

THE CONSTITUTION AND INTERNATIONAL AGREEMENTS OR UNILATERAL ACTION CURBING "PEACE-IMPERILING" PROPAGANDA*

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I have been asked to address my remarks to the question of constitutional limitations applicable to international agreements concerning propaganda. Undoubtedly we are all "for peace" and presumably sympathetic to attempts to curb those factors which contribute to war. Therefore, one might properly ask, is propaganda a factor so contributory to war that it ought to be restrained? On the nature and effect of propaganda we have the testimony of two participants in this conference. Professors Whitton and Larson, in their book on propaganda¹ take as their subject "not what to do about propaganda in general, but what can be done with the kinds of propaganda—war-mongering, subversive, and defamatory—that imperil the peace."² Presumably that is the focus of this conference, and I take their definitions, in the absence of official governmental proposals, as a starting point for discussion. Distinguishing between "good" and "bad" propaganda, they concern themselves with that type of propaganda which "tends to produce a breach of peace."³ This category is further refined in the following terms. They state that "war-mongering propaganda directly undermines peace by actually fomenting war, preparing people for war, and building up incidents or ideas that will bring on war."⁴ With respect to subversive propaganda, they assert:

[A]lthough it may not be as blatant and obvious in its menace to peace, [it] has perhaps done more to disrupt peace than any other form of propaganda. The objective of such propaganda is ordinarily to produce violence within a country—the violence necessary to overthrow the existing political order, to stir up domestic strife, to set class against class, and to turn people against their government.⁵

Their third category, defamatory propaganda,

also imperils peace, although perhaps not as directly or immediately as the other two kinds. Nevertheless, when defamation and false news are sufficiently extreme

* This article is based largely on an address made at the Conference on the International Law of Propaganda, held at Duke University on February 18-19, 1966. Documentation and footnotes have been added.

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¹ JOHN B. WHITTON & ARTHUR LARSON, PROPAGANDA: TOWARDS DISARMAMENT IN THE WAR OF WORDS (1964) [hereinafter cited as WHITTON & LARSON]. Their book is heavily documented and carries an extensive bibliography on the subject of propaganda.

² *Id.* at 11.

³ *Id.* at 9.

⁴ *Id.* at 10.

⁵ *Ibid.*

and persistent, they tend to create hatreds, fears and passions whose predictable outlet is violence.⁶

The question is, under what circumstances might restrictions by the United States upon such propaganda raise constitutional issues? In this respect, it is necessary to note that Professors Whitton and Larson suggest the primary problem with respect to propaganda is propaganda *by* governments.⁷ And an international agreement proposing to restrict propaganda *by* governments would seem to raise no substantial questions of United States constitutional law.⁸ But as a corollary they also suggest, and rightly I believe, that restraints on propaganda *by private persons* is of relatively little real consequence. If this is so, then perhaps the subject of my remarks is entirely fanciful, and, as one of the commentators has suggested in a comparable situation,⁹ one does not care to be entirely fanciful in considering constitutional problems. Fortunately, the situation is saved by Professors Whitton and Larson who suggest that efforts to control propaganda by private persons, although of relatively minor consequence, do have a *raison d'être* because of—pardon the expression—their “propaganda” value.¹⁰ Perhaps that should be “evidence of good intention.” In any case, with that reassurance, perhaps we may proceed without being engaged entirely in an academic exercise.

But it will be helpful to broaden the topic to include unilateral efforts by the United States, as well as the making of international agreements. In addition, for meaningful discussion, some assumptions will provide concreteness. Thus the basic issues can be posed by assuming the following alternatives:

- i. Either a statute passed by Congress, or a treaty entered into by the United States which
 - a. provides punishment for warmongering, subversive, and defamatory propaganda, defined therein by terms comparable to the Whitton and Larson definitions, and

⁶ *Id.* at 10-11.

⁷ *Id.* at 242.

⁸ But if the concern is with the Government restricting itself, suppose we have an agreement not to publish certain information which, by hypothesis, is “necessary” for an “informed” citizenry on matters of public policy. If this is seen as a clash between “the right to hear” and “government secrecy for security” then one might catch strains of a first amendment problem as suggested by the discussion of *Lamont v. Postmaster General*, 381 U.S. 301 (1965), in the text accompanying notes 56-64 *infra*. Compare the analogous clash between congressional interest in information and the executive demands for secrecy set forth in *Berger, Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044 (1965).

⁹ Nathanson, *Constitutional Problems Involved in Adherence by the United States to a Convention for the Protection of Human Rights and Fundamental Freedoms*, 50 CORNELL L.Q. 235 (1965), based on a paper prepared for the Cornell Fifth Summer Conference on International Law, May 1964.

¹⁰ WHITTON & LARSON 240: “Why, in the view of the probable rarity of such offenses, would it be worth the trouble to pass such a statute [punishing warmongering propaganda by individuals]? . . . [One] useful result would be to show that the democracies are willing within the framework of their own constitutional traditions to do everything they can with their domestic law to help solve the propaganda problem. This would help clear the way to get on with more essential moves, such as the adoption of genuine remedies through the United Nations and through treaties.”

- b. possibly restricts the entry of such expressions from without the borders of the United States, regardless of whether the utterances are by individuals or foreign governments.
2. Some kind of presidential action regulating such propaganda; either
 - a. an executive agreement entered into without participation by Congress, or
 - b. unilateral presidential action of some form described more specifically later.

Moreover, as with all discussions of constitutional law involving action of the federal government, one must consider the question of power, as well as limitations. There would seem to be no serious question of power. From the wide range of powers available—the power of Congress to regulate foreign affairs,¹¹ the power of self-preservation invoked by Chief Justice Vinson in *Dennis v. United States*,¹² the treaty power,¹³ the war powers,¹⁴ perhaps even the grab-bag commerce clause,¹⁵ and the power of the President to conduct foreign relations¹⁶—certainly the federal government would find power to regulate, to a degree, the type of expression in question.¹⁷ “To a degree”¹⁸—the serious question concerns the extent to which the Constitution, more specifically the first amendment, restricts the United States Government if it should attempt to regulate warmongering, subversive, and defamatory propaganda.

The first amendment questions may best be taken in two steps. First, the “ordinary” first amendment situation: What doctrine, or doctrines, has the Supreme Court developed with respect to facts not seen as involving the conduct of foreign relations? Second, will it make a difference which source of federal power is relied on? That is, will the involvement of the conduct of foreign relations make a significant difference? Are there certain powers either not limited by the Bill of Rights or, at least, less rigorously limited than others? What role will the concept

¹¹ The scope and source of the power are analyzed in the seminal article by Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959).

¹² 341 U.S. 494, 501 (1951).

¹³ The standard reference materials are gathered in WILLIAM W. BISHOP, JR., *CASES ON INTERNATIONAL LAW* 87-94 (2d ed. 1962). However, with respect to uncertainties concerning the scope of this power, see Lissitzyn, *The Law of International Agreements in the Restatement*, 41 N.Y.U.L. REV. 96, 113-17 (1966), a critical review of the RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES (1965).

¹⁴ On the subject generally, see EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* (1947).

¹⁵ Cf. *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965)

¹⁶ On the subject generally, see EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* ch. 5 (4th rev. ed. 1957).

¹⁷ Compare the statement by Henkin, *supra* note 11, at 933: “The complicated facts of national and international life have also complicated the powers of Congress themselves. Few situations requiring regulation fall within one area only of congressional interest and authority. Analysis of congressional power may, then, tend to deal in sums of congressional powers.”

¹⁸ This phrase assumes a position at odds with the “absolutists” in the controversy usually described as “absolutists” versus the “balancers” in constitutional litigation. For a summary of the sounder points against the “absolutists” see Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 78-81. Of course, the complexities of giving meaning to broad constitutional norms belie the apparent simplicities suggested by terms such as “absolutists” and “balancing.” Compare Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 736-44 (1963).

of "embarrassment of the executive" play? Is the problem ultimately to be resolved by making the question one of "survival"?

I

"ORDINARY" FIRST AMENDMENT SITUATIONS

The more things change, the more they seem to remain the same. In 1964, in *New York Times Co. v. Sullivan*,¹⁹ the United States Supreme Court invalidated a libel judgment on first amendment grounds. The significance of that decision for my topic is suggested by the following provocative comment on the case.

It is strange how rapidly things change. Just a little more than a decade ago we were all concerned with devising legal controls for the libeling of groups. The war and the rise of fascism had made us suddenly sensitive to the evils of systematic defamation of minority groups, sensitive to the new and unexpected power of malevolent propaganda. Existing doctrines of free speech appeared to cast long shadows over the validity of any legal efforts at control. Then, in 1952, the Supreme Court got its chance at the problem and in *Beauharnais v. Illinois* held that group-libel laws could be constitutional.²⁰

In the *New York Times* case, the Court retreated significantly from *Beauharnais*,²¹ to the almost unanimous applause of legal commentators,²² and brought libel clearly within the ambit of the first amendment. Yet, here we are again concerned with restraints upon "malevolent propaganda," and asking are there any serious constitutional impediments to curbing such utterances.

Those familiar with Supreme Court precedent in the area of freedom of expression are aware of the folly of predicting the course of constitutional law without recourse to the matured facts of concrete controversies.²³ Nevertheless, given definitions of warmongering propaganda, subversive propaganda, and defamatory propaganda comparable to those of Professors Whitton and Larson,²⁴ one finds that comparable terms have been dealt with by the Supreme Court in past evaluations of legislative collisions with first amendment principles. The similarity of statutory language and factual situation is found principally in those cases concerned with governmental restraint on political speech and association legislatively characterized as "subversive."

But before proceeding to a discussion of these decisions, it is wise to recall that one man's warmongering may well be another's criticism of government. This

¹⁹ 376 U.S. 254 (1964).

²⁰ HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 7 (1965).

²¹ 343 U.S. 250 (1952), *reh. denied*, 343 U.S. 988 (1952).

²² Except that the language of the opinion was directed to criticism of the official conduct of "public officials" and questions have been raised whether the proper first amendment focus should have been simply on discussion of "public issues." See Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 *YALE L.J.* 642 (1966).

²³ Compare Brandeis, J., concurring in *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936). And see the incisive analysis by Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1 (1964).

²⁴ See text accompanying notes 4-6 *supra*.

proposition makes it appealing to look for guidelines in Professor Kalven's thesis²⁵ that the opinion in the *New York Times* case offers a guideline to the core meaning of the first amendment in terms of seditious libel, described by him briefly as "the doctrine that criticism of government officials and policy may be viewed as defamation of government and may be punished as a serious crime."²⁶ He concludes that "the touchstone of the First Amendment has become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy."²⁷ Recall that the *New York Times* case arose out of the protest movement concerning racial equality in the United States—a movement vitally concerned with governmental policy. The controversial publication in question was a newspaper advertisement, critical of governmental treatment of Negroes active in the civil rights movement.²⁸ Given Kalven's thesis, we may speculate that insofar as attempts to suppress warmongering, subversive, and defamatory propaganda are, in specific instances, directed at criticisms of governmental officials and governmental policy, *New York Times Co. v. Sullivan* may be taken as affording substantial protection for such utterances. How substantial? The language of *New York Times* is not that of a balancing formula concerned with degree but is more in the spirit of the "absolute" theory of the first amendment. However, before exploring the question of how substantial, consider a possible analytical distinction when criticism involves foreign relations.

By definition, does not warmongering propaganda involve some likelihood of criticism being directed at the policy of a *foreign* government? If so, remember that Professor Kalven's version of *New York Times* focuses upon the essential role of free speech in a democratic society and the consequent prohibition against the government of that society applying sanctions to criticisms of *itself*. Nevertheless, the expression of ideas with respect to matters of government relates to the formulation of a foreign policy as much as it does to policies of a domestic nature, at least in this rapidly shrinking world of ours. And criticism of foreign governmental officials and foreign governmental policy is intimately intertwined with the formula-

²⁵ Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

²⁶ HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 15 (1965).

²⁷ Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209. On the question whether the intent of the framers of the first amendment was to eliminate seditious libel, Kalven is opposed by LEONARD W. LEVY, *THE LEGACY OF SUPPRESSION* (1960). See also Brant, *Seditious Libel: Myth and Reality*, 39 N.Y.U.L. REV. 1 (1964); Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964). For provocative suggestions concerning a libertarian position for freedom of expression, see the book review by Professor Willmoore Kendall, 16 STAN. L. REV. 755 (1964), reviewing LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963).

²⁸ The paid political advertisement solicited funds for the defense of Martin Luther King, Jr., and described alleged deprivations of Negroes' rights in the South, especially with respect to Negro demonstrators. The advertisement was signed by several members of the "Committee to Defend Martin Luther King . . ." including nationally well-known individuals such as Mrs. Eleanor Roosevelt. Plaintiff, Sullivan, was the elected city commissioner responsible for supervision of the Montgomery police. There were some factual inaccuracies in the advertisement.

tion of a foreign policy. Therefore, no reason is apparent for distinguishing attempts by the United States to punish propaganda because the particular utterance might be directed at a government other than that of the United States.

But even though the *New York Times* case may be read by some as barring the punishment of criticism of governments and governmental policy on the grounds that such criticism is seditious libel, unanswered constitutional questions concerning how much protection remain. On the heels of *New York Times Co. v. Sullivan*, in the fall of 1964, the Supreme Court reviewed a criminal libel conviction of a local district attorney who had published defamatory statements about the judges of the local criminal court and held the conviction unconstitutional. The opinion in that case, *Garrison v. Louisiana*,²⁹ leads one to believe that the Court will not adhere strictly to Professor Kalven's thesis and that we must ultimately turn to some version of the clear-and-present-danger formula when criticism of government and governmental policy is cast in the form of words which may also be characterized as triggers to action.³⁰ And it is such trigger-words that are our concern. The arguments in favor of restricting warmongering, subversive, and defamatory propaganda seem to have as their principal thrust the notion that the supposed danger from the utterances is the danger of illegal warfare—the "big brother," I suppose, of breach of peace on the domestic scene. Therefore, as helpful as *New York Times* may be, the most relevant line of precedent must be those cases concerning legislative proscription of allegedly subversive speech or association culminating doctrinally in the *Dennis-Yates-Scales*³¹ trilogy concerning prosecutions under the Smith Act.

If *Gillow v. New York*,³² quoted approvingly by Professors Whitton and Larson,³³ were still the law then we could stop right here. For in *Gillow*, which upheld the New York criminal anarchy statute, the majority gave great weight to the legislative determination that "utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized."³⁴ It further stated that the test for measuring the application of such legislative proscriptions to specific utterances would be met if the utterances' "natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent."³⁵ That interpretation of the meaning of the first amendment would raise

²⁹ 379 U.S. 64 (1964).

³⁰ See Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A.L. REV. 1, 8 (1965).

³¹ *Dennis v. United States*, 341 U.S. 494 (1951); *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961).

³² 268 U.S. 652 (1925).

³³ WHITTON & LARSON, 236-37.

³⁴ 268 U.S. at 668.

³⁵ *Id.* at 671. The due process clause of the fourteenth amendment was involved because state governmental action was involved. However, in *Gillow* the Court made clear that the first amendment is made applicable to the states via the fourteenth, so that doctrinally cases are interchangeable whether involving the fourteenth or first amendments, and one may properly speak of "first amendment freedoms" even when states are involved.

no significant barriers to treaty or legislative language directed at warmongering, subversive, and defamatory propaganda.

Fortunately, *Gitlow* is no longer the law. *Dennis*, *Yates*, and *Scales*, decided in 1951, 1957, and 1961, respectively, represent at least a partial return to the Holmes-Brandeis version of the clear-and-present-danger test, which, especially as developed by Justice Brandeis,³⁶ emphasizes the requirement of immediacy. Justice Brandeis in his eloquent formulation of this constitutional standard emphasized the need for a close causal relationship between the proscribed speech and the anticipated anti-social action if punishment of expression was to be justified. He stressed two elements: nearness in time and probability of outcome. True, *Dennis*, in which convictions for advocacy were upheld, represents a diluted version of Brandeis's clear-and-present-danger test. For in *Dennis*, Chief Justice Vinson accepted Judge Learned Hand's reformulation of the test, which held that in each case the courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."³⁷ The consequence of such a standard, of course, is to reduce the need for the government to show a high degree of imminency if the anticipated danger is relatively grave. But certainly the opinion by Justice Harlan for the Court in *Yates* breathes life into the imminency requirement by its "distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action."³⁸ To Justice Harlan, the fine line between protected and unprotected expression was "the essential distinction . . . that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something."³⁹ He conceded the ephemeral nature of this distinction, suggested by Justice Holmes's remark that "'every idea is an incitement.'⁴⁰ However, the distinction was bolstered and given additional significance as a limitation by the rigorous degree of proof which was required to connect the defendant to the utterances and the utterances to the antisocial outcome which it was alleged they would bring about.⁴¹

Yates, then, seems to reduce the possibility of successfully challenging such a

³⁶ See *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (concurring opinion).

³⁷ Judge Learned Hand, in *Dennis v. United States*, 183 F.2d 201, 212 (2d Cir. 1950), quoted in 341 U.S. 494, 510 (1951). Of the flurry of discussion on the standard to be used after *Dennis*, see WALTER GELLHORN, *AMERICAN RIGHTS* 74-79 (1960); Hyman, *Judicial Standards for the Protection of Basic Freedoms*, 1 BUFFALO L. REV. 221 (1952); Nathanson, *The Communist Trial and the Clear-and-Present Danger Test*, 63 HARV. L. REV. 1167 (1950); Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1 (1951).

³⁸ 354 U.S. 298, 318 (1957).

³⁹ *Id.* at 324-25.

⁴⁰ *Id.* at 326-27, quoting from Justice Holmes's dissenting opinion in *Gitlow v. New York*, 268 U.S. 652, 673 (1925).

⁴¹ At least as interpreted by Justice Harlan in his opinion in *Scales v. United States*, 367 U.S. 203, 232 (1961), where he stated: "The decision in *Yates* rested on the view (not articulated in the opinion, though perhaps it should have been) that the Smith Act offenses, involving as they do subtler elements than are present in most other crimes, call for strict standards in assessing the adequacy of the proof needed to make out a case of illegal advocacy."

legislative proscription directed at propaganda on its face.⁴² But *Yates* and its aftermath are grounds for believing that there is a significant first amendment barrier to the *application* of general language of this category to specific utterances. Apart from the considerable number of prosecutions under the Smith Act which were dropped by the Justice Department after the *Yates* decision, prosecution against some of the defendants in that case itself was abandoned on the grounds that insufficient evidence was available to show that they had advocated action, as distinct from opinion.⁴³ This general thrust of *Yates* was confirmed by *Scales*, concerning the membership clause of the Smith Act. Justice Harlan, writing for the majority, rejected the constitutional challenge to the clause on its face, but narrowly construed the provision to punish only "active" membership and only membership with the specific intent to accomplish the aims of the organization by resort to violence.⁴⁴

How may these principles gleaned from *Dennis-Yates-Scales* be related to the topic at hand? An international agreement or statute directed against warmongering or subversive propaganda, defined in terms comparable to those used by Professors Whitton and Larson,⁴⁵ might possibly withstand first amendment challenges to the validity of such language on its face. But any attempts to apply such general language to concrete situations in a criminal trial would most assuredly face the closest scrutiny, not only with respect to the adequacy of the proof proffered to demonstrate the imminency of war—the evil which the legislation would prevent—but also as to the meaning of the words in order to avoid application—and the consequent constitutional issue—by narrowing construction.

The preceding cases are the most relevant for evaluating the proposed restrictions upon propaganda because they deal with legislation, the specific purpose of which is to punish "subversive" speech. Of other tangential lines of constitutional precedent,⁴⁶ the most helpful comprises those decisions evaluating restrictions upon expression in light of time, place, and manner. In the felicitous phrase of Professor Kalven, these cases deal with the use of the public ways as a "public forum."⁴⁷ The most im-

⁴² On overbreadth as a first amendment limitation, see notes 62-65 *infra*.

⁴³ See GELLHORN, *op. cit. supra* note 37, at 82, and sources there cited.

⁴⁴ It is true that *Scales's* conviction was upheld, but the bite of the narrowing construction was effective in the companion case, *Noto v. United States*, 367 U.S. 290 (1961), in which a conviction under the membership clause was reversed for insufficiency of the evidence on the basis of the *Yates* standard.

⁴⁵ See text accompanying notes 4-6 *supra*.

⁴⁶ I have not drawn upon the "obscenity" cases relating to criminal punishment for distribution, *e.g.*, *Ginzberg v. United States*, 383 U.S. 463, *reh. denied*, 384 U.S. 934 (1966); *Mishkin v. New York*, 383 U.S. 502, *reh. denied*, 384 U.S. 934 (1966); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Roth v. United States*, 354 U.S. 476 (1957); or those cases relating to "censorship" or "prior restraints," *e.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931). As for the former, the Court has used a definitional-contextual technique which, apart from the discussion of *New York Times Co. v. Sullivan* (see text accompanying notes 19-22, 25-30 *supra*), offers no assistance on the subject of this essay. As for the latter, they add nothing to the cases discussed in the text when the concern about propaganda is focused upon words as triggers to action.

⁴⁷ Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

portant are the two recent cases which, like *New York Times Co. v. Sullivan*,⁴⁸ arose out of the civil rights protest movement, *Edwards v. South Carolina*,⁴⁹ decided in 1963, and *Cox v. Louisiana*,⁵⁰ decided in 1965. Both involved, among other issues, generalized breach-of-peace charges which were found unconstitutional. And despite the difference in attitude between the earlier and later opinions that Professor Kalven tellingly excoriates,⁵¹ it seems relatively certain from these cases that the Court will continue to require a high degree of imminency, that is, something more than the mere expectation of violence when it hears challenges to governmental action which has suppressed expression in the interest of order. And that collision of interests is identical to the class presented when "propaganda" is suppressed in the name of "peace." Incidentally, although the Court has not yet fully developed the issue, one may conjecture that the reaction of a hostile audience will not be a permissible basis for suppressing a speaker,⁵² and this nascent principle is relevant to suppression of propaganda that may imperil peace because of the hostile attitude of a "listening" foreign government.

Of other cases developing first amendment principles, one of the most useful is *Shelton v. Tucker*,⁵³ decided in 1960, invalidating an Arkansas statute requiring public school teachers to file annually a list of every organizational tie. In formulating the constitutional standard, the Court stated that only the most compelling interest of the state justifies restriction of expression, and then also went on to say, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."⁵⁴ Thus in measuring proposed restrictions upon warmongering and subversive propaganda by treaties or statutes, the Court will not only be concerned with a showing of imminency of the social evil when expression is restricted but will also evaluate the probability that the permissible goal of such legislation could be achieved by other means, involving less harm to the constitutionally protected preferred freedom. Thus, the question may be posed to those who argue in favor of such legislation or treaties: Is there no other way of achieving

⁴⁸ See text accompanying notes 19-22, 25-30 *supra*.

⁴⁹ 372 U.S. 229 (1963).

⁵⁰ 379 U.S. 536 (1965).

⁵¹ The general unhappiness of the Court with this line of cases is reflected in *Brown v. Louisiana*, 383 U.S. 131 (1966), a 5-4 decision overturning convictions under a breach of the peace statute for an alleged "sit-in" in a public library. There was no majority opinion, but three different opinions resting on separate grounds.

⁵² See HARRY W. KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140-41 (1965); Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118 (1949); Note, *Free Speech and the Hostile Audience*, 26 N.Y.U.L. REV. 489 (1951); Note, *Verbal Acts and Ideas—The Common Sense of Free Speech*, 16 U. CHI. L. REV. 328 (1949).

⁵³ 364 U.S. 479 (1960).

⁵⁴ *Id.* at 488. The opinion is sharply criticized by ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 51-55 (1962), who is rebutted in turn by Hyman, *Concerning the Responsibility and Craftsmanship of the Judge: A Review of Julius Stone's Legal System and Lawyers' Reasoning, in Light of Recent Criticism of the Supreme Court*, 14 BUFFALO L. REV. 347, 367-69 (1965).

this end without directly suppressing speech? Moreover, the cases which have been discussed suggest that the burden will be upon those supporting such legislative devices to satisfactorily answer that question.⁵⁵

The recent case of *Lamont v. Postmaster General*,⁵⁶ decided in May of 1965, reveals broader dimensions of the problem and is relevant to a possible statute or treaty restricting the entry of warmongering, subversive, or defamatory propaganda into the United States from without its borders.⁵⁷ As often pointed out,⁵⁸ the essential role of free expression in a democratic society relates not so much to the right of the individual *qua* speaker but rather to the interest of a society, or community, in hearing all views and making its collective decision after all views have been considered. This proposition was neatly capsulized by Professor Freund when he said, "The right to speak is the individualized legal reflection of the more generalized right to hear, which is basic to the process of political flux."⁵⁹

Such a view was vindicated by the *Lamont* case, a landmark decision in which the Supreme Court for the first time held a federal statute to be contrary to the first amendment guarantees of speech and press. The case is especially significant for the topic at hand, because the statute involved was directed at "political propaganda." Congress had authorized postal officials to detain and destroy mail that had been determined by the Secretary of the Treasury to be "communist political propaganda," unless the mail was requested in writing by the addressee or unless it was otherwise ascertained that delivery was sought.⁶⁰ The complaining party in *Lamont* was not the sender; he had no interest in his own expression. But the decision of the Court seems to recognize that freedom of expression in a political democracy has its corollary in the interest of hearing, and it was the latter interest of Mr. Lamont that was vindicated. The Court held that the requirement of a written request unconstitutionally abridged "the addressee's First Amendment rights" because of its "almost certain . . . deterrent effect" on any addressee.⁶¹ Justice Douglas, writing for the

⁵⁵ For a brief review of the operation of the preferred-freedoms concept, see Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First*, 60 NW. U.L. REV. 1, 44-50 (1965).

⁵⁶ 381 U.S. 301 (1965).

⁵⁷ See pp. 507-08 *supra*.

⁵⁸ E.g., Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First*, 60 NW. U.L. REV. 1, 51 (1965).

⁵⁹ PAUL A. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 81 (1961).

⁶⁰ Postal Service and Federal Employees Salary Act of 1962, § 305(a), 76 Stat. 840, 39 U.S.C. § 4008(a) (1964). The statute defines "communist political propaganda" by reference to § 1(j) of the Foreign Agents Registration Act of 1938, which includes, *inter alia*, the following interesting words: "The term 'political propaganda' includes any . . . communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions . . ." 56 Stat. 250 (1942), 22 U.S.C. § 611(j) (1964).

⁶¹ 381 U.S. at 307. In a separate concurring opinion, Justice Brennan made the proposition more explicit. Noting that "the First Amendment contains no specific guarantee of access to publications," he

Court, interestingly concluded with this statement: "The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment,"⁶² citing *New York Times Co. v. Sullivan*, discussed above.⁶³

Neither the opinion by Justice Douglas nor the concurring opinion by Justice Brennan suggests that the first amendment interest of "hearing" is subject to no restraint. But they certainly mean that statutes or treaties barring the entry of warmongering, subversive, or defamatory propaganda into the United States may be challenged without raising troublesome problems of standing.⁶⁴ And they also suggest that the first amendment interest of "hearing" may be invoked to test with preferred-freedom rigorousness such statutes or treaties, both as to the imminency of the anticipated evil and the availability of less restrictive but workable alternatives to achieve the permissible legislative goal, so that the broader sweep of such legislation would not necessarily avoid the impact of *Lamont*.

One final line of ordinary first amendment cases ought to be mentioned. These concern the overbreadth concept derived from first amendment principles,⁶⁵ a limitation concerned not with inability to understand what is prohibited—*i.e.*, the vagueness forbidden to criminal statutes by due process—but with the delusive clarity of meaning of a legislative proscription which sweeps within its scope clearly protected activity as well as nonprotected activity and consequently wreaks its havoc on preferred freedoms by the repressive necessity of having to undergo the burden and risk of challenge.⁶⁶ This limitation may be illustrated by reference to the peripheral part of Professors Whitton and Larson's definition of warmongering propaganda:

made the following important assertion: "[T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment *those equally fundamental personal rights necessary to make the express guarantees fully meaningful*. See, *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497; *NAACP v. Alabama*, 357 U.S. 449; *Kent v. Dulles*, 357 U.S. 116; *Aptheker v. Secretary of State*, 378 U.S. 500. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308. (Emphasis added.) This is a curious statement, which, considering the particular citations, might seem to suggest the interest of "hearing" was being derived from, perhaps, the due process clause of the fifth amendment. However, in the immediately succeeding paragraphs Justice Brennan consistently refers to "First Amendment freedoms" as he considers the impact of the specific statute, and derives his standards from first amendment expression cases said to require the Government to demonstrate a compelling governmental interest to justify restrictions and also supporting the proposition that the Government has the "duty to confine itself to the least intrusive regulations which are adequate for the purpose." *Id.* at 310.

The recent cases concerning the right to travel abroad are alleged to involve a comparable interest, that is, the opportunity to gather information necessary to make an informed judgment about governmental policy with which all citizens are vitally concerned. See *Zemel v. Rusk*, 381 U.S. 1 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). However, in neither case was the decision based on that issue.

⁶² 381 U.S. at 307.

⁶³ See text accompanying notes 19-22, 25-30 *supra*.

⁶⁴ Justice Brennan, in his concurring opinion, took explicit note of the "troublesome" possibilities in such an issue. 381 U.S. at 307-08.

⁶⁵ See generally Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

⁶⁶ See FREUND, *op. cit. supra* note 59, at 67-68.

“War-mongering propaganda directly undermines peace by . . . building up . . . ideas that will bring on war.”⁶⁷ If one should find in proposed legislation or treaties proscribing warmongering propaganda terms comparable to these, then there is no great risk in speculating that *Baggett v. Bullitt*,⁶⁸ for example, would be good authority for the proposition that such legislation would be unconstitutional on its face. In *Baggett*, the Court, relying on the overbreadth concept, invalidated the Washington loyalty oath, which required employees to disclaim being a “subversive person,” defined, *inter alia*, as one who “teaches by any means any person to . . . aid in the commission of any act intended . . . to assist in the . . . alteration of . . . the constitutional form of the government of the United States . . . by revolution.”⁶⁹ Of course, if such peripheral language in proposed statutes or treaties is severable, then the more difficult problems already discussed remain.

One may conclude then, on the basis of ordinary first amendment doctrine, that there are serious questions as to the constitutional validity of language which might be included in proposed treaties and statutes proscribing warmongering, subversive, and defamatory propaganda—at least, as such language might be applied in specific instances. That is, there are serious questions unless the introduction of the conduct of foreign affairs makes a difference.

II

“EMBARRASSMENT OF THE EXECUTIVE,” THE QUESTION OF “SURVIVAL,” AND INTERNATIONAL COMPLICATIONS

The introduction of the subject of the conduct of foreign relations into a discussion of constitutional law brings to mind the rather pessimistic observation of one commentator from the social sciences, Professor Woodford Howard:

Few constitutional problems have produced more discourse, with less result, than the scope of constitutional limitation on foreign policy-making. . . . The fact is that the nation’s rise to giant power status has been accompanied by ever-increasing discretion on the part of its authorities and only passing regard to self-limitation. Constitutional theorizing, in the main, has been fruitless in the face of necessity.

Yet tenaciously we cling to a philosophy of limitation, some mechanical means of control beyond the ballot box [A] closeted Princeton seminar [recognized this trait] when Alpheus T. Mason shook it with a typical query: “What is the future of our subject, constitutionalism, in an age of prolonged Cold War?”⁷⁰

With perhaps less pessimism, we can at least begin with certain fairly ascertainable propositions.

⁶⁷ WHITTON & LARSON 10.

⁶⁸ 377 U.S. 360 (1964). And see the most recent decision in this area, *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

⁶⁹ 377 U.S. at 362.

⁷⁰ Howard, *Constitutional Limitation and American Foreign Policy*, in *ESSAYS ON THE AMERICAN CONSTITUTION* 159 (Dietze ed. 1964).

If it is not "hornbook" law it is at least "law review" law that the treaty power is subject to the Bill of Rights just as any other laws enacted by Congress, and to the same extent.⁷¹ Admittedly the best judicial authority we seem to have for this proposition is the dictum of Justice Black in *Reid v. Covert*.⁷² Professor Howard is not as sanguine as I in this respect, but his reference to the congressional power over aliens is not germane,⁷³ and apart from the Japanese-American wartime cases,⁷⁴ mentioned below, he has little to substantiate the proposition that treaty clashes with the Bill of Rights would be treated less rigorously than congressional statutes.⁷⁵ Therefore, in the absence of convincing evidence to the contrary, we may assume that a treaty punishing warmongering, subversive, and defamatory propaganda would face the same scrutiny as comparable domestic legislation when first amendment interests are invoked.

Moreover, when it comes to the implied power of Congress to regulate foreign affairs,⁷⁶ we are not without precedent concerning the applicability of the Bill of Rights and the rigorousness of that application. This was demonstrated in the involuntary loss of citizenship cases decided since 1958,⁷⁷ involving both the power of

⁷¹ See, e.g., LOUIS HENKIN, *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* 29, 169-73 nn. 14 & 15 (1958). The question was discussed with considerable heat during the height of the "Bricker Amendment" debate. References are gathered in BISHOP, *op. cit. supra* note 13, at 104-05.

⁷² 354 U.S. 1, 16 (1957).

⁷³ Howard, *supra* note 70, at 168, 173. The Court held that the Constitution does not contain substantive restrictions on the power of Congress to exclude or expel aliens, *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); and, indeed, no procedural restrictions with respect to the power to exclude. Given these holdings, the treatment of aliens with respect to exclusion and expulsion stands in contrast to exercise of other powers concerning foreign affairs. Indeed, one may doubt whether the opinion for the majority in *Harisiades*, concerning expulsion, would be literally followed by the Court. On the power over aliens, see Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 918-19 (1959). See generally Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578 (1959); *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 *id.* 262 (1959).

⁷⁴ *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). See text accompanying notes 102-05 *infra*.

⁷⁵ Indeed, the real thrust of his article seems to be a reiteration of the thesis that the Court can never offer significant protection with respect to any constitutional rights (see, for example, Howard, *supra* note 70, at 174, 177), a view sometimes attributed to Judge Learned Hand in *THE BILL OF RIGHTS* (1958). See, e.g., Mendelson, *Learned Hand: Patient Democrat*, 76 HARV. L. REV. 322, 334-35 (1962).

To the extent that misunderstanding here is involved with the "political questions" doctrine, see the thoughtful study by Scharpf, *Judicial Review and the Political Question—A Functional Analysis*, 75 YALE L.J. 517, 542-48, 561-65, 578-83 (1966). Compare the less sophisticated statement by Howard, *supra* note 70, at 168-69.

⁷⁶ This is not among the enumerated powers of Congress. But if it was not clear before *Perez v. Brownell*, 356 U.S. 44 (1958), that Congress had such an implied power, the Court made the matter explicit in *Perez* and later in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). See generally Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 918-19 (1959).

⁷⁷ *Schneider v. Rusk*, 377 U.S. 163 (1964) (foreign affairs power); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (foreign affairs power and war powers); *Trop v. Dulles*, 356 U.S. 86 (1958) (war powers); *Perez v. Brownell*, 356 U.S. 44 (1958) (foreign affairs power); *United States ex rel. Marks v. Esperdy*, 315 F.2d 673 (2d Cir. 1963), *aff'd by an equally divided court*, 377 U.S. 214 (1964).

Congress to regulate foreign affairs and its war powers.⁷⁸ It is true that initially, in *Perez v. Brownell*,⁷⁹ the Court sustained a congressional statute providing for the involuntary loss of citizenship by an American citizen who voted in a foreign political election, the majority requiring a showing only of a rational nexus between the withdrawal of citizenship and the regulation of foreign affairs, the end of which was "the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign political elections."⁸⁰ However, two more recent cases seem to depart from *Perez* insofar as it failed to treat citizenship as a preferred freedom.⁸¹ In *Kennedy v. Mendoza-Martinez*,⁸² a statute providing for loss of citizenship by a citizen who departed from or remained outside of the United States in time of war or national emergency for the purpose of evading military service was held to be penal in nature and unconstitutional for failing to comply with the fundamentals of criminal justice in the fifth and sixth amendments. Justice Goldberg, writing for the majority, left no doubt that the preferred-freedoms status of citizenship influenced the reading of the ambiguous statute as penal. In *Schneider v. Rusk*,⁸³ the foreign affairs power and its administrative convenience with respect to embarrassment in the conduct of foreign relations were invoked by the Government in support of a statute providing that a naturalized citizen residing continuously for three years in the country of his birth should thereby lose his nationality. In holding the statute contrary to the due process clause of the fifth amendment on the grounds that it constituted an unfair classification, the Court was led by the preferred-freedoms status of citizenship to apply a standard of review more rigorous than mere minimum rationality. Neither case involved freedom of expression, but they are relevant to a proposed statute drawing on the foreign affairs power to punish warmongering, subversive, or defamatory propaganda be-

⁷⁸ The subject of this essay is the concern whether the injection of foreign relations into a case will make a difference when the Court is asked to apply constitutional limitations. However, the war powers cases have often been intertwined with foreign affairs cases, see, e.g., *Kennedy v. Mendoza-Martinez*, *supra* note 77, and it would be ostentatious to offer proof that the exercise of the war powers will usually be intimately related to the conduct of foreign relations.

In any case, there are cases which support the applicability of the Bill of Rights, without dilution, to the war powers—cases dealing primarily with military jurisdiction over civilians. E.g., *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957). Cf. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). But see Howard, *supra* note 70, at 174-75, who, curiously, would dismiss the significance of these cases because they were "confined" to drawing a jurisdictional line between civilian and military authority. But to determine who has, and who has not, power is to deal with one of the most fundamental of issues.

The cases which cause the most difficulty are those which not only involve the exercise of the war powers during wartime but also involve the exercise of judicial review during wartime. This problem is discussed below.

⁷⁹ 356 U.S. 44 (1958).

⁸⁰ *Id.* at 58, 60.

⁸¹ For a discussion of citizenship as a "preferred freedom," see Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First*, 60 Nw. U.L. REV. 1, 81-84 (1965).

⁸² 372 U.S. 144 (1963).

⁸³ 377 U.S. 163 (1964).

cause the opinions make it clear that not only does the Bill of Rights limit the exercise of that power but the injection of foreign relations into an issue does not dilute the vigor with which the Bill of Rights shall be applied.

The right to travel and passport cases⁸⁴ add only a little to my thesis. In 1964, in *Aptheker v. Secretary of State*,⁸⁵ a majority made the preferred-freedoms nature of the right to travel clear, relying on the standards of first amendment cases to hold that section 6 of the Subversive Activities Control Act of 1950, making it a felony for a member of a Communist organization to apply for or attempt to use a passport, violated the due process clause of the fifth amendment. The power of Congress involved was that of protecting national security. *Zemel v. Rusk*,⁸⁶ decided in May 1965, more directly involves the conduct of foreign affairs. A majority upheld the Secretary of State's 1961 ban on travel to Cuba. Relevant to our discussion, Zemel claimed that this denial violated the freedom of expression guaranteed by the first amendment. Chief Justice Warren, writing for the majority, distinguished the earlier case of *Kent v. Dulles*,⁸⁷ in which the passport had been denied because of alleged associations, and concluded that Zemel's freedom of expression was not involved. As a consequence, the language of Chief Justice Warren with respect to the broader scope permitted the executive and Congress in the area of foreign affairs is limited to the question of delegation of powers. It was only with respect to delegation of powers in the area of foreign affairs that Warren stated Congress "must of necessity paint with a brush broader than it customarily wields in domestic areas."⁸⁸

However, there are other aspects of the conduct of foreign relations, recently dealt with by the judiciary, which suggest some possibly startling paradoxes. I refer here to the grounds offered by the Supreme Court for refusing to intervene in *Banco Nacional de Cuba v. Sabbatino*.⁸⁹ A major factor influencing the majority was the potential "possibility of embarrassment to the Executive Branch in handling foreign relations."⁹⁰ The problem may be suggested by this question: Could the President enter into an executive agreement and achieve the same result which by hypothesis I have, if not denied, at least questioned with respect to Congress? Silly? Well,

⁸⁴ See generally SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, THE RIGHT TO TRAVEL AND UNITED STATES PASSPORT POLICIES (1958); SPECIAL COMM. TO STUDY PASSPORT PROCEDURES, ASS'N OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL (1958); Gould, *The Right to Travel and National Security*, 1961 WASH. U.L.Q. 334 (1961).

⁸⁵ 378 U.S. 500 (1964).

⁸⁶ 381 U.S. 1 (1965).

⁸⁷ 357 U.S. 116 (1958).

⁸⁸ 381 U.S. at 17.

⁸⁹ 376 U.S. 398 (1964). The writing on *Sabbatino* has been voluminous. See the bibliography in ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE AFTERMATH OF SABBATINO 218-20, 225-28 (7th Hammarskjöld Forum 1965).

⁹⁰ 376 U.S. at 412. See notes 102-03 *infra*. Compare the analysis of constitutional questions involved in the Logan Act, Voigts, *The Logan Act: Paper Tiger or Sleeping Giant*, 60 AM. J. INT'L L. 268, 293-300 (1966).

maybe. But the implications of *Sabbatino* seem to be the concern of any conference concerned with international law. Moreover, the question may be even more dramatically posed by assuming unilateral action by the President. The use of the following hypothetical may lead us most quickly to Professor Mason's query, "What is the future of our subject, constitutionalism, in an age of prolonged Cold War?"⁹¹

Suppose that during the 1962 crises with respect to installation of Soviet missiles on Cuban soil,⁹² the President had been on the verge of an agreement with Castro which, in the judgment of the President and his closest advisers, would have removed an imminent threat of an all-out nuclear war involving the Soviet Union. Suppose further, however, that at the crucial moment before agreement, Castro had refused to proceed until a certain newspaper in Miami, Florida, ceased publications of editorials which Castro charged as being nothing but "warmongering," "subversive," and "defamatory" propaganda. Suppose next that a phone call to the editor from the President was unsuccessful—the editor invoking the first amendment's freedom of the press as justification for his continuing to publish editorials attacking Castro and his government. Assume then that the President ordered a military detachment from a nearby base to immediately padlock the offending newspaper. Suppose now that immediately after the military detachment performed its task the editor had his lawyer start proceedings in an appropriate federal court to enjoin the military detachment from continuing the padlock. Would the judiciary refuse to interevene for the purpose of passing on the validity of the alleged unconstitutional interference with first amendment rights, on the ground that such judicial action might embarrass the executive in the conduct of foreign relations—admittedly the conduct of foreign relations having to do with national survival? Remember, at this stage the question is directed simply to the problem of *Sabbatino*—that is, a refusal to hear—not whether, on the "merits," the court would deny the requested injunction because no constitutional rights were being violated.

The *Sabbatino* case, as we all know, concerned the nationalization of American-owned property in Cuba by the Castro government and the claim that this nationalization violated norms of customary international law.⁹³ It is sufficient for the purposes

⁹¹ See text accompanying note 70 *supra*.

⁹² See generally ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *THE INTER-AMERICAN SECURITY SYSTEM AND THE CUBAN CRISIS* (3d Hammarskjöld Forum 1964), including the proceedings of a forum held in November 1962 and a bibliography on the Cuban crisis through June 1, 1963; 1963 AMERICAN SOC'Y OF INTERNATIONAL LAW, PROCEEDINGS 1-17, 147-73. Description of the events of 1962 are now appearing in the flurry of books on the Kennedy Administration. See, e.g., the perceptive review of ELIE ABEL, *THE MISSILE CRISIS* (1966), by I. F. Stone, *The New York Review of Books*, April 14, 1966, p. 12.

⁹³ This was the controversy upon which the storm centered, and assumptions as to how the Court should have decided on the merits seems to have colored much discussion of the case and accounts for such accusations as Friedmann's that dissatisfaction with *Sabbatino* on the "act-of-state" question is necessarily tied to a desire for a decision holding the nationalization invalid. Friedmann, *National Courts and the International Legal Order: Projections on the Implication of the Sabbatino Case*, 34 *GEO. WASH. L. REV.* 443, 448, 451-52 (1966).

of this discussion to note that the property in controversy reached the shores of the United States and came within the jurisdiction of a federal district court in an action to recover the proceeds of a sale of the property.⁹⁴ The majority of the Supreme Court, speaking through Justice Harlan, relied upon the "act-of-state" doctrine⁹⁵ to preclude any judicial inquiry into the validity of the nationalizing decrees under customary international law. The opinion is a long and complex one. Yet it is not unfair to say that a major theme stressed throughout was that the act-of-state doctrine not only has constitutional overtones derived from the doctrine of separation of powers⁹⁶ but that also the doctrine is grounded, at least in part, on the policy that such an inquiry might embarrass the executive branch of our Government in its dealings with foreign nations. For example, this statement: "The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."⁹⁷ Taking another tack, and stressing the uncertainty of the customary norms of international law which were alleged to be applicable, the opinion suggests that a wrong guess by the judiciary "might provide embarrassment to the Executive Branch."⁹⁸

I emphasize that I do not rely upon *Sabbatino* for direct authority in seeking a resolution to my hypothetical. Certainly, there are important distinctions between that case and the hypothetical. For example, different systems of law are invoked in each as authority for invalidating the challenged invasion of citizens' rights: in *Sabbatino*, customary international law; in the hypothetical, the United States Constitution. (However, one might suspect that the vague international law norms involved in *Sabbatino* are only a degree more difficult to articulate than any constitutional norms applicable to the hypothetical.) Moreover, *Sabbatino* may have its primary importance as an interpretation of the role of a domestic court in interna-

⁹⁴ As pointed out by Lowenfeld, *The Sabbatino Amendment—International Law Meets Civil Procedure*, 59 AM. J. INT'L L. 899, 900 (1965): "The *Sabbatino* case itself was a freak case, in that it was the plaintiff which claimed under an expropriation, and the defendant, who (by sleight of hand) had taken possession of the proceeds of the expropriated property The typical situation . . . is the reverse. There has been an expropriation, and some property belonging to the taking state later finds its way into the United States. Plaintiff, a dispossessed owner, seeks to attach this property as a means of securing at least partial compensation for his loss."

⁹⁵ 376 U.S. at 401: "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory."

⁹⁶ *Id.* at 423: "The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state."

"The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Cf. id.* at 940.

⁹⁷ *Id.* at 423. See *id.* at 428, 429.

⁹⁸ *Id.* at 433. See *id.* at 436.

tional law.⁹⁹ Nevertheless, even one of the most able critics of the Court in this respect, Professor Falk, concedes that Justice Harlan's opinion deals almost entirely with internal relations rather than with the external relations which he views as most important.¹⁰⁰ Therefore, for all its differences, *Sabbatino* provides thoughts for fascinating speculation, by asking whether the threat of "embarrassment of the executive in the conduct of foreign relations," said in *Sabbatino* to justify judicial forbearance, should also justify judicial forbearance in the case of the Miami editor in my hypothetical. One could hardly deny that intervention in the hypothetical case by the judiciary would serve to "embarrass" the conduct of foreign relations by the President and, moreover, would do so in a situation of the gravest sort "in a world where friendly relations often rest on very thin ice."¹⁰¹

This suggestion focuses our attention on the fact that the context of the hypothetical—as indeed the context of proposals to restrict warmongering, subversive, and defamatory propaganda—is that of "survival." And if this is so, then we may find some assistance by looking to that development of constitutional law found in the *Japanese-American Cases*,¹⁰² arising out of and decided during the Second World War. In these cases, the Supreme Court was asked to pass on the validity of the internment of over 100,000 west coast Japanese in what were, in fact, our own concentration camps. The scope of the program, its arbitrariness, and its shame have been movingly described by Dean Rostow.¹⁰³ He suggests: "These cases represent deep-seated and largely inarticulate responses to the problems they raise. In part they express the Justices' reluctance to interfere in any way with the prosecution of the war. In part they stem from widely shared fears and uncertainties about the technical possibilities of new means of warfare."¹⁰⁴ He was writing at the time of those events. But note that at this conference we are discussing what are apparently widely shared fears and uncertainties about the impact of warmongering, subversive, and defamatory propaganda. To return to the *Japanese-American Cases*, it is sufficient for these remarks to note that by substantial majorities the Court sustained the extraordinary interferences with personal liberty, finding such interferences grounded in the congressional and executive exercise of those collective powers known as the war powers. The several opinions of the majorities in those cases struggled, almost desperately, to avoid giving a stamp of constitutional approval. But, in the end, the effect of the decision was to refuse to review the reasonableness of the

⁹⁹ Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935 (1964); Friedmann, *supra* note 93.

¹⁰⁰ Falk, *supra* note 99, at 947.

¹⁰¹ Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461 (1963).

¹⁰² *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

¹⁰³ EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE* 193 (1962), reprinting *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). See generally, MORTON GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION* (1949).

¹⁰⁴ ROSTOW, *op. cit. supra* note 103, at 256-57.

military and executive judgments concerning the necessity of the relocation program as a matter of survival.

May we infer then that in my hypothetical an invocation of the war powers—or at least “cold” war powers—would be found sufficient to justify padlocking the Miami newspaper on the grounds that the judiciary would not, or perhaps should not, substitute its judgment as to whether such action was justified in the name of national “survival”? The *Japanese-American Cases* raise the basic issue whether or not military and executive judgments exercised under the war power should be subjected to the same judicial scrutiny that is appropriate when the lawfulness of peacetime executive action is challenged as an unlawful invasion of private rights.¹⁰⁵ Note the phrase “the same judicial scrutiny”—one more conjecture may be helpful before reaching some general conclusion with respect to the degree the Constitution limits attempts to proscribe warmongering, subversive, and defamatory propaganda.

If we reduce the problem of the hypothetical Miami editor to one of national survival, or even survival of the entire world, then who would say that the Supreme Court should intervene if we were “absolutely certain” that, if the President did not padlock the Miami newspaper, nuclear bombs would be launched within days (hours)? But, then, is not such a judgment, instinctive or otherwise, simply an example of something like a clear-and-present-danger test in operation? And this is so whether the judgment relates to determining the issue on the merits or to avoiding judicial intervention by abstaining. For is this not a reflection of how time controls how we act upon predictions? This may be illustrated by substituting, with respect to the hypothetical, judgments along a spectrum ranging from “absolutely certain,” through “there is a good chance,” to “it is not impossible that it might actually happen, so why take a chance?” So that, to shift to the more familiar terms developed in the first amendment context, when subordinating interests of society which are compelling are gravely threatened and responsible men conclude that the antisocial evil is close at hand—so close that there is little if any time to take corrective action other than suppression of expression—then such suppression will withstand challenge from the first amendment.¹⁰⁶

¹⁰⁵ Rostow, *op. cit. supra* note 103, at 258-59, would answer affirmatively. For suggestions of further questions which must be answered in order to devise a workable standard here, see the sympathetic and discerning review of Rostow by Nathanson, Book Review, 77 HARV. L. REV. 1361, 1366 (1964). On the abuse of the “political questions” doctrine with respect to these cases, see Scharpf, *supra* note 75, at 561-66.

¹⁰⁶ And in this respect it is pertinent to recall that the antisocial evil allegedly close at hand is the threat of war, necessitating an exercise of judgment on the question of imminency when the factors involved may well be immensely intricate and arguably, at times, beyond the control of the judiciary; and if the decision must be made at the time of crisis, then without the comfort of hindsight. But this is simply to stress Professor Freund’s admonition that “Even where it is appropriate, the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors No matter how rapidly we utter the phrase ‘clear and present danger,’ or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.” FREUND, *op. cit. supra* note 59, at 44. However, to admit this does not require the double talk of Chief

But to say this brings into better focus the proposed restrictions upon warmongering, subversive, and defamatory propaganda. In the absence of more specific proposals we may again fairly resort to the definitions offered by such responsible persons as Professors Whitton and Larson. I have already referred to their definition of warmongering propaganda as that which may directly undermine peace by "building up ideas that will bring on war."¹⁰⁷ They also say,¹⁰⁸

Subversive propaganda, although it may not be as blatant and obvious in its menace to peace, has perhaps done more to disrupt peace than any other form of propaganda. The objective of such propaganda is ordinarily to produce violence within a country—the violence necessary to overthrow the existing political order, *to stir up domestic strife, to set class against class, and to turn people against their government.*

It is not necessary to dream up a parade of horrors to suggest the broad reach of such a definition. For example, would critical remarks about racial discrimination in South Africa be within this definition? And I am not speaking entirely "tongue-in-cheek" when I suggest that we could take the words of the Declaration of Independence and paraphrase them only slightly, direct them at a foreign government, and find that we have another example within this definition of "subversive" propaganda. Perhaps I am simply suggesting that the burden of showing the requisite degree of immediacy has yet to be met with respect to warmongering, subversive, and defamatory propaganda—at least as defined in such broad and sweeping terms. Therefore, whether it be unilateral action by the President, joint action by the President and Congress by the use of the treaty power, or the exercise of the power of Congress to regulate foreign affairs—regardless of the power invoked—the conclusion is not substantially different from that reached on considering ordinary first amendment principles. One may doubt that the injection of foreign affairs into this discussion of constitutional law will make a significant difference. Whatever the power invoked, there are grounds for believing that attempts to apply regulations of such a general nature would receive the rigorous scrutiny the Court has designed for measuring legislative collisions with preferred freedoms under the Constitution. One cannot be so absolutely certain that national survival is tied to such regulations.

But beyond constitutionality, and as a matter of wisdom, I must confess that I have some of the same reactions that I have when considering statutes such as the

Justice Warren, who seems to suggest that in such situations as the wartime cases the Court can consider the question of constitutionality and both answer it and not answer it at the same time. Warren, *The Bill of Rights and the Military*, in *THE GREAT RIGHTS* 87, 101-02 (Cahn ed. 1963). Nor does it seem necessary to go as far as Dean Acheson, who suggests that "to talk of the legal aspects of the Cuban incident reminds me of the the story of the women discussing the Quiz Program scandals. One said that she felt the scandals presented serious moral issues. The other answered, 'And I always say that moral issues are more important than real issues.'" He goes on to suggest that "the survival of states is not a matter of law." 1963 *AMERICAN SOC'Y OF INTERNATIONAL LAW, PROCEEDINGS* 13-14.

¹⁰⁷ See note 4 *supra*.

¹⁰⁸ WHITTON & LARSON 10. (Emphasis added.)

Smith Act within our domestic scene. If antisocial acts, as distinguished from words, may clearly be reached, and in fact are reached by law—whether acts of sabotage, espionage, or other similar acts, including violence—then we may seriously question whether it is worth the risk to become enmeshed in the stifling attempts to proscribe speech as such. The late Professor Chafee, speaking in the early 1950s at the height of the controversy over the Smith Act prosecutions, laid to rest rather effectively the argument that runs: “Well, yes, but it’s different now. Before there were only little dangers.” He reviewed in a dramatic fashion documents of the 1920s illustrating the extent to which people then thought the danger was something more than little, and he eloquently concluded: “Reading what everybody now agrees about the panic-stricken alarmists of 1920, I wonder what will be said thirty years from now about the alarmists of 1952.”¹⁰⁹ And what will they say in 1996?

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A COMMENT ON PROFESSOR NEWHOUSE'S PAPER

NATHANIEL L. NATHANSON*

The only aspect of Professor Newhouse's analysis that I am inclined to question is the failure to distinguish between warlike, defamatory, or subversive propaganda directed to the American people and that deliberately beamed abroad. The distinction that I have in mind is not the one which he does mention between attacks upon a foreign government and those directed against our own government. I agree with him that this distinction is not a satisfactory one because the directions of our own foreign policy may well be responsive to the popular opinion of foreign governments. But the opinion which the people of other countries have of their own governments is quite another matter. To the extent that anyone subject to the law of the United States is primarily and distinctively engaged in attempting to influence the public opinion of the people of another country, it seems to me that there are distinctive considerations which are not allowed for in Professor Newhouse's analysis.

In the first place, the clear-and-present-danger test as conventionally stated and as used by Professor Newhouse himself has little, if any, application to the situation which I am positing. The attempt to arouse other people against their own government does not involve advocacy of, or incitement to, the kind of action which our own government has a right to prevent. The ultimate action is more properly described as one which is none of our government's business. Should it follow from this that

¹⁰⁹ Chafee, *Thirty-Five Years With Freedom of Speech*, 1 KAN. L. REV. 1, 6 (1952).

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