

# THE WAR IN SOUTHEAST ASIA: A LEGAL POSITION PAPER\*

## INTRODUCTION

We do not need less criticism in time of war, but more. It is to be hoped that the criticism will be constructive, but better unfair criticism than autocratic suppression.

—Woodrow Wilson

**T**HIS document is submitted in the spirit expressed above by President Wilson. It was prepared in the hope that its presentation might help effect a change in the foreign policy of the United States in Southeast Asia. It is in a way a dissenting opinion, a rebuttal to the official justifications which have been offered for President Nixon's recent action in Cambodia and for the larger United States involvement in Viet Nam. At a time when irrationality and heightened emotionalism characterize the foreign policy debate on both sides, it is imperative that reasonable men make their voices heard.

The sections which follow deal with the legal questions arising out of the United States' actions in Southeast Asia. Though recognizing that many nonlegal factors must be involved in the determination of foreign policy, we believe that the threshold questions must be legal in nature. This is particularly true in any society predicated on the rule of law, where official actions, however wise, can be acceptable only if legally justifiable.

We recognize that any criticism of the Administration's foreign policy is always susceptible to the retort that those who criticize lack access to the numerous sources of information which the President has at his command. This argument, however, if pressed beyond its reasonable limits, would totally isolate the President's policies from public debate. When accepted by members of Congress, it becomes particularly dangerous, as it inhibits the legislative branch from the proper exercise of its constitutional responsibilities. As Congressman Abraham Lincoln observed about another President in another war:

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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 purpose—and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect, after you have given him so much as you propose.<sup>1</sup>

## PART ONE QUESTIONS UNDER DOMESTIC LAW

### I

#### CHARACTERIZATION OF THE CONFLICT

The President may not act unilaterally to initiate or conduct a war. Indeed, Article I, Section 8 of the Constitution specifically provides that the power “to declare war” shall rest with Congress. The initial question in this discussion must thus be whether the present Southeast Asian conflict amounts to a “war” in the constitutional sense; if it does not, its conduct may well be within the executive prerogative.

American courts have traditionally given a broad interpretation to the term “war.” The Supreme Court in the *Prize Cases*<sup>2</sup> held that a state of war exists whenever a nation prosecutes its rights by force. While it is doubtful that any modern court would employ so sweeping a definition, it is clear that when a given conflict reaches a certain level of intensity, the constitutional requirement is satisfied. In 1953 in *United States v. Bancroft*,<sup>3</sup> the Court of Military Appeals, construing the term “war” as used in the Uniform Code of Military Justice, stated:

We believe a finding that this is a time of war . . . is compelled by the very nature of the conflict; the manner in which it is carried on; the movement to, and the presence of large numbers of American men and women on the battlefields . . . ; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service . . . ; and the tremendous sums being expended. . . .<sup>4</sup>

Application of these criteria to the Southeast Asian conflict reveals that it qualifies as a war. Since 1965 over 2,500,000 Americans have served in Southeast Asia. Present troop strength is reported at 427,000; however, such strength has in the past been as great as 543,400. Of these, 41,733 have been killed and

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<sup>1</sup> E. Corwin, *The President: Office and Powers* 451 (1964).

<sup>2</sup> 67 U.S. (2 Black) 635 (1863).

<sup>3</sup> 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

<sup>4</sup> *Id.* at 5, 11 C.M.R. at 5.

275,724 wounded—more casualties than the United States suffered in World War I. The monetary cost of the war is also telling. At the beginning of 1969, the Defense Department stated that the cost of the war was about \$28 billion per year. To this date the war has cost Americans \$104.5 billion.<sup>5</sup> In 1968 over 50 per cent of the nation's entire airpower was committed to military activities in Viet Nam.<sup>6</sup> In addition, more bomb tonnage has been dropped in Southeast Asia than was dropped on America's European enemies during World War II.<sup>7</sup> These factors clearly indicate that the Southeast Asian conflict is in fact a "war."<sup>8</sup>

## II

### LIMITS ON THE PRESIDENT'S POWER AS COMMANDER-IN-CHIEF

Having determined that the Southeast Asian conflict is a war in the constitutional sense, it follows that the President's power to initiate or conduct military activities is narrowly circumscribed. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court in 1952 ruled that there are only two sources of presidential power—an express grant from the Constitution itself or a constitutionally valid act of Congress.<sup>9</sup> The following paragraphs will demonstrate that the President lacks authority to conduct present military operations in Southeast Asia since the power "to declare war" is expressly entrusted to Congress and thereby removed from the presidential prerogative. Further, it will be shown that Congress has not exercised this power through a delegation to the President or otherwise.

#### *A. President's Military Power Under the Constitution*

##### *1. Legislative History*

Article II, Section 2 of the Constitution provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States," but the legislative history of the Commander-in-Chief clause indicates that the power so delegated to the President was quite limited in scope. The Constitution was written with the desire to avoid many of the evils of the monarchies of Europe. The Framers were aware that while kings and princes

<sup>5</sup> The figures in this paragraph were supplied by the Department of Defense in a telephone conversation of May 11, 1970.

<sup>6</sup> 114 Cong. Rec. 6490 (daily ed. 1968) (remarks of Senator Young).

<sup>7</sup> See note 5 *supra*.

<sup>8</sup> *United States v. Anderson*, 17 U.S.C.M.A. 588, 594, 38 C.M.R. 392, 398 (1968) (Ferguson, J., concurring).

<sup>9</sup> 343 U.S. 579, 585 (1952).

made wars, it was the people who paid with their money and lives. Thus, by voice vote the Constitutional Convention refused a proposal to give the President the power to declare war and limited his powers instead to those of Commander-in-Chief.<sup>10</sup> These Presidential powers were intended to be substantially less than those traditionally exercised by the English monarch. Though the king could declare war and raise and regulate armed forces, the Constitution reserved these powers in the new republic to Congress alone. The President's power as Commander-in-Chief was intended to be nothing more than the supreme command and direction of the military and naval forces as "first general and admiral of the confederacy."<sup>11</sup> The President was not to be vested with vast war powers which could be exercised arbitrarily and without authorization.

Another clear expression of the limited extent of the President's power is found in Article I, Section 8, which grants to Congress the power "to declare war." The original draft of the Constitution conferred upon Congress the power to "make" war, but several delegates objected that this terminology might lead to an interpretation that the President might himself commence a war. To render such an interpretation impossible, the draft was amended by substituting the word "declare."<sup>12</sup>

## 2. *Early Cases*

The Supreme Court has upheld the limitations on the President's war power intended by the Framers of the Constitution in those few cases that have dealt with the President's power as Commander-in-Chief. In *Little v. Barreme*,<sup>13</sup> the Court held that the President had exceeded his powers in ordering the Navy to seize ships coming from French ports, since Congress' consent to hostilities was limited to ships going to French ports. In *Fleming v. Page*,<sup>14</sup> the Court, while not expressly deciding the point, nevertheless addressed itself to the scope of the President's war-making power. "His duty," wrote the Court, "and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by

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<sup>10</sup> J. Madison, *Debates in the Federal Convention of 1787*, at 418-19 (G. Hunt & J. Scott eds. 1920).

<sup>11</sup> *The Federalist* No. 69, at 516 (J. Hamilton ed. 1882) (A. Hamilton).

<sup>12</sup> 2 J. Madison, *Journal of the Federal Convention* 548 (Scott ed. 1893). See also 2 M. Farrand, *The Records of the Federal Convention* 313, 318-19 (1911).

<sup>13</sup> 6 U.S. (2 Cranch) 170 (1804).

<sup>14</sup> 50 U.S. (9 How.) 602 (1850).

law at his command . . . ."<sup>15</sup> In *Ex Parte Milligan*,<sup>16</sup> the Court held that the President's military power to establish military courts of general jurisdiction could not be exercised in areas where constitutionally established courts were in operation. In a concurring opinion Mr. Chief Justice Chase made the following observation pertaining to the division of military powers between the executive and legislative branches:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns. That power and duty belong to the President as commander-in-chief.<sup>17</sup>

From the statement of the Chief Justice one can clearly infer that neither branch may interfere with powers expressly granted to the other. Thus, the President, as Commander-in-Chief, may not interfere with either the powers of Congress to raise, support and govern the armed forces or to declare war.

### 3. *History of Executive Actions*

Both the legislative history of the Constitution and case law support the conclusion that the President may not unilaterally initiate and conduct a war. Indeed, were it not for numerous instances of the President's unilaterally taking military action, there would be little question of his inability to do so. In 1966, however, the Department of State sought, in part, to justify American involvement in Southeast Asia by citing 125 "similar" actions in which the President had ordered troops into action or position without obtaining prior congressional authorization.<sup>18</sup> A closer examination of these instances reveals the dangerously misleading nature of the Department's assertion.

The early history of congressional involvement in military affairs demonstrates that Congress in no sense abdicated its constitutional responsibilities. In the so-called "undeclared war" with France (1798-1800), President Adams felt the need for congressional authorization to wage what amounted to only a limited war.<sup>19</sup> A unanimous Supreme Court affirmed the con-

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<sup>15</sup> *Id.* at 614.

<sup>16</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>17</sup> *Id.* at 139.

<sup>18</sup> Department of State, Office of the Legal Adviser, Legality of the United States Participation in the Defense of Vietnam, 60 Am. J. Int'l L. 565, 579 (1966) [hereinafter Memorandum].

<sup>19</sup> M. Pusey, *The Way We Go to War* 62 (1969).

gressional role in *Bas v. Tinney*<sup>20</sup> where Justice Chase stated: "Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in object, in time."<sup>21</sup>

When President Jefferson took action against the Tripolitan pirates in December 1801, he instructed the Navy to protect Americans but nevertheless restrained the United States forces from any but defensive actions without congressional approval.<sup>22</sup> In December 1801 Jefferson went to Congress requesting authority<sup>23</sup> to take offensive measures, which was ultimately granted.<sup>24</sup> In December 1805 Jefferson, fearing Spain might violate the Louisiana border, asked Congress for authority to use appropriate protective force.<sup>25</sup> The Congress thought it unwise, however, and demurred.<sup>26</sup>

Even the Monroe Administration, which in 1823 boldly announced a forceful United States foreign policy, showed deference to the constitutional authority of the Congress. Secretary of State John Quincy Adams informed the Colombian ambassador that in reference to the use of military force under the Monroe Doctrine: "[B]y the Constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government."<sup>27</sup>

While there are several instances of the President's sending United States forces abroad, at no time during these early years did the President wage a war, limited or otherwise, without the full consent of Congress. In the nineteenth century there were some apparent deviations from the policy of congressional participation in military affairs, but in each case Congress vigorously asserted its prerogative. In May 1846 President Polk unilaterally undertook military operations against Mexico in response to what was arguably an invasion of United States territory. On January 3, 1848, the House of Representatives declared that the war was "unnecessarily and unconstitutionally begun by the President of the United States."<sup>28</sup> The Congress was similarly outspoken eight years later when President Pierce authorized United States

<sup>20</sup> 4 U.S. (4 Dall.) 35 (1800).

<sup>21</sup> *Id.* at 43.

<sup>22</sup> 1 T. Jefferson, *A Compilation of the Messages and Papers of the Presidents* 327 (J. Richardson ed. 1896).

<sup>23</sup> 7 *Annals of Congress* 19 (1851).

<sup>24</sup> *Id.* at 327-29; 8 *Annals of Cong.* 1210-25 (1852).

<sup>25</sup> III *Abridgement of Debates of Cong.* 348-49 (1857).

<sup>26</sup> Jefferson, *supra* note 22, at 389-90.

<sup>27</sup> *The Record of American Diplomacy* 185 (R. Bartlett ed. 1956).

<sup>28</sup> E. McCormac, *James K. Polk—A Political Biography* 530 (1922).

shelling of Greytown, Nicaragua.<sup>29</sup> At the beginning of the twentieth century the President again acknowledged congressional authority by seeking legislative authorization for military actions against Spain.<sup>30</sup> The pattern of the formative years of the nation's history is clear—all three branches of government recognized Congress' sole authority to initiate and conduct war.

In recent years the President has acted more independently than before in commencing military actions, but the constitutional import of these unilateral uses of force remains unclear. In the first place, of the numerous instances cited by the Department of State, it is uncertain how many qualify as "wars" in the constitutional sense. Secondly, assuming *arguendo* that a sufficient number so qualify, it is by no means clear that such exercises of executive prerogative can operate to expand the Presidential powers granted by the Constitution.

The *only* conflict of this century which was arguably instituted by unilateral presidential action and which rivaled the present Southeast Asian situation in terms of duration, costs and troop commitment was the Korean conflict. The Korean "police action," which lasted for some three years, ultimately proved to be the fourth largest war in the nation's history, costing some 30,000 lives and scores of billions of dollars.<sup>31</sup> Moreover, some members of Congress, regarding the conflict as a "war," had grave doubts as to its constitutional propriety. Senator Robert S. Taft of Ohio, for example, stated that by sending American forces to Korea at his own discretion and without legislative authorization, the President had "usurped power and violated the Constitution and laws of the United States."<sup>32</sup>

Some constitutional theorists have argued that a history of unchallenged executive practices can put a "gloss" on the Constitution, *i.e.*, that a history of congressional acquiescence in the exercise of a power by the President may create the authority for that exercise where it does not otherwise exist under the Constitution. The Supreme Court adopted this position in *United States v. Midwest Oil Co.*<sup>33</sup> The Court ruled that the long-continued practice of the President, with the tacit acquiescence of Congress, of withdrawing certain public lands that would other-

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<sup>29</sup> F. Wormuth, *The Vietnam War: The President Versus the Constitution*, in *The Vietnam War 2nd International Law 24* (R. Falk ed. 1968).

<sup>30</sup> 31 Cong. Rec. 3699 (1898).

<sup>31</sup> A. Kelley & W. Harbison, *The American Constitution* 858 (3d ed. 1963).

<sup>32</sup> *Id.*

<sup>33</sup> 236 U.S. 459 (1915).

wise have been open to private acquisition, operated as a grant of implied power to the President to continue such withdrawals.

As the *Midwest* Court made clear, the finding of such implied power depended on the existence of a long-continued executive practice coupled with congressional acquiescence. But the proposition that the President acting unilaterally can take this country to war in the constitutional sense can be justified if at all, only on the basis of the Korean precedent, an argument which scarcely demonstrates a long-continued executive practice. Moreover, assuming that any life remains in the *Midwest* holding, neither that case nor any other Supreme Court case has ever held that an implied grant of power to the President may be found as a result of congressional acquiescence in the exercise of a Presidential power expressly granted to Congress by the Constitution. Thus, it is doubtful that even the rationale of the *Midwest* case could be applied to executive exercise of Congress' war power.

Further, the Supreme Court itself in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>34</sup> has virtually abandoned the *Midwest* holding. Ruling that President Truman's seizure of a steel mill without congressional authority could not be justified by virtue of the fact that previous Presidents had acted similarly, the Court observed:

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."<sup>35</sup>

The Court's holding seems eminently reasonable, for otherwise we are left in the absurd position of affirming the proposition that the President can increase his power by means themselves unconstitutional.

#### 4. *President's Power to Repel Attack*

The Government has argued, quite correctly, that the power of the President as Commander-in-Chief includes the power to engage in hostilities, without congressional authorization, in order to repel armed attack against the country. At the Constitutional Convention the wording of the provision granting Congress the

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<sup>34</sup> 343 U.S. 579 (1952).

<sup>35</sup> *Id.* at 588-89.



power to "make" war was changed allowing Congress to "declare" war instead. The reason for the change was, *inter alia*, to permit the President to defend against attacks on his own initiative, as Congress might be slow to meet such an emergency.<sup>36</sup> This exception to the exclusivity of Congress' power to declare war is, however, narrowly circumscribed.

As previously observed, in granting the power to initiate war solely to Congress, it was the Framers' intention that a decision of such gravity should be made only by the representatives of the people. The emergency power of the President to repel attack must be construed in light of this primary intent. While it is perfectly natural that the President was granted sufficient powers to protect the nation from irreparable harm in situations where the Congress could not be convened, that power must be viewed as only temporary. This was clearly the understanding of James Madison, who asserted that Congress retained most of the war power, thereby allowing the President to repel attacks but not to commence war.<sup>37</sup>

Early Presidential actions support Madison's interpretation. In 1801 President Jefferson, though directing the Navy to take defensive measures against Tripolitan pirates, sought and received a congressional grant of authority before authorizing offensive actions.<sup>38</sup> In 1805 Jefferson, fearing an attack by Spain across the Louisiana border, asked Congress for authority to use appropriate protective force. Although his request was denied, the fact that Jefferson felt constrained to seek congressional authorization indicates the narrowness with which he construed his "defensive" powers.<sup>39</sup>

#### *B. President's Military Powers Under Congressional Authority*

From the above discussion it is apparent that the President derives no authority from the Constitution unilaterally to initiate a war. Such power is vested only in Congress. The question remains, however, whether Congress may to any extent or under any circumstances delegate its exclusive military power to the Chief Executive. In *Panama Refining Co. v. Ryan*,<sup>40</sup> the Supreme Court ruled that Congress may delegate certain of its powers to selected agents. In *Schechter Poultry Corp. v. United States*,<sup>41</sup>

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<sup>36</sup> See Madison, *supra* note 10, at 418-19.

<sup>37</sup> *Id.*

<sup>38</sup> See Jefferson, *supra* note 22, at 327.

<sup>39</sup> *Id.*

<sup>40</sup> 293 U.S. 388 (1935).

<sup>41</sup> 295 U.S. 495 (1935).

the Court ruled that any such delegation must be sufficiently specific as to the nature and scope of the powers authorized and as to the circumstances in which they may be exercised. The following discussion will demonstrate that Congress has not delegated authority to the President to make the Cambodian incursion or to wage the Viet Nam war.

### III

#### THE CAMBODIAN INCURSION

We can discern no possible legal justification for the President's actions in Cambodia. Many arguments have been advanced in favor of the legality of American operations in Viet Nam. While we find none of these persuasive (as shall be demonstrated below), they are at least arguable. One searches the record in vain, however, for any evidence which supports the constitutionality of the President's actions in Cambodia.

The President, in his speech of April 30, 1970, offered at most one justification for unilaterally ordering the incursion into Cambodia—his power as Commander-in-Chief.<sup>42</sup> The President has no power as Commander-in-Chief to initiate or conduct a war save in the case of an armed attack. The question thus arises whether the President's actions in Cambodia were in response to an armed attack. As will be discussed more fully later in this paper,<sup>43</sup> no military forces were deployed from Cambodian sanctuaries against troops of either the United States or South Viet Nam in a manner to make executive action imperative without congressional consultation.<sup>44</sup> Hence, the narrow constitutional requirements for unilateral Presidential action were not satisfied.<sup>45</sup>

Since the President had no power to initiate the Cambodian operation unilaterally, his actions can be justified constitutionally only if undertaken pursuant to congressional authorization. We are unable to find such a legislative grant, nor has the Government to date suggested one. None of the legal arguments advanced to show congressional authorization for United States presence in Viet Nam can be made with regard to our involvement in Cambodia. For example, the Gulf of Tonkin Resolution<sup>46</sup> in its broadest interpretation cannot be stretched to authorize

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<sup>42</sup> Address by President Nixon, April 30, 1970, reprinted in *N.Y. Times*, May 1, 1970, at 2, col. 1. See Documentary Supplement *infra*.

<sup>43</sup> See Part Two *infra*.

<sup>44</sup> See text accompanying note 36 *supra*.

<sup>45</sup> See text accompanying notes 36-39 *supra*.

<sup>46</sup> 78 Stat. 384 (1964). See Documentary Supplement *infra*.

the present incursion. Even assuming that this resolution authorizes the American presence in Viet Nam, section 2 seems to limit our assistance to members or protocol states of the Southeast Asia Collective Defense Treaty (SEATO), a category that does not include Cambodia.<sup>47</sup> Likewise, Congress has neither appropriated funds for military activities in Cambodia nor specifically authorized troop commitments there. Indeed, the evidence suggests that the only congressional consideration of possible Cambodian activities resulted in opposition to such a commitment by the Senate Foreign Relations Committee.<sup>48</sup>

In view of these conclusions, it is most disturbing that the President, being the officer of the Government expressly entrusted with the responsibility to see that the laws of the land are faithfully enforced, should so blatantly ignore his constitutional responsibilities. Such action can only serve to undermine confidence in the President and to exacerbate the growing disrespect for law throughout the country.

#### IV

#### THE VIET NAM WAR

We need not here repeat the reasons why the present conflict in Viet Nam qualifies as a war in the constitutional sense.<sup>49</sup> Nor need we remake the arguments relative to the consequences resulting from such a characterization, *viz.*, that the President lacks constitutional power to initiate or conduct a war without congressional authorization except in an emergency situation in response to an armed attack.<sup>50</sup>

Even conceding that the President's initial exercise of military power in Viet Nam might have qualified as an emergency action, we have seen that the authority created under such excep-

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<sup>47</sup> Sept. 8, 1954, [1955] 6 U.S.T. 81, T.I.A.S. No. 3170, 209 U.N.T.S. 28 (effective Feb. 19, 1955). See Documentary Supplement *infra*.

<sup>48</sup> See N.Y. Times, Apr. 28, 1970, at 1, col. 8. It is also appropriate to note that on June 25, 1969, the Senate by a vote of 70-16 passed the so-called "National Commitments Resolution." S. Res. 85, 91st Cong., 1st Sess. (1969). The Resolution was generally hailed as a congressional attempt to reassert its voice in decisions committing United States forces for use in foreign territories. It provides:

Whereas accurate definition of the term "national commitment" in recent years has become obscured: Now, therefore, be it *Resolved*, That it is the sense of the Senate that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment.

<sup>49</sup> See Section I of this Part *supra*.

<sup>50</sup> See Section II of this Part *supra*.

tion expires when it is first possible to place the matter before Congress.<sup>51</sup> The President himself tacitly acknowledged this limitation in seeking the Gulf of Tonkin Resolution from Congress in August 1964. Since it is impossible to justify our present military actions in Viet Nam as a response to an armed attack, the sole remaining question is whether Congress itself has authorized such actions in any constitutionally permissible manner.

### A. *Gulf of Tonkin Resolution*

The executive branch has repeatedly claimed that the Gulf of Tonkin Resolution<sup>52</sup> constitutes congressional authorization for the extensive military operations in Viet Nam. Indeed, Under Secretary of State Katzenbach went so far as to call the resolution the "functional equivalent" of a congressional declaration of war.<sup>53</sup> An examination of the legislative history of the resolution, however, does not support this conclusion.

Statements made on the floor of Congress and in hearings before congressional committees indicate the limited nature of legislative intent with respect to the resolution. Senator Fulbright, one of the sponsors, indicated that the purpose of the resolution was "to prevent the spread of war, rather than to spread it."<sup>54</sup> Further, the message from President Johnson in support of the congressional authorization stated in part: "As I have repeatedly made clear, the United States intends no rashness and seeks no wider war."<sup>55</sup> The executive branch also promised that Congress would not be ignored after enactment of the resolution. Secretary of State Rusk declared: "[I]f the Southeast Asia situation develops . . . there will continue to be close and continuous consultation between the President and Congress."<sup>56</sup>

During the Senate debates Senator Brewster stated that he "would look with dismay on the landing of large armies on the continent of Asia," and asked Senator Fulbright if the resolution would approve "the landing of large American armies in Vietnam or China."<sup>57</sup> Senator Fulbright replied: "There is

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<sup>51</sup> See Madison, *supra* note 10, at 419.

<sup>52</sup> 78 Stat. 384 (1964). See Documentary Supplement *infra*.

<sup>53</sup> Senate Comm. on Foreign Relations, Statement of Nicholas deB. Katzenbach, Nat'l Commitments to Foreign Powers, S. Rep. No. 797, 90th Cong., 1st Sess. 82 (1967) [hereinafter Nat'l Commitments Hearing].

<sup>54</sup> 110 Cong. Rec. 18,462 (1964).

<sup>55</sup> 110 Cong. Rec. 18,132 (1964).

<sup>56</sup> Statement of Secretary of State Dean Rusk, Joint Hearing on Southeast Asia Resolution Before the Senate Comm. on Foreign Relations and the Senate Comm. on Armed Services, 88th Cong., 2d Sess. 4 (1964).

<sup>57</sup> 110 Cong. Rec. 18,403 (1964).

nothing in the Resolution, as I read it, that contemplates it. I agree with the Senator that that is the last thing he would want to do."<sup>58</sup> In the House Representative Thomas Morgan, Chairman of the House Committee on Foreign Affairs, stated unequivocally: "The Resolution is definitely not an advance declaration of war. The committee has been assured by the Secretary of State that the constitutional power of Congress in this respect will continue to be scrupulously observed."<sup>59</sup> In summary, the legislative history demonstrates beyond doubt that in passing the Gulf of Tonkin Resolution Congress did not intend to declare war or to authorize the sustained, large-scale hostilities which have resulted.

*B. Ratification by Appropriation of Funds  
or by Congressional Inaction*

Proponents of the Administration's position have argued that by appropriating funds to support the military in Viet Nam, Congress has thereby authorized our participation in the war. This argument, however, cannot stand under scrutiny.

Whether a Congressman agrees or disagrees with the policy of the President in Southeast Asia, he can neither morally nor politically deny weapons, shelter and food to American soldiers facing daily attack. Congress is forced to appropriate money to keep American soldiers alive, even if their lives are endangered solely as a result of executive usurpation of Congress' power to declare war. This fact has been recognized both by those who have supported the President's policy and by those who have opposed it. Senators Richard Russell,<sup>60</sup> Sam Ervin,<sup>61</sup> Joseph Clark,<sup>62</sup> Peter Dominick,<sup>63</sup> Bourke Hickenlooper,<sup>64</sup> and Representative Paul Findley<sup>65</sup> have all recognized that Congress had no choice but to protect the lives of soldiers already in the field. In addition, before passing a Viet Nam appropriations bill in March 1966, numerous Congressmen and Senators indicated that their votes were not to be interpreted as authorizing large-scale military escalation.<sup>66</sup>

Ratification by appropriation is constitutionally impermis-

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<sup>58</sup> Id.

<sup>59</sup> 100 Cong. Rec. 18,539 (1964).

<sup>60</sup> 112 Cong. Rec. 4370, 4372 (1966).

<sup>61</sup> Nat'l Commitments Hearing, *supra* note 53, at 219-20.

<sup>62</sup> 112 Cong. Rec. 4382 (1966).

<sup>63</sup> Nat'l Commitments Hearing, *supra* note 53, at 246.

<sup>64</sup> Id. at 219, 248.

<sup>65</sup> Id. at 235.

<sup>66</sup> N.Y. Times, Mar. 1, 1966, at 1, col. 7.

sible for another reason. In *Greene v. McElroy*,<sup>67</sup> the Supreme Court stated that where executive action is of dubious constitutionality, it is not sufficient to argue that Congress has impliedly ratified the action by appropriating money. Explicit ratification is necessary to insure "careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."<sup>68</sup> Thus, appropriation of funds to keep American soldiers alive constitutes neither congressional approval of the President's policy nor, even if such approval were intended, the necessary explicit ratification of the President's actions required by the Constitution.<sup>69</sup>

The above principles apply with even greater force to the argument that ratification of presidential actions in Viet Nam may be implied from congressional acquiescence. Since the Supreme Court has held that ratification cannot be implied from the affirmative act of appropriation, *a fortiori*, congressional inaction cannot be construed as constituting the necessary ratification. The decision of the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>70</sup> supports this conclusion. Holding that Presidential seizure of a steel mill could not be justified on grounds that previous Chief Executives had taken similar actions without congressional approval, the Court concluded that the failure of Congress to disapprove the former exercises of Presidential power in no way reduced Congress' "exclusive constitutional authority" in the field.<sup>71</sup>

## PART TWO

### QUESTIONS UNDER INTERNATIONAL LAW

#### I

##### CAMBODIA

###### *A. Collective Self-Defense Under the United Nations Charter*

The legal justification under international law for the incursion of United States forces into Cambodia was presented in a

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<sup>67</sup> 360 U.S. 474 (1959).

<sup>68</sup> *Id.* at 507.

<sup>69</sup> See text accompanying notes 40-41 *supra*.

<sup>70</sup> 343 U.S. 579 (1952). See text accompanying notes 34-35 *supra*.

<sup>71</sup> 343 U.S. at 588.

letter of May 5, 1970, from the Permanent Representative of the United States to the United Nations, Ambassador Charles Yost, to the President of the Security Council.<sup>72</sup> The letter stated that the United States action in Cambodia was taken as a measure of "collective self-defense."<sup>73</sup> In essence, this same justification has been employed to explain all United States military actions in Viet Nam and it forms the foundations of the March 1966 Department of State Memorandum on the legality of United States participation in the defense of Viet Nam.<sup>74</sup>

It is important, therefore, to consider the meaning of the concept of "collective self-defense" as embodied in Article 51 of the United Nations Charter.<sup>75</sup> Article 51 constitutes an exception to the basic article 2(4) obligation of members of the United Nations to "refrain in their international relations from the threat or use of force." Article 51 states in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security." Military action taken in self-defense which does not satisfy the article 51 exception results in a *prima facie* violation of the obligations assumed under the Charter. The invocation of self-defense as the justification for the use of force depends on the satisfaction of two preconditions: (1) the existence of an "armed attack" and (2) a response proportionate to that attack.<sup>76</sup>

### 1. *Armed Attack*

The United States asserted no credible claim of an actual, physical armed attack on allied forces in South Viet Nam. The right of collective self-defense is the right of the state which has been the victim of an armed attack, not of a would-be protector. Even assuming that the *threat* of an armed attack would qualify as an armed attack under article 51, the military activities of North Vietnamese troops in Cambodia merely raised

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<sup>72</sup> United States Notification to the United Nations Security Council of Self-defense Measures Taken by the United States and the Republic of Viet-Nam Armed Forces, U.N. Doc. S/9781 (1970) [hereinafter Yost Letter]. See Documentary Supplement *infra*.

<sup>73</sup> *Id.* at 1. See Documentary Supplement *infra*.

<sup>74</sup> Memorandum, *supra* note 18, at 565.

<sup>75</sup> U.N. Charter art. 51. See Documentary Supplement *infra*.

<sup>76</sup> Falk, *International Law and the United States Role in the Viet Nam War*, 75 *Yale L.J.* 1122, 1135-36, 1143 (1966).

the possibility of an attack. But this possibility was so remote in time as to fall outside the meaning of a "threat of armed attack."

Traditionally, the use of armed force against another nation in self-defense has been restricted. For example, the *Caroline*, an American vessel used for supplies and communication in a Canadian insurrection, was boarded in an American port at midnight by an armed group acting under the orders of a British officer. The boarding party set the vessel afire and let it drift over Niagara Falls. The United States protest resulted in an apology by Lord Ashburton, the British Special Commissioner to the United States. In a note of reply of August 6, 1842, Secretary of State Webster stated the limited circumstances in which self-defense may be used:

[R]espect for the inviolable character of the territory of independent states is the most essential foundation of civilization . . . . Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation."<sup>77</sup>

When the United Nations Charter was originally drafted, an armed attack was generally understood as an action through which a state sought the initiative by the violent exercise of physical power.<sup>78</sup> Since then, some have argued for an expanded concept which would include a military process rather than a single, hostile, offensive event.<sup>79</sup> The Department of State's 1966 Memorandum espoused this broadened concept. Specifically, the Memorandum argued that the concept of an armed attack includes the processes of externally supported subversion, clandestine provision of arms, infiltration of armed personnel, and introduction of regular units of the North Vietnamese Army into South Viet Nam.<sup>80</sup>

The Department of State's broad description of armed attack fails to fall within Secretary Webster's more restricted definition. Many modern treaty instruments of the United States define an armed attack in a limited way which resembles

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<sup>77</sup> 2 J. Moore, *A Digest of International Law* § 217, at 412 (1906). See also R. Hull & T. Novogrod, *Law and Vietnam* 139-47 (1968).

<sup>78</sup> Alford, *The Legality of American Military Involvement in Viet Nam: A Broader Perspective*, 75 *Yale L.J.* 1109, 1114 (1966).

<sup>79</sup> *Id.* at 1113.

<sup>80</sup> Memorandum, *supra* note 18, at 565.



Webster's definition and not that of the Department of State.<sup>81</sup> For example, Article 25 of the Charter of the Organization of American States<sup>82</sup> differentiates unequivocally between an armed attack and other forms of aggression. This distinction is also found in Articles 3 and 6 of the Inter-American Treaty of Reciprocal Assistance of 1947,<sup>83</sup> in the North Atlantic Treaty of 1949,<sup>84</sup> and in the United States-Japanese Treaty of Mutual Cooperation and Security of 1960.<sup>85</sup> In each treaty, measures of collective self-defense taken against an armed attack are justified under Article 51 of the United Nations Charter.

Even more revealing is Article 2 of the SEATO Treaty,<sup>86</sup> which specifically distinguishes between armed attack and "subversive activities directed from without." Article 4(1) authorizes unilateral action in response to "aggression by means of armed attack" and requires an immediate report of the action to the Security Council of the United Nations. Moreover, article 4(2) provides for consultation in case of threats "in any way *other* than by armed attack" or "by any *other* fact or situation which might endanger the peace of the area." (Emphasis added.)

The United States clearly sought to conform Article 4(1) of SEATO to Article 51 of the United Nations Charter to allow unilateral use of armed force only in case of an armed attack,<sup>87</sup> and article 51 has always been understood to embody a narrow construction of armed attack.<sup>88</sup> Thus, United States incursions into Cambodia could only be justified under article 51 if they were in response to an armed attack emanating from Cambodia.

President Nixon described the alleged threat from within Cambodia in his televised address to the Nation on April 30, 1970, as follows:

North Vietnam in the last two weeks has stripped away all pretense of respecting the sovereignty or neutrality of Cambodia. Thousands

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<sup>81</sup> Armed attack is also the controlling term in the Warsaw Treaty which established the Warsaw Pact. See 219 U.N.T.S. 3 (effective Oct. 10, 1955).

<sup>82</sup> Apr. 30, 1948, [1951] 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 (effective Dec. 3, 1951).

<sup>83</sup> Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (effective Dec. 3, 1948).

<sup>84</sup> Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243 (effective Aug. 24, 1949).

<sup>85</sup> Jan. 19, 1960, [1960] 11 U.S.T. 1632, T.I.A.S. No. 4509, 372 U.N.T.S. 267 (effective Aug. 12, 1960).

<sup>86</sup> SEATO Treaty art. 2. See note 47 supra.

<sup>87</sup> Hearing on Executive K Before the Senate Comm. on Foreign Relations, 83d Cong., 2d Sess., pt. 1, at 4 (1954).

<sup>88</sup> Lawyers Comm. on American Policy Towards Viet Nam, Vietnam and International Law 27 (1967) [hereinafter Lawyers Comm.].

of their soldiers are invading the country *from the sanctuaries*; they are encircling the capital of Phnom Penh. Coming from these sanctuaries, as you see here, they have moved into Cambodia and are encircling the capital.

[I]f this enemy effort succeeds, Cambodia would become a vast enemy staging area and a springboard for attacks on South Vietnam along 600 miles of frontier—a refuge where enemy troops could return from combat without fear of retaliation.<sup>89</sup>

Apparently, the attack to which the President referred was the increasingly intensive strife between Cambodian and North Vietnamese forces. The joint United States—South Vietnamese response involved an attempt to prevent a defeat of the Government in Phnom Penh. Indeed, the President confirmed this view in a later portion of his speech: “[T]he aid we will provide will be limited *for the purpose of enabling Cambodia to defend its neutrality* and not for the purpose of making it an active belligerent on one side or the other.”<sup>90</sup>

Ambassador Yost’s letter to the President of the Security Council referred to base areas maintained for five years by the North Vietnamese in Cambodia for purposes of conducting military operations against South Viet Nam.<sup>91</sup> The letter identified the developments which triggered United States’ action as the expansion by the North Vietnamese of the perimeters of their base areas, the expulsion of any remaining Cambodian presence in those areas, the linking of the base areas into a continuous chain along the South Vietnamese border, and the extension of the bases deeper into Cambodian territory.<sup>92</sup> The letter asserted that North Vietnamese forces were massing in those areas in preparation for attacks against South Viet Nam.<sup>93</sup>

Both President Nixon’s address and the Yost letter displayed concern over the enlargement and extension of military staging areas in Cambodia. Certainly the use of all of Cambodia as a base of operations against South Viet Nam would increase the strength and flexibility of North Vietnamese operations. However, it strains both language and credibility to consider the enlargement of a base of operations as an armed attack.

One might properly characterize North Vietnamese activity in Cambodia as an effort to facilitate the threat of an armed attack.

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<sup>89</sup> N.Y. Times, May 1, 1970, at 2, col. 2 (emphasis added). See Documentary Supplement *infra*.

<sup>90</sup> *Id.* at col. 3 (emphasis added).

<sup>91</sup> Yost Letter, *supra* note 72, at 1. See Documentary Supplement *infra*.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

But this threat was sufficiently distant in time as to render meaningless any attempt to equate the *threat* of armed attack with an "armed attack" as defined under article 51. The latent threat of hostile action launched from a neighboring state has not traditionally justified resort to armed force in preemptive self-defense.<sup>94</sup> For instance, in the Nuremberg trial of war criminals the court dealt with the defense "that Germany was compelled to attack Norway to forestall an allied invasion and her action was therefore preventive."<sup>95</sup> The tribunal said:

[I]t must be remembered that preventive action in foreign territory is justified only in case of "*an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment of deliberation.*" . . . From all this [evidence as to German belief regarding an allied attack on Norway] it is clear that when the plans for an attack on Norway were being made they were not made for the purpose of forestalling an imminent allied landing, but, at the most, that they might prevent an allied occupation at some future date. . . . In the light of all the available evidence it is impossible to accept the contention that the invasions of Denmark and Norway were defensive and in the opinion of the Tribunal they were acts of aggressive war.<sup>96</sup>

Thus, even if the threat of an armed attack qualifies as an armed attack, that threat must be imminent. But President Nixon, in response to a reporter's question at the President's press conference, indicated that the Administration considered that the threat might not materialize for at least one year.<sup>97</sup> Therefore, the United States crossed an international boundary and employed armed force in response to a threat which was by

<sup>94</sup> Lawyers Comm., *supra* note 88, at 1.

<sup>95</sup> Quoted in C. Bishop, *International Law* 778-79 (1962).

<sup>96</sup> *Id.* (emphasis added).

<sup>97</sup> Q. On April 20, you said Vietnamization was going so well that you could pull 150,000 American troops out of Vietnam. Then you turned around only 10 days later and said that Vietnamization was so badly threatened you were sending troops into Cambodia. Would you explain this apparent contradiction for us?

A. Well, I explained it in my speech of April 20, as you will recall, because then I said that Vietnamization was going so well that we could bring 150,000 out by the spring of next year, regardless of the progress in the Paris talks and the other criteria that I had mentioned.

But I also had warned at that time that increased enemy action in Laos, in Cambodia, as well as in Vietnam was something that we had noted and that *if I had indicated and if I found that that increased enemy action would jeopardize the remaining forces who would be in Vietnam, I would take strong action to deal with it.*

*I found that the action that the enemy had taken in Cambodia would leave the 240,000 Americans who would be there a year from now without many combat troops to help defend them would leave them in an untenable position. That's why I had to act.*

N.Y. Times, May 9, 1970, at 8, col. 1 (emphasis added).

no means imminent. Attempting to justify preemptive actions exclusively in terms of such a distant threat does violence to the clear meaning of article 51. Furthermore, such an overly broad definition of an armed attack eliminates the distinction between the concepts of armed attack and self-defense. A defensive measure which anticipates an attack by one year can itself be interpreted as an armed attack necessitating self-defensive measures.<sup>98</sup> To allow self-defense in circumstances which legally entitle the aggressor in turn to respond in self-defense is to destroy the purpose of the United Nations Charter, *i.e.*, to limit the use of self-defense only to a response to an immediate threat.<sup>99</sup>

As previously stated, the assertion of a claim of collective self-defense is the right of the victim state, not of the would-be protector.<sup>100</sup> Collective self-defense involves the right of a nation to request assistance in its defense. It differs fundamentally from any contention that third-party nations have a discretionary right to intervene by force in conflicts between other countries.<sup>101</sup> Thus, even if the North Vietnamese launched some sort of armed attack, the question of determining the victim of such an attack would remain. The North Vietnamese activity, according to the United States' argument, constituted an armed attack because such activity involved the enlarging of staging and supply areas within Cambodia, troop movement in the direction of Phnom Penh but within Cambodia, and the possibility of an eventual threat by North Vietnamese forces within Cambodia to remaining United States units in South Viet Nam.<sup>102</sup> On these facts it is clear that the asserted thrusts of North Vietnamese main force units were directed against Cambodia. Cambodia, therefore, was the victim of an armed attack.

The victim of an armed attack may invoke the justification of self-defense under the United Nations Charter.<sup>103</sup> There is no indication, however, that Cambodia asserted a claim of self-defense. Even if Cambodia had asserted such a claim, the United States could not legally have joined in an action of collective self-defense. Under the Charter the right of self-defense does not extend to a state which seeks to associate itself in the

<sup>98</sup> Falk, *supra* note 76, at 1136.

<sup>99</sup> For the legal justification of the right of self-defense in the U.N. Charter see L. Goodrich, E. Hambro & A. Simons, *Charter of the United Nations* 244-48 (1969).

<sup>100</sup> D. Bowett, *Self-Defense in International Law* 216-18 (1958).

<sup>101</sup> *Lawyers Comm.*, *supra* note 88, at 33.

<sup>102</sup> Yost Letter, *supra* note 72, at 1. See *Documentary Supplement infra*.

<sup>103</sup> U.N. Charter art. 51. See *Documentary Supplement infra*.

defense of a state acting in self-defense.<sup>104</sup> However, the United States did not invoke the doctrine of collective self-defense in conjunction with Cambodia, but in conjunction with South Viet Nam.<sup>105</sup> The latter was not in this instance a victim of any armed attack, the tenuous justification in the Yost letter notwithstanding. In addition, any assertion that South Viet Nam has been the victim of an armed attack from Cambodia for a five-year period cannot be sustained. The fact that such hostilities could continue over five years without requiring measures of self-defense indicates that these hostilities did not create a need for self-defense which was instant.

## 2. *Proportionality*

The second precondition necessary for the justification of the use of armed force in self-defense under article 51 is that the response must be proportionate to the attack.<sup>106</sup> A disproportionate response will transform an otherwise justifiable exercise of the right of self-defense into an act of aggression.<sup>107</sup>

Ambassador Yost's letter stated that "North Vietnam has stepped up guerrilla actions into South Vietnam and is concentrating its main forces in these base areas in preparation for further massive attacks into South Vietnam."<sup>108</sup> This factual assertion is not reflected in President Nixon's address of April 30 or his subsequent press conference of May 9. The President indicated that he was responding to the threat which would exist to United States forces following another withdrawal of 150,000 men should North Vietnamese forces succeed in consolidating their position in Cambodia through the overthrow of the Government of Premier Lon Nol or by a severe limitation of its power.<sup>109</sup> Without dwelling on this crucial discrepancy, one cannot seriously say that the incursion into Cambodia of at least 50,000 allied troops on six fronts with accompanying air support,<sup>110</sup> a flotilla of 140 gunboats<sup>111</sup> and a one-hundred mile allied blockade of the Cambodian coastline<sup>112</sup> was a proportion-

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<sup>104</sup> Lawyers Comm., supra note 88, at 33.

<sup>105</sup> Yost Letter, supra note 72, at 1. See Documentary Supplement infra.

<sup>106</sup> Falk, supra note 76, at 1143.

<sup>107</sup> Because art. 51 is an exception to the general rule that use of armed force without prior consultation with the United Nations is illegitimate, any use of armed force which does not fall within this exception is aggressive.

<sup>108</sup> Yost Letter, supra note 72, at 1. See Documentary Supplement infra.

<sup>109</sup> N.Y. Times, May 1, 1970, at 2, col. 3.

<sup>110</sup> N.Y. Times, May 10, 1970, § 4, at 3, col. 1.

<sup>111</sup> N.Y. Times, May 12, 1970, at 1, col. 2.

<sup>112</sup> N.Y. Times, May 13, 1970, at 1, col. 4.

ate response of self-defense to "stepped up guerrilla actions,"<sup>113</sup> the only alleged new military action emanating from Cambodia against South Viet Nam.

### *B. The Neutrality of Cambodia*

As President Nixon affirmed in his address of April 30, 1970, the United States has acknowledged Cambodian neutrality.<sup>114</sup> Respect for that neutrality was previously assured by a diplomatic note during the Johnson administration<sup>115</sup> and was reiterated on numerous occasions by repeated demands that North Viet Nam respect the neutrality and territorial integrity of Cambodia.<sup>116</sup>

Generally, a neutral state must remain impartial toward belligerents and a belligerent state must respect the neutral's impartiality.<sup>117</sup> A belligerent must also respect the territorial integrity of the neutral state. On the other hand, a neutral state is obligated to prevent the use of its territory for the launching of attacks by one belligerent upon another.<sup>118</sup> A neutral state has the further duty to protest such violations. Failure to do so would offend its duty to maintain impartiality.<sup>119</sup> However, the breach of its neutrality by either a belligerent state or the neutral state itself does not terminate neutral status.<sup>120</sup> Only a declaration of war or hostilities amounting to acts of war by one of the belligerents against the neutral will have that effect.<sup>121</sup>

The Administration has argued that North Vietnamese forces have violated the territorial integrity of Cambodia by utilizing Cambodia as a base for military operations against South Viet Nam.<sup>122</sup> These actions certainly did constitute a breach by North Viet Nam of Cambodian neutrality. But they have not terminated Cambodia's neutral status. Indeed, it has been the announced, albeit unsuccessful, policy of the Cambodian Gov-

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<sup>113</sup> Yost Letter, *supra* note 72, at 1. See Documentary Supplement *infra*.

<sup>114</sup> N.Y. Times, May 1, 1970, at 2, col. 1.

<sup>115</sup> United States Note to the Kingdom of Cambodia (Dec. 4, 1967), cited in 58 Dep't State Bull. 124 (1968).

<sup>116</sup> The most recent United States affirmation of Cambodian neutrality was made in an address by the Secretary of State entitled "Two Aspects of the Search for Peace." Address by Secretary of State William P. Rogers, Cornell Alumni Ass'n, Apr. 18, 1970. See Dep't State Publication 8525, Gen'l Foreign Policy Ser. 243 (May 1970).

<sup>117</sup> 2 L. Oppenheim, *International Law* 673-74 (7th ed. 1948).

<sup>118</sup> *Id.* at 704.

<sup>119</sup> *Id.* at 675.

<sup>120</sup> *Id.* at 752.

<sup>121</sup> *Id.* at 753.

<sup>122</sup> Yost Letter, *supra* note 72, at 1. See Documentary Supplement *infra*.

ernment to keep its territory free of armed Viet Cong troops.<sup>123</sup> Hence, under traditional principles of international law the movement of American forces into Cambodia is itself a violation of that state's neutrality unless some further justification can be shown.

The argument that Cambodia ratified the American action after it had taken place is not persuasive. In fact, two members of the Cambodian Government made an initial protest.<sup>124</sup> Clearly, the joint United States-South Vietnamese incursion constituted a fundamental breach of Cambodian neutrality and could not later be legally justified by Cambodian acquiescence, particularly since the Cambodian Government had little choice but to acquiesce.<sup>125</sup> Nor does the argument that the areas subjected to invasion were no longer under the effective political control of Cambodia justify the incursion. Political and military considerations do not diminish the right of the Government of Cambodia to maintain its territorial integrity and neutrality. Otherwise, one could argue that South Viet Nam could claim no rights over Viet Cong-held portions of its own territory. Finally, the argument that Cambodia's failure to repel the North Vietnamese presence justified the United States incursions into this neutral country must fail in view of the United States' treaty obligation under Article 33(1) of the United Nations Charter to *first of all* seek a solution of disputes, other than an armed attack, by peaceful means.

### C. *Rights and Obligations Under SEATO*

The Administration did not attempt to justify its policy under the SEATO Treaty. The reluctance to invoke the SEATO Treaty commitment is understandable since the Cambodian incursion was in violation of that treaty. The SEATO Treaty obligates the signatories to uphold the United Nations Charter.<sup>126</sup> Since United States actions in Cambodia are violative of the Charter,<sup>127</sup> they therefore violate the SEATO Treaty as well. There are four additional reasons why the United States incursions into Cambodia violated the SEATO Treaty. First, the treaty speaks of meeting "the common danger in accordance with its [each coun-

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<sup>123</sup> N.Y. Times, Dec. 28, 1967, at 17, col. 4.

<sup>124</sup> See statement of Foreign Minister, Yem Sambour, Time, May 11, 1970, at 13, col. 3; statement of Information Minister, Trinh Hoanh, N.Y. Times, May 2, 1970, at 4, col. 4.

<sup>125</sup> The Cambodians could hardly afford to protest the United States' incursion as they already found themselves on the defensive.

<sup>126</sup> SEATO Treaty art. 1. See note 47 supra.

<sup>127</sup> See Part Two, IA supra.

try's] constitutional processes."<sup>128</sup> The incursion into Cambodia is per se invalid under the treaty because under the United States Constitution such a decision must be made by Congress.<sup>129</sup> Second, articles 4(1) and 4(2) establish a distinction between an armed attack and "subversive activities directed from outside." As pointed out above, there occurred no armed attack to which the United States could respond. As the late Secretary of State John Foster Dulles cautioned, the treaty language does not support the contention that "any country which feels it is being threatened by subversive activities in another country is free to use armed force against that country."<sup>130</sup> Third, the SEATO Treaty was further violated by the United States because it expressly requires that all the parties consult before taking any action to meet the common danger posed by such outside subversion.<sup>131</sup> The United States made no effort to consult with the SEATO allies prior to taking action in Cambodia. Finally, the failure to obtain Cambodian consent or act in response to a Cambodian invitation resulted in a direct, unequivocal violation of SEATO's Article 4(3) because Cambodia was designated a state within the scope of Article 4 by the September 1954 Protocol to the SEATO Treaty.<sup>132</sup>

*D. The Position Taken by the United States in Analogous Situations*

The action taken by the United States in Cambodia is inconsistent with positions propounded by the United States in the past. When confronted with similar types of action initiated by other nations, United States spokesmen in the United Nations have consistently condemned unilateral attacks directed across national borders in pursuit of foreign troops using foreign soil as sanctuaries.

*1. Tunisia*

For example, in 1957 French forces operating in Algeria attacked Sakiet-Sidi-Youssef in Tunisia, which was then being used as a sanctuary and staging area by Algerian revolutionary

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<sup>128</sup> SEATO Treaty art. 4(1). See note 47 supra.

<sup>129</sup> See Part One supra.

<sup>130</sup> Statement of Secretary of State John Foster Dulles, Hearings on the President's Proposal on the Middle East Before the Senate Comm. on Foreign Relations, 81st Cong., 1st Sess., pt. 1, at 28 (1957).

<sup>131</sup> SEATO Treaty art. 4(2). See note 47 supra.

<sup>132</sup> Protocol to the SEATO Treaty, Sept. 8, 1954, [1955] 6 U.S.T. 87, T.I.A.S. No. 36 (effective Feb. 19, 1955).



forces. The United States publicly expressed concern about the incident and the Department of State summoned the French Ambassador to explain the French action.<sup>133</sup> The official French explanation markedly paralleled the stated United States objective in Cambodia: to destroy enemy sanctuaries as well as staging and supply bases used by guerrilla forces for raids into Algeria.

## 2. *Yemen*

In 1964 Ambassador Stevenson, speaking in the Security Council, condemned a British bombing attack on Habir in Yemen which was undertaken in response to Yemeni attacks against the British Protectorate of Aden.<sup>134</sup>

## 3. *Middle East*

During the course of the present conflict in the Middle East, the United States has repeatedly expressed negative reactions ranging from concern to condemnation of Israeli attacks upon Arab guerrilla sanctuaries in Arab countries.<sup>135</sup> The Israeli raids were designed to accomplish the dual objectives of reprisal and destruction of guerrilla sanctuaries and staging bases. The American incursion into Cambodia does not materially differ from these invasions, which were all condemned by the United States. Consequently, the Cambodian affair invites cynicism toward subsequent United States' efforts to encourage respect for law in the conduct of international affairs. Finally, the allied incursions into Cambodia also compound the prolonged violation of international law by the massive military presence of the United States in Viet Nam.

## II

### VIET NAM

#### A. *Collective Self-Defense Under the United Nations Charter*

The Department of State Memorandum justified United States action in Viet Nam as collective self-defense in response to an armed attack.<sup>136</sup> But the concept of armed attack under Article 51 of the Charter should be construed narrowly to restrict the right of self-defense to instances "when the necessity for

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<sup>133</sup> 38 Dep't State Bull. 333 (1958).

<sup>134</sup> 19 U.N. SCOR, 1108th meeting 67 (1964).

<sup>135</sup> 62 Dep't State Bull. 226 (1970); 60 Dep't State Bull. 340 (1969); U.N. Doc. S/RES/248 (1968); 58 Dep't State Bull. 509 (1968).

<sup>136</sup> Memorandum, *supra* note 18, at 565-85.

action" is "instant, overwhelming and leaves no choice of means, and no moment for deliberations."<sup>137</sup>

Long-smoldering conditions of unrest, subversion and infiltration existed for ten years prior to American involvement in South Viet Nam. Before 1965, according to the Mansfield Report, infiltration from North Viet Nam "was confined primarily to political leaders and military leadership." But by 1962 "United States Military Advisors and service forces in South Viet Nam totaled approximately 10,000 men."<sup>138</sup> Apparently, Department of Defense figures indicate that there were only 400 North Vietnamese troops in South Viet Nam in March 1965.<sup>139</sup> Large numbers of North Vietnamese troops infiltrated into South Viet Nam only after the United States intervened in 1965 to prevent the collapse of the Saigon Government:

U.S. combat troops in strength arrived at that point in response to the appeal of the Saigon authorities. The Vietcong counter-response was to increase their military activity with forces strengthened by intensified local recruitment and infiltration of regular North Vietnamese troops. With the change in the composition of opposing forces, the character of the war also changed sharply.<sup>140</sup>

In view of the narrow definition of armed attack, the subversion in South Viet Nam before 1965 could not justify measures of collective self-defense under the Charter and could not allow attacks against North Viet Nam.

The Viet Cong guerrilla attacks on Pleiku on February 7, 1965, marked the beginning of active United States war actions in South Viet Nam and the extension of those actions into North Viet Nam. However, no attempt was made to describe such war actions as collective self-defense. They were officially explained as reprisals. Labelling as provocations the attacks near Pleiku, in which seven Americans were killed and 109 wounded, President Johnson announced that "retaliatory [air] attacks against barracks and staging areas . . . in North Vietnam [were] today [launched] in response to [these] provocations ordered and directed by the Hanoi regime."<sup>141</sup>

But reprisals involving the use of armed force violate the

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<sup>137</sup> Moore, *supra* note 77, § 217, at 412; see text accompanying notes 77-88 *supra*.

<sup>138</sup> The Vietnam Conflict: The Substance and the Shadow, Report Submitted to the Senate Comm. on Foreign Relations 2 (Jan. 6, 1966) [hereinafter Mansfield Report].

<sup>139</sup> Schlesinger, Vietnam and the 1968 Elections, 113 Cong. Rec. S14454 (daily ed. Oct. 9, 1967).

<sup>140</sup> Mansfield Report, *supra* note 138, at 1.

<sup>141</sup> 52 Dep't State Bull. 238 (1965).

United Nations Charter.<sup>142</sup> The Security Council condemnation of British raids against Yemen in April 1964 in reprisal for Yemeni attacks against the British Protectorate of Aden exemplified the United Nations position. Moreover, Ambassador Adlai Stevenson emphasized that the United States disapproved of "retaliatory raids, wherever they occur and by whomever they are committed."<sup>143</sup>

Under the United Nations Charter the United States reprisals were illegal in two other respects. First, they were not directed against insurgent forces in South Viet Nam, which staged the attack on Pleiku, but against North Viet Nam. Second, the massive bombing raids were totally disproportionate to the original attacks to which they supposedly responded. The air raids vastly exceeded the force or destruction of the attacks near Pleiku and resulted in the escalation of the previous conflict into a war against North Viet Nam.

The International Control Commission rejected the arguments promulgated in justification of the American reprisals. On February 13, 1965, an ICC Special Report written by the Indian-Polish majority advised the Co-Chairmen of the Geneva Conference that United States military actions against the North on February 7 and February 8, 1965, "indicated violations of the *Geneva Agreement*."<sup>144</sup>

#### *B. Article 33(1) of the United Nations Charter*

Article 33(1) provides that "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security," must first seek a solution by peaceful means of their own choice. Yet the United States did not seek a peaceful solution to the growing conflict in Indochina through the world body prior to using armed force. By 1954 the United States had given aid to South Viet Nam and had operated a Military Assistance Command there since February 1962. The United States has alleged that infiltration of troops from the North to the South has continued since at least 1959.<sup>145</sup>

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<sup>142</sup> U.N. Doc. A/16799 (XXII) (Sept. 26, 1967); U.N. Doc. S/RES/5650 (1961) (United States and United Kingdom abstaining).

<sup>143</sup> 19 U.N. SCOR, 1108th meeting 67 (1964).

<sup>144</sup> Special Report, June 2, 1962, para. 20, Hearings on Supplemental Foreign Assistance, Fiscal Year 1966—Vietnam Before the Senate Comm. on Foreign Relations, 89th Cong., 2d Sess., at 742 (1966) [hereinafter 1966 Hearings]. The Geneva Accords of 1954 art. 7 provide that "[n]o person, military or civilian, shall be permitted to enter the demilitarized zone except persons concerned with the conduct of civil administration and relief and persons specifically authorized to enter by the Joint Commission."

<sup>145</sup> Memorandum, supra note 18, at 565.

Nevertheless, the first American report to the Council was submitted only in 1964;<sup>146</sup> the United States did not submit the question of the Viet Nam dispute to the Security Council until January 31, 1966,<sup>147</sup> approximately one year after the commencement of the bombing of the North.

Potential means for a peaceful settlement included General de Gaulle's proposal in 1963 of a neutral Viet Nam,<sup>148</sup> a subsequent French call in 1964 to reconvene the Geneva Conference on Laos,<sup>149</sup> and a suggestion by Secretary-General U Thant in 1964 that a secret meeting between representatives of North Viet Nam and the United States be arranged in Burma.<sup>150</sup> The United States rejected each of these alternatives over the three-year intervening period between General Maxwell Taylor's Report of November 1961, which dealt with the possible contingency of taking defensive measures directly against the North<sup>151</sup> and the initiation of the bombing raids in 1965. During that period the United States must have contemplated the increased use of armed force against North Viet Nam. The failure to resort to the United Nations is therefore inexcusable.

### *C. Duties and Rights Under SEATO*

SEATO provisions do not allow the United States to commit troops to South Viet Nam under the circumstances. Under Articles 1 and 6 of SEATO, any action in violation of the United Nations Charter cannot be justified under SEATO since those articles pledge the signatories' respect and support for the Charter. Although the Department of State's Memorandum speaks of the "obligation . . . to meet the common danger in the event of armed aggression" under article 4(1), the precise wording of the treaty language in article 4(1) is "aggression by means of armed attack." Armed attack is narrower than armed aggression. As already discussed, North Vietnamese activities in South Viet Nam cannot be construed as an armed attack under Article 51 of the United Nations Charter.<sup>152</sup> That the activities did not constitute an armed attack under SEATO is apparent from article 2:

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<sup>146</sup> Senate Comm. on Foreign Relations, Background Information Relating to Southeast Asia and Vietnam, 89th Cong., 2d Sess., at 132-35 (1965).

<sup>147</sup> *Id.* at 271-73.

<sup>148</sup> *Id.* at 14.

<sup>149</sup> *Id.* at 16.

<sup>150</sup> Staff of Senate Republican Policy Comm., *The War in Vietnam*, 113 Cong. Rec. 5242, 5250 (daily ed. May 9, 1967).

<sup>151</sup> *The Vietnam Hearings 171-72* (Vintage ed. 1966).

<sup>152</sup> See text accompanying notes 136-143 *supra*.

In order more effectively to achieve the objectives of this Treaty, the Parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist *armed attack* and to prevent and *counter subversive activities directed from without against their territorial integrity and political stability*. [Emphasis added.]

Thus, under article 4(2), unless an armed attack has occurred, the parties must "consult immediately in order to agree on the measures which should be taken for the common defense." The Communiqué of the SEATO meeting, dated April 15, 1964, did not indicate a finding of an armed attack against South Viet Nam. It merely cautioned that members of SEATO should remain prepared to take further steps in fulfillment of their obligations under the treaty.<sup>153</sup> The United States has never obtained collective consent from SEATO members for its combat actions in Viet Nam. Consequently, the United States acted and continues to act in violation of SEATO's prohibition of unilateral military action except in case of an armed attack. If SEATO had approved United States' military operations in Viet Nam, such action would still have had to be authorized by the Security Council under Article 53 of the United Nations Charter as an enforcement action by a regional arrangement. In conclusion, the American violations of SEATO and the United Nations Charter completely undermine the argument that the United States must act in Viet Nam to demonstrate to other nations that the United States maintains its treaty commitments.

#### D. *The Geneva Accords of 1954*

The increase in hostilities since 1954 is obvious evidence of the fact that all the parties to the Viet Nam conflict have violated the Accords. But in its Memorandum the Department of State argued that South Viet Nam's violations of the Accords were justified by prior violations by North Viet Nam and relied on the principle that "a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations."<sup>154</sup>

At the outset it is necessary to indicate that both the United States and South Viet Nam are bound by the 1954 Geneva Accords. In Article 2 of the Treaty of Viet Nam Independence of June 4, 1954,<sup>155</sup> Viet Nam agreed to accept France's obliga-

<sup>153</sup> 50 Dep't State Bull. 692 (1964).

<sup>154</sup> Memorandum, supra note 18, at 577.

<sup>155</sup> 161 British and Foreign State Papers 649 (1963).

tions with respect to Viet Nam. France was a signatory of the 1954 Geneva Accords and orally agreed to the Final Declaration.<sup>156</sup> The United States is bound by the 1954 Accords as a "successor" to France. Under Article 27 of the Accords, signatories and their successors are responsible for ensuring the observance and enforcement of the terms and provisions thereof.

### 1. *Election Provisions*<sup>157</sup>

In justifying South Viet Nam's refusal to implement the election provision of the 1954 Geneva Accords, the Department of State declared that "the South Vietnamese Government's failure to engage in consultations in 1955, with a view to holding elections in 1956, involved no breach of obligation. The conditions in North Viet Nam during that period were such as to make impossible any free and meaningful expression of popular will."<sup>158</sup>

But the alleged repression of the popular will in either North or South Viet Nam could not, under the Accords, entitle either regime to refuse to plan and consult about the elections for unification. Between July 1955 and July 1956 the two regimes were obligated to consult in order to determine the framework for the elections although South Viet Nam was free to demand whatever safeguards it considered necessary for proper elections.<sup>159</sup> To the extent that the United States, as a successor to France, encouraged the Saigon government to avoid consultation, it breached its duty under Article 27 of the Accords to ensure the observance of its provisions.

### 2. *Articles 16 and 17*<sup>160</sup>

The Department of State Memorandum also contended that intensified Communist aggression in late 1961 justified a substantial increase in the number of military personnel and types

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<sup>156</sup> Under international law oral agreements are binding. H. Briggs, *The Law of Nations* 838 (2d ed. 1952).

<sup>157</sup> Final Declaration of the Geneva Conference, July 21, 1954, para. 7, Senate Comm. on Foreign Relations, Background Information Relating to Southeast Asia and Vietnam, 98th Cong., 1st Sess., at 58 (1965) [hereinafter Final Declaration].

<sup>158</sup> Memorandum, *supra* note 18, at 578.

<sup>159</sup> Final Declaration, *supra* note 157.

<sup>160</sup> Geneva Accords arts. 16 & 17 provide in part: art. 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." . . . ; art. 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, munitions and other war material, such as combat aircraft, naval craft, pieces of ordnance, jet engines and jet weapons, and armored vehicles, is prohibited."

of equipment introduced into South Viet Nam. But the International Control Commission, in a Special Report prepared by the Indian-Polish majority, specifically rejected the claim that increased aid was permissible for South Vietnamese self-defense. The Report concluded:

[T]he Republic of Vietnam has violated Articles 16 and 17 of the Geneva Agreement in receiving the increased military aid . . . [and] the establishment of a U.S. Military Assistance Advisory Command in South Vietnam, as well as the introduction of a large number of U.S. military personnel . . . amounts to a factual military alliance, which is prohibited under Article 19 of the Geneva Agreement.<sup>161</sup>

### III

#### THE PROSPECT OF CONTINUING ARMED CONFLICT

A fundamental violation of the United Nations Charter is particularly grievous when committed by such an immensely powerful and influential supporter of the United Nations as the United States. But should the United States succeed in legitimizing its position by claiming that measures of self-defense were justified in response to questionably documented armed attacks, the damage to the United Nations would be irreparable. The acceptance of a broad definition of armed attack would render virtually meaningless those provisions of the United Nations Charter which provide machinery for anticipatory conflict resolution. Conditions favorable to justice and respect for the obligations arising from treaties and other sources of international law could not be maintained. The determination, stated in the Preamble, "to save succeeding generations from the scourge of war" would become an empty hope.

#### CONCLUSION

The United States today faces a grave crisis. Never before in our history has the nation been so fundamentally divided over issues of foreign policy. More important, growing numbers of our citizens believe themselves frustrated in all efforts to change the course of policies they regard as unwise or immoral. The situation, if allowed to worsen, could have grave consequences for the future viability of our democracy.

The debate over the nation's course in Southeast Asia reflects more than a mere disagreement with foreign policy. It indicates a dangerous shift in the balance of power within our constitutional

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<sup>161</sup> 1966 Hearings, *supra* note 144, at 740.

system. It is thus imperative, as never before, that the Congress vigorously reassert its responsibilities as the only branch of government constitutionally empowered to decide issues of war and peace. It is incumbent upon each member of Congress, whether he opposes or defends the present policy in Southeast Asia, to consider seriously the consequences of congressional inaction.

We have witnessed in the atomic age a continual exacerbation of the tensions which tend to divide the world community. When coupled with the exponential increase in the magnitude of man's destructive capabilities, this process invites disaster. Therefore, actions by the world's most powerful nation which either violate or ignore the basic tenets of international law, as embodied in the United Nations Charter, constitute culpable irresponsibility. We are painfully aware that in this regard the United States does not stand alone. But historically the United States has represented itself as a moral force in the world and has repeatedly affirmed its faith in the rule of law. Quite simply, United States actions should conform to that rhetoric. Respect for the United Nations Charter and use of machinery for conflict resolution which exists under it must comprise the keystone of American foreign policy. Ultimately, our security in the world depends as much upon the foregoing considerations as upon the wise exercise of armed power.