transparently plain. In making the decision to go to war, the Constitution, as Senator Thomas Eagleton stated, "requires the participation of the House, and in my view the Senate cannot abrogate that responsibility by treaty." (Fulbright hearings 610). That is the view of Professor Rostow's distinguished colleague Prof. Alexander Bickel, and of Prof. Henry Steel Commager. *Id.* at 563, 61. As Prof. Louis Henkin stated:

The Founders considered the power to declare war too important to entrust it to the President alone, or even to him and the Senate, and gave it to the Congress (or left it there, as under the Articles of Confederation).⁵

After so fastidiously granting the power to Congress, we cannot impute to the Founders an intention to unravel all their labors by conferring upon the treaty-makers—President and Senate—a power to involve the Nation in war without congressional authorization. Certainly the reservation that the Nation must act via "constitutional processes" points back to the necessity of action by the entire Congress, as Wiley, Smith, and Watkins agreed. And this leads to what Professor Rostow regards as the fatal flaw in my position.

(3) After lining me up with Prof. William van Alstyne and Charles A. Lofgren for the proposition that "the President can act only as the agent of Congress in the use of force, save for a short time in narrowly defined emergencies directly affecting the territory or the Armed Forces of the United States," Professor Rostow states that "one fact inconsistent with a theory disproves that theory" (Rostow 397). That "one fact * * * which conclusively disproves all [our] hypotheses at once" is "the treaty power, and the Founding Fathers' intimate experience with that power in connection with the Benjamin Franklin Treaties with France of 1778" (*Id.* at 397).

As I understand the argument, the Franklin Treaty of Alliance with France (1778) contained an "American guarantee of 'the present possessions' of France in America"; the treaty was ratified by the Constitution (Rostow 398); France became involved in war with Britain. So much is true. Next Professor Rostow asks us to support

² The debates are reprinted in *Hearings on War Powers Legislation before the Senate Foreign Relations Committee (March–October 1971)* 721 et seq. (hereafter cited as *Fulbright hearings*). The quotation is at p. 735.

³ *Id.* at 736.

⁴ *Id.* at 727, 729, 731, 733, 736. Senator Smith, on whom Professor Rostow relies for the "Monroe Doctrine approach," (Rostow 12), stated that in case of a violation of the Monroe Doctrine in South America, "The President should be prepared to issue a stern warning and have Congress back of him and ask for the support of Congress." He "absolutely agreed" with Senator Watkins that before "he ordered out the Armed Forces * * * the President by all means should come to Congress and get power to take that action." *Id.* at 747.

⁵ L. Henkin, *Foreign Affairs and the Constitution* 80 (1973).

that the British had stationed troops and naval vessels in the French Islands of the Caribbean and then asks:

Can the President take no steps to implement that guaranty * * * without the prior consent in each case of Congress? Is it constitutional for a Treaty to declare, as Article 5 of the North Atlantic Treaty does, that an armed attack against one or more of the allies shall be considered an attack against them all? * * * Their [Berger et al.] version of the Constitution would confine the President's emergency powers to attacks on the territory of the United States. Either the Treaty is unconstitutional, or their version of the original intent is inadequate and erroneous. *Id.* at 9.

Professor Rostow does less than justice to the meticulous way in which Professor Lofgren and myself have set forth the evidence of the original intent—the unmistakable statements by the framers themselves. Our bald recital of the historical facts does not therefore represent our “version of the original intent” nor bare “hypotheses.” Only one who resolutely turns his face from those facts will dispute the plainly manifested “original intention” of the founders. Professor Rostow would have us repudiate that clearly articulated intention in order to sustain the constitutionality of a 20th century treaty—as he reads it, when the true test is whether the treaty is compatible with the intention of the framers. And I would remind Professor Rostow that in 1966 the Legal Adviser of the State Department conceded that “the framers probably had in mind attacks upon the United States” as the limit of Presidential power to repel sudden attacks, not attacks on the French possessions in the Caribbean, or on Kamchatka. There is not a shred of evidence that the framers intended to alter the distribution of war powers when President and Senate made a treaty. The very fact that the decision to wage war was confided to the entire Congress, not the President and Senate alone speaks against it.

Let us now consider the Rostow argument in the frame of the 1778 treaty of Franklin. Having so carefully put it beyond the power of a “single man,” in the words of James Wilson, to “hurry” us into war (RB 36) when the framers were focusing directly on the distribution of the war powers, they scarcely intended by their ratification of the 1778 treaty to throw these labors into the discard. Rather, the reasonable presumption is that they meant execution of the treaty to be subject to the constitutional provisions respecting the power to wage war. To the extent that effectuation of the “guarantee” to France entailed warmaking, the Constitution left the decision to Congress.

Professor Rostow's mistake, which vitiates both his analysis of the Franklin treaty and the earlier-quoted Hamilton State-Federal passage, is to assume that because there is a necessity for the Nation to act, it necessarily follows that the President must implicitly be empowered to do so. But as Justice Frankfurter stated, the fact “that power exists in the Government does not vest it in the President.” (RB 42). The founders left no doubt as to their intention severely to limit Presidential responses to “sudden attacks” on the United States. Thus it is that Professor Rostow's elaborate attempt to turn that intention topsy-turvy is pierced by “one fact.”

(4) A few brief comments on several other points in the Rostow statement must suffice. It is true that former Justice Arthur J. Goldberg remarked in another context that the Constitution is not “a suicide pact.” (Rostow, 403). But he himself testified with respect to the Javits war powers bill that—

This [remark] is a far cry from recognizing the President's unfettered powers to plunge us into war without congressional sanction. * * * (Fulbright Hearings 770).

Professor Rostow quotes at length from Hamilton's enunciation in 1793 of the novel theory that the Executive was given plenary power, not confined to the subsequent enumeration of powers, and that the congressional war power and Senate participation in the treaty power were "exceptions" which have to be strictly construed. (Rostow 400-401). This view was triumphantly refuted by Madison; it simply does not stand up in the face of the historical record. See Berger, *The Presidential Monopoly of Foreign Relations* 1, 18025 (1972). Professor Rostow advised me that he read this article; and I suggest that it is not in keeping with the fastidious standard he lays down for scholars to take no account of Madison's refutation and the accompanying documentation. A court would demand of a lawyer that he meet the opposing argument. Legal analysis is not advanced by closing one's eyes to unpalatable facts.

Finally, I reject the imputation that I noted "with apparent approval the actions of Presidents Wilson and Roosevelt before the First and Second World Wars . . ." (Rostow 402). Of Wilson I concluded that "he withstood the temptation 'to resist force with force,' single handedly to commit the Nation to war." (RB 66). My references to Roosevelt were to set forth the facts, concluding with a statement that "While these measures might have involved the Nation in war, they did not commit our troops to battle." (RB 66). It required Pearl Harbor to accomplish that. And, as I testified before your committee, I am not among those who subscribe to the notion that a President must save a benighted nation against its will. Tomorrow a malign President could plunge us into the abyss.

REPLY OF PROF. EUGENE V. ROSTOW TO PROFESSOR BERGER'S
RESPONSE (APRIL 10, 1973)

DEAR MR. CHAIRMAN: May I add, for the record, a brief reply to Mr. Raoul Berger's letter of March 31, addressed to my submission of March 14, 1973.

1. When I quoted Hamilton's comment in No. 23 of the *Federalist*, to the effect that no constitutional shackles can wisely be imposed upon the war power, I did not mean to suggest that the President has an unlimited power to wage war. On the contrary, as I tried to make clear, both in that letter and in my Texas article, the Constitution, in my view, entrusts and commits the care of the national safety both to the President and to Congress. My reference to *McCulloch v. Maryland*, in a section of my Texas article addressed to the problem of the "undue delegation" of congressional authority to the President, was intended to support the practice of advance declarations of policy, or ratifications after the event, through which Congress and the President have handled these problems together, as a problem of shared and concurrent authority.

In exercising the war power, effective national policy invariably requires the cooperation of both branches—a pooling of their respective powers in patterns which necessarily vary from case to case, depending upon circumstance. In my opinion, Congress may constitutionally join the President in advance declarations of policy, as it did in the

United Nations Participation Act of 1945, the North Atlantic Treaty or the Middle East Resolution of 1957 and 1961; or it may ratify what the President has done after the President has initiated a line of policy, as was the case in the Civil War, in Korea, and on many other occasions when the national force was used. I am not prepared to say that American policy in Korea, or in the handling of the Cuban missile crisis, or in Commodore Perry's mission to Japan, was unconstitutional. But this is necessarily the premise of all the bills before you.

No one has yet succeeded in drawing a neat and simple map of the division of authority between Congress and the Presidency with regard to the use of the national force, beyond the obvious propositions that only Congress can declare war, and only the President can direct the troops in the field, or conduct the diplomacy of the Nation. In the nature of the problem of national safety, I believe that drawing lines as sharp as those which Mr. Berger attempts is unwise, and indeed impossible.

2. The error of Mr. Berger's views, and those of Professor Van Alstyne, on the relationship between the treaty power and the war power is well brought out in *Diggs v. Schultz*, 470 F(2d) 461 (App. D.C., 1972). In that case one of our finest judges, Judge McGowan, had to deal with a conflict between a statute and the President's earlier interpretation and application of a treaty. The statute, being later in time, of course, prevailed, since statutes and treaties have exactly the same constitutional dignity. When valid, they are equally "the supreme law of the land."

In 1966, and again in 1968, the Security Council passed resolutions, supported by the United States, calling on all member states to impose an embargo on trade with Southern Rhodesia. That step was taken under chapter VII of the charter, which deals with the most extreme powers of the Security Council—those of taking binding decisions, requiring members to take appropriate action to restore peace and security. It is the same chapter which authorizes the Security Council to employ military as well as economic coercion.

Economic sanctions are, of course, a use of force. They may, and often do, provoke a response. There are many who believe that American economic measures against Japan in the late thirties led to Pearl Harbor.

In 1945, the United Nations Participation Act created the office of U.S. representative to the United Nations, which functions under the President's direction. Section 5 of the act makes it an offense to violate or evade rules or regulations promulgated by the President to give effect to decisions of the Security Council calling upon the United States to apply economic sanctions. In 1966, the President issued executive orders applying the Security Council decision with regard to American trade with Southern Rhodesia. In 1971, however, Congress adopted a law intended to abrogate the Security Council decision, so far as the United States was concerned.

Judge McGowan's opinion did not conclude that the United Nations Participation Act was an invalid delegation to the President of a power which could not be delegated at all, or that the President's vote was invalid because no joint resolution of the Congress instructing our Ambassador at the United Nations how to vote was obtained within a few days or hours before the vote was cast.

On the contrary, the Court treated the President's power to interpret and apply the United Nations Charter in the Rhodesian case as complete and obvious, and entirely valid until Congress, several years later, overruled the President on the matter. The decision of Congress, the Court said, made the United States "a certain treaty-violator,"¹ and perhaps involved it in international obligations for breach of the treaty, as was the case when Congress abrogated the alliance with France in 1798.² But whether the United States decides to carry out a treaty of this character, or to breach it; or how it decides to interpret and apply such a treaty, are political decisions entrusted by the Constitution to the discretion of the President and the Congress—the President in the first instance, and Congress ultimately. Congress can support the President's initial application of the Treaty by its silence, as was the case in the Rhodesian affair for 5 years, or by affirmative action, through joint resolutions, appropriation bills, or otherwise. And Congress can overrule the President.

3. Mr. Berger reproaches me for not commenting on Madison's reply to Hamilton's defense of the constitutionality of the President's Neutrality Proclamation of 1793. The episode was not one of the most attractive in the careers either of Jefferson or of Madison. Jefferson, having supported the President in the decision to issue a Presidential Proclamation of Neutrality, "was quite ready to make whatever political capital he could out of the opposition to it," as Professor Corwin points out.³ Becoming alarmed at the political effect of Hamilton's defense of the constitutionality of a Presidential Proclamation of Neutrality, Jefferson induced Madison to enter the lists, although Madison was reluctant, and took positions at variance with many of his earlier constructions of the Executive power, for example, on the problem of removals. I fully agree with Professor Corwin that in this instance, and on the particular issue of the President's authority to interpret and apply treaties in the first instance, Hamilton's view has prevailed.⁴

4. Mr. Berger refers to Senator Wiley's statements on the floor of the Senate with regard to the Korean Treaty. To me, the differences between Senator Fulbright and Senator Wiley on this point simply confirm the correctness of Senator Cooper's judgment that the issue has never in fact been resolved.

The true problem facing the Nation is not whether Congress has the exclusive power to authorize a state of war—no one contests that fact—but how to distinguish those acts or threats of force which the President may appropriately initiate, in the course of diplomacy, in executing the treaty obligations of the United States, in defense of the United States, or in asserting the rights of the Nation under international law; and (2) when, and how, the concurrence of Congress should be obtained.

In my view, Mr. Berger's answer to these questions is simplistic, and unconvincing.

Yours sincerely,

EUGENE V. ROSTOW.

¹ *Diggs v. Schultz*, 470 F. 2d 461, 466 (App. D.C., 1972).

² *Gray v. United States*, 21 Court of Claims 340 (1886).

³ Edward S. Corwin, "The President's Control of Foreign Relations" (1917), p. 16.

⁴ *Id.*, at p. 32. See also Corwin, "The President, Office and Powers" (1940), pp. 208-216.