Mr. Adams. They never tried that one on me. But it had been tried on other people. For example, it is my opinion that in late 1967 the Military Assistance Command had told its intelligence component to come up with any number of Vietcong so long as the number was under 300,000. Then, again, in June of 1971 my understanding is that another person within the Agency was told to come up with estimates for the size of the Khmer Communist Army of no higher than 30,000. Our present official estimate is something in the neighborhood of 40,000 to 50,000 Cambodian components.

Mr. Wolfe. Thank you.

Mr. Nixon, Mr. Broomfield, do you have further questions?

Mr. Broomfield. No.

Mr. Nixon, Mr. du Pont.

Mr. du Pont. No.

Mr. Nixon. We want to thank you very much, Mr. Adams, for your appearance here.

Mr. Adams. Thank you.

Mr. Nixon. We will begin testimony on our foreign relations with our older allies in Asia. The testimony today will be our relations with Taiwan and South Korea. Later we will take up the question of our relations with Japan.

When the President made his trip to Peking many of our older allies worried as to whether or not our relations with their countries would be damaged. It was, after all, an American doctrine that the non-Communist nations should rely on a system of collective security. The President's trip was undertaken in secrecy and many of our allies did not have consultations with us about it. The Japanese Government was embarrassed and our relations with Japan were strained. Taiwan and South Korea were likewise concerned.

It is hoped that we will be able to arrive at a clear understanding of what our policy is in order to reassure our own people and the citizens of other countries as to the intentions of the Administration. This is not necessarily a simple matter. In order to conduct a rational foreign policy in a complicated world we must have understandings with rival nations as well as allied nations. Each nation will necessarily have questions as to our intentions. Our only recourse is from time to time to reassure our friends and demonstrate firmness to our rivals.

Today we will hear from Ambassador Hummel. Acting Assistant Secretary for East Asian and Pacific Affairs, Department of State. We have enjoyed working with him and his testimony has been of great value to the subcommittee. Mr. Nooter of the Agency for International Development will make a statement on Cambodia as well as on programs planned for Taiwan and South Korea.

Mr. Hummel, will you take the stand and introduce your associates, Mr. Nooter and Mr. White.

STATEMENT OF HON. ARTHUR W. HUMMEL, JR., ACTING ASSISTANT SECRETARY, BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, DEPARTMENT OF STATE

Mr. Hummel. Mr. Chairman, I have asked two of my colleagues from the Department of State to come with me to answer questions
that might be more detailed than I would be able to answer, particularly on the subjects of Taiwan and South Korea. These gentlemen are Mr. Donald Ranard, the Country Director for Korea, and Mr. Leo Moser, the Country Director for the Republic of China.

Mr. Nix. You may proceed.

Mr. Nooter. Mr. Chairman, with your permission I would be glad to read a statement which we have prepared for you regarding the economic aid program in Cambodia.

Mr. Nix. Certainly.

Mr. Nooter. It is a privilege to appear before you to discuss our program in Cambodia.

First of all, I think it might be useful to give you a brief summary of how the economic aid program in Cambodia began in 1971.

In March of 1970, following the deposition of Sihanouk, the North Vietnamese opened hostilities against the Cambodian Government. Their enemy's military actions seriously affected the country's commerce and, in the summer of 1970, Cambodia asked the United States to resume economic assistance.

Prior to the war Cambodia was in relatively good economic shape. Export earnings, together with tourism, loans and aid, were enough to pay for the country's imports of $100 to $120 million a year. Foreign exchange reserves were about $65 million. By 1971, however, as a consequence of the war, there was a precipitous drop in Cambodia's export earnings. The Government drew down its foreign exchange reserves in order to finance imports and used up its prewar stockpile of commodities.

With almost no exports, the country was unable to continue financing imports needed to sustain the economy. Agricultural production, particularly rice, fell sharply because of territorial losses and labor shortages resulting from the military buildup. The major rubber plantations curtailed or ceased operations. Industrial production also fell because of raw material shortages, manpower diversions and war damage. Tourism virtually disappeared.

At the same time rapid expansion of the Cambodian Armed Forces, which before 1970 was only a 35,000 man largely ceremonial force, and the burden of armed conflict resulted in a drastic increase in Cambodian budget expenditures.

In formulating our initial economic aid program we analyzed available data, including prewar import patterns, military force levels and the impact of hostilities on agricultural and industrial production and transportation. Based on this analysis, we developed an aid framework geared primarily to supplying commodity imports needed to meet real resource needs rather than to combat inflation. We decided that the number of AID employees administering the program would be kept small; that we would not, at least for the present, initiate technical or capital assistance projects; that we would not have a separate AID mission in Phnom Penh; and that we would try to develop and maintain a procurement system that minimized the need for United States and Cambodian Government administrative controls.

We asked Congress to approve a $70 million commodity import program in fiscal year 1971. This program was initiated in March 1971. Following the advice of the International Monetary Fund, the Cambodian Government acted courageously to implement a number of im-
important self-help measures, including adoption of a flexible exchange rate system, simplification of the import licensing mechanisms, increased import taxes and higher interest rates. Parallel with these reforms, and in an effort to reduce the continuing drain on Cambodian reserves, we made a $20 million cash grant to the Cambodian Government in October 1971. We have since replenished the commodity import program from time to time with additional resources.

Cambodia has also received, under Public Law 480 sales program, substantial amounts of agricultural commodities, including cotton, wheat and rice. Public Law 480 sales would be about $30 million in fiscal year 1973.

As part of the stabilization effort, a multilateral Exchange Support Fund of $35 million was established in 1972 on the advice and with the assistance of the IMF. This fund was established in recognition of the fact that not all of the country's foreign exchange needs could be met through the tied procurement procedures of the commodity import program. Donor contributions are made available on an untied basis at a level worked out by the IMF. This fund was established in recognition of the fact that not all of the country's foreign exchange needs could be met through the tied procurement procedures of the commodity import program. Donor contributions are made available on an untied basis at a level worked out by the IMF. The fund has been an effective mechanism for enabling Cambodia to secure outside assistance in helping to meet part of the country's foreign exchange needs. Contributors include Japan, Australia, the United Kingdom, Thailand, New Zealand and Malaysia besides the United States and Cambodia itself.

Now, having said that, what has our aid program accomplished? First, U.S. economic aid to Cambodia has been, and still is, essential for the survival of the Cambodian economy in time of war. We finance food and other imports required to keep the economy going, some of which replace domestic production lost as a consequence of the war. Equally important, these imports are essential to forestall a serious deterioration in the living standard of the Cambodian people. Cambodia has never been a rich country, with prewar per capita income estimated at $111, and without U.S. assistance the lot of the average Cambodian would have been a sad one indeed.

As United States and other economic aid programs have gotten underway, imports have resumed and are about $115 million annually, a level which should sustain the economy. Foreign aid has financed only the import needs, not the domestic budget deficit.

In order to finance the budget for the expansion of its military forces, the government has had to borrow from its central bank. The amount of such deficit financing which the government has used for the military buildup has been greater than the stabilization impact of foreign aid. The country, as a consequence, has seen substantial monetary expansion and inflation. In 1971, monetary expansion was 50 percent, and close to that in 1972. Inflation has been somewhat erratic, prices rising early in the war during 1970, then lagging behind the rate of monetary increase, but again recently price increases have accelerated.

The Khmer government's role in economic policy has always been of cardinal importance. Provision of economic assistance presupposed
the Khmer government would take the measures that were necessary to maximize the usefulness of that assistance and, in addition, use its own foreign resources as well as seeking international support. Monetary and fiscal policies were to be the primary tools for controlling the allocation of resources and the rate of inflation.

Given the situation it faced, the Cambodian Government has done well, particularly for a country which moved so swiftly from tranquility to war. The Khmer government has generally followed a realistic exchange rate policy, even though that has required continuous devaluation as the rate of inflation continued.

Recently, we have also begun a program of direct assistance to refugees and war victims. Until 1972, Cambodia was able to meet the most pressing needs of its refugees, most of whom found housing with other members of their families or friends, and the Khmer government did not seek additional outside aid. Last year, however, the continuation of hostilities led to an increasing number of persons who were not able to find employment or otherwise provided for themselves. This was particularly true of the 10,000 persons in government refugee camps, most of whom were women, children and old people.

On August 10, 1972, the Cambodian Government first requested U.S. assistance to refugees. We dispatched a team to review the situation and determine what forms of U.S. assistance would be the most helpful in keeping with U.S. policy and legislative restraints regarding personnel limitations. The team confirmed that there were real needs to be met, with the most urgent requirement for relatively small amounts of assistance to those refugee families living in camps. The team recommended that assistance be provided through the United Nations or through private voluntary organizations in order to keep direct U.S. involvement to a minimum.

Since that time, AID has given several grants to private organizations interested in and able to assist Cambodia's refugees. The first of these grants, for $50,000, was made in December 1972 to the International Red Cross (ICRC) to provide food, clothing, medical care and other assistance. In April, we gave an additional $100,000 to the ICRC. More recently, we made grants for $500,000 each to the Catholic Relief Services (CRS) and to Cooperative for American Relief Everywhere (CARE). These grants will provide medical care, food, assistance in resettlement and, when security conditions permit, goods and credit facilities to finance resumption of farm activities.

Regarding future aid requirements, the longer term objective of U.S. policy is to achieve a negotiated cease-fire and a return to peace. While prospects for peace are uncertain, it is the U.S. Government's hope and intention that a cease-fire will be achieved and that soon our assistance will be directed to a postwar situation. First priority will be relief for war-displaced persons. We will seek, primarily through additional grants to private and international organizations, to provide medical care, assistance in resettlement, food, credit facilities to finance resumption of farm operations, seeds and tools, and housing materials.

In terms of longer range reconstruction and development requirements, the economic outlook for Cambodia is fair. With a settlement or a subsiding of hostilities, commerce would resume its normal pattern and domestic production and exports should approach prewar
levels. Manpower would be released from military service and return to domestic agricultural and industrial pursuits. Cambodian agricultural exports should be reasonably competitive and commercially attractive, and tourism to Angkor Wat should again become an important source of foreign exchange.

While the need for aid to finance essential consumption imports should gradually decline, there will be a requirement for extensive aid in the private sector to assist industry and in the public sector to restore transportation and infrastructure. Some of this aid should be forthcoming from international and regional aid organizations. Indeed, the international framework for increased assistance is already in place in the form of the Exchange Support Fund. There are also bilateral aid programs in Cambodia. Japan, for instance, has given substantial amounts of rice and humanitarian relief, principally through its Red Cross. Other countries, the U.N. development program, the Mekong Committee and the Asian Development Bank are also helping Cambodia with technical assistance or loans.

It is our expectation that these existing multilateral aid arrangements can be expanded to assist in Cambodia's longer-range development. Other countries have indicated their desire to provide additional assistance, particularly in humanitarian and reconstruction aid. The United States should also stand prepared to provide assistance which will help Cambodia move toward economic self-sufficiency when peace is restored there.

Thank you, Mr. Chairman. I will be glad to answer any questions that you may have.

[The attachments to the statement follow:]

**ATTACHMENT 1**

_Cambodia AID and Public Law 480 obligations_

**Fiscal year 1971:**
- Reimbursable import agreement: $20 million
- Commodity Import Program (CIP): 50 million
- Total SA: 70 million
- Public Law 480: 8.5 million

**Fiscal year 1972:**
- Cash grant: 20,000 million
- CIP: 18,502 million
- Subtotal: 38,502 million
- Technical support: 585 million
- Total SA: 37,087 million
- Public Law 480: 20,560 million

**Fiscal year 1973:**
- CIP: 45.00 million
- Exchange support fund: 20.50 million
- Refugees: 1.15 million
- Subtotal: 66.65 million
- Technical support: 6.30 million
- Total SA: 67.25 million
- Public Law 480: 25.733 million

*Agreements.*
Estimated contribution to 1973 exchange support fund

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<th>Contribution</th>
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<td>IMF compensatory drawing</td>
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<tr>
<td><strong>Total</strong></td>
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Mr. Nix. Thank you.

I would like to ask, what are the factors which influence the U.S. Government to render aid to Cambodia?

Mr. Noofer. That may be more in Mr. Hummel's territory.

Mr. Hummel. The Government of Cambodia is a friendly government and it has needs of its own that are quite obvious to anyone who has been there. From the point of view of American national interests, the situation of Cambodia and our interests, these are directly related to its geographical situation. The importance of Cambodia in terms of the Vietnamese peace agreement is quite obvious and the importance also of our support for the Cambodian Government in helping to achieve the implementation of Article 20 particularly of the Vietnam peace agreement is also important to us.

I would say then, in summary, Mr. Chairman, that insofar as we have any interests in this area—and on this honest men might perhaps differ about those interests—our interests are certainly engaged by the predicament in which the Khmer government finds itself by its request for assistance not only from ourselves but from a number of other countries that have helped to support it, by the fact that most countries internationally recognize the Khmer government in Phnom Penh rather than the exiled government in Peking. All these factors I think bear upon our desire to assist the Cambodian Government.

Mr. Nix. Now specifically do we have any treaty obligation to assist the people of Cambodia?

Mr. Hummel. No, sir; we do not.

Mr. Nix. We do not. Then our motivation first is our self-interest? That is true, is it not? I think you said it was to our interest.

Mr. Hummel. Yes.

Mr. Nix. It still is, continuing the aid?

Mr. Hummel. Yes, sir.

Mr. Nix. What, in particular, is that interest?

Mr. Hummel. I tried to describe a direct relationship of our interests in Indochina as a whole and the success of the peace agreement in South Vietnam and Cambodia's relationship to that agreement which does indeed affect our interest directly.

Mr. Nix. How is the success in Vietnam connected with our activities in Cambodia?

Mr. Hummel. Mr. Chairman, I and others have testified at some length before this committee and other committees about the intimate relationship in Cambodia and the applicability of the success, the genuine implementation of the cease-fire agreement in South Vietnam. Insofar as we have interests in that agreement, and I think those interests
are very strong, it is also to our interest to do what we can do to assure that article 20 of that agreement, a very important part of it, is in fact carried out and that in turn dictates that we ought to continue to assist the Khmer government.

Mr. Nix. Is it your opinion that the help we have given Cambodia has in fact served the purposes that you mentioned?

Mr. Hummel. Yes, sir, it has.

Mr. Nix. How do you come to that conclusion?

Mr. Hummel. Because in the absence of anyone's outside help except help from the North Vietnamese—massive help to the Khmer insurgents—there would, it seems to me, obviously be no possibility that our objective of a neutral Cambodia and our desire, along with the Cambodians, to have a cease-fire in Cambodia simply could not be achieved.

Mr. Nix. Well, I want to pursue it further because that does not satisfy me.

Mr. Broomfield.

Mr. Broomfield. No questions.

Mr. Nix. Mr. Wolff.

Mr. Wolff. Thank you, Mr. Chairman.

Mr. Nooter, could you tell us how much of the territory of Cambodia was in rebel hands in 1971?

Mr. Hummel. I am sorry, sir. I don’t have that figure. I could give you an estimate of the current situation but I do not—

Mr. Wolff. Has it been progressively worse or progressively better? In other words, do we control more territory today than we did in 1971 or do we control less territory? Do we control more people or less people?

Mr. Hummel. We do not control any territory or people.

Mr. Wolff. Does the Cambodian Government control more or does it control less?

Mr. Hummel. It controls less now certainly than in 1971.

Mr. Wolff. How about the so-called Ho Chi Minh Trail that comes down through that area? I believe that that area is used fairly excessively to supply the cadres and Vietcong that exist in South Vietnam. Is that correct?

Mr. Hummel. Yes, sir.

Mr. Wolff. Has that traffic continued at a steady pace or has it leveled off? Has it been reduced?

Mr. Hummel. There has been continued traffic along that route which traverses Laos as well as Cambodia en route to the various rebel areas in South Vietnam, the various PRG areas. That traffic has been diminishing in recent months but it has not ceased as you know.

Mr. Wolff. Why do you think it has diminished? Was it because of the agreements that were reached in Paris or was it because Government of Cambodia troops and our bombing were able to interdict the supplies?

Mr. Hummel. The Government of Cambodia has not been able to interdict any part of that trail nor has the Government of Laos been able to interdict any part of that trail that goes through Laos so it would not be because of actions by either the Cambodian Government or the Lao Government.
Mr. Wolff. So therefore if we continue to do what we are doing in Cambodia, there will be little effect upon the amount of supplies that are getting into Vietnam?

Mr. Hummel. That is true.

Mr. Wolff. Then why do we go on?

Mr. Hummel. With one exception, sir. As you know, the American air support and air strikes in Cambodia do have as one of their major targets the supply areas in the northeast of Cambodia that you were referring to a minute ago. We believe that these air strikes have had some effect. We are not sure exactly how much but they certainly have had some effect in diminishing what otherwise would have been a larger flow of supplies through Cambodia and into South Vietnam and through Cambodia into the hands of the Cambodian insurgents.

Mr. Wolff. Regardless of the agreement that has been reached in Paris the North Vietnamese are continuing to supply the Vietcong and their forces that they do have in South Vietnam, is that right?

Mr. Hummel. Yes, the supply we believe is continuing.

Mr. Wolff. Do you believe that if we reach an agreement in Cambodia that they will continue to do the same type of thing?

Mr. Hummel. No, sir. Our objective is to see the implementation—

Mr. Wolff. I don't know what our objective is but do you think they will do this in contravention of the agreement?

Mr. Hummel. Some of this rests, sir, on the negotiations that are now taking place in Paris and I think you will understand if I don't want to go into detail about those negotiations. But it is certainly no secret. It has been announced that the present round of negotiations with the North Vietnamese is dealing, among other topics, with this very difficult situation in Cambodia and with our strong desire that the North Vietnamese live up to their commitments as defined in the Vietnam peace agreement for withdrawal of all forces from Laos and Cambodia according to article 20. We hope that the North Vietnamese will abide better in the future by these provisions than they have in the past.

Mr. Wolff. Trying to follow through the questioning of the chairman in how Cambodia really affects Vietnam, because we have been able to do very little in stemming the supplies that are going into Vietnam, isn't it true that the loss of Cambodia to us would mean very little in stopping or in continuing the flow of material into Vietnam?

Mr. Hummel. Mr. Wolff, we are not trying for a military solution to these problems; I would like that to be made very clear.

Mr. Wolff. Well, what does the bombing do? Isn't the bombing military?

Mr. Hummel. It is not a solution and we have never tried to pretend that it is. We would like to have a diplomatic solution. The original diplomatic solution was signed in terms of the Vietnam peace agreement and in terms of article 20. Essentially these problems are not going to be solved by military action on the ground and we have never said that we felt that air support for the Cambodian Government would solve this. As a matter of fact, we have said the reverse. We devoutly hope that in Cambodia the different parties, the Government and the various insurgent groups, can come together to discuss a cease-fire and implement a cease-fire. That in fact is our objective.
This is the diplomatic side that we feel is much more important than anything else.

Mr. Wolff. One final question. In the bombing that we feel is necessary there have not been any reports of recent date of the loss of any aircraft. Have we lost any aircraft within this past year and do we have any additions to figures that we have issued on MIA's or POW's?

Mr. Hummel. It is my understanding, and I will correct this in the record if my information is not up to date, that four American aircraft have been lost. No American POW's have been taken but there has been American loss of life in connection with the loss of those four aircraft. My information on this is some days old. I think all of these four air crashes were in fact reported in the American press at different times in the last 2 months. If there is anything to add to that, I will add it for the record.

[The following was subsequently supplied:]

From January 27, 1973, through June 15, 1973, eight U.S. aircraft were downed in Cambodia. As a result, three U.S. airmen are carried as MIA; none as POW's; and five as KIA.

Mr. Wolff. Thank you.
Thank you, Mr. Chairman.
Mr. Nix. Thank you.
I would appreciate it very much if you would give us the benefit of our Government's position on our old friend the Government of Taiwan.

Mr. Riegle, would you care to examine the witness?
Mr. Riegle. Thank you, Mr. Chairman.
I, too, would be interested in the answer to that question when you get around to it.

Do you have an up-to-date figure as to the total dollar amount of assistance in all forms from the United States either directly to or in behalf of the Government of Cambodia on the one hand versus our best estimate of the total dollar support from the North Vietnamese to the Cambodian insurgents? I realize this gets into a lot of categories of different kind of spending but has any effort been made to accumulate the total amount of expenditures? I would think bombing runs probably make up the most significant element.

Mr. Hummel. I would have to supply that for the record, Mr. Congressmen. I don't know that we are going to be able to give any kind of dollar estimate for the amount of support that has come from the North Vietnamese to insurgents hands if that is one element of your question. We would do our best. We have, of course, cumulative figures that are reported every year to the Congress for American assistance to the Government of Cambodia, both military and economic, and I can recapitulate those for you.

[The material follows:]

Based upon cost factors covering munitions, fuel, aircraft attrition and certain amounts paid to crews while in flight status, the following costs were incurred by the United States January 17, 1973 through June 7, 1973 for bombing operations over Cambodia: $263,482,000.

Military and economic assistance to Cambodia reported to Congress for fiscal year 1972 totaled $239,308,000 (plus fourth quarter excess defense articles valued at $310,000). Through the third quarter of fiscal year 1973, military and economic expenditures were $212,047,000.
STATEMENT OF HON. ROBERT H. NOOTER, ASSISTANT ADMINISTRATOR, BUREAU FOR SUPPORTING ASSISTANCE, AGENCY FOR INTERNATIONAL DEVELOPMENT

Mr. Nooter. The number that was reported for fiscal year 1972 was $239.6 million in economic and military aid and that does not include any bombing support.

The number for the first three quarters of fiscal year 1973 was $212,047,000.

Mr. Riegel. What is the bombing costing us today as an incremental cost? I mean full cost now, the cost to run that show. Do you know how much it would cost to run that per day or per hour?

Mr. Hummel. The Department of Defense does know and we do not have anyone from the Department of Defense here. The question has been asked by a number of committees and I saw in the Congressional Record replies to similar questions posed by Congressman Hébert last month. If there is some updating of those figures that we can do, we will do our best.

Mr. Riegel. There are several things that trouble me. Just from the point of view of policy decisionmaking, it is hard for me to understand how policy decisions can be made without costs being totally accumulated and looked at as an element of the decision. In other words, how does the State Department decide at what point a policy may no longer be relevant simply because it is too expensive if you don't have the cost data? Is that something that does not get considered?

Mr. Hummel. Well, it is considered. Mr. Congressman. I am not sure I understand quite the force of your question. It is considered.

Mr. Riegel. We are spending a number of dollars this month on Cambodia. We have spent so much in the last calendar year. The bombing costs have been a very substantial incremental cost, and so forth. What I am saying is that one of the ways that I would like to measure the wisdom or lack of wisdom in this policy is, how much it costs us and then later try to identify what it is we are gaining for this very large expenditure of dollars. What concerns me, and what concerns me also in the case of the Vietnam war, is that we never really knew what we were spending until after the fact and then we were so busy coping with new problems we didn't go back and find out how much we had spent.

Does the State Department have today a current, up-to-date, comprehensive cost analysis of what this policy means in dollars and cents to the United States, how much we are spending, how expensive is this policy? That to me is how you measure whether you want to do it or not.

Mr. Hummel. I do not have those figures in hand today.

Mr. Riegel. I am not surprised to hear that but I am troubled to hear that because it just seems to me that that ought to be one of the ways that you measure whether or not a policy makes good sense.

Let me go to this civilian side of it. How precise an understanding and feeling do we have today for the civilian casualties that are arising from the bombing we are doing in Cambodia?

Mr. Hummel. Not very precise, Mr. Congressman. Our Embassy in Phnom Penh, including its AID component and other components, is
tasked with trying to interview refugees, collecting material from as many sources as they can, given their very limited manpower there and the fact that American officials do not move outside of Phnom Penh very much. We have made this a high-priority task. We have rough totals for refugees who are at present in the Phnom Penh area; the Khmer Government supplies us with such numbers.

We have, frankly, not been able to find very good sources about direct results of American bombing that have, in fact, caused refugees. In fact, we have found that it is very difficult to find refugees who say that they fled directly because of American bombing. The situation is, first of all, very unfortunate and very difficult for the Khmer people. One of the difficulties that one should not underestimate are the actions of the Khmer insurgents who have used assassinations, forced relocation of populations, forced labor on their side to carry supplies—

Mr. Riegle. If you want to get into that area which is a very long and involved area—you have been to South Vietnam. I have been to South Vietnam—it is a much longer term and broader problem. There have been forced population programs by which people have been moved from areas by the people that we have been allied with in South Vietnam. There are hundreds of thousands of people that have been forced to relocate in other places living in refugee villages. If you want to get into the area of talking about who is causing the greatest civilian damage and dislocation, it is very hard to pin down how much we have done, say, in terms of the U.S. effort versus how much has been done by the North Vietnamese or anybody else we want to label as enemy forces. I don't want to get into that because I don't think the data are good enough to begin to prove that the damage we have done is less than the damage that we may want to allege that the other side has done.

Mr. Hummel. I thought that was the force of your question, Mr. Congressman.

Mr. Nix. May I interrupt you to say the bells have sounded. Will it put you to any great inconvenience to ask your indulgence while we record our vote?

Mr. Hummel. Not at all.
Mr. Nix. Thank you, gentlemen.
[Whereupon, the subcommittee recessed.]
Mr. Nix. The subcommittee will be in order.
Mr. Riegle, will you proceed.
Mr. Riegle. Thank you, Mr. Chairman.

To pick up where we were, I think we were discussing the extent to which our intervention may have created civilian casualties. You raised the issue as to the extent to which North Vietnamese people operating in Cambodia may have created civilian casualties. Rather than pursue that, because I know that precise figures do not exist in terms of comparative analysis, what I would like to know is, apart from whatever the North Vietnamese may or may not have done, do we know what we have done? Do we have any quantitative measures that we have confidence in that are up to date as to what the United States has caused to happen with respect to either civilian deaths or civilian injuries? Does that data exist and can you give it to the subcommittee at this time?
Mr. HUMMEL. I don't have it at this point. We can ask our Embassy for the most up-to-date estimates, most of which would have to come I think from Khmer government sources.

Mr. Congressman, may I address just briefly the points you made a little earlier. You mentioned that there has been forced relocation of population by the North Vietnamese Government. I don't think that is germane to what we are talking about in Cambodia because the Cambodian Government has never taken forced relocations of population to our knowledge. The activities of the Khmer insurgents and the North Vietnamese in Cambodia, regardless of whether your information about Vietnam is correct or not, it is really not germane to the situation in Cambodia.

Mr. RIEGLE. Well, I won't argue that point with you any more than I will argue whether forced relocation in Cambodia is really relevant to my original question of to what extent have we caused civilian casualties in Cambodia which I have not got an answer to yet.

What you are saying is that you will get up-to-date information and pass it on to us. What you, in effect, are saying is that presently you don't have that information. I mean how current and how complete is the information that you do have?

Mr. NOOTER. To my knowledge there are no reliable estimates in this area.

Mr. RIEGLE. How can you make policy decisions if you don't know the answer to that question? Are you suggesting to the subcommittee that the extent of civilian casualties does not really matter?

Mr. HUMMEL. Of course not, Mr. Riegel.

Mr. RIEGLE. Then what do you have?

Mr. HUMMEL. That is a disturbing comment. Any casualties do matter and we feel just as strongly as anyone else does about it. We have taken the maximum feasible number of measures to make sure that our air support activities of Cambodian Government forces cause the absolute minimum number of civilian casualties. This is important to us. The mechanism of command and control and targets and the ground rules for kinds of airstrikes that can be undertaken are very precisely laid down, and a large number of requested airstrikes are turned down on exactly the grounds we are describing. This is important to us.

Mr. RIEGLE. What data do we have then? I mean how do we test the fact that these safeguards that you speak about work? In other words, if you don't have data available to yourselves or that you can share with us, that does not really mean anything because what you are saying is we don't know the effect of our bombing. Isn't that what you are telling the subcommittee? You don't have the answers today? You can't tell us that?

Mr. NOOTER. Mr. Hummel did say that the people in the Embassies there do check in the areas.

Mr. RIEGLE. Do they make the decisions about whether we continue to bomb in Cambodia? Where are those decisions made? Aren't they made here?

Mr. NOOTER. Mr. Hummel can go into that in more detail but the people out in the Embassies do check with the areas, with the hospitals.
They make whatever kind of surveys they can to see what is going on to learn as much as they can about it.

Mr. Riegle. Do you mean participate in the decision? Do either of you participate in the decision as to whether or not the United States bombs Cambodia?

Mr. Hummel. Yes; in the Bureau of East Asian Affairs as part of the Department of State exercising and passing along the best judgment of the Department of State. Yes; we do.

Mr. Riegle. So in other words, it is your position then as one of the people who participates in this decision that today we should be bombing?

Mr. Hummel. Yes, sir.

Mr. Riegle. All right. I am asking you as a part of that decision-making process—my earlier inquiry was do you know what the civilian effects of American bombing are?

Mr. Hummel. We don’t have precise quantitative numbers. We believe it to be small.

Mr. Riegle. What is “small”?

Mr. Hummel. We are doing our best to make it as small as possible.

Mr. Riegle. How small?

Mr. Hummel. We don’t have numbers.

Mr. Riegle. How can you crank that into your decision? You are telling us you really don’t know.

Mr. Hummel. I do not have quantitative numbers.

Mr. Riegle. But you make decisions anyway?

Mr. Hummel. Yes, sir. One of the reasons we do not have quantitative numbers is because the Congress has placed restrictions on the numbers and functions of the people that we are allowed to have as American officials in Cambodia. There are very few Americans there. We are not able to have people in the field on the ground examining the results of bombing attacks the way we would like to. These are restrictions that are placed by Congress, not by us, and our lack of precise information is due in large part to those congressional restrictions.

Mr. Riegle. Well, I don’t want to pursue that at too great a length now because I am not sure we get to any conclusions or that we can do anything about it today. But I think that way of making decisions, and I speak just for myself and not anybody else on this subcommittee or in the Congress—I think that is an inhuman way to make decisions. I think it is inexcusable if that is done in the name of the U.S. Government. I think the fact that you cannot tell us what the effect is on the civilian population is an enormous admission of just poor performance. I don’t understand the human values that are being used in the State Department or in the administration that can make decisions that way, and I am ashamed of those decisions and I am ashamed to hear you say those things here.

Mr. Chairman, I wish to submit this newspaper article for insertion in the record.

Mr. Nix. Without objection, so ordered.

[The newspaper article follows:]
A CAMBODIAN LANDSCAPE: BOMB PITS, RUBBLE, ASHES

(By Sydney H. Schanberg)

PHNOM PENH, CAMBODIA, MAY 21.—The destruction in Cambodia has multiplied greatly since the escalation of the American bombing began here in February. Scores of villages have been blown away. Twelve-foot-deep bomb craters pock the ruins. Great numbers of livestock have been killed, harvested crops burned to ash, orchards destroyed—all creating a degree of damage, and therefore a reconstruction problem, that until now had been associated only with North and South Vietnam.

Although most of the bombed areas are impossible to get to, an idea of the extent of the damage can be gained by venturing as far as is safe on the roads leading out of Phnom Penh. Normally one can go no more than 25 to 30 miles in any direction, and sometimes much less.

BOMBING LARGELY RESPONSIBLE

But even in these short distances, the destruction is extensive, and the refugees along the roads say that the bombing caused a considerable part of it. Even without their testimony, the huge craters that have gouged the once-fertile earth tell the story.

Largely because of air power, whole series of villages no longer exist along Route 1, along the banks of the Mekong and Bassac Rivers southeast and south of Phnom Penh, along Route 30 south of Phnom Penh, and in many other areas. Sometimes the devastation is continuous for several miles—not a house or a piece of one left standing. Along one 10-mile stretch of Route 30, there is total destruction for three miles, then a break, then two more miles of ruins, then another break and finally another mile of rubble. Ashes, broken cooking pots, shattered banana and mango trees, twisted corrugated iron roofing and sometimes the concrete stilts of a house reaching toward nothingness—that is all that is left.

A few people wander forlornly through the rubble, still stunned by what has happened, skirting the craters, picking at the debris.

“When I came back to my village,” said a farmer from the destroyed village of Svay Meas on Route 30, “there was no sound. No people. No children. Not even a dog. It was all quiet. I wanted to cry. Everybody wanted to cry.”

The Americans say that every possible precaution is taken to avoid civilian destruction. But the visible evidence on the ground and information from other sources indicate considerable confusion in the conduct of the air war and widespread damage to civilian property.

There is no doubt that the Seventh Air Force is making a marked effort to avoid civilian casualties—at least outside the eastern third of the country, which is solidly held by the enemy. But the Americans are dependent for their information on the Cambodian military officials, who tend to panic under enemy pressure and have shown, in their requests for air strikes, almost no concern about civilian lives or property.

CAMBODIANS WILL BOMB IT

According to an informant close to the situation, even when the Americans reject a target because it is too close to a pagoda or school, or it otherwise violates the rules of engagement, the Cambodians will frequently give it to their own small air force—consisting of about 20 propeller-driven T-28 single-engine planes.

Officially, little is known about how many civilian casualties have been caused by the American bombing, for information is difficult to gather. Most of the areas bombd are inaccessible, either because of current fighting or because they are in enemy hands.

The many refugees interviewed in the last three weeks usually tell a story of having fled their villages before the planes came to bomb—because the Cambodian rebels had arrived and a ground clash with Government forces was either believed imminent or had already begun.
These refugees report only a relatively small number of casualties in their own groups. They say they do not know about possible casualties among the considerable number of fellow villagers who went away, willingly or unwillingly, with the guerrilla forces.

However, there is a different category of American bombing, in a different part of Cambodia, and information about this area is even scarcer than what is known about the area hit by the recently escalated air attacks. This is the bombing in “Freedom Deal”—the name the Americans have given to the area east of the Mekong River that has never been ventured into by Government troops and has been used by the Communists for moving troops and supplies from North Vietnam into South Vietnam.

The Americans have been bombing heavily in “Freedom Deal” ever since the war began in Cambodia in 1970. It is essentially a free-fire zone, where the Seventh Air Force, now based in Thailand, can hit virtually what it wants to. The Nixon Administration has divulged almost nothing about this bombardment. Questions about the tonnage of bombs dropped, the number of sorties, the considerable numbers of fell­low villagers who went away, willingly or unwillingly, and the tonnage of tonnage of bombs dropped, the number of sorties, the considerable numbers of fell­low villagers who went away, willingly or unwillingly, and the number of enemy killed are not answered. The number of Cambodian civilians killed is also either not known or not revealed.

But every once in a while, some civilians make their way into Government territory from “Freedom Deal” and tell stories of bombing that has wiped out entire groups of villages and sizable numbers of the people who were living there under Communist administration.

Such was the story told a few days ago by a group of villagers who reached Phnom Penh from Svay Rieng Province in southeastern Cambodia, bordering South Vietnam. They are now living in a refugee camp here.

Ouk Nourm, a 25-year-old woodcutter, acted as their spokesman. Speaking in Cambodian through an interpreter, Mr. Ouk Nourm said that his own village, Kompong Cham, and seven nearby villages had been destroyed, bit by bit, during the three years of American bombing. He gave the names of these villages as Prey Romong, Prey Tram, Prey Channa, Wat Saray, Set, Prey Thom and Phnom Srao. He said that the Vietcong were in these villages and controlled the area.

Mr. Ouk Nourm said that his sister-in-law was killed in a bombing raid on his village seven months ago. He also told of witnessing another, much more devastating raid—on the same day. He said that the 30 civilians killed by the raid included his brother-in-law and 50 of his friends, who, he said, were among more than 100 men, including himself, taken prisoner by the Vietcong. He later escaped and moved north as a laborer to Kompong Cham Province.

It was there, he said, that the bombing took place one night when the 30 prisoners were camped in one building and the others elsewhere. A bomb from a B-52 scored a direct hit on the building. No one survived, he said.

Mr. Ouk Nourm and his wife said they had fled Svay Rieng Province for Phnom Penh because “we are afraid of the planes.” Mr. Ouk Nourm also said that he was afraid of being taken away again by the Vietcong.

The American Embassy in Phnom Penh will say nothing about what is happen­ing in “Freedom Deal,” where the Seventh Air Force runs the bombing and the embassy plays only a minor role. It says almost nothing about the bombing in other two-thirds of Cambodia, which was stepped up in February and which the embassy helps direct.

But the frightened villagers upset by the bombing have a great deal to say. Why does Nixon send airplanes to bomb our village and destroy our house?” ask a refugee from a largely destroyed village, Phnom Penh, about 16 miles southeast of Phnom Penh.

TWO VERSIONS ON CASUALTIES

Another man from the village says he is angry only at the Cambodian Government because it was the Cambodians who called for the American planes. Still another says that he is bitter at both sides because the bombing would not have happened if the rebels had not attacked the Government troops in the area. “Both sides destroyed my village,” he says.

 Officials at the American Embassy say that they continually investigate such reports of civilian casualties and “have found that almost all the reports do not hold up.”

Yet in half an hour one recent morning at the Khmer-Soviet Friendship Hospital in Phnom Penh, three civilian casualties from the bombing were found, including a 13-year-old boy from Kompong Chhnang Province named Sok Sam An.
The boy, recovering from fragment wounds in his lower back, said that he had been cutting soya in his father's field one morning late in February when "a plane came over and dived and dropped a bomb near me." He added that "there were no enemy troops around and no fighting in the area."

Mr. Nix. Mr. Hummel, we will go into the question of Taiwan.

Mr. Hummel. I would be delighted.

Mr. Chairman, I have no prepared statement. I was not asked to prepare one. I would make a few opening remarks about our relations with the Government of the Republic of China on Taiwan and then answer questions you may have.

The United States has had a long policy over many years of friendship and cooperation with the Republic of China. Our two Governments have cooperated and they will continue to do so in a wide spectrum of endeavors. This close friendship has continued notwithstanding developments in our China policy which culminated in the President's February trip to Peking last year. The American policy toward the Republic of China is based on our determination to maintain our traditional ties of friendship and cooperation and also at the same time to proceed with the normalization of relations with the PRC, the Peoples Republic of China, at the same time.

We continue to support the participation of the Republic of China in international meetings and in seminars when that government can contribute to the knowledge and expertise of the world community. We are pleased to observe that during the past year the economy of Taiwan has been booming, that statistics for the year 1972 are really quite extraordinary. The overall foreign trade of Taiwan rose 48 percent in 1972 over the previous year reaching a total value of 5.8 million U.S. dollars' worth.

Taiwan's real gross national product increased by almost 12 percent in 1972 and the comparable rates of growth of gross national product were about the same for the previous 2 years. This is an extraordinary high and sustained rate of economic development. Our own exports to Taiwan increased by about 22 percent during 1972. Our American capital investments in Taiwan are very substantial, indeed.

With that background, sir. I would be pleased to answer questions.

Mr. Nix. I take it, Mr. Hummel, that our relationship with the Taiwanese Government, the 12 million people of Taiwan, has in no sense been eroded by virtue of our recent relationship with the Peoples Republic of China.

Mr. Hummel. That is correct, sir. Perhaps I could use the words Secretary Rogers used in addressing a meeting in June 1972, just a year ago. He said, and I quote:

"Our new relationships will not be achieved by sacrificing the interests of our friends. We obtained explicit recognition of this fact in the principles to which we described with the Peoples Republic of China and the Soviet Union."

Mr. Nix. Mr. Wolff.

Mr. Wolff. Mr. Hummel, we have a treaty of mutual assistance with the Republic of China, do we not?

Mr. Hummel. Security treaty; yes, sir.

Mr. Wolff. Security treaty.

Mr. Hummel. Yes, sir; we do.

Mr. Wolff. That treaty, I take it, is still in force.

Mr. Hummel. Yes, indeed.
Mr. Wolff. Were there any conversations that were held with the PRC with relationship to the removal of our forces from the China Sea or the Straits of Formosa?

Mr. Hummel. There is a paragraph that relates to these points in the Shanghai communique which was signed on February 22 last year on the occasion of President Nixon’s visit. Would you like me to read that paragraph at this point?

Mr. Wolff. Yes, sir.

Mr. Hummel. “The United States acknowledges that the Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of that China. The U.S. Government does not challenge that position, it reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves. With this prospect in mind, it affirms the ultimate objective of the withdrawal of all U.S. forces and military installations from Taiwan. In the meantime, it will progressively reduce its forces and military installations on Taiwan as the tension in the area diminishes.”

Mr. Wolff. Don’t you think that that reduces or compromises in some way the interests of our ally in the security treaty? Saying that we are going to remove the forces from the area and that we consider China to be one China, doesn’t that change the status of the Republic of China?

Mr. Hummel. The security treaty does not require us to station American forces in Taiwan. There is no requirement in that treaty for such stationing so I don’t think the two things are contradictory. It was certainly not our intention to derogate the force of our security relationship with the Republic of China in this communique.

Mr. Wolff. Isn’t there a contradistinction between the statement that has been made and the security treaty? Suppose the PRC decided to move upon the Republic of China and we have indicated in our position paper here that there is one China. Now how would those—

Mr. Hummel. I am sorry, sir. That is not an assertion that we made. This is an assertion made in earlier parts of the statement by the Peoples Republic of China. Our statement is that the U.S. Government does not challenge that position.

Mr. Wolff. That is exactly what I am saying, that we have agreed to the statement that was made then by the Republic of China; there is one China and that there should not be forces on the—

Mr. Hummel. No, sir. The purpose of this phrase has been explained a number of times and it is that the United States is not taking a position here and that the question of Taiwan should be resolved by the Chinese themselves. The sentence which I will re-read is that “it reaffirms”—that is, the U.S. Government—“its interests in a peaceful settlement of the Taiwan question by the Chinese themselves.” We are not attempting to decide what kind of settlement that would be.

Mr. Wolff. But if in the improbable event that the PRC would attempt to move upon the Republic of China, our treaty commitments would be in full force; is that correct?

Mr. Hummel. Yes, indeed.

Mr. Wolff. Thank you.

Mr. Hummel. We do not expect that such a thing is likely, Mr. Congressman.
Mr. Wolff. Well, I know we don't expect it but the important element I think you underlined—the intent of the U.S. Government to live up to its commitments and its prior treaties.

Mr. Hummel. Yes, sir. Many high Government officials maintain that treaty force is in effect.

Mr. Wolff. Thank you.

Mr. Nix. Mr. Riegle.

Mr. Riegle. No questions.

Mr. Nix. Mr. Hummel. Mr. White. Mr. Nooter, I want to express the thanks of the subcommittee for your appearance here today. We are very grateful to you.

Your statement, Mr. White, would you care to submit it for the record?

Mr. White. Thank you.

Mr. Nix. Without objection the statement will be incorporated in the record.

[The statement follows:]

STATEMENT OF ALFRED D. WHITE, DEPUTY ASSISTANT ADMINISTRATOR, BUREAU FOR ASIA, AGENCY FOR INTERNATIONAL DEVELOPMENT

Mr. Chairman and members of the committee: I am pleased to appear before you to testify on A.I.D.'s program in South Korea.

Two decades ago, the Republic of Korea lay in ruins from the devastation of war. Politically isolated, poor, endowed with few natural resources, few observers regarded it as a likely candidate for economic development.

Today its 32 million citizens, although crowded on a land area the size of Indiana, have solid reasons to be optimistic: Korea's economic situation has changed dramatically. The economy is booming. The average citizen in both the urban and rural areas is benefiting from a per capita income which more than doubled since 1960. The economy grew 7% per year over the past decade, with growth accelerating toward the end of the decade. Balance of payments performance was even more impressive. Since the export drive started in the mid-1960s, sales of Korean products overseas rose from $250 million in 1966 to $1.4 billion in 1972. Imports rose less rapidly than exports. Korea still experiences sizable trade deficits but the 1972 deficit of about $900 million was down significantly from the $1.3 billion trade gap of 1971.

The economic progress of Korea can be attributed to a series of sound development policies adopted by the Korean Government and businessmen. These included a strong economic stabilization program, measures to increase savings and investment, the attraction of foreign capital and an all-out campaign to find overseas markets for Korean products.

The U.S. has made a major commitment to Korean economic progress, providing since 1953 about $5.3 billion to finance Korean development projects and vitally needed imports and technical assistance.

The U.S. interest in continued Korean economic progress remains strong. A strong Republic of Korea will be in a better position to negotiate for a reduction of tensions in the Korean Peninsula. An economically strong Korea is better able to provide for its own defense. It will also be a better commercial market for U.S. products and investment. Korea accounted for about $650 million of U.S. export sales in 1972 and already U.S. private investment totals more than $200 million.

The role of U.S. economic assistance in promoting Korean development has changed over the years. A decade ago, the U.S. was virtually alone in providing development assistance. Today, Korea receives aid from a large group of countries and international agencies which are members of the Consultative Group of Korea. These donors include the major European countries, Japan, the World Bank, the Asian Development Bank and the UN and they now provide, on concessional terms, substantially more aid than the United States.

Current U.S. aid closely supports the Korean Government's priorities established in its Third Five-Year Plan. The Plan, which covers the years 1972 through 1976 places increased emphasis on agriculture, seeking to close the gap in income
and quality of life between the rural and urban populations. The major share of U.S. assistance in FY 1974 will aid Korean agriculture and rural development. The government also seeks to reduce its population growth rate from 2.2% to 1.5% in the next five years. Again, our aid will support this objective.

In FY 1974, we plan to make available $25 million in development loans. We would use about $8 million to strengthen Korean agriculture research, $7 million to improve farm irrigation systems, $10 million to help build rural roads and $5 million to strengthen industrial standards and testing.

The $2 million technical assistance program is designed to meet the special needs of a nation in Korea's advanced stage of development: advisors in agricultural planning, educational modernization, science and technology and economic policy, and highly specialized training in the United States of Korean officials and technicians.

Public Law 480 helps finance some of Korea's substantial agricultural commodity purchases from the U.S. In FY 1974, PL 480 will help Korea purchase about $150 million of American wheat, rice, cotton and corn, commodities which cannot be produced in Korea in quantities which approach consumer demand.

It is now possible to look ahead with optimism to declining levels of U.S. aid, in view of Korean progress and the increasing amounts of assistance coming from other sources. We expect to be able to terminate development lending in FY 1975 and PL 480 sometime thereafter. U.S. technical assistance will probably continue over a longer period, although we expect Korea itself will increasingly finance and manage its requirements for technical experts and training.

Mr. Chairman, thank you very much. I would be happy to answer any questions you may have.

Mr. Nix, Thank you very much, gentlemen.
The subcommittee will stand adjourned.

[Whereupon, at 3:24 p.m., the subcommittee adjourned.]
APPENDIX

[From Commentary, July 1972]

THE CONSTITUTION AND THE WAR

(By Alexander M. Bickel)²

It is frightening when out of the privacy of the Oval Room or of Camp David a decision emerges to invade Cambodia, bomb Laos or North Vietnam, or, as most recently, mine the harbor at Haiphong and risk a clash with the Russian navy. Made privately, the decision is irrevocable, and by the time it is announced, it has been implemented. One man makes it, as freely as any dictator or emperor. Have we come these thousands of miles and hundreds of years to be governed in so old a fashion? Can this be in accordance with the American Constitution?

In wartime or in face of a threat of attack on our territory or our forces, the answer is yes, it is in accordance with the American Constitution. Commanders are dictators, and the President is Commander-in-Chief. The Constitution says so, and very deliberately. Its framers had cause to know that war cannot be waged democratically and Presidents have acted accordingly. President Roosevelt, for example, did not ask the permission of Congress to invade North Africa in 1942 or Europe in 1944.

Mr. Nixon came to office as a war President. His policy has been to end the war on certain conditions, but to fight it until those conditions are met. Congress, as I shall point out, has power under the Constitution, subject to the President’s veto, to impose a different policy on him: not different tactics or a different strategy for waging the war, but a different policy, requiring him to end the war on different conditions or on no conditions at all. But Congress has not exercised this power.

The closest Congress has ever come was in a hortatory provision of the Military Procurement Authorization Act of 1971, declaring it to be “the policy of the United States” to end the war “at the earliest practicable date” and to undertake a “prompt and orderly withdrawal . . . subject to the release of all American prisoners of war.” The President rejected this advice. And advice was all it was. The amendment, said the President, describing its language and the intent behind it with total accuracy, “is without binding force or effect.” Congress shied from using mandatory language—“the President shall”—because it shied from the responsibility, and because it tried to evade the constitutional necessity of a two-thirds vote. For had Congress exerted its power and told the President what he “shall” do, it would probably have been met with a Presidential veto, which can be overridden only by two-thirds vote of both houses of Congress.

President Nixon might have concluded that the de facto war he found in progress when he came into office was unconstitutional, and should be ended promptly and unconditionally for this reason, if no other. In reaching this conclusion he would have been right, as I shall argue at length. But he was not compelled to reach it. Reasonable men—fairly reasonable, if not altogether dispassionate ones—can differ on the point. No authoritative determination by any institution charged with having the last word exists or is obtainable, and the President is entitled to his own view, however erroneous. The egregious Bella Abzug wants to impeach him for his error. But if every error, even every error in con-

²Alexander M. Bickel, Chancellor Kent, professor of law and legal history at Yale University, is the author of, among other works, The Supreme Court and the Idea of Progress and Politics and the Warren Court. Mr. Bickel’s last previous contribution was “Judging the Chicago Trial” (January 1971).
The Constitution, qualified as one of those “high Crimes and Misdemeanors” for which impeachment will lie, then Thomas Jefferson, John Marshall, Theodore Roosevelt, Franklin D. Roosevelt, and Harry Truman, among others, not to mention Earl Warren, would have spent as much time in the dock as in committing their respective errors. Impeachment is not the equivalent of taking a motion of no confidence in a parliamentary system. The trial of Andrew Johnson has taught us that.

But President Lyndon Johnson did launch an unconstitutional war, and President Nixon, though entitled to wage de facto war until Congress stops him, should know, conservative lawyer that he is, that the war he wages was unconstitutional in its inception. Commencing a war and waging it were very different acts in the contemplation of the framers of the American Constitution.

When the Constitutional Convention was debating allocation of the war power, George Mason of Virginia said that he “was against giving the power of war to the Executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it.” He was for “clogging rather than facilitating war; but for facilitating peace.” Oliver Ellsworth of Connecticut, later the third Chief Justice of the United States, expressed the same thought. “It should be more easy to get out of war,” said Ellsworth, “than into it.”

Not only in the policies that two successive Presidents have been permitted to pursue, but in the institutional arrangements that Congress and the people have acquiesced in for many decades, we have managed to reverse the proper order of things. We have managed to clog peace and facilitate war.

The Founding Fathers were no visionaries. They did not believe that it is in truth easier to make peace than to make war. It is in truth, as Ellsworth was careful to say, harder to make peace and simpler to make war. But the framers of the Constitution intended that our institutions and processes should be so arranged as to make it harder to do the easy thing, and easier to achieve the difficult. For this reason, they insisted that the declaration of war not be an Executive prerogative, as it had been under the British Crown. They insisted also that it not be left to the Senate, a single, less numerous chamber which they viewed as capable of more expedient action than the House or than Congress as a whole. Rather they provided that Congress, acting through both Houses, with the approval of the President, have the sole power to declare war.

The Convention earlier had thought of using another, more comprehensive word, and empowering Congress to make war. But this term seemed to vest in Congress the function of conducting a war once it had started, and also possibly to the power of the Commander-in-Chief to repel attacks against the United States. Hence the framers said, “declare,” not “make.” The President was to be Commander-in-Chief, exercise independent tactical control over the armed forces, and see to their safety. The President was to have power also to repel attacks, and—we must say in modern times—to respond to the threat of attacks against the United States or against our forces, when instant action is of the essence.

Yet the framers were extraordinarily wary of standing armies, and of their use by the Executive. They authorized Congress to “raise and support Armies,” and then tried to insure that the exclusive power of Congress would be jealously guarded, by providing that no appropriation of money to raise and support armies “shall be for a longer Term than two Years.” Moreover, Congress was given the overall, comprehensive power to make “all Laws which shall be necessary and proper for carrying into Execution,” not only its own powers, but “all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof”—a phrase that includes the President! The implied powers of the federal government, most of the unstated powers that lie in nationhood, almost everything that goes without saying or that is residual—all that belongs to Congress.

The text of the Constitution and its history thus plainly limit the President. Yet the law of the Constitution under our system is not only defined by the text; it is also influenced by usage. The earliest practice conformed to the division of war-making powers intended by the framers. Later practice, however, in this century, and on occasion in the 19th, has tended to enlarge the scope of independent Presidential initiatives.

The practice grew up through a series of episodes, many of them bearing exotic names, and not many to be counted among the stories of American history. A short list would include General Jackson’s pursuit of the Seminole Indians into Spanish Florida on President Monroe’s authorization in 1818; President Polk’s
move to the Rio Grande, where the Mexicans not unnaturally—since they claimed the territory—attacked his forces, thus beginning the Mexican War, which Congress subsequently could not help but declare; President McKinley's intervention in China as part of the Boxer Expedition; numerous interventions in the Caribbean, as by Presidents Theodore Roosevelt, Wilson, and Coolidge; President Wilson's bombardment of Vera Cruz and pursuit of Pancho Villa into Mexican territory; Korea; and the dispatch of troops by President Eisenhower into Lebanon, and by President Lyndon Johnson into the Dominican Republic. (This list omits President Lincoln's actions at the start of the Civil War, and lesser instances of the domestic use of troops, as by Presidents Eisenhower and Kennedy, because whatever questions might be raised about Lincoln's authority, the issue is different. The President is charged by the Constitution to take care that the laws be faithfully executed, meaning that the authority and integrity of the government be maintained, and he must act on his own, at least so long as Congress has not by statute prescribed the means he may or may not use.)

Yet even against the background of prior Presidential foreign ventures, the decisions made in the first half of 1965, and executed thereafter, to commit the nation to full-scale war in Vietnam, represented an extraordinary extension of Presidential power. Certainly the power of the President in matters of war and peace has grown steadily for over a century, since before the Civil War. The decisions of 1965 may have differed only in degree from earlier stages in this process of growth. But there comes a point where a difference of magnitude is in kind. The decisions of 1965 amounted to an all but explicit transfer of the power to declare war from Congress, where the Constitution lodged it, to the President, on whom the framers refused to confer it.

Prior Presidential initiatives have been averted—at least variously plausible attempts were made to fit them—into theories that fail short of complete repudiation of the constitutional division of war-making power between Congress and the President. Essentially the President's power has been justified as necessitated by, and arising in, emergencies. The President has been viewed as entrusted with a reactive, not a self-starting, function: as possessing the power to respond to an emergency, not the affirmative, ultimate power to commit the material and moral resources of the nation to full-scale war.

The decisions and actions of 1965 outran such theories. There was no sudden attack aimed at or endangering forces of the United States, of the sort that can be deemed to require instant response and thus to make resort to Congress impossible if effective action is to be taken. Nor were we in any sense, as in some of our Latin American ventures, interposing our forces in a foreign country to protect American citizens and property, while remaining neutral with respect to conflicts there.

The Korean action had no doubt stretched Presidential emergency power to a prior extreme. But the invasion of South Korea from the North was sudden, and it did threaten to succeed quite rapidly and irrevocably, thus affecting the position of our own forces in neighboring Japan. This is not to maintain that President Truman's independent action in Korea should necessarily be viewed as falling within the President's legitimate power. It is merely to emphasize the sudden nature of the emergency to which President Truman responded, and consequently the measure of plausibility, however faint, with which his action might be made to fit the established sudden-attack theory of Presidential power. Again, there is a measure of plausibility in the attempt to fit the dispatch of troops to Lebanon by President Eisenhower before 1965, as well as President Johnson's intervention in the Dominican Republic later, into the neutral-interposition theory. But no such fits are possible for the round-the-clock bombing of North Vietnam, which began in February 1965, or for the sending of 50,000 troops to fight in South Vietnam, by a single decision that President Johnson announced on July 28, 1965, with the comment, “This is really war.”

It was really war. It raised the American troop level to over 100,000, soon of course to be multiplied five times over, and it committed, as President Johnson had said some two weeks earlier, on July 9, “our power and our national honor”—by a deliberate decision, considered over an extended period of time, not forced by sudden events: a decision functionally and in every other way amounting to an initiative for war. If this decision was not for Congress to make under the Constitution, then no decision of any consequence in matters of war and peace is left to Congress. This time, no justifications drawn from sophisticated
theories would do. The constitutional division of powers had been repudiated in the sincere but misguided conviction that it no longer suited modern conditions.

It is said that President Johnson acted in fulfillment of an obligation we undertook under the Southeast Asia treaty (SEATO) of 1955. Whatever else the obligation we incurred the may or may not amount to, it was in terms of the treaty itself no more than a commitment to "act to meet the common danger in accordance with [our] constitutional processes." Language such as this was missing in the draft of the earlier North Atlantic treaty (NATO) as it came to the Senate for ratification, and the treaty was not ratified until assurances were given by the Secretary of State that it placed the United States under no obligation to go to war automatically, other than by following the processes required by our domestic law. Of course, under our law, the powers of the President are considerable in case of sudden attack. In order to avoid this point of contention, the Southeast Asia treaty included the language I have quoted, providing that each signatory would act in accordance with its constitutional processes. Whether or not the treaty imposed any sort of obligation upon us in Vietnam, therefore, it did not authorize the President to discharge such an obligation on his independent initiative. Rather, the treaty relegated us to the division of powers provided for in the Constitution. And it is, in any event, most improbable that any treaty could override the Constitution of the United States so as to change the allocation of powers among branches of the federal government.

President Johnson relied heavily on the Tonkin Gulf resolution of August 1964 as a source of authority, although the Nixon administration abandoned it, and Congress repealed it in December 1970. The terms of that resolution are so extraordinarily broad that it can be read to have given away anything and everything. Although the text does express the intention to make the resolution "complementary with the Constitution of the United States" as well as with the Southeast Asia treaty, and although portions of the brief debate that attended passage of the resolution support this intention, other passages in the debate do sound as if Congress had indeed given away anything and everything. Yet the first wisdom in the construction of statutes, the first lesson in the uses of legislative history, is that the intent of the legislature is to be understood against the background of facts and circumstances to which the legislature was addressing itself. Congress addressed itself to the relatively trivial Tonkin Gulf incident—if there was a Tonkin Gulf incident—and intended to approve, if it intended anything, a reaction commensurate with that incident and incidents of that sort. If the resolution is read to have done more, the question arises whether it is within the power of Congress to give prospective approval to actions that would not, without such approval, conform to the Constitution.

In other contexts, the Supreme Court has held that Congress has no power to give away its power by delegating it to the President without standards, for use in the future in indefinite circumstances. And the doctrine that delegation without standards is unconstitutional is no mere technical teaching. It is concerned with the sources of policy, with the crucial joiner between power and broadly based democratic responsibility, bestowed and discharged after the fashion of representative government. Delegation without standards short-circuits the lines of accountability that make the political process meaningful.

United States v. Curtiss-Wright Corp. is often cited as indicating a modern development of independent Presidential power, which cuts across. It is said, what would otherwise be the requirements of the doctrine of delegation. The case is a rather eloquent, if not grandiloquent, opinion by a Justice (Sutherland) whose eloquence was usually reserved for decisions constraining rather than enlarging the power of the federal government. The opinion has, therefore, the impact of the unexpected. But it is really quite a limited holding. Congress had, by joint resolution, authorized the President to prohibit sales of arms and munitions to countries then engaged in a specific armed conflict in the Chino, whenever the President found that such a prohibition would contribute to the re-establishment of peace between those countries. The President used this authority, and the joint resolution was attacked as an instance of excessive delegation. The Court assumed without deciding that the delegation would have been

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2. 290 U.S. 304 (1934).
excessive if applicable to internal affairs, and then upheld it anyway on the ground that in foreign affairs the rules were different. But the assumption about domestic affairs was probably not valid even at the time. Little more was delegated to the President than the power to establish a necessary factual condition precedent. The joint resolution closely defined what the President was to do, namely stay out of war, not get into it, and where he was to do it—a far cry from the Tonkin Gulf resolution. This was hardly a vast delegation, and this was all the Court upheld.

The Tonkin Gulf resolution, it must be realized, was proposed and enacted by men who readily accepted an expansive view of independent Presidential power or at least did not care to challenge it, even though many were later surprised to find just how expansive a view of Presidential power could be taken and acted upon. The resolution makes use of the treaty, therefore, to produce the studied ambiguity suitable to a document which is not intended to resolve a prickly issue. We will, says the treaty, act "in accordance with our constitutional processes." Then comes the resolution. Let the President act as necessary, it says, in accordance with our treaty commitment (which calls for constitutional processes), and consonantly with the Constitution. We are left, and were meant to be left, in a circle.

The Tonkin Gulf resolution was put forward and passed because it had come to be the fashion since Korea to associate Congress and the President in a show of unity. But everyone vaguely assumed that if the President wanted to, he could act on his own anyway, and that in any event he was being authorized to act only insofar as under the Constitution he was authorized to act. Hence it was in the national interest to grant him a show of support. When a President proposed a resolution such as Tonkin Gulf, he made no concession of power to Congress. He made a concession to appearances, chiefly for external ears and eyes. It seemed not to matter, therefore, just precisely what the supposed treaty obligation meant, or just precisely what Congress was prospectively approving. The responsibility for action was the President's. His was the will. Congress was a witness, little more. This attitude also explains repeated appropriations of money by Congress to support the President's war. Far from ratifying anything, Congress, at least in part, appropriated and continues to appropriate under the misapprehension that it is in principle obliged to extend general support, even if free to make its own judgments on questions of detail, and that in any event it is assuming no general responsibility by extending support.

It is asserted also in defense of independent Presidential action that Congress is authorized by the Constitution only to declare war, and in modern circumstances, that is, after all, often not what is wanted. A declaration of war may be too much, and since too much is all that Congress has authority to do, it must be for the President to do anything less, which in present world conditions is generally what is required. The argument is altogether fallacious. There may actually be some sort of difference between the war we have waged in Vietnam and a war that Congress might have declared, although the difference, if any, is metaphysical. But there is utterly no reason to think that Congress has only the megapower to declare war in the exact terms of the constitutional clause that authorizes declarations of war, and no mini- or intermediate power to commit the country to something less than a declared war. Congress, as I have emphasized, has the power to do anything that is necessary and proper to carry out the functions conferred upon it, and upon any other department or officer of the government. If in the conditions of our day it is necessary to carry out the power to declare war by taking measures short of a declaration of war, everything in the scheme of government set up by the Constitution indicates that Congress has the needed authority.

The strongest and most searching argument in support of the constitutional power of the President to do what President Johnson did in 1965 relies essentially on the idea of organic constitutional growth. Granted that President Johnson carried the practice of a century forward, granted even that he extended it by some additional degrees; but usage, gradual changes by successive degrees to a point where a change in kind may be perceived—these, it is said, have been the life of the American Constitution. "Our Constitution," Justice...
Brandes once wrote, "is not a straitjacket. It is a living organism. As such it is capable of growth—of expansion and of adaptation to new conditions."

Now, Brandes was talking about the growth of the great open-ended provisions of the Constitution—chiefly the Bill of Rights and the Fourteenth Amendment—which were intentionally framed in general terms, precisely so as to leave open the possibility of their evolution over time, in light of new conditions. Constitutionalism also implies, however, the stability of structural arrangements, the binding nature of the rules of the game, which may be changed only by express amendment. We would not think, for example, that we could change the length of the President's term, as fixed in the Constitution, or abolish the electoral college, otherwise than by reaching a new consensus through the difficult amendment process, and writing new provisions into the Constitution. To be sure, the allocation of the warpower is more subject to interpretation and evolution than the length of the President's term. But if the Constitution grows and adapts itself without losing its essential shape, it does not undergo radical mutations, except by the process of amendment. Thus the function of the electoral college has changed very considerably from the original conception of it, but the college has retained its shape. There is a crucial difference, therefore, between extending the President's war-making power by another degree and leaping over the brink to a change in kind, to an explicit, notorious, inexpiable alteration of the original structure.

Be that as it may, it is useful to ask, the constitutional organism bids us ask, putting aside the constitutional text and its history, whether the change in the division of war-making power between President and Congress, resulting in what is at least a marked imbalance in favor of the President, has been an element of beneficial growth in the Constitution, a necessary consequence of changes in the world about us, and justified by them. If this is the question, it obviously makes a difference whether one thinks that the Indochina war has been a moral and practical disaster or whether it has been a noble effort on our part in the service of peace and freedom, which we will rue not carrying to a successful conclusion. The constitutional issue has drawn so much lively interest these past few years. Nothing so enlightens us on the rights and wrongs of institutional arrangements as the wrong practical and moral results of an institutional arrangement.

There is very little left to say about this war, but the juxtaposition of an item from the New York Times, datelined Saigon, May 12, 1972, and a passage from Conrad's Heart of Darkness may perhaps be added. The Times item reports that an American "naval task group including the heavy cruiser Newport News and four other ships continued to bombard North Vietnamese coastal defense sites and other unspecified targets on spits of land a few miles from Haiphong, which is 60 miles southeast of Hanoi." In Heart of Darkness, Marlow is steaming along the African coast. Occasionally a boatful of natives comes from the shore, and gives Marlow "a momentary contact with reality." The natives "wanted no excuse for being there. They were a great comfort to look at." Marlow would have a sense of the real world, but the feeling would not last long:

"Something would turn up to scare it away. Once, I remember, we came upon a man-of-war anchored off the coast. There wasn't even a shed there, and she was shelling the bush. It appears the French had one of their wars going on thereabouts. . . . In the empty immensity of earth, sky, and water, there she was, incomprehensible, firing into a continent. Pop, would go one of the six-inch guns; a small flame would dart and vanish, a little white smoke would disappear, a tiny projectile would give a feeble screech—and nothing happened. Nothing could happen. There was a touch of insanity in the proceeding, a sense of lugubrious drollery in the sight; and it was not dissipated by somebody on board assuring me earnestly there was a camp of natives—he called them enemies!—hidden out of sight somewhere."

There you have it. We fire into a continent. But ours has been no conventional imperialist war; wrong and morally wrong in its conduct and consequences, it was nevertheless not evil in intent or origin. What propelled us into this war was a corruption of the generous, idealistic, liberal impulse which, together with a sense of legitimate self-interest, informed and sustained this country's foreign policy through the Second World War, and in the years after, I use the word corruption not to connote evil, but merely decay. Our self-interest began to be invoked mechanically rather than realistically, and the altruistic impulse de-
cayed into self-assurance and self-righteousness; it became, as generosity and idealism assuredly can, oppressive, and in the end cruel. Liberal, generous ideology often decays in this fashion, as does religious ideology. Of course, such ideologies sometimes draw to themselves authoritarian and otherwise morally deficient personalities. But the seeds of decay are within the ideologies themselves, in their pretensions to universality, in their overconfident assaults on the variety and unruliness of the human condition, in the intellectual and emotional imperialism of concepts like freedom, equality, even peace.

The war has been wrong, too, for another reason, which is of particular interest from an institutional point of view. A democracy cannot well—as witness the earlier examples of the War of 1812 and the Mexican War—and should not wage a war which a substantial and intense body of opinion, whether amounting to 35 or 45 or 51 percent of the electorate, resolutely opposes on both political and moral grounds. Even autocracies cannot effectively wage wars in such circumstances. Of course the Constitution provides for no special majority, two-thirds or the like, and certainly not for any kind of referendum, before the country can go to war. Congress may declare war by the narrowest of majorities, and no individual is legally—though he may well be morally—entitled to nullify application to himself of a declaration of war because he disagrees with it, any more than he can refuse to render unto Caesar the things which are Caesar's when it comes to other disagreeable laws passed by narrow divisions. This is not a question of law but of law-formation, and of the forbearance and confidence of those who govern, without which law cannot be effective, or on some occasions just. "It is not," said Edmund Burke to the government of King George III in his second speech on conciliation with America, "what a lawyer tells me I may do; but what humanity, reason, and justice tell me I ought to do." The fact is that no measures of pervasive application can or should rest on narrow majorities. These are the limits of effective legal action, and they bear with particular force on the making of war.

The double error of this war is a product in good part of the imbalance we have permitted in the division of war-making power between the President and the Congress. The President represents a distinct constituency and thus ought properly to speak with an independent voice and to have considerable leverage. But the President is a single official, in many ways a distant and regal personage. The discipline of the democratic process plays on him only grossly, at wholesale. He commands attention and he communicates with greater impact than any other institution of government, but he is not equally communicated with. His policy-making process is necessarily private, almost like that of a court. The large results become known, and on these he can be judged and held to account. But the process by which he reaches them is seldom open to much scrutiny, and consequently little open to influence.

Congress, on the other hand, is institutionalized communication, access. Congress reflects in its very membership varieties of views, and represents most groupings of opinion, to each of which it parcels out a share of power, at least negative power. It is subject, therefore, to being disabled by a minority of its membership from deciding too much, too soon, or even at all.

The Presidency can speak for an existing broad consensus, and its genius is action. But its antennae are blunt, and it can mistake silence for consensus. Its errors are active ones, like the Indochina war—sins of commission. The genius of Congress lies precisely in its antennae, in its differentiated sensitivity. Its errors generally are those of irresolution, sins of omission. We should have learned the good conservative lesson that, in governments at any rate, these are, by and large, the less grave sins.

If we have permitted a serious imbalance to arise between President and Congress, which is bad for the country and reduces the capability of our government to devise, and to implement effectively, policies that serve the national interest, then what is to be done? The imbalance is not only bad in practice and wrong in theory. It also runs counter to the constitutional text and to its history. Does it not follow that the Supreme Court, which has more than once been asked to declare the Indochina war unconstitutional, should do so?

For my part, I think the Court has been wise to exercise its discretion so as to avoid passing on the constitutionality of the war. If the Court were to hold the war unconstitutional, the effect would not be to cause Congress to nullify the action, but rather to make it less likely than otherwise that Congress will assume its responsibility, now and in future. There would be signs of relief on Capitol
Hill to have had the responsibility taken off Congress’ shoulders, and in future, likely as not, Congress would continue to tolerate Presidential initiatives and wait for the Supreme Court to hold them unconstitutional.

This is speculative, and infected no doubt by a general bias in favor of political rather than judicial government. But there is another aspect of the problem. The Court cannot declare the war unconstitutional and then do nothing about it. That would deny its nature as a court of law, sitting to decide cases and see controversies to their resolution. And it is on its nature as such an institution of law that the Court’s whole claim to authority rests. The Court cannot well forbid—as it has been asked to do—the sending of some soldiers or sailors to Vietnam, while allowing those already there to remain indefinitely. It cannot well declare the war unconstitutional and then fail to respond to a further suit asking it to direct the President’s agents to stop the war. The Court, rather, would inevitably be drawn into directing and supervising the conclusion of the war, just as it has directed and supervised the desegregation of the public schools in the South, and the reapportionment of state legislatures and of the federal House of Representatives. We would thus match the wrong way of getting out of a war to the wrong way of having got into it.

The answer lies with Congress. Whatever aggrandizement of Presidential power we have witnessed, the practice of recent decades or of a century cannot have worked a reduction of the residual legislative power of Congress, if Congress should but exercise it. The power of Congress may have lain in disuse, but it is still as legitimate as the day it was conferred. From this power flows the duty to act. Congress should prescribe the mission of our troops in the field in accordance with a foreign and war policy of the United States which it is for Congress to set when it chooses to do so. And Congress should equally review and settle upon an appropriate foreign policy elsewhere than in Vietnam, and reorder the deployment of our forces accordingly. It should finally, by statute, as in the Javits-Spong bill which the Senate has passed, reassert its own general authority in matters of war and peace and redefine the President’s.

The United States remains a world power, and the world remains unclear and uneasy. The Russians and the Chinese have not yet lain down with the lamb. Hence the United States must retain credible capability to act in a crisis. And while American power has, no doubt, been spread too thin, and mutual security treaties have proliferated beyond the likely limits of credibility, it does remain true that our security and the peace of the world still rest in some measure on international commitments undertaken by the United States. If we redefine Presidential power, will we in effect be dismantling all that we have built in the world, by declaring that the United States could not lawfully react with the adequately speedy use of force in a crisis?

The President has and will in all circumstances retain, because it is vested in him by the Constitution, great power to react independently to the threat of attack on our territory or our forces. Congress, in turn, if called upon to act, can do so very quickly indeed. All that is enough. No one should ever have reasonably assumed, and well-advised allies have not assumed—the late Charles de Gaulle for one never did—that the United States would go to war automatically, simply in pursuance of supposed treaty or like commitments, contrary to our constitutional arrangements. Neither NATO nor SEATO can have been so understood. And no one should wish it so now, for now it is known how ill we serve the world as well as ourselves when we venture beyond constitutional legality.
LETTER FROM EUGENE V. ROSTROW

YALE UNIVERSITY LAW SCHOOL

HON. ROBERT N. C. NIX,
CHAIRMAN, ASIAN AND PACIFIC AFFAIRS SUBCOMMITTEE, COMMITTEE ON FOREIGN
AFFAIRS, HOUSE OF REPRESENTATIVES, WASHINGTON, D.C.

DEAR CONGRESSMAN NIX: I am happy to answer your clear letter of April 16, although I should much have preferred to discuss these problems with you and your colleagues in person.

Save in detail, our position with regard to Cambodia and Laos is an indistinguishable part of our basic position in South East Asia as a whole. We are there—as we are in Korea, in Europe, and in many other parts of the world—to exercise our sovereign right to assist nations exercising their inherent right of self-defense, confirmed in Article 51 of the United Nations Charter. Our decision to exercise this right in the interest of stability in South East Asia was solemnly proclaimed in the SEATO Treaty of 1954, which has been applied, confirmed, and reiterated since then by four Presidents, and many acts of Congress.

Unless the United States should abrogate the Treaty, and repudiate its national commitment, this remains the basis of our policy, and of the President's constitutional obligation faithfully to execute it.

It is convenient, I think, to view the United States position in Cambodia in two perspectives—those of international law, and of our own constitutional law. International law considers what the United States can and cannot do in Cambodia as a member of the society of nations. Constitutional law is concerned with the division of authority between Congress and the Presidency in exercising the powers, duties, and privileges of the United States in world politics.

I

As a matter of international law, the right of the United States to assist Cambodia rests on several related foundations.

First, Cambodia has the right under Article 51 of the United Nations Charter to defend itself against armed attack from North Vietnam, through the infiltration of North Vietnamese forces into Cambodia, and military assistance by North Vietnam to "insurrectionary" forces within Cambodia. The United States and other nations have the equal right to assist Cambodia in defending itself against such attacks by North Vietnam. North Vietnam has no right under international law to assist a rebellion within Cambodia. Such action on its part is naked aggression, and a plain violation of the Charter of the United Nations.

As you know, the right of a state to defend itself, and the right of other states to come to its assistance, are recognized in Article 51 of the Charter of the United Nations as "inherent" rights of sovereignty. They can be legitimately exercised without the prior permission of the Security Council. The Security Council may support such efforts, as it did when we and other nations went to the aid of South Korea in 1950. The Council may disapprove the claim of self-defense by nations using force, as it did with regard to the actions of Great Britain and France in Egypt during the Suez Crisis of 1956. (The posture of Israel in the Suez affair was treated somewhat differently, as the settlement of 1957 indicates.) Or the Council may remain silent, as was the case in the Cuban Missile Crisis, and in Vietnam. The silence of the Security Council does not in any way qualify the legal right of a state to defend itself, or of others to come to its assistance if they wish to do so.

There is a second, and closely related ground in international law for American action in Cambodia—its right to intervene there to deal with hostile action from Cambodia against South Vietnam. Every state is responsible for the use of force from its territory directed against the territorial integrity or political
independence of another state. When it cannot or will not suppress such forces, the state threatened has the right, in the name of self-defense, to use its own forces to eliminate the threat. This is a recognized example of permissible self-defense in international law in time of peace—the right of self-help to redress a breach of international law by the state from which hostile forces are operating against it.

The principle was classically formulated during the Caroline episode in 1837, when British forces invaded the United States to deal with encampments of armed men planning to invade Canada, and to participate in a rebellion there. We have relied on this principle many times—when Andrew Jackson invaded Spanish Florida in 1819 to deal with armed bands harassing settlements in Georgia, for example, and in President Wilson's time, when he sent General Pershing into Mexico to pursue Pancho Villa. Our use of force, and our threat to use more during the Cuban Missile Crisis is the most spectacular recent instance on our part of our reliance on the Caroline principle. Our forays into Cambodia and Laos in 1970 were another.

Our resolve to assist South Vietnam, Cambodia and Laos in the exercise of their rights of self-defense was formally and publicly stated in the SEATO Treaty, a copy of which I attach for convenience. Cambodia and Laos, thus far, have not exercised their right under the Treaty to request assistance from us. That posture on their part does not, of course, affect our rights, and those of South Vietnam, to attack armed forces in Cambodia threatening South Vietnam.

There is a third principle of international law that would justify American assistance to the recognized government of Cambodia—the right of that government to request assistance from friendly states in the suppression of rebellion, whether assisted from abroad or not. This was the basis of international action to assist Greece, in the late forties, when guerrillas from Yugoslavia, Bulgaria and Albania were assisting revolutionary forces; the Congo, during the Katanga secession; and Nigeria, during the Biafran revolt. Great Britain has recently assisted Tanzania in putting down a revolt, and France is helping Chad in the same situation.

These problems are more fully discussed in the enclosed reprint of a review article I recently published in the Yale Law Journal.

II

What are our constitutional processes for making the national decision to use force in circumstances of this kind?

These problems are considered at length in an article in the May, 1972, Texas Law Review, and in supplemental comments I recently offered to Congressman Zablocki's Subcommittee of the House Foreign Affairs Committee. I enclose these documents for your consideration.

As you will see, I contend that the pattern of our constitution gives some independent authority to the President, and some to the Congress, but generally requires Congress and the Presidency to cooperate effectively when the armed forces of the nation are employed for an extended period of time. The constitutional pattern of effective cooperation between Congress and the Presidency with respect to the use of the national force necessarily takes many forms, depending upon circumstance: declarations of war, statutes authorizing limited war, advance declarations of the national purpose, through Treaties or Joint Resolutions; or ratifications of what the President has done on an emergency basis after the event, like the legislation, and the Treaty, adopted with respect to our course in Korea.

In Korea, the President acted first to exercise our international law right to assist South Korea in its self-defense against the attack from North Korea. Congress later supported the President's decision—not through a declaration of war, or through a formal declaration like the Tonkin Gulf Resolution, but through a series of statutes authorizing and confirming the nation's course. In 1954 we entered into a Mutual Defense Treaty with South Korea. Our forces are still operating in Korea—and still sustaining casualties—under this combination of authorities. In the Indo-China War, Congressional support has been manifested in many ways before, during, and after the event—through the ratification of the SEATO Treaty, and through a maze of subsequent legislation.

Now the President has concluded two agreements on ending the war and restoring peace in Vietnam, the agreement of January 27, 1973, with the
principal parties to the conflict, and the Act of Paris of March 2, 1973, through which twelve nations approved the agreement of January 27, and issued a public declaration of their will to support it. These agreements—which are in effect armistice agreements and agreements to make peace without further armed conflict—are fully within the President's sphere of authority as Commander-in-Chief, and as the sole organ of the nation in the conduct of our foreign relations.

Together, the Paris agreements of January 27, and March 2, 1973, constitute a significant confirmation of the legal position the United States has taken throughout the long and tragic history of the Indo-China War—that the war has been an international war, not a civil war; that the people of South Vietnam have the right to determine their own destiny without interference by or from North Vietnam; that North Vietnam must withdraw from Laos and Cambodia, as had been promised in the Geneva agreement of 1962; and that the United States, and other nations, have the right to assist South Vietnam, Cambodia and Laos in defending themselves against North Vietnamese aggression.

Our government has now stated publicly what has long been obvious—that North Vietnam is violating the agreement of January 27 in many ways, and particularly by its refusal to withdraw its forces from Cambodia and Laos. In short, despite the armistice agreement, North Vietnam is continuing its armed attack on South Vietnam, Laos, and Cambodia, and continuing to use Laos and Cambodia as bases from which to attack South Vietnam.

These provisions requiring North Vietnam to withdraw its forces from Laos and Cambodia are the heart of the January 27 agreement. It is manifest from a glance at the map that South Vietnam cannot be secure while hostile forces operate against it from Cambodia and Laos.

While we have not denounced the Paris accords, and are doubtless making strenuous diplomatic and military efforts to insist on their fulfillment, we have a perfect right under international law to act against their breach when that breach involves the threat or the actuality of armed attack. Under our Constitution, it is for the President in the first instance to interpret and apply the international agreements of the United States. Congress has the last word, of course, as the recent case of *Diggs v. Schultz*, decided by the Supreme Court on April 17, 1973, demonstrates.

To sum up, then, the President is acting in Cambodia in the exercise of his Presidential power to carry out the international law privileges of the United States under Article 51 of the United Nations Charter, affirmed in this instance by the SEATO Treaty, and by many subsequent acts of Congress. His constitutional position is therefore more complete, in combining the authority of the Presidency and that of Congress, than President Truman's posture in Korea.

Sincerely yours,

EUGENE V. ROSTOW.
LETTERS FROM ALFRED P. RUBIN

UNIVERSITY OF OREGON SCHOOL OF LAW,

ROBERT N. C. NIX,
Chairman, Asian and Pacific Affairs Subcommittee, Committee on Foreign Affairs,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN NIX: My views have been requested for the use of your Subcommittee concerning the South East Asia Collective Defense Treaty of September 8, 1954 (the SEATO Treaty). I gather that the question has arisen whether the SEATO Treaty, law of the land under Article VI of the Constitution, authorizes the President to send bombing missions into Cambodia. As you know, I have spelled out my opinion of the nature of the SEATO commitment in some detail in an article in The International and Comparative Law Quarterly for July 1971. Nonetheless, a summary review might be useful to the Subcommittee and I am very happy to be able to help.

The International Law Issues.—Cambodia is not a party to the SEATO Treaty. Moreover, Cambodia has repeatedly announced its refusal to accept the SEATO arrangement. To the best of my knowledge, the present Government of Cambodia has not been given the opportunity to join in the SEATO arrangement by the existing parties to it and the denunciations pronounced by the prior Government of Cambodia have not been contradicted. Therefore, the United States is not bound to Cambodia by any expectations embodied in the SEATO Treaty. In International Law, as in Anglo-American contract law, there is no legal obligation in the absence of an obligee: One to whom the obligation is owed. If the United States is bound to act in Cambodia by virtue of the commitments contained in the SEATO Treaty, it is bound only vis-a-vis its fellow parties. I have seen no evidence that any of those parties regards the SEATO Treaty as obliging anybody to aid Cambodia at present; indeed, a careful reading in context of the few statements by which SEATO parties other than the United States construe SEATO to apply even to Vietnam (such as the Philippine statement reproduced in United States Security Agreements and Commitments Abroad of the Senate Committee on Foreign Relations, 89th Cong., 2d Sess., Vol. 1 at p. 31) reveals more than a little reluctance to construe the SEATO Treaty as requiring military action in Indochina. In these circumstances it is difficult to perceive just whose justifiable expectations would be disappointed by the United States construing its obligations under the SEATO Treaty in such a way as to not require action in Cambodia. Indeed, any other interpretation would seem to raise problems with regard to our SEATO partners. If the SEATO Treaty obliges the United States to act in Cambodia it would seem equally to oblige our SEATO partners to act there, and there has been a notable reluctance of those partners to become involved. To the best of my knowledge, the United States has not claimed its SEATO partners are obliged to act in Cambodia.

Even if the SEATO Treaty as a whole were construed to apply to Cambodia despite the Cambodian expressions to the contrary and the disinterest of our SEATO partners, it is not clear that the Treaty would oblige the United States to use military force there. In the case of internal difficulties, even if Communist-inspired and supported, the obligation of SEATO partners is merely to "consult". Various other possible interpretations of the key language of Article IV (2) of the Treaty were negated by Secretary of State Dulles under close questioning at the Senate Foreign Relations Committee Hearings incident to Senatorial advice and consent to United States ratification. Indeed, Senator Homer Ferguson specifically asked Secretary Dulles if the external armed attack that would trigger an obligation to do more than consult would exclude "a subterfuge of penetration or subversion". In reply, Secretary Dulles said, "Yes, sir." Thus, the publicly announced interpretation of the treaty commitment excluded "penetration or subversion" even when only a "subterfuge", from the commitment of parties to act. The only commitment in such a case is to consult. It is my under-
standing that the major burden of fighting in Cambodia now is being borne by Cambodians loyal to Prince Sihanouk; not by attackers from without pressing an "armed attack" of the ordinary sort.

Even if there were an "armed attack" of the ordinary sort in Cambodia now, and the SEATO Treaty were interpreted to commit the United States to respond, the required response itself is merely to "act to meet the common danger in accordance with its constitutional processes". This reference to constitutional process was clearly intended not to expand the authority of the President to order action without regard to the pre-existing legal relations between the Executive and the Legislature under our Constitution, but to assure that the United States commitment could not be construed to require the President to go to war without regard to the unchanged Constitutional requirements, if any, for coordination with the Congress (see below). Thus, it cannot be argued convincingly that any justifiable expectations arising from the text of the SEATO Treaty would be disappointed by the refusal of the Congress to permit the President to act in Cambodia.

Even if it were felt that under the SEATO Treaty some action beyond a good faith decision not to send military help may be required, presumably that obligation would be met by the President or Congress affirmatively acting to decide that no military or other help would be given because inappropriate to meet a "common danger". The question of whether there is a "common danger" caused by external armed attack in Cambodia seems to me to involve questions of fact which can be resolved only by the SEATO parties. None of those parties has publicly determined that what is happening in Cambodia involves either an external armed attack or a "common danger". Since the danger must be "common", it seems doubtful that a unilateral United States determination would be determinative, even for the United States, of the question of the extent of the SEATO commitment.

I confess to some hesitation on these latter points, since the true ramifications of the SEATO commitment cannot be definitively analyzed until the pertinent interpretations have been published. The minutes of the SEATO Council and Foreign Ministers meetings and the SEATO contingency plans that might shed light on the definition of "common danger" at least, have not been made available to the public.

With that caution, it may be tentatively concluded that under normal rules of treaty interpretation, the United States is not bound by the SEATO Treaty to act in Cambodia.

The Constitutional Law Issues.—Even if the United States were bound to act in Cambodia in present circumstances, as noted above the SEATO Treaty limits that commitment to either mere consultation or (in the case of overt "armed attack") action to meet the common danger "in accordance with its Constitutional process". While I would not presume to offer an opinion at this time on the power of the President as Commander-in-Chief to order bombing in Cambodia, it seems clear to me that the SEATO Treaty does not compel him to that particular action. Nor, indeed, can it authorize such action. The SEATO Treaty is not part of the Constitution of the United States. It is merely a law on the same level as other laws. Cf. Corwin, The Constitution of the United States of America, Senate Doc. No. 89, 88th Cong. 1st Sess. (1964) at p. 470. I know of no Supreme Court decision or convincing argument ever made that a Treaty can change the constitutional relationship between Branches of the Federal Government. In the famous case of Missouri v. Holland, 252 U.S. 416 (1920) Justice Holmes speaking for the Supreme Court ruled that the Tenth Amendment did not diminish the power of the Federal Government to make Treaties that would diminish the police powers of some states, but in that case the Executive and Legislative Branches of the Federal Government acted together and no question of the balance of powers within the Federal Government was raised.

I conclude that the SEATO Treaty cannot authorize the President to do anything under our Constitution affecting the powers of the Congress as set out in the Constitution. To the extent the Treaty might be interpreted otherwise there is no evidence that the Senate or the other parties to the Treaty were in any way advised that one effect of the Treaty was to authorize the President to act without whatever coordination with the Congress our unaltered Constitution required. On the contrary, all the available evidence indicates that the intention of the framers of the "constitutional processes" provision was to preserve the powers of the Congress, not to expand any powers of the President. Cf. Hearings cited above, p. 744.
None of the foregoing addresses the question of whether the President might have other authority for dispatching bombers to Cambodia. Article 51 of the U.N. Charter and a request by the recognized Government of Cambodia may be interpreted to support the legality of the President's actions on behalf of the United States at international law; the Commander-in-Chief and foreign relations power may authorize the President to direct a bombing of Cambodian territory as a matter of Constitutional law. But it is very difficult to perceive how Article VI of the Constitution, making Treaties the supreme law of the land, given its broadest conceivable interpretation consistent with precedent, can be used to authorize the bombings. The only pertinent treaty, the SEATO Treaty, cannot be interpreted to have that effect if words retain their normal meanings. Executive submissions to the Congress in 1954 and later have been made in good faith, and no unpublished interpretations exist that change the apparent meaning of the SEATO Treaty.

Yours truly,

ALFRED P. RUBIN, Professor of Law.

UNIVERSITY OF OREGON SCHOOL OF LAW,

MR. THOMAS R. KENNEDY,
Asian and Pacific Affairs Subcommittee, Committee on Foreign Affairs, U.S.
House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: You have indicated that my views on the Department of State memorandum, Presidential Authority to Continue United States Air Combat Operations in Cambodia, might be useful to the Asian and Pacific Affairs Subcommittee of the House Committee on Foreign Affairs. I am happy to be able to submit those views.

About half of the State Department memorandum is devoted to arguing that the policy of conducting combat operations in Cambodia is reasonable in current circumstances. I do not feel competent to judge the reasonableness of the current policy on the basis of the facts alleged. To do so I should have to know a great deal more than I do about the effectiveness of air operations as opposed to ground operations, and the effectiveness of either with regard to the kinds of problems the United States has been trying to resolve in Southeast Asia.

But the reasonableness of current operations is essentially irrelevant to the Constitutional issue: The degree to which the President must have the consent of the Congress before committing the United States to military action abroad in the absence of the most compelling exigencies. As to that question, the State Department memorandum finds adequate Presidential authority in the very vague language of Article II of the Constitution. It goes on to point out that the precise definition of the President's authority is unclear and that "Congress should play an important role in decisions involving the use of armed forces abroad" (page 11). The argument seems to be that when Congress cooperates with the President in implementing his policy, as it has been doing, such Constitutional issues as some may perceive are not brought to issue and no clear legal problem exists.

I concur. While I suppose some theoretical argument could be raised concerning the power of the Federal Government as a whole under the Tenth Amendment, which reserves to the States or the people the powers not delegated to the United States by the Constitution, I see no clear expansion of Federal authority beyond the limits set by the Constitution and a long history of interpretation. Within the powers of the Federal Government, I see no clear limitation on the powers of the President, either express or implied, that would prevent his ordering American military forces into action abroad in any circumstances so long as he does not invade the powers of the Congress to raise and appropriate funds under Article II, Section 8, clauses 12 and 13 and Amendment XVI, and to make rules under Article II, Section 8, clauses 11 and 14. I know of no convincing argument that can be made today that the President has so invaded the Constitutional powers of the Congress with respect to the Cambodian situation.

Nothing in this comment should be taken to pass any judgment as to the Constitutionality of actions of the President not related to the current military action in Cambodia; and nothing in this comment should be taken to indicate that the Congress does not have the power to place conditions on appropriations or take other steps consistent with the Constitution to limit the President's room for discretion.

Yours truly,

ALFRED P. RUBIN, Professor of Law.
Mr. THOMAS R. KENNEDY,
Asian and Pacific Affairs Subcommittee, Committee on Foreign Affairs, U.S.
House of Representatives, Washington, D.C.

DEAR MR. KENNEDY: Yesterday I sent you my comments on the Department of
State memorandum, Presidential Authority to Continue United States Air Com­
batt Operations in Cambodia, agreeing that no clear Constitutional issues are
raised while Congress continues to cooperate with the President in implementing
his policies.

Today I learned that the House of Representatives had refused to pass appro­
priations for American military activities, and that the Senate appears likely
to take the same position. This raises many issues not discussed in the State
Department memorandum but likely to be of interest to the Subcommittee on
Asian and Pacific Affairs.

It seems to me that the central point relates to whether the President has prop­
erly discharged his obligations as holder of "The executive Power" under Article
II Section 1 of the Constitution, and the requirement laid on him "to give to the
Congress Information of the State of the Union, and recommend to their Con­
sideration such Measures as he shall judge necessary and expedient" under
Article II Section 3. It seems to me that the responsibilities implicit in the
word "executive" in Section 1 and explicit in the mandatory terms of Section 3
are not discharged by his merely laying his conclusions before the Congress
without convincing reasoning or, at least, furnishing the Congress with the
technical information it may need on all sides of a problem to permit a wide­
ranging discussion by the Congress concerning the policies that lead to the need
and expediency for the legislation (including appropriations legislation) he has
proposed. Hitherto, the Congress has not objected to the President's rather off­
handed way of achieving the minimal cooperation necessary to avoid a consti­
tutional confrontation. Now that the issue is raised, the scope of Article II
Sections 1 and 3 must be explored so that the ultimate political issues can be
laid before the country.

In contrast to views reportedly expressed last night by members of the Ex­
ecutive Branch regarding Congressional responsibility for events in Southeast
Asia, it seems to me that the overriding issues involve the responsibility of the
President to allow the Congress to play the balancing role envisaged for it in
the Constitution. The integrity of the Constitutional system is far more impor­
tant to the United States than the security of any part of Southeast Asia, and
there is no reason that I know of why both interests cannot be served if the
President is willing to discharge his responsibilities to "preserve, protect and de­
defend the Constitution", including that part of it that requires him to recommend
legislation "to their Consideration" (emphasis added) when seeking funds or
other cooperation from the Congress.

I do not overlook the duty of the President to "take care that the Laws be
faithfully executed" and his failure to deliver to the Congress various reports
required by legislation. See Senate Comm. on Foreign Relations, Reporting Re­
I distinguish reporting requirements under existing legislation from the need
to furnish information with regard to proposed legislation. It is in the latter
area that the most interesting Constitutional questions seem to arise now.

Yours truly,

ALFRED P. RUBIN, Professor of Law.
It is common practice to justify present behavior on the ground of “established” policy. This attribution of great insight and wisdom to the past has two main advantages: (1) It saves us the trouble of determining what policy really is the best, and (2) it gives us a sense of security. What greater assurance can there be of the utility and reasonableness of the Monroe Doctrine, for example, than the knowledge that President Monroe established it in 1823?

But President Eisenhower and Secretary of State Dulles have not yet achieved the reputation that Monroe and the other founding fathers have. We are still free to doubt the wisdom of their policies. One of the policies of Eisenhower and Dulles whose wisdom is frequently doubted is the policy surrounding the Southeast Asia Collective Defence Treaty of September 8, 1954. But the basis for this doubt, aside from many intellectuals’ vague resentment of the Republican “style” and what is called Dulles’ “moralism,” seems to be rooted in the idea that the Treaty (which is usually mis-called the SEATO Treaty for convenience) commits the United States to act in Asia in ways now perceived to be inconsistent with the present best interests of the United States. But this presupposes that the Treaty in fact commits us legally to act, and that, if it does, the legal commitment cannot be changed or ignored without disastrous consequences. The fact that the Treaty was cited as one facet (among many) of the American commitment to the unpopular war in South Vietnam does not mean that the Treaty actually committed the United States legally to act in that conflict; it means merely that a Democratic administration wanted to find a policy (not necessarily a legal) basis for an unpopular action in the prior acts of a Republican administration. It is not self-evident that the commitment contained in the SEATO Treaty is inflexible or that our policy-makers have no choice but to interpret it to require Southeast Asian adventures.

II. THE BACKGROUND; THE NETWORK OF DEFENCE ALLIANCES

In 1947 Harry Truman was President, Hitler was dead, the United States was disarming and, in any case, had a monopoly on nuclear weapons, Russia was an ominous enigma in Europe but was not regarded as a threat to the Western Hemisphere. Nonetheless, on September 2 of that year the Rio Pact was opened for signature. This Pact was the first step in formalizing a degree of inter-American co-operation which in the United States was considered the natural and desirable development of the Monroe Doctrine. The Monroe Doctrine had originally been embodied in President Monroe’s annual statement to Congress on December 2, 1823: “... the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers.” The precise meaning of this policy pronouncement is elastic, like most. For present purposes it is necessary merely to point out that the makers of the foreign policy of the United States have found it convenient to cite President Monroe whenever they have contemplated intervening between a second country and a third country when the outcome of the foreign intrigue may have some impact on the interests of the United States.

In the Rio Pact the modern implications of the Doctrine were made less elastic, more specific. The Pact provides (Art. 3) that the Parties, each one,
severally, "undertakes to assist" in meeting "an armed attack by any State against an American State." Even more, (Art. 6) it provides for consultation in meeting an armed attack. The commitment to consultation envisages agreement "on measures which must be taken in the case of aggression or, in any case, the measures which should be taken for the common defense." Whether this meant that the subject-matter of the consultations might not go beyond defense measures, or whether those consulting are bound in good faith to come to some agreement on those measures, was left unclear.

In 1949 the North Atlantic Treaty was concluded. The operative defence commitment in that Treaty (Art. 5) was a defence commitment in the case of armed attack similar to the commitment in the Rio Pact. With regard to situations other than armed attack, however, the commitment (Art. 4) is merely to consult, with no restriction on agenda or prejudgment of the agreement that should result from the consultation.

In 1949, also, Communists won control of mainland China. In June of 1950 the United States became involved in a war in Korea and by the end of 1950 Chinese Communists had become our main antagonists there. In late 1950 the Chinese Communists invaded Tibet, which surrendered to them in May 1951.

On August 30, 1951, the United States signed a commitment to Korea (Art. 4) "to act to meet the common danger in accordance with its constitutional processes" in case of "armed attack." On September 1, the identical commitment was made to Australia and New Zealand. On September 8, to Japan. In all three Treaties the obligation to consult in situations not involving an armed attack is stated, but without the peculiar qualifications of the Rio Pact concerning the subject-matter or need to reach agreement.

In 1952 and 1953 the major threat to the established order in Southeast Asia in reality was probably not "armed attack," but armed nationalism. Yet armed attack was considered the more serious and immediate danger. Was not Indochina a peninsular extrusion of mainland China, just like Korea? Did not Indochina have a history of subordination to China (when China was strong) and independence (when China was weak), just like Korea and Tibet? Had not Indochina suffered for two generations under foreign, non-Chinese domination which might lead China to think it ripe to welcome Chinese occupation, just like Korea and, in the Chinese view, Tibet? Did not everybody, all one's most trusted friends, agree that a resurgent China under the militant and victorious Communists would be expansionistic? Blocked in Korea, where the fighting ended after an Armistice was signed in July 1953, and presumably blocked in Russia by what was thought to be comradely good will if nothing else; having already occupied the vast barrenness of Tibet, where else was there for China to expand?

Furthermore, Dien Bien Phu having fallen after almost three months of siege on May 7, 1954, about a week after the Geneva Conference to settle the Indochinese situation convened, it was clear that the old order posed no obstacle to what was regarded as an expansion to Indochina of Communist ideology based on Chinese power. Red China was a party to the Conference. To the extent the North Vietnamese presented the "hardest" line, it was regarded by the West as a rather transparent Chinese (or, indeed, Russian) negotiating tactic.

As the French position in Indochina was deteriorating, and apprehension of the future plans of the Chinese Communists grew in Washington, on April 4, 1954, President Eisenhower wrote to Winston Churchill, then Prime Minister of the United Kingdom, "... under the conditions of today the imposition on Southeast Asia of the political system of Communist Russia and its Chinese Communist ally, by whatever means, would be a grave threat to the whole free community, and that in our view this possibility should now be met by united action and not passively accepted." But how could China be stopped? NATO had stopped Russian advance in Europe, or so it must have seemed. More important than a possibly mistaken analogy, the bilateral defence engagements of the United States in the Far East were giving local governments a chance to devote their economies to development while the United States took up the burdens of defence. Could not the same game be played in Indochina, fairly cheaply to the United States, by a multilateral defence agreement by which France, the United Kingdom, the United States,
Thailand and others would share the defence burden, leaving the weaker States of the area to devote their energies to nation building? In his letter to Churchill, Eisenhower suggested "a new, ad hoc grouping or coalition of nations which have a vital concern in the checking of Communist expansion in the area," specifically, the United States, United Kingdom, France, Australia, New Zealand, Thailand, the Philippines, and the three Indochinese States. By June, under pressure of the French collapse in Indochina and the continuing "Emergency" in Malaya, the British had agreed. The analogy between SEATO and NATO was Churchill's contribution. The Southeast Asia Collective Defence Treaty was signed at Manila on September 8, 1954.

III. THE COMMITMENT

A. Subversion: Action by the United States Senate

The pertinent part of the SEATO Treaty divides the Parties' obligations, on the pattern of the other defence treaties, into obligations in cases of armed attack, and obligations in cases not involving armed attack. The latter problem, although more complex in some ways, is easier to dispose of, so let us turn to the "other than armed attack" provisions first. In this matter the SEATO Treaty did not follow the NATO precedent; it followed the precedent of the Rio Pact. The precise wording of the SEATO Treaty (Art. 4(2)) is:

"If, in the opinion of any of the Parties, the inviolability or the integrity of the territory or the sovereignty or political independence of any Party in the Treaty area or of any other State or territory to which the provisions . . . of this Article . . . apply is threatened in any way other than by armed attack . . ., the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense." [Emphasis added.]

In the Rio Pact the obligation in cases of subversion was to consult "in order to agree on measures which must be taken in the case of aggression" as well as "the measures which should be taken for the common defense." Whether the parties intended some difference in obligation by this change in wording is not clear.

On November 11, 1954, Secretary Dulles testified before the Senate Foreign Relations Committee as to the meaning of the SEATO obligation supporting the President's request for the Senate's advice and consent to the Treaty. In his letter transmitting the text to the Senate, Secretary Dulles wrote that the express obligation to act in case of "armed attack," which will be discussed below, "is based upon the Monroe Doctrine principle." He also wrote that the commitment to action "leaves to the judgment of each country the type of action to be taken in the event an armed attack occurs."

With regard to the obligation applicable in the absence of armed attack, Secretary Dulles wrote, with almost charming ambiguity, that the Treaty "... contains no obligation beyond consultation, but the purpose of consultation is to agree on measures to be taken for the common defense." Did this mean merely that the subject to be discussed was to be restricted? Or did it mean that the Parties had bound themselves in good faith to agree on at least some measures—failure to reach agreement being a breach by the hold-outs of their Treaty commitments? Both of those interpretations seem to be absurd. Why should States restrict the subject-matter of their talks in an emergency? Did they want to provoke arguments among themselves in such a consultation as to whether a measure proposed by one of them was a "common defense" measure or not? On the other hand, how could responsible statesmen "agree to agree" when serious disagreements were clearly foreseeable? If all the rest agreed that Thailand should invade China, for example, as a mutual defence measure, was Thailand to be considered bound to act in accordance with the decision of other countries? Would the United States Senate ever consent to a provision that might commit the United States to "agree" on steps that seemed suicidal or beyond our political or economic capacity to take? It is overwhelmingly likely, rather, that the real interpretation is that the language was intended to "authorize" the powers to draw up contingency plans to handle subversion to which the political decision-maker of each would be committed to agree if the foreseen contingency came about.

Senator H. Alexander Smith, a Member of the Committee who had also been a member of the U.S. Delegation to Manila that signed the Treaty subject to

4 Executive R. 83d Cong., 2d sess.
ratification, pressed Secretary Dulles specifically on the issue of insurgency in Vietnam during the oral part of the hearings. Secretary Dulles' response was:

"... if that situation arises or threatens, that we should consult together immediately in order to agree on measures which should be taken. [Thus seeming to adopt the second of the two absurd interpretations; but going on, inconsistently.] That is an obligation for consultation. It is not an obligation for action."

Under close questioning by Senator Theodore Green, he retreated even further:

"If there is a subversive thing which seems dangerous, we sit together and talk about it, and then try to agree as to whether it calls for action... [T]here is in the Treaty itself no commitment to action in that event [no armed attack] unless action is subsequently agreed to as a result of the consultation."

This interpretation seems to eliminate completely whatever meaning could be put upon the language of the Treaty indicating a commitment to conclude consultations with an agreement to act.

One further point troubled Senator Homer Ferguson, and he asked Secretary Dulles just how flexibly the words "armed attack" were to be interpreted. Apparently, he did not want the automatic commitment contained in the "armed attack" provisions of the treaty to be applied to insurgency situations, however broadly discretion as to specific action was reserved to the United States. "In other words," he said to Secretary Dulles, "the words 'armed attack' in paragraph 1 of Article 4 are the ordinary armed attack rather than a subterfuge of penetration or subversion." Dulles responded: "Yes, sir."

With the Korean and Tibetan precedents for overt armed attack before them as the threat to which the United States proposed signalling its intention to respond quickly, and with the Vietnam troubles of 1954 as the precedent before them for what was believed to be Chinese or Russian "penetration or subversion," the Senate had before it a definitive interpretation of the ambiguous language of the Treaty making it clear that, in the absence of overt armed attack, the United States had no obligation under the Treaty other than to consult. Despite the Monroe Doctrine language used by Secretary Dulles, and the ambiguity of the Treaty and his first attempts to explain it, the Senate had before it a document for advice and consent which, it was told, followed the NATO pattern rather than the Rio Pact pattern.

None of the foregoing analysis means that the United States is freed of possible moral or policy obligation resulting from history or unilateral declarations of policy to do more than consult with its SEATO partners in cases of penetration or subversion in the SEATO area. We are speaking at this time only of the legal obligation contained in the SEATO Treaty. Legally speaking, mere declarations of policy can be changed at the whim of the one with authority to declare policy or his successor in authority. But Treaty obligations cannot be changed so easily.

The Senate did not significantly question the "armed attack" terms of the draft Treaty. The Senatorial advice and consent was given and the Treaty entered into force February 19, 1955.

B. Armed Attack

The Senate had officially and openly secured an interpretation of the Treaty to limit the terms of the United States commitment before advising and consenting to its being ratified. Arguments attempting to trace United States involvement in Indochina, including in Vietnam, to some SEATO commitment, thus founder as a matter of strict treaty interpretation unless the action of the United States is traced to an "armed attack" rather than "penetration or subversion."

This is the reason the United States took the position in Vietnam State Department Press Releases of January 3 and 7, 1966: "The United States has a clear and direct commitment to the security of South Vietnam against external attack. This commitment is based upon... [among other listed things] the SEATO Treaty..." and by the State Department Legal Adviser's brief of March 4, 1966: "... the infiltration of thousands of armed men clearly constitutes an 'armed attack' under any reasonable definition... the United States has a commitment under Article IV, paragraph 1, of the SEATO Treaty..."

Before pursuing the technical interpretation of the United States obligations under the SEATO Treaty to determine the strict legal commitment of the United States in the case of "armed attack" (whether or not it is accepted that the
events being considered can properly be labelled “armed attack”), a short dis­
gression into legal theory seems necessary.

Under Anglo-American concepts of contract some “bargained-for-exchange” is
necessary between (or among) the parties before the law will hold any of them
bound legally by his promise. Under European civil law concepts there is an
equivalent requirement for causa—basically analogous to our “consideration”—
something given in exchange for the promise and legally sufficient to take the
promise out of the class of things to be labelled a “gift”. In international law
there is no equivalent concept. A promise given in appropriately solemn form is
legally binding even if there is no counter-promise. Therefore, a treaty obliga­
tion cannot be evaded in international law merely because the apparent obliga­
tions are all on one side.

But must the recipient of the benefits be a “Party” in order to gain a legal
right to the “gift”?

Under at least some municipal legal systems it is possible in some special
cases to give a third party a right to enforce by direct legal action in his own
name a promise made between others. At international law it is doubtful that
such a right exists. Certainly, the rights of so-called “third party beneficiaries”
are at heart doubtful at international law, and particularly so with regard to
treaties of alliance. Even when simpler issues are involved, such as the possible
rights of third party users of an inter-oceanic canal (like the Suez Canal) to
press directly for the enforcement of the treaties opening the waterways to them,
several doubts have been raised and after preliminary failures the users have not
in fact asserted their purported rights directly. 5

Therefore, in order to know the precise United States legal obligations under
the SEATO Treaty, a question that must come to the mind of an international
lawyer must be: “Obligation to whom?” Since the obligation in cases of subver­sion
seems to be merely an obligation to consult, no matter to whom that obliga­
tion is owed, it seems too petty to warrant further analysis at this point. But the
obligation to act in response to an armed attack is not petty. It involves life and
death. Furthermore, the SEATO Treaty, like the other multilateral alliances of
the United States, contains a “several” obligation: each party has promised to
act regardless of the failures of the other parties. But to whom is that obliga­
tion owed?

A second question of interpretation must be, assuming an obligation to some­
body exists at all, precisely what action is owed. As we shall see that also is not
necessarily an easy question to answer.

The precise wording of the pertinent provision of the SEATO Treaty is:

(Article 4(1)): Each Party recognizes that aggression by means of armed attack in the Treaty
area against any of the Parties or against any State or territory which the
Parties by unanimous agreement may hereafter designate would endanger its
own peace and safety, and agrees that

The United States formally restricted the obligation to cases of “Communist”
aggression and it is used here with that interpretation implied.

1. Commitment to whom?

There can be no question but that United States owes some duty to act to
its fellow parties in the Treaty. The treaties are the United Kingdom, France,
Australia, New Zealand, Pakistan, the Philippines and Thailand. But with regard
to those parties that do not in a particular case share the view of the United
States that action is necessary under the Treaty, no problem can arise. It is, of
course, possible to argue logically that the United States owes them a legal
duty to act (1) that an armed attack has occurred, (2) that the attack is part of
the larger set “aggression,” and (3) that the object of the attack is a party or
a designated territory in the Treaty area. But that seems, as it were, a bit too
clever. Unless the complaining State has made the same determination, it is not
likely to be able to argue convincingly that it is in any way aggrieved by the
failure of the United States to act according to United States classification of
events. Furthermore, if the determinations that trigger the commitment are to

5 Cf. 3. Whiteman, Digest of International Law, p. 1097 et seq. (Washington, 1964):
McNair, The Law of Treaties, pp. 265–266, 315 (Oxford, 1911); cf. Vienna Convention
on the Law of Treaties, May 23, 1969, Arts. 34. 35.
be made severally and subjectively, it would seem that the trigger to the obliga-
tion of the United States or any other SEATO party is a thing to be deter-
dined solely by the particular party; therefore no obligation is owed to any
other party until that determination has been made. If a complaining party
contends the failure of the United States to make such a determination to act
exhibits a lack of good faith—that the American failure is a dishonest inter-
pretation of the real world—its own failure to make the same determination opens
it to the same charge. Its complaints are not likely to be convincing.

But suppose the complaining State has made the same determination; that
the labels "armed attack" and "aggression," like the territory to be protected
by the Treaty parties, is a matter of objective evidence? In that case it would
seem that the Treaty's obligation is triggered. The result of this is somewhat
anomalous, but consistent with United States policy of 1954 (and today, for that
matter): if Thailand and the United States agree severally that aggression by
means of an armed attack has occurred in protected territory, even though
territory of neither the United States nor Thailand, the United States and Thai-
land would be legally bound to each other to act in accordance with the Treaty
provisions.

In this legal sense, the SEATO treaty does not really contain either multi-
lateral or wholly several obligations. It contains a series of several bilateral
commitments, each bilateral obligation being triggered by any two parties con-
cluding that an aggression by means of armed attack is occurring in the Treaty
area. The commitment seems to extend far beyond the other bilateral commit-
ments of the United States, such as those with Japan, the Philippines, Korea or
the trilateral one with Australia and New Zealand in that it extends to cover
interests not within the direct legal purview of any party to the Treaty. Thus,
indeed, the SEATO Treaty seems to involve an extension of the modern United
States view of the Monroe Doctrine to Southeast Asia—and more. Because
while the United States could until the Rio Pact unilaterally alter its
policy commitment to protect Latin America from European adventures, the
United States cannot legally avoid the equivalent commitment in Southeast
Asia under the SEATO Treaty after the United States and any other party
have concluded independently (or together) that Communist aggression by
armed attack has occurred in the Treaty area. Even the NATO commitment is
not so deep. The NATO commitment merely requires several and joint assistance
to the party attacked; not the defense of any third country.

The SEATO Treaty contains no direct commitment to non-parties. The terri-
tories of three non-parties were designated by unanimous agreement as terri-
tories to which the legal obligations of the parties to each other extended. Those
non-party territories were the territories under the jurisdiction of South Viet-
nam, Laos and Cambodia. Secretary Dulles explained at the Senate hearings on
the draft Treaty that the reason the three governments involved had not become
parties to the Treaty was that the rather complex group of agreements and
declarations that were part of the Indochinese settlement reached at Geneva
on July 21, 1954, only six weeks prior to the signing of the SEATO Treaty, were
interpreted to prevent their direct participation.

The explanation makes obvious political sense, but like many of Secretary
Dulles' pronouncements, it was bad law.

Parenthetically, it has been a source of some wonder to me since I began
investigating American foreign policy of the Eisenhower years, that some very
perceptive men perpetuate the canard that Dulles was saddled in legalisms and
that international law was an obstacle to his policy-making. Dulles' moralizing
may have been distasteful to many and may have reflected something of a ri-
gidity of approach that is not helpful in foreign policy matters, but I have
never found him using legal arguments to support action that he had not already
decided on for extra-legal policy reasons. And his legal arguments, as in this
case, are frequently (to quote Pooh-Bah slightly inappropriately) mere corre-
orative detail intended to lend verisimilitude to an otherwise bald and unconv-
incing narrative.

The real reasons for excluding the three non-Communist Indochinese States
from full partnership in the SEATO Treaty involved their own reluctance to
antagonise Red China and North Vietnam. It was part of the unreported record
of the 1954 Geneva settlement that the settlement was only an interim thing,
and that the United States should be discouraged from entering a political
arena whose principal antagonists felt they could manage best without outside
advice. It was also, obviously, feared that a United States presence would in
time inevitably mean a Red Chinese presence—which nobody wanted. But this
is all a side issue.

Whatever the reasons, the three non-Communist Indochina Governments were
not made part to the SEATO Treaty. They were not expressly given the rights
of parties. Therefore, they did not have the rights of parties: their determina-
tions as to the existence of aggression by means of armed attack were legally
irrelevant to the possible Treaty obligations of the United States in the SEATO
area. Of course, their views were highly relevant to United States policy; and
certainly relevant to the United States feeling of commitment—perhaps even
legal commitment—individually of the SEATO Treaty. But those views were
(and are) not relevant to the SEATO commitment of the United States.

Now, how could the United States discharge its SEATO obligations to parties
that determined along with the United States that there was aggression by means
of armed attack in Indochina? Would the agreeing parties be obliged to intervene
where they were not wanted? The answer is, of course, no. Paragraph 3 of Article
4 of the SEATO Treaty provides that: "... no action on the territory of any
State designated ... under paragraph 1 [i.e., the Indochina States] can be taken
except at the invitation or with the consent of the government concerned." There is little question that the "government concerned" was intended
to mean the government of the territory in which action was to be taken. Thus,
while the Indochinese States were to have no voice in triggering the SEATO
obligation, they were to have a veto on action in their territories ostensibly
under that obligation.

Red China has been very much opposed to this system, apparently construing
the United States obligation as an obligation directly to the Indochinese States.
Chinese representations in 1956 resulted in Cambodia expressing "disinterest" in
the SEATO umbrella, implying it would never consent to action in Cambodian
territory by any SEATO member in the guise of a SEATO obligation regardless
of the possible presence of an aggression by means of armed attack. In 1955
Cambodia tried to renounce its interest in the SEATO umbrella. But since
Cambodia is not a party to the Treaty, these attempts to extricate itself from
the Treaty obligations of the parties to each other seems to have been received
by the parties as amusing irrelevancies.

At the Geneva Conference of 1962 to try to settle affairs in Laos, the Red
Chinese were intransigent on the need for Laos to be cut loose from the SEATO
arrangement. Governor Harriman, the principal United States negotiator, re-
responded that aside from obvious problems in the United States, there would be
political difficulties in getting other SEATO parties to agree to change their
formal designation of Laos as a territory covered by the Treaty—that to insist
on that modification of the SEATO arrangement would be, in effect, to give the
Philippines, which was not a party to the Geneva Conference, a veto on the
Laos settlement. So an alternative was found. In its Declaration of Neutrality
the Government of Laos declared that it would not "recognize the protection of
any alliance or military coalition, including SEATO," and the other parties to
the conference agreed to "respect the wish of the Kingdom of Laos" in this
regard. The legal effect of this arrangement will be discussed below in Part IV.

2. Commitment to do what?

The commitment to act appears on its surface to leave specifics to each party
to the Treaty to interpret in the light of circumstances at the time the obligation
is triggered. That is a gross oversimplification of the truth. Barbara Tuchman
has pointed out that "the plans worked out jointly by the [British and French]
General Staffs [in 1914] have [in the words of Lord Esher] certainly committed
us all, whether the Cabinet likes them or not." While it is doubtful that the
joint planning by the permanent SEATO staff in Bangkok has reached that point
yet, there is a SEATO staff and there have been newspaper references to SEATO
contingency plans. The true scope for United States flexibility in responding to an
emergency in the SEATO area must inevitably have been limited by those plans.
They may not prescribe inevitable actions but they may foreclose some alterna-
tives. In short, it is probably untrue that the United States SEATO obligation to
act involves decisions that can be made entirely within the United States. Yet,
since technically the United States is of course free to ignore SEATO plans, the
precise degree to which they involve what can be called a commitment is not

clear. To the extent the rather amorphous legal commitment has been supplemented by a practical military, non-legal commitment, the United States is “committed.” That extent is impossible to determine from outside.

Another consideration makes it impossible to be confident about our perception of the full extent of the SEATO commitment to act: the official interpretations of ambiguities that are inevitably part of any legal document. Many of the ambiguities of the SEATO Treaty as applied to specific circumstances must have been resolved by correspondence that has never been made public. An example relating to the SEATO trigger that has been referred to in the press will illustrate the point: It appears to be the official interpretation of Article IV (1) of the SEATO Treaty and Articles IV and V of the ANZUS Treaty that an armed attack on “any of the Parties” includes attacks on the armed forces of a party wherever in the total treaty area those armed forces may be. The “treaty area” is defined in the SEATO Treaty Article VIII as “the general area of Southeast Asia” in pertinent part; and in the ANZUS Treaty Article V as “the Pacific Area” merely. Leaving aside the questions this may raise with regard to the Kingdom, Australia and New Zealand and the American involvement in Indochina, it has been interpreted to mean that an armed attack on British or Australian forces in Malaysia would trigger the United States obligations even though an armed attack directly on Malaysian forces in the same place would not. Malaysia has specifically rejected the SEATO arrangement and is not party to the ANZUS Treaty.

The interpretation leading to this anomalous result does not flow inevitably from the language of the Treaties or from political logic. Neither is it patently absurd. Obviously, an analyst with no “inside” information can hardly be expected to find this very important official interpretation of United States obligations merely by exercising the usual diligence in research; the directly pertinent documents are secret and the published newspaper and Congressional reports revealing what the position really is are badly indexed and obscure.

IV. CAMBODIA AND LAOS: THE CURRENT SEATO COMMITMENT

There are several grounds that international law recognizes for avoiding a treaty commitment, some of which may be applicable to the United States involvement in SEATO One would be the doctrine, technically called calusa rebus sic stantibus, that in all treaties there is an implied provision that the obligation ceases when there is a change in the essential external conditions contemplated by the parties when they entered into the Treaty. There is no doubt that one of the principal assumptions of the parties to the SEATO Treaty was that the Communist orientation of the leaders of a revolt or the perpetrators of an aggression by means of armed attack implied a central control ultimately traceable to Russia; that American anti-Communism in the foreign policy arena was part of great-power politics and the “game” to borrow Kipling’s word, between the United States and Russia. It is difficult to maintain that view today. Certainly our willingness, often expressed, to co-exist with Communist governments—even to give economic assistance to North Vietnam—makes it clear the United States no longer equates Communism with evil. Is this not a fundamental change in official American perceptions of the world since 1954? Is this not an essential change of the condition of lasting “confrontation” that was one of the major bases for the SEATO commitment, and was expressed indeed in the formal “Understanding of the United States of America” appended to the SEATO Treaty which restricted the United States obligation under paragraph 1 of Article IV to cases of “communist aggression”?  

1 This example rests in part on personal conversations in 1965 when I discussed the impact of the SEATO Treaty on the Indonesia-Malaysia “confrontation” with a well-placed State Department official in connection with my responsibilities in the United States Department of Defense. Those conversations alerted me to the true meaning of various published comments that have appeared since. The interpretation given here is not classified any longer, indeed, it may even not be the official interpretation of the Treaty any longer.

2 International Law Commission Draft Articles on the Law of Treaties. art. 56 (1967) 47 AJIL 263 at 280; Vienna Convention on the Law of Treaties, May 23, 1969, art. 62. There are other grounds that have been suggested for the United States to avoid its apparent SEATO commitment. Cf. Allison, May and Yarmolinsky, “Limits to Intervention” (1969-70) 48 (2) Foreign Affairs 245 at 254 et seq. None seems as well founded in law and the history of the SEATO Treaty as the argument based on the rebus sic stantibus doctrine.

3 See speeches by President Johnson dated April 17 and May 13, 1965, and March 31, 1968.
This possibility is not necessarily persuasive, since perceptions usually change slowly and we cannot know from published material the extent to which the change of perception has gradually resulted in changes in the official interpretation of the SEATO Treaty by its parties through which the actual obligation has kept pace with shared expectations by silent revision of the obligations. If it has kept pace, then clearly the fundamental change of conditions has already resulted in changes in the obligations making denunciation on this basis impossible. It is an interesting thought, and one that may have significance, that Senatorial advice and consent to a legal commitment cannot practically be required as the content of that commitment evolves through interpretation; and all treaties that survive any length of time at all do evolve. The so-called "silent revision" of the United Nations Charter is only the most notorious example. The SEATO Treaty is another. It may be concluded that while the form of Senatorial advice and consent may be a valuable constitutional device in the United States to prevent too rapid changes in major obligations, it cannot prevent the evolution of those obligations if the executive branch of our Government succumbs, as it always does, to the temptation to agree on ad hoc treaty interpretations not specifically ruled out by the terms of the Senate's consent.

Since all its parties still seem to regard the SEATO Treaty as continuing in force, it is overwhelmingly likely that for the United States to now assert its obsolescence on the basis of changed circumstances would be politically impossible even if a theoretical legal possibility. Thus, as a practical matter, the United States undoubtedly regards itself as still bound by the SEATO Treaty even if fellow parties futurists in armed attacks on their own territory or on their armed forces in the treaty area. Therefore, the more pressing question at this moment is: Would the United States be legally bound to some party to act several to defend Laos or Cambodia from communist aggression by means of armed attack? I suppose that there is no significant doubt that the present Administration regards Viet Cong actions in Cambodia, for example, and North Vietnamese efforts in Laos, as such Communist aggression by means of armed attack.

As noted earlier, the Governments of Laos and Cambodia have publicly indicated in unilateral declarations their refusal to accept the SEATO arrangement. And without the permission of the territorial government, the parties to the SEATO Treaty are not bound (indeed, in general not legally permitted) to act in the victim's territory. But what would be the legal situation if the present Government of Laos or Cambodia changed its mind? As we have seen, neither Government has acceded to the SEATO Treaty, and, as non-parties, neither therefore has the legal right to demand the United States abide by its promise to others. But what if some SEATO party like Thailand determined that a communist aggression by means of armed attack were occurring in Laos or Cambodia, and the United States could not in good faith take a different view? By a strict construction of the SEATO Treaty it seems that the United States would be bound to act. The unilateral declarations by Laos and Cambodia refusing to accept the protection of the SEATO umbrella are in form like all unilateral declarations: revocable at the whim of the declarant. This conclusion is strengthened with regard to Cambodia by the circumstances in which the first of the Cambodian declarations was made. Prince Ishanouch's 1956 renunciation of the SEATO umbrella was made while he was in mainland China on an official visit. Had he wished to commit his country formally to not permitting SEATO partners to enter its territory in the event of Communist aggression by means of armed attack, he should certainly have had no difficulty finding a government willing to accept his declaration formally.

With regard to Laos the legal situation is a bit more complicated, although the result seems to be the same. The Laos Declaration of Neutrality was unilateral in form due to the adumbrance to the SEATO partners, some of whom would not accept any revision to the Protocol. It would be strange indeed now for the SEATO States to argue that their own refusal to amend the Protocol was legally meaningless. Thus it would seem that while Laos (like Cambodia) remains a designated "Protocol State" the SEATO partners are bound to each other to extend the SEATO obligation to the territory of Laos, and the Laotian permission required by the Treaty (and general international law) prior to a party's acting in Laos can be given at any time regardless of Laos's prior policies. But does Laos indeed retain the legal power to grant that permission? The non-Laotian parties to the international conference of 1962, with the con-
currence of the Government of Laos accepted the Declaration of Neutrality in

a counter-Declaration by which they agreed among themselves to regard the
two Declarations as constituting an international agreement." The simplest
of several possible legal arguments supporting the continued power in Laos to
withdraw its commitment not to invite SEATO into its territory would be based
either on changed conditions or on the failures of other parties to the 1962
Conference (all of them) to live up to their equivalent commitments to refrain
from all direct and indirect interference in the internal affairs in Laos and to
consult appropriately "in the event of a violation or threat of violation of the
sovereignty, independence, neutrality, unity or territorial integrity of the King-
dom of Laos." This obligation, joined by Red China and both Vietnams, was
part of the balancing *quid pro quo* for Laos's undertaking not to "recognize the
protection of . . . SEATO." The counter-arguments to this seem to rest on up-
holding the words and form of the Laotian Declaration at the expense of all
the probabilities as to what the 1962 arrangement was actually intended to do,
and to destroy the formal bargain itself.

It is important to note that not all the SEATO partners are parties to the
results of the 1962 Laos Conference. Thus, even if it is concluded that Laos is
bound to the United States, United Kingdom, France and Thailand (parties to
both the Treaty and the 1962 Conference) not to permit SEATO action in its
territory despite the arguments just adduced, it is free to invite or consent to
SEATO action as far as concerns Australia, New Zealand, the Philippines and
Pakistan. It is reasonable to assume—indeed unreasonable not to assume—that
the latter four have in unpublished diplomatic correspondence released the
four SEATO partners who were parties to the 1962 arrangement from whatever
SEATO obligations might be deemed to be inconsistent with the Laos
settlement. But the terms of that release are not published; and there is no
information available to the public whether they have released each other to
the same extent. Thus the same events that might require the parties to the
1962 Laos arrangement, such as the United States, to consult with the other
to that arrangement, may also require Australia, New Zealand, the
Philippines and Pakistan to send troops into Laos under their mutual and
several SEATO obligations. As we have seen in mentioning the impact of the
SEATO and ANZUS Treaties on the Malaysian confrontation (note 6 above),
this anomaly can lead to grave legal (and practical) complications for the
United States.

The easier legal answer is one that is equally applicable in the case of Cam-
bodia. It is that each State's conception of its legal obligations with regard to
Laos and Cambodia under the SEATO Treaty has so changed, due in large part
to the actions, including the Declarations, of Laos and Cambodia themselves,
that a strict construction of those obligations is irrelevant. The SEATO obliga-
tions in that regard can properly be viewed as terminated. My hesitancy in
stating this conclusion stems from ignorance of the actual plans made by the
SEATO staff to take account of what I should have thought were obvious
changes in each party's intentions. If, for example, the SEATO partners through
their representatives at SEATO Headquarters or in the annual conference of
SEATO Foreign Ministers in Bangkok have made unpublished adjustments to
their obligations to each other in the light of the Cambodian renunciations and
the Laos Declaration (which are five and nine years old respectively), those
unpublished adjustments would represent silent revisions of the obligations as
the situation changed and, as in the case of the United Nations Charter, leave
the basic document intact. If that is the case, it will take a document longer than
this for our Government to explain all the ramifications of the SEATO Treaty
at present, and I have some confidence that such an explanation will never be
openly published. On the other hand, any legal assertions that do not reveal
more logic than a reading of the bare terms of the SEATO Treaty would be
evasive and unsatisfying.

V. CONCLUSIONS

Under the SEATO Treaty the United States is not bound directly to Cambodia
or Laos. The United States is apparently bound to its fellow parties in the
Treaty severally to defend the territory of Cambodia and Laos from external
armed attack by Communist forces subject to the necessity of receiving Camb-
dodian and Laotian permission for operations in the territory over which each
of their two Governments has jurisdiction. The United States need not accept as
definitive the assertions of the Government of Laos or of Cambodia or of any party to the Treaty as to the actual existence of such an armed attack. A unilateral determination of "aggression by means of armed attack" by the United States does not trigger any SEATO commitment; to trigger the SEATO commitment there must be equivalent determinations by at least one other SEATO party.

Even if the SEATO commitment is apparently triggered by determinations by parties regarding the existence of an appropriate armed attack, there would be doubt as to the continued validity of the Treaty arising from vastly changed circumstances since 1954. Whether that doubt must be resolved in favor of the continued validity of the apparent Treaty obligation depends on information concerning international consultations at the Foreign Minister level and the military staff level which is not available to the public. The reciprocal of this point is also true: Any assertions that the United States is not bound to its SEATO partners by the SEATO commitment to act to defend Cambodia and Laos from Communist aggression by means of armed attack must be doubtful unless resting on information concerning the evolution of the SEATO Treaty and its subsidiary arrangements that has not yet been made public.

This unsatisfying situation raises an even larger question. How can the educated public in an open society form judgments as to the soundness of its leaders' decisions in the complex world of international law and relations?

It does not necessarily follow that all the plans and assurances given under the SEATO Treaty should be made public. There is a need for secrecy about some matters, even (or perhaps especially) when those matters involve complex and subtle interests which the general public is not able to evaluate and which have in them the potential for major political impact based on slogans. Possibly Senator Fulbright is right in feeling that the State Department ought to be much more open in its dealings with the elected representatives of the people about its commitments, even if only in classified discussions. But that alternative is not a cure, or even much of a palliative; Senators and Congressmen as a group are not known for their discretion when political capital is to be gained by indiscretion. I have no general cure to propose to the ultimate governmental problem of reconciling the need for decision-making by experts, the need for public knowledge, and the fact that most organizations create in themselves a penchant for Byzantine intrigue as a qualification for popular election or effectiveness at policy-making levels.

I do conclude that the Government ought to inform the public fully about the reasons for its decisions after the decisions are made. There can be no convincing argument to preserve paper secrecy after the secret arrangements have already been revealed in action. Failure to explain fully and frankly the legal bases for action can only lead antagonists, friends and constituents into confusion. Furthermore, acknowledging the immediate need to explain fully, even if to explain only after the act, unquestionably serves as a deterrent to rash action. Perhaps it is the failure of the past two Administrations in the United States to accept the need to explain as a necessary corollary of decision-making power in our system that has led to so much public disappointment and misunderstanding of what, for all we know, may be rational decisions despite the unfortunate show of confusion and public-relations sloganeering.
LETTER FROM CHARLES B. NUTTING

UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,

HON. ROBERT N. C. NIX,
Chairman, Asian and Pacific Affairs Subcommittee,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Although I am glad to respond briefly to your inquiry of April 26th, I am not sure I can be particularly helpful.

I have just read the newspaper reports of Secretary Rogers' statement to the Senate Committee and I think it is about as clear a one as could be made.

The principal problem, as I see it, is that the Constitutional provisions regarding the Executive power are very broad, I think, intentionally so. Furthermore there is very little in the way of judicial authority to support any conclusions in this area. As you know, the courts have regarded these matters generally as inappropriate for judicial review.

This being true, one can rely only on practice and precedent. As far as the Constitution goes, I suppose chief reliance is to be placed on the provision that the President is Commander in Chief of the armed forces. There have been many instances in which, relying on that power, he has sent members of the armed services into combat in foreign areas.

As far as I know, there is no effective means to challenge the President's actions except through political sanctions of one sort or another. I am not prepared to say that there is any firm constitutional footing for any other sort of restraint.

Thank you for inviting my comments.

Yours very truly,

CHARLES B. NUTTING, Professor of Law.
LETTER FROM DEAN RUSK

UNIVERSITY OF GEORGIA SCHOOL OF LAW,


DEAR CONGRESSMAN NIX: I very much regret that long-standing commitments will not make it possible for me to meet with your Subcommittee on the 9th and 10th of May to discuss the constitutional aspects of the present Cambodian situation.

In general, it has been my view that constitutional issues should be resolved by those who are carrying the current responsibilities of government, both in the Executive and Legislative branches. I understand from the press that the Secretary of State has now provided the Congress with a legal memorandum on the views of the Executive branch, but I have not yet seen a copy. In any event, when I left office, I resolved not to try to play the role of a grandstand quarterback.

There is one point which your Subcommittee might wish to examine. Cambodia was a "protocol state" originally covered by the SEATO Treaty. Prince Sihanouk announced that he did not consider Cambodia to be under the protection of SEATO and that he would not request assistance in accordance with its terms. During my period in office, we assumed that this action by Prince Sihanouk removed Cambodia from SEATO consideration. However, a new government has now appeared in Cambodia and has apparently requested assistance. Whether that revives the application of SEATO to Cambodia is a question which would require an examination of the record by someone on your staff. However, even if Cambodia is covered by the SEATO Treaty that does not necessarily resolve the constitutional point. In Article IV, paragraph 1 of the SEATO Treaty, each party in certain circumstances agrees that it will "act to meet the common danger in accordance with its constitutional processes." No attempt is made by the Treaty to prescribe what those constitutional processes should be.

One further point occurs to me. Whatever one's attitudes might have been at various stages of the tragic conflict in Southeast Asia, President Nixon assumed office at a time when large American forces were in Southeast Asia and the Southeast Asia resolution of August 1964 was in full force and effect. The Congress subsequently rescinded that resolution under powers which it clearly had in paragraph 3 of the resolution itself. I would suppose that a President, under those circumstances, would have some flexibility in the withdrawal of our forces in Southeast Asia. President Nixon has in fact withdrawn a very high proportion of the forces he found in Southeast Asia when he took office. The extent of the flexibility to which I referred is, of course, a matter for honest debate.

Finally, I am not at all sure that such issues can be resolved by a strict application of constitutional law since our Constitution is somewhat imprecise at crucial points. If both the President and the Congress press their respective attitudes on the constitutional issues at the end of the day, the result could clearly be impasse—the ghost which haunts our constitutional system. I would hope that there could be full and frank discussion between the two branches of government in a genuine effort on both sides to find the degree of consensus which is necessary if our constitutional arrangements are to work at all. In general, I feel that any significant numbers of American forces engaged in conflict for any significant period of time should be a matter for determination both by the President and the Congress. My experience has been that constitutional issues tend to arise only where there is a difference on the policy. This suggests to me that the final answer should be reached by the political process rather than by strictly legal debate.

With personal best wishes.

Cordially yours,

DEAN RUSK.
LETTER FROM CLARK M. CLIFFORD

CLIFFORD, WARNKE, GLASS, MCLINWAIN & FINNEY
ATTORNEYS AND COUNSELORS AT LAW
WASHINGTON, D.C., MAY 8, 1978.


DEAR Mr. NIX: I have your letter of April 23rd in which you request that I set out my views, by letter, on the question of the President's authority to carry out military operations in Cambodia at the present time.

There are many compelling reasons of national interest why our country should not be conducting bombing operations in Cambodia today. However, your inquiry is directed solely to the authority, or legal right, of the President to conduct such operations, so I shall confine myself to this issue.

Section 8 of Article 1 of the United States Constitution gives to the Congress the sole right to declare war. We are clearly engaged in conducting a war in Cambodia today, no matter how it is variously described by those apologists who favor our present policy. The fact is that hundreds of our planes are engaged in daily operations over Cambodia and thousands of tons of bombs have been dropped. President Nixon has ordered this bombing in Cambodia, although he cannot but be aware that he does so without any authority from the Congress.

Throughout our lengthy and tragic involvement in Indo-China, different theories have been advanced from time to time to justify our conduct of military operations in that part of the world.

It has been suggested that the SEATO Treaty authorizes such military activity.

It appears to me that this is clearly incorrect. Cambodia is not a signatory of the SEATO Treaty but is a protocol state for purposes of Article IV. That Article provides that where such state is a subject of "aggression by means of armed attack," each Party "will in that event act to meet the common danger in accordance with its constitutional processes." Obviously, the appropriate constitutional process under these circumstances would be to submit the matter to Congress so that it might determine if it was proper for war to be declared.

At one time, it was contended that our military activities in Indo-China were sanctioned by the Senate Gulf of Tonkin Resolution. This authority cannot be utilized at the present time, however, because the Gulf of Tonkin Resolution was repealed months before the present military activity was ordered by the President.

On many occasions these past years, President Nixon has justified military activity in Southeast Asia on the basis that it was necessary to protect the lives of the members of our military forces in the area. This justification was dramatized by the statement of President Nixon on June 3, 1970, when he said:

"The only remaining American activity in Cambodia after July 1st will be air missions to interdict the movement of enemy troops and materials where I find that it is necessary to protect the lives and security of our men in South Vietnam."

The obvious interpretation of this language is that there would be no justification for the bombing in Cambodia after we have withdrawn our military forces from South Vietnam.

The constitutional authority of the President as Commander-in-Chief provides no justification for the present exercise of preemptory authority where Congress has sanctioned no military involvement and where no emergency exists which threatens our national security. Indeed, by categorical legislative enactment, the Congress has declared that our military forces should not be recommitted in that country. The latest theory advanced to sanction the bombing is that it is necessary in order to encourage compliance with Article 20 of the Executive Agreement, the purposes of which was to end the hostilities in Indo-China. Careful reading of that Agreement fails to disclose any authority for the United States to bomb in (145)
Cambodia. In addition to that, the Agreement was never submitted to the Congress for approval and it does not have the dignity of a treaty. No “bootstraps” doctrine can be condoned whereby unilateral executive fiat is sought to be utilized to support Presidential usurpation of Congressional constitutional authority to wage war.

To recapitulate, it is clear to me that none of the reasons advanced through the years and down to today are operable at this time in bestowing the right upon the President to engage in this activity. It appears clear that no authority exists, in either our Constitution or our statutes, for the conduct of bombing operations in Cambodia.

Sincerely yours,

CLARK M. CLIFFORD.

Hon. Robert Nix,
Chairman, Asian and Pacific Affairs Subcommittee,
Washington, D.C.

Dear Congressman Nix: I appreciate your inquiry of April 26th concerning the authority of the President for continued aerial bombardment in Cambodia, and I regret that personal circumstances precluded an earlier reply. As it happens, the November, 1972 issue of the University of Pennsylvania Law Review carries an article I wrote last year which attempts to examine the war power as applied to Vietnam, and by implication to Cambodia and Laos as well. The article is titled "Congress, The President, and The Power to Declare War: A Requiem for Vietnam."

For reasons set forth in that article, my conclusions relevant to your question were these:

1. The sustained use of military force abroad by the President of the United States is without constitutional authority in the absence of a declaration of war by Congress.

2. Neither Bills of Appropriation, general levies of manpower, nor alleged obligations arising from treaties (which are subject to ratification by the Senate exclusive of House concurrence) are a sufficient constitutional means of providing that declaration;

3. Nevertheless, a not unreasonable construction of the original Tonkin Gulf Resolution, joined in by both Houses of Congress, would find it sufficient as a declaration of limited war in Vietnam and in Laos and Cambodia as well.

4. By express provision made in that Resolution, however, Congress reserved the authority to modify or to repeal that declaration, as it was entitled to do pursuant to its separate constitutional authority. In January of 1971, the Resolution was repealed outright, with no provision made of any kind by way of continuing authorization for the executive use of military force. Subject only to the President's duty as Commander in Chief to secure the immediate safe withdrawal of all American forces from the contested area, the President thereafter was without authority to use military force for any purpose whatever, no matter how vital he might believe such force to be in the national interest.

In short, I believe that the continuing executive use of aerial bombardment in Cambodia is wholly lacking in constitutional authority. I have considered carefully the published views of others on this subject, but for the reasons developed at length in the article I have already referred to, I believe they are mistaken.

Sincerely,

William W. Van Alstyne.