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NO-FIRST-USE BY ONE DECISION MAKER

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LAWYERS DEBATE CONGRESSIONAL LIMITS ON FIRST USE OF NUCLEAR WEAPONS

Herein is contained the lightly edited and excerpted transcript of a conference of Constitutional lawyers held November 15–17 in Warrenton, Virginia. Co-sponsored by FAS and the Lawyers Alliance for Nuclear Arms Control (LANAC), the lawyers were convened to discuss the constitutionality of a statute proposed by the Federation—most recently in Director Stone's September, 1984 Foreign Policy article "Presidential First Use Is Unlawful".

The statute would have made it unlawful for the President to institute a first-use of nuclear weapons during conventional hostilities abroad, in the absence of a declaration of war, unless he received the majority vote of a leadership committee of Congress set up for the purpose (various side conditions and understandings were specified).

Papers were commissioned pro and con and, in addition, were prepared for several separable topics. Highlights of the debates were these:

Dr. Alton Frye, Washington Director for the Council on Foreign Relations, set the stage for the conference with a brillant keynote address outlining the issues.

Professor Allan Ides said the statue was, from a legal point of view, a Congressional ban on first-use of nuclear weapons coupled with specific authority to a Committee to revoke that ban. He pronounced it constitutional.

Professor John Norton Moore had genuine doubts whether even the Congressional ban on first-use itself was constitutional in the absence of some relevant piece of international law enhancing the Congress's authority to do so. He viewed the Committee delegation as unconstitutional and the proposal as one that interfered with the Commander-in-Chief's operational authority to use weapons consigned to him. For these and other reasons, he viewed the statute as unconstitutional and undesirable.

Charles Tiefer, Deputy General Counsel to the Clerk of the House of Representatives, held that the Committee delegation aspect of the statute was constitutional and, indeed, that the famed Chadha decision of the Supreme Court did not, and was not meant to, apply to statutes in a wide range of foreign policy areas of shared Congressional and Executive Branch powers, quite apart from the time-urgency and special circumstances of this statute. Professor William Banks agreed, and termed the statute constitutional overall.

Professor Stephen Carter disagreed on the constitutionality issue, arguing that, in this area, Congress no longer had authority to decide on the initiation of conflicts but only to halt conflicts once begun and that this could be done with disapproving votes of a single House of Congress but not less.

Since even much weaker war powers statutes generate considerable controversy, it was no surprise that consensus was not reached on the statute. Indeed, the conference solicited papers with a view to ensuring that the opposition to the statute would be present and given ample time.

Surprising Support

What was surprising, however, was the depth and degree of legal support which the statute won. Clearly the constitutionality of the statute can no longer be dismissed as the work of a non-lawyer or a Federation of scientists but has become a controversy among lawyers.

In this connection, the Federation is urging the Lawyers Alliance to study the matter further and, under the editorship of Professor Peter Raven-Hansen, who chaired the conference, plans to publish the papers and portions of the transcript along with commentary.

Obviously, the desirability of the statute goes well beyond the narrow legal question of its constitutionality but turns on questions of strategy, international politics and the domestic feasibility of eventual passage—or of passage of modified forms—of the statute. The Federation is planning a subsequent meeting on these issues.

At the conference, a final session was convened to discuss the desirability of a leadership committee of Congress for national emergencies which, while not empowered with a specific statute, would exist in readiness for a wide range of consultations. A newsletter excerpting those exchanges will appear in the spring.

CONTENDING IMPERATIVES: NUCLEAR POLICY AND CONSTITUTIONAL VALUES

MR. FRYE: We assemble to consider some of the gravest issues ever to confront a free society. Those issues arise from the profound tension between the imperatives of nuclear deterrence and the ideals of self-government, between the unprecedented conditions created by modern military technology and the enduring ambition to protect individuals against the final centralization of power over the life and death of whole societies.

These issues take many forms. They stand at the center of debates over strategic and theater nuclear weapons systems. They lurk in the background of negotiations over arms control. They animate the contest for power between the

CARL SAGAN RECEIVES 1985 PUBLIC SERVICE AWARD, p. 36

separate branches of government. They exacerbate frictions with possible adversaries, imposing a degree of sobriety while simultaneously subjecting that sobriety to stresses that might shatter it in a moment of intense crisis. They confound relations among allies committed to each other's security, but constrained by their own domestic political requirements. They provoke anguish in the citizenry and they move churches to find new voices in addressing the moral conundrums of nuclear policy.

In these and myriad other ways concern about the nuclear problem makes itself felt. Surprisingly, however, there has been relatively little systematic consideration of the critical questions posed for political philosophy by the advent of weapons powerful enough to threaten life on the planet. We have tended to evade the hard questions of constitutional structure and practice which the new situation of singular presidential authority over the use of nuclear weapons poses. Partly this may be due to a kind of aversion psychology: all of us shy away from confronting basic contradiction between the concept of limited government and the reality of absolute authority to place the nation at risk by presidential decisions to employ nuclear weapons.

Not a New Problem

To be sure this is not the first time in American history we have encountered tendencies of this nature. Tensions between practice and theory often occur under the pressures of armed conflict. So it was during the Civil War, and we all recall Lincoln's stretching of constitutional boundaries in order to save the Union and the Constitution. Similarly, Franklin Roosevelt's undeclared war in the Atlantic during 1940 was an act of state vindicated by ultimate success, not by ready concurrence with the dictates of the Constitution. Those constitutional excursions earned the tolerance of Americans and, in many ways, the admiration of later generations.

For some they are sufficient to justify complacency toward the extension of presidential power in wartime. For others they reinforce the fatalistic verdict that, in circumstances of modern war, to save the Constitution Presidents must sometimes suspend it—or at least escape its strictures. For a few they have even fostered an aura of glamor about the lonely executive who becomes savior of the nation by dint of extra-constitutional boldness. Whatever one's precise attitude toward these precedents, there is reason for concern when a constitutional government slips too comfortably into a habit of excusing its deviations.

Yet these episodes do not parallel the unique situation of our time. The actions of Lincoln and Roosevelt carried risks of historic magnitude, but they were circumscribed by countervailing political power. Congress, the courts and the electorate had the time and resources to correct executive excesses, to assess failure if it occurred, and to hold the president accountable for his action. Neither Lincoln nor Roosevelt made irreversible decisions that could have ended the nation's history within hours or days.

It is strange to consider that a nation grounded in wariness of concentrated power seems almost to have acquiesced in a contemporary doctrine that asserts there is no alternative

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to absolute concentration of authority in decisions regarding the possible use of nuclear weapons. The task of this conference is to examine that doctrine and to explore whether we can contrive an alternative that more nearly respects the values and traditions of the American people.

The context for our deliberations is rich and complex, for we must meld matters of law and procedure with military, technical, and diplomatic factors. If we are to mine that context effectively, it is important to focus our inquiry carefully.

We are dealing here not with sweeping contentions setting President and Congress against each other in some fundamental antagonism. We are searching for ways in which both the executive and the legislature can best meet their overlapping responsibilities under the Constitution.

We are not assembled to rehearse the entire debate over war powers. We are here to consider a narrow and specific aspect of that subject, one thoroughly neglected in the debates of the early 1970's which primarily concerned scenarios for conventional warfare. The question before this conference is: Is it constitutionally required and procedurally feasible to assure that any use of nuclear weapons *initiated* by the United States involve the legislative as well as the executive power? That first formulation only begins the discussion; it will require much refinement.

But it permits one to set aside some of the extraneous arguments which may obscure the matter. Those who raise the issue just stated concede a great deal at the outset. They do not challenge the authority of the President to retaliate with nuclear weapons if the United States or its forces are attacked by nuclear weapons. They do not deny that the President has comparable authority to launch American nuclear weapons if those weapons themselves come under attack and the President obtains clear warning of the incoming strikes. In those instances where decision time is truly measured in minutes, there is, I suggest, something approaching consensus that constitutional law and military necessity empower the President as Commander-in-Chief to respond on his own authority.

But This is First-Use

The questions for debate in these proceedings are different ones: In the course of an ongoing conventional conflict, whether declared or undeclared, does the President have the unfettered right to initiate the use of nuclear weapons? Or does escalation to nuclear war, as a policy choice distinct from retaliation for nuclear attack, constitute a new war requiring conformity with constitutional provisions for congressional participation in the decision?

Since there could be no weightier exercise of the war powers than one exposing the nation to the risk of rapid and comprehensive destruction that characterizes general nuclear war, is it compatible with the shared powers of the Constitution for a single decisionmaker to assert that prerogative? Could Congress insist on exercising its own war powers in such a scenario by providing statutory ways and means to participate in any decision to initiate nuclear warfare? Or must Congress' sole role be to provide the means for nuclear escalation, thereafter forsaking any judgment as to the wisdom of their use? And, if the latter conclusion prevails, can anyone doubt that the exigencies of the nuclear age have brought us to a plight even more perilous than the king-made wars against which the founding fathers rebelled?

Much depends on our vision of how and how fast escalation might occur. In the past that vision has assumed that any presidential decision to "go nuclear" in a conventional conflict would be made under the most stringent time pressures; consultation with political authorities outside the executive branch would be impossible. It has also assumed that, however awesome the consequences, it would represent an abrupt, but still limited, intensification of the war. On close analysis both of those assumptions weaken.

It develops that the President of the United States is already committed to consultative and deliberative procedures that would consume many hours, if not days. Arrangements for the release of nuclear weapons to commanders are framed to ensure civilian control and, in the NATO context where the prospect of escalation would most likely arise, the United States is formally obligated to consult with its allies. The Supreme Allied Commander, Europe (SACEUR), General Bernard Rogers, has stressed the elaborateness of these sequences. Not only must the SACEUR seek approval from political authorities at NATO headquarters, but he would consult the ministers of defense of all NATO nations. He would go simultaneously to both Britain and the United States, the allies possessing nuclear weapons, with his request for release. The actual request would be preceded by so-called "early notification" to alert the governments that the issue may be pending.

British Retain Control

Recent debates over deployment of cruise missiles and other weapons in Europe have firmed up these assurances. British officials have made clear that U.S. cruise missiles in the United Kingdom could not even be dispersed from their bases unless a Royal Air Force unit accompanied them. Her Majesty's Minister of Defense has vouchsafed to the House of Commons that for thirty years British Prime Ministers have had "absolute" assurances that there would be no unilateral American decision to launch nuclear weapons based there.

Alton Frye

To a significant degree, it appears that allies enjoy both firm expectations that there will be time and opportunity for the American President to seek their counsel—and a measure of physical control over U.S. weapons to ensure that he does not disregard it. Thus, the contention that there would be no time for a President to consult Congress or its leaders does not bear scrutiny.

The only two precedents of relevance are imperfect, but they make the same point. During the protracted Cuban missile crisis of 1962, apprehension about possible escalation to nuclear war was keenly felt. There was ample time to consult with Congress, had a suitable mechanism existed. That point is made tellingly by the very title of Robert Kennedy's memoirs, *Thirteen Days*. Failure to consult with members of Congress reflected a political calculus, not military necessity or constitutional scruples.

Similarly, Harry Truman's decision to employ nuclear weapons to hasten the end of the war in the Pacific was obviously not a snap judgment made in hours. Yet even in the days after the first bomb was dropped and before the attack on Nagasaki, the President's own memoirs reveal no hint that he considered consulting congressional leaders. The habits of total war governed all. The atomic bomb was just another military weapon, only more powerful, and the President saw its use as one more option in the American arsenal.

Forty years later, however, the relative ease with which Mr. Truman reached his fateful choice would not be tenable. That ease rested on monopoly of the weapon; its use posed no imminent danger that the American homeland would suffer nuclear reprisals. Today, it is improbable that the United States could employ nuclear weapons against a nuclear-armed opponent without expecting a response in kind, perhaps against the homeland itself. And that altered reality compels re-examination of the President's constitutional althority to make such decisions alone. For the dynamics of escalation remain essentially incalculable. To initiate the use of nuclear weapons is to enter a region of risk utterly beyond anything involved in conventional warfare. It is to wager the nation's survival on the self-restraint of an adversary. Is it a wager prudently left to a single individual, however exalted in the constitutional scheme?

Covert Operations Posed Analogous Problems

In several analogous areas Congress has been groping for adequate measures to re-engage its authority over national security policy. Its creation of parallel intelligence oversight committees in the House and Senate has been a wholesome development. Those committees have acquired an important role in supervising plans for covert operations. Ten years ago the shakedown cruise chaired by Senator Frank Church and Congressman Otis Pike was not always a smooth voyage. In the years since, the Committees' performance has demonstrated growing legislative competence in handling the most sensitive information and in helping to guide the country's intelligence organizations. Their record argues that Congress can organize itself to share responsibility with the executive branch for national security.

Even more ambitious was the enactment of the War Powers Act. There will be varied perspectives here regarding the purposes and effects of that Act. Those effects have undoubtedly been less than its proponents hoped, although its reporting requirements seem to have induced within the executive a useful degree of discipline and a heightened awareness that the President will be held accountable. There is no evidence that the United States has failed in any necessary use of its power because of inhibitions allegedly created by the War Powers Act.

In my opinion it is essential to understand that the Act's intent is not to render the President impotent in decisions to use force. Its authors sought to assure that Congress would meet its own constitutional responsibilities to judge the exercise of war power as an issue of high policy—rather than as a "hodgepodge" of framentary, indirect verdicts rendered through measures to provision forces already in the field.

In assessing the experience with the War Powers Act and the Intelligence Committees, any final judgment is premature. For our purposes it is sufficient to note that recent years have seen a number of innovations in congressional-executive practice aimed at ensuring responsible legislative participation in critical decisions affecting national policy. There is no reason to assume *a priori* that Congress is intrinsically disabled from equipping itself to play a similar role in so portentous a decision as one to cross the nuclear threshold of our own volition.

These are the kinds of issues to which we are led by Jeremy J. Stone's provocative essay, "Presidential First Use is Unlawful". Dr. Stone's analysis poses a powerful challenge to conventional thinking about these matters.

Irony: President Consults with Foreigners

At present the spirit of the Constitution resides not in agreed arrangements for consultations between President and Congress regarding possible escalation to nuclear warfare. It exists, ironically enough, in the President's international obligations not to cross the nuclear threshold in Europe without thoroughly consulting NATO allies. It is not clear that similar restraints exist in other theaters where U.S. nuclear weapons might be used in an attempt to prevail in conventional war. Under these circumstances there is a strong case for inventing new political devices through which Congress can meet its own obligation to judge whether the nation should accept the risk of nuclear escalation.

PRESENT U.S. POLICY PERMITS FIRST USE

U.S. official statements on the first use never preclude it but assert, instead, that it will be done for defensive purposes only. When President Jimmy Carter addressed the subject before the United Nations on October 4, 1977, he put it this way:

"To reduce the reliance of nations on nuclear weaponry, I hereby solemnly declare on behalf of the United States that we will never use nuclear weapons except in self-defense; that is, in circumstances of an actual nuclear or conventional attack on the United States, our territories or armed forces or such an attack on our allies."

In contemplating such political inventions, a number of issues present themselves. There is the strategic issue: Would some form of congressional machinery to participate in consultations on such a decision inherently weaken deterrence and tempt aggressors?

The Defense Department's General Counsel says, "yes", in asserting that procedures for formal consultation with Congress "would threaten NATO's ability to deter Soviet aggression". That, of course, is a prediction about Soviet strategic behavior, not a statement of constitutional law or duty. It is not apparent why a role for Congress, suitably defined, would necessarily impede a timely decision any more than would the allies whose territory would be most immediately at risk.

There are political issues: One recalls John Kennedy's distress when, having informed a few congressional leaders moments before he announced the quarantine of Cuba, he met a storm of protest. Yet he noted later that the legislators had reacted with little chance to appraise the options; he thought that, given time and information, they would have reached conclusions similar to those of the Ex Comm. It might well be that a body of congressional leaders, formally included in deliberations regarding the initiation of nuclear war, would reinforce rather than moderate executive inclinations. Even so their involvement would spread responsibility for whatever decision was taken. And their presence would compensate for the dangers of reaching such a momentous choice in a closed, hierarchical process. The hard, practical question is how to design a workable congressional connection for this function.

Can the Desired Arrangements Be Made?

And then there are legal issues: Can one contrive lawful procedures and means to avoid the hazards of a single decisionmaker initiating nuclear war? Is it possible to reconcile constitutional values with wartime exigencies?

The implications of the Chadha decision obviously require attention. Some will argue here that there is greater leeway for Congress to act on time-urgent issues of foreign policy through instruments other than the two houses in their corporate form. Where there is no time for Congress as a whole to take action, where the legislature has made provision to implement its war powers in circumstances of demonstrably emergency character, there may well be greater latitude for leaders invested with statutory authority to represent Congress. Whether or not such a statute claimed a prerogative for Congress to veto the initiation of nuclear war, the existence of consultative machinery would be difficult for a President to ignore.

Indeed, I would contend that the important objective is to engage the political weight of congressional counsel at the crucial decisionmaking juncture. Senior legislators may read the situation differently than a harried commnder. But whatever their advice may be, guaranteeing its availability is bound to enhance the legitimacy of any decision that is taken.

The legal issues will be debated at length during the coming hours. On Sunday our discussions will focus on the specific topic of a possible congressional committee to provide a focal point for legislative-executive consultation during crises involving possible nuclear use. The concept has analogues and predecessors; it has no current equivalent. Our mission is to assess its promise for relieving the intolerable stresses between constitutional aspiration and strategic compulsion.

Elihu Root once said that "Every sovereign state has the right to protect itself by preventing the creation of circumstances in which it will be too late to protect itself." Applied with discretion, Root's maxim is a reasonable rule of statecraft. But it contains within it the potential for extremes, indeed the seeds of preventive war.

Helping Congress Protect the Nation

For Americans, however, it also contains a second and more subtle implication. For it is the sovereign obligation of the American government to protect its constitutional order. To do so Congress and the President may well have to make contingency arrangements for the conduct of their affairs during wartime. It is a sad lesson of our time that Congress in particular must anticipate dire situations in which its institutional responsibility to protect the nation exceed its capacity for prompt, collective action. If we can help it do so wisely, we, too, will have served the nation.

At the crucial moment in October 1962, with both sides straining to escape the confrontation, a U-2 pilot strayed over Soviet territory. In the command center Robert McNamara went white. "This means war," he yelled. Fortunately, the incident passed without escalation. When President Kennedy heard about it, he shrugged and said, in effect, "There's always some poor bastard who doesn't get the word."

Looking ahead to a time when a future President may face the dreadful choice to go nuclear, a responsible Congress will act now to make sure it does not become the "poor bastard" of American government.

DR. STONE: Well, you see now why the organizers of the conference were so happy when Alton was persuaded to find time for this conference. Questions?

QUESTION: Suppose the President simply felt that he wanted to give the order because the other consultations

FAS STATUTE—1975

The bill drafted by the FAS in 1975 proposed as a solution this provision: "In any given conflict or crisis whatsoever, so long as no nuclear weapons have been used by others, the President shall not use nuclear weapons without consulting with, and securing the assent of a majority of, a committee" composed of the speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and the chairman and ranking member of the Senate and House committees on armed services, the Senate Committee on Foreign Relations and the House Committee on International Relations. Moreover, "nothing herein shall preclude the President from using nuclear weapons first if Congress adopts a declaration of war that explicitly suspends the authority granted in this act."

were going to take too long. Is there anything in what you are discussing that considers that?

MR. FRYE: If the President has to decide promptly in the face of nuclear attack upon our forces, or upon the United States, that is a separate case.

The case you describe is one in which the President senses, feels a compelling sense of urgency, the sooner the better. That does not, a priori, demonstrate that it *is* the sooner the better.

Is it in our interest as a nation to facilitate his action on the basis of that instinct or perhaps to constrain it somewhat? I think for many of the scenarios that I can imagine my strong conservative American instinct is to say it's better to constrain that.

I can't guarantee that the circumstances would argue in fact for restraint, but it's quite clear to me that there would be somewhat greater probability for independently-expressed congressional opinion suggesting that the time might better be spent in a demonstration shot, at the time of Hiroshima, for example, or in diplomatic explorations. I can't help but think that a proper mechanism would have raised that World War II probability somewhat, somewhat.

QUESTION: You are talking about a situation where there is no fighting going on?

At Issue Is Escalation Of War

MR. FRYE: No. I'm basically considering the cases where escalation is the issue—where there is a war under way and the question is does the President have total and irreversible, unfettered authority to use any weapon at his disposal. I'm not prepared myself to support a constitutional hypothesis that says once war begins the commander-in-chief has absolute authority to use any weapon in the nation's arsenal. I'm not prepared to support that.

MS. COLLIER: I was going to ask you how you would deal with the phenomenon of group think and of fears that some Members would get too powerful.

MR. FRYE: They are at least less bound by their office to that kind of hierarchical group think orientation than are those who serve at the whim of the President. They at least have some other constituencies to which they are responsible. They at least have a wider and different perspective from that of those who are managing this hypothetical conflict on an ongoing daily basis. For all of those reasons, I think the risk of group think is less than the risk of having no opportunity for them to participate.

I don't believe that the tendency of automatic subordination of congressional view to the executive is likely to be the one that takes hold in this particular set of circumstances. Besides, even if I thought that, I don't think we have a better alternative. As weak as it might turn out to be, it's about the only option I think we can conceive of in the system of separation of powers we have.

FATHER DRINAN: I was wondering what you think of using the War Powers Resolution as a structure, and adding to it, so that the Congress would have some power, some right to be consulted, at least at this crucial moment.

MR. FRYE: I'm attracted to that. It seems to me that whatever we think the impact on the War Powers Act has been of the variety of developments in the last decade-plus, the reporting provisions and the reporting requirements of the War Powers Act seem to me intact and operating with good effect. You could argue that a fresh statutory base would be prudent in order to set this issue in a framework that is not instantaneously contaminated with the previous debate. I think as a practical matter, your point is entirely well taken.

QUESTION: You had mentioned in your opening remarks the issue of the effect on the deterrent psychology and what the Soviet perception of such a mechanism would likely be. I would like your comment on the proposition that perhaps it would have no effect, for the reason that the Soviets would believe it to be inherently incredible that the President would consider himself bound to follow the consultative mechanism.

MR. FRYE: It strikes me as a possibility that they would assume a President would act for reasons of state whatever the counsel of the legislators might be.

On the other hand, we are judging two quite separate things here. We are judging those international consequences as one factor and perhaps the least measurable factor, the one that we have the least basis for judging—Soviet expectations about our behavior under these new procedural arrangements. I would give primacy to the constitutional factors, and our own values, and subordinate that strategic expectation partly because I think we must acknowledge that any such strategic expectation is even more speculative than our guess about whether the President would respond in the constitutional framework from our side.

A Soviet Preemptive Strike

QUESTION: What if the Soviets react preemptively—perhaps on a grand scale throughout the theater?

MR. FRYE: Well, if they don't give us time because they resort to an allout nuclear assault even within the theater themselves, then the test that we set up early in the discussion has been met. The President will then be facing a situation where we have been attacked, or our allies have been attacked by nuclear weapons, and he is free to use nuclear weapons in response.

NINE CASES OF NUCLEAR USE

Nine cases can be distinguished for U.S. use of nuclear weapons (see the September, 1984 FAS Public Interest Report, pg 10). These include: "second-strike" where the Nation is attacked; cases where enemy forces are deemed to have been "irrevocably launched" at the U.S.; and cases of pre-emptive forestalling attack where the President claims highly certain knowledge that such an attack is coming. These are treated, for the present analysis as "second-strike" cases not providing sufficient time to permit Congressional consultation or involvement.

Nuclear attacks on our allies or cases of forestalling such general attacks, are treated similarly.

This debate concerns "affirmative" first use in undeclared foreign conventional wars, especially in NATO. But the reasoning covers as well cases in which part of the U.S. is attacked with conventional weapons (not of mass destruction).

I think General Rogers no longer expects that kind of grand preemption by the Soviets. It would be his expectation that they have reached the stage where they have more selective and discriminating capabilities and would not have to bear the risks associated with the grand preemption in Europe. I think he feels that they have many lower level options now that would be more probable in order to interdict our attempt to prepare for nuclear use.

QUESTION: If we are at the point where we are actually considering moving across the nuclear threshold, would it be fair to say that we have to at least consider waging some sorts of selective strikes within the Soviet Union against their capability to escalate war even further to the U.S. homeland?

MR. FRYE: You see, all of those questions are exactly the ones that presumably would be weighing on a President as he confronts these questions. I can't answer very well the set of hypotheses you raise, but I can say, with conviction, that I would rather the President think about that with the benefit of people who don't work for him but who have responsibility to share in the decision.

Declaration of War Outmoded?

QUESTION: It seems no vitality is left to the traditional constitutional doctrine that Congress must declare war, and if that is dead what gives any vitaility to lesser doctrines? Eugene Rostow said last year that, since World War II, no nation on earth has declared war on any other nation. He suggested that the power to declare war has become a dead letter.

MR. FRYE: I guess the truth is that it has been atrophying. The question being raised at the conference is can we arrest the atrophy and build on that root in the Constitution a new structure that is more responsive to the circumstances of the 20th century? I'm not prepared to concede that because it has passed through a period of desuetude that the central authority inscribed in the Constitution to declare war has forever been rendered impotent.

If you start from the premise that the affirmative use of nuclear weapons constitutes the creation of a new war, a war jeopardizing the survival of the nation, that is a decision of such gravity that I do find great difficulty disconnecting it from the powers associated with the declaration of war authority of the Congress. I grant the practice that Professor Rostow describes is probably what has been the case in the World War II period, post-World War period.

I would distinguish the question of whether the fading of that practice is the same thing as the destruction of the root power embedded in the constitutional authority to declare war. And since that power is connected with the authority to raise armies, and fund them, and tight review over military authorizations and appropriations, and a host of other powers that tie the Congress into the war power, I would incline to say that the cluster powers available to the Congress would permit it, if it chose to do so, to assert authority over realms which the President might well dominate absent any congressional action or initiative.

I would not want to suggest a comprehensive judgment of total illegality for presidential use of nuclear weapons. I think the presumption of legality is greater in a situation where there is no congressional institution to participate in that decision. If no one else is in the field, the President has the presumption working in his favor.

I'm not suggesting we should destroy that presumption. I'm simply arguing the case that we should establish the parallel intersecting, overlapping, interlocking congressional presumption of its authority and right to participate. I don't think those are incompatible things and therefore I would not like us to get into a posture of saying it's Congress versus the President. That has never been my view.

My view of the entire problem we face in this area and in all aspects of war powers and, frankly almost any issue you can think of, the task is how do you make the system of separated powers function effectively in contemporary circumstances. And that, I think, requires not only good will among the leaders of the two political branches; it requires mechanisms enabling them to act on that good will. That is what I think we are about here.

Congress Should Be Involved

I think we have to take account of the assurances that Secretary Acheson and others gave in supporting the NATO treaty, that bear on this question of the expectations at the time of ratification that there would be a constitutional involvement, frankly, of the Congress. So I think that is an important additional element.

QUESTION: I agree. And Jefferson made the same point that the war-declaring power was given to Congress, not to the Senate, and therefore a treaty could not commence war.

GUIDELINES FOR NATO CONSULTATION ON NUCLEAR WEAPONS

"In the event of a full scale Soviet attack with conventional forces, indicating the opening of general hostilities in any sector of the NATO area, the forces of the alliance would, if necessary, respond with nuclear weapons on the scale appropriate to the circumstances. Again consultation would [deleted]. In the event of a Soviet attack which did not fulfill the conditions described in the first two cases, but which nevertheless threatened the integrity of the forces and the territory attacked and which could not be successfully held with the existing conventional forces, the decision to use nuclear weapons would be subject to prior consultation in the North Atlantic Council. In all cases, special weight would be given to the views of the NATO country most directly affected—that is, the country on, or from, whose territory nuclear weapons would be employed; the country or countries providing the nuclear warheads; and the country or countries providing or manning the contemplated means of delivery.

—Report of Senate Foreign Relation Committee Staffers James G. Lowenstein and Richard M. Moose Nov. 26, 1973 to the Senate

CAN CONGRESS LEGISLATE CONTROLS ON FIRST USE?

MR. RAVEN-HANSEN: We are going to discuss a war powers question. Under the Constitution, is there a role for Congress in first use decisionmaking? In the afternoon we are going to ask whether the congressional role can take the form of a committee that could approve or disapprove a proposed presidential first use. I have called this the Chadha question, but I think it may be broader than Chadha.

I would like Professor Glennon to begin. Michael Glennon teaches at the University of Cincinnati Law School. He teaches constitutional law, international law, U.S. foreign relations, and also manages to handle a seminar at NYU at the same time. He is a co-author of "United States Foreign Relations Law" with Tom Frank and was formerly legal counsel to the Senate Foreign Relations Committee from 1977 to 1980.

He will discuss whether the legislative branch authorized presidential first use even in the absence of a declaration of war by approving the NATO treaty and/or other mutual security pacts.

MR. GLENNON: First, can a treaty authorize the first use of nuclear weapons? And second, does any existing treaty do so?

Is War Automatic?

First, can a treaty do that? I think this question is ancillary to a larger issue that was considered in the course of Congressional consideration of the seven mutual security treaties to which the United States is a party. That larger issue was what Senator Javits used to refer to as automaticity. The question, as Javits put it, was whether a mutual security treaty to which the United States is a party automatically commits the United States to come to the defense of a party which is attacked?

If the answer to that question is yes, it's fair to construe the treaties as authorizing the President to exercise war-making power which he would not have had in the treaties' absence. If he has that power, it may be that the power conferred by the treaties includes also power to engage in first use of nuclear weapons.

The Philadelphia convention expressly rejected a proposal to place the war-making power in the hands of the Senate. That proposal was made by Alexander Hamilton, and again, after that proposal was rejected, by one of his allies, Charles Pinkney. The Philadelphia convention rejected the notion that the Senate in a treaty of alliance could place the nation at war.

Madison later explained the reason for that. He said: "Congress, in case the President and Senate should enter into an alliance for war, would be nothing more than the mere heralds for proclaiming it."

My conclusion, therefore, is that because there is no constitutionally cognizable custom with respect to the first use of nuclear weapons, the intent of the framers must be given great weight. Accordingly, notwithstanding ambiguities in the state of the delegation doctrine today, it is probably fair to say that a treaty that purported to place the United States automatically at war, or which purported to increase the President's share of the war-making power, would be unconstitutional.

Peter Raven-Hansen, George Washington University National Law Center, and Conference Chairman, opens proceedings.

In a sense, however, that question is moot. As Professor Henkin has written, I think correctly, no treaty to which the United States has been a party has ever purported to place the United States automatically at war. I go through in my paper every one of the mutual security treaties and review the legislative history at great length.

I won't try to summarize that here, but I think that Professor Henkin's analysis is still accurate. No treaty to which the United States is a party can reasonably be construed as conferring any authority on the President which he would not have had in the absence of that treaty.

No Treaty Determines on War

No treaty confers any authority on the President to engage in first use of nuclear weapons. No treaty commits the United States automatically to come to the defense of any other party to that treaty. In each instance, each of our mutual security treaties reserves for the United States the full discretion to decide in each particular set of circumstances what response, if any, the United States will make to an attack on any of its treaty partners.

Does the President have the power, in the face of Congressional silence, to engage in the first use of nuclear weapons. I think that Professor Henkin is correct that the President does not have the independent power, without Congressional consent, to change the state of the nation from peace to war. I think it is also correct that the President, on the same theory, does not have the independent power to change the state of the nation from conventional war to all-out thermonuclear war.

Whether, in specific circumstances, any given first use of nuclear weapons by the President would cause that conclusion to obtain is a question of fact that will vary.

The key point, however, is that at some point along that continuum power passes from the President to the Congress. Where escalation to all-out nuclear war is likely, the President cannot engage in first use of nuclear weapons without Congressional concurrence.

MR. RAVEN-HANSEN: I have asked John Norton Moore to go next. He needs no introduction for most of you. He's

the Director of the Center for Law and National Security, as well as the Center for Oceans, Law and Policy at the University of Virginia Law School, where he's also a professor.

He has numerous counseling and consultative positions with the Government. He was the U.S. Ambassador to the Law of the Sea Conference. He is the author of "Law and the Indochina War" and more recently "Law and the Grenada Mission."

MR. MOORE: No issue is more important than enhancing strategic stability and reducing the risk of war. And no issue in enhancing strategic stability is more vexing than the problem we face in the NATO-Warsaw Pact area in the conventional-nuclear interface.

Imaginative proposals for suggesting ways that we can get out of the difficult policy dilemma in that setting should be welcomed. It is entirely appropriate that they receive the kind of attention which they are receiving in this very fine forum.

Because of the time that we have in the symposium this morning, I will not discuss the policy issues or the possible policy alternatives, which are equally important in assessing the overall issues, if not more important. But I will confine myself, pursuant to our general instructions, solely to the constitutional issues.

Three Points At Issue

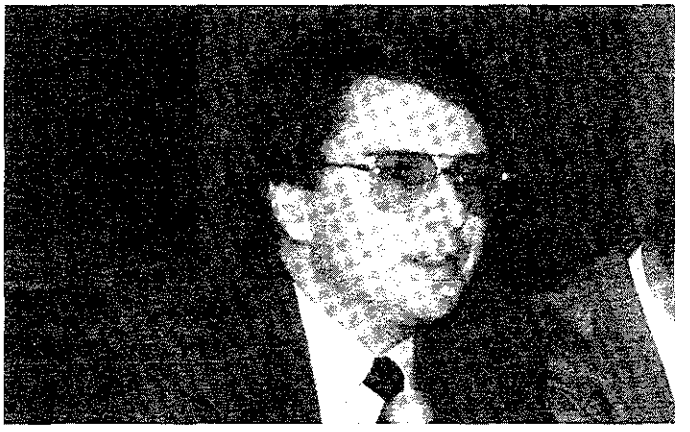
I would like to address three points: first, the general constitutional law; second, the application of that constitutional law to the generic issue we are looking at; and third, to apply that to the imaginative proposal by Dr. Stone that has triggered this discussion.

In this area of separation of powers, as many of the experts in this room know very well, there are not many propositions that are enormously clear. The framers created a fairly fuzzy arrangement deliberately, to serve goals of checks and balances.

Nevertheless, it seems to me that there are also some propositions that are generally accepted and I regard at the present at least as fairly clear. One of those is that the question of constitutional authority to authorize hostilities is a separate constitutional issue from the question of the conduct of hostilities that are constitutionally authorized. Whether or not a particular use of force must require Congressional prior authorization or subsequent authorization is a different issue from whether the President has a power on his own to use force in particular settings, such as attacks against the United States.

Once one is engaged in a constitutionally authorized set of hostilities, then a second issue arises which is primarily the one we are looking at here, that of the authority to conduct hostilities, the appropriate scope of that power to conduct such hostilities, and any scope of a Congressional power to place limits on that power.

The second proposition which I regard as clear is that, under the Constitution, on that first issue the President has the power to repel attacks on the United States or on the armed forces of the United States. That is a proposition that was made reasonably clear by the changing of the language "make war" which was proposed to "declare war," with



Michael Glennon

the purpose being to repel attacks made against the United States and its armed forces.

That proposition is admitted, when few others are, in the war powers by Congress itself in the war powers resolution in Section 2(c), where it specifically confirms that the President does have the power to repel attacks not only against the United States but on United States forces.

I would point out that any all-out conventional attack in the Warsaw Pact-NATO area against NATO on the central NATO front would certainly be an attack simultaneously against the United States armed forces which are stationed there.

The third proposition that I regard as absolutely clear, although it is obvious that not all members of this panel do this morning, is that absent Congressional action to the contrary, the President of the United States has the sole authority to make decisions concerning the conduct of hostilities during constitutionally authorized hostilities.

Now, that it seems to me is a reasonably clear proposition not only from the general executive power, but the specific power in the Constitution in which the President is made the Commander in Chief. It follows from a host of writers, including Quincy Wright and Birdall, Whiting, Pomeroy, many others I can cite.

You can find language in the Supreme Court of the United States, the Ex Parte Milligan case, for example. All basically assume that, at least in settings where Congress has not acted, the President has the exclusive authority to make a variety of command decisions, including the movement of the troops and issues concerning weapons use.

Could the President Take the Field?

In fact, if you look at the debate about the commander in chief power during the Constitutional Convention, the interesting thing is it was really a debate as to whether the President should himself personally go into the field as a general in the field, or rather whether he should delegate to his generals most of that power and generally supervise it. And even in the face of that debate, he was permitted the power to, in fact, go into the field if he chose to do so, although many regarded that as something that would be unwise.

The fourth proposition and the one that I regard as the only real constitutional issue in the discussion—and I regard it as a real and genuine constitutional issue—is what is the

John Norton Moore

power of Congress to place constraints on the ability of the President as Commander-in-Chief to use the armed forces, either through, for example, area restrictions or through restrictions concerning the use of nuclear weapons or some other kind of weapons system.

Now frankly my conclusion about that one, in as scholarly a fashion as I can, is to say that the issue is extremely unclear. I don't know how the courts would answer that question, but it does seem to me that for purposes of considering the generic issue, and the Stone proposal, we should at least look at some of the significant doubts that are raised as to whether Congress does have constitutional power in this area.

Powers of the President

I would concede that arguments can also be made that I regard as having some force on the other side of this issue. But what are some of the doubts that we should have in front of us as well. First, it is clear from both Marbury v. Madison and Meyers v. United States, as well as other landmark Supreme Court decisions, that there are some areas under the Constitution that are exclusive in the President and that the Congress is powerless to encroach. That's the general principle.

The issue becomes, then, the scope of the commander-in-chief power in terms of the ability of Congress to deal with it. On that issue, we have the language of Mr. Miller in the North Carolina Constitutional Convention considering the Constitution. Mr. Miller criticizes the Constitution because it did not give Congress the power to control the "motion of the troops", so that Mr. Miller clearly believed that Congress did not have the power to place, for example, area restrictions on the use of the armed forces abroad.

A second point that raises some doubt is that we know there's been a long history of debates on area restrictions. For example, at the time of the World War II effort, pre-World War II, to place a provision that none of the persons drafted under the Selective Service Act could be used outside of the continental United States, Canada, and Latin America.

Now there have been a series of these debates. That wasn't the first. But many extraordinarily learned constitutional scholars in those debates have taken the position that there is no such Congressional power to limit the commander-in-chief power and that that power is exclusive. They include Justice Charles Evan Hughes, among others, who certainly was one of our legal giants.

The third point that casts some doubt is that many scholars, who are some of the best scholars that have studied the issues over the years, have said that the power is exclusive and cannot be dealt with or interfered with by Congress. They include Birdall, that I cited in my paper; it also includes Pomeroy, it includes Wright, it includes Whiting, it includes a number of others that I simply did not have time to put in.

Another point is that we have language in the Milligan case, Ex Parte Milligan, in 1866 in which the Supreme Court of the United States' Chief Justice Chase seems to suggest that there is no such power. Let me read that one to you. "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief."

Where did Congress get the specific grant of authority to limit the power of the President as commander-in-chief? We know that this is an area of general foreign policy competence given to the President in general, which many constitutional scholars over the years—including some of our framers such as Hamilton—have inferred to mean that the Constitution had to be construed strictly in terms of any congressional power.

Congress Governs the Armed Forces

Now Congress has given the power in this area to make rules concerning the government of the armed forces. Is it clear from the language "government" that that includes the ability to control the conduct of hostilities? If not, what are the other powers that we seek to rely on? The "necessary and proper" clause won't do it because that is simply something that has to be read in relation to whatever the other powers may be.

I don't cite this simply to indicate that it proves that there is no such congressional power but simply to indicate there is a genuine question as to whether Congress has the constitutional power to limit the commander-in-chief power for conducting hostilities once you are dealing with a setting of constitutionally authorized hostilities.

Now let me apply this very briefly to the generic issue and then go to the Stone proposal. On the generic issue, it seems to me that it's clear that the President has the authority, which is confirmed by the War Powers Act itself, to commit to hostilities in a setting in which there is an attack on the central NATO-Warsaw Pact front, including an attack against American forces. I do not regard that as doubtful in any sense.

Secondly, it seems to me that absent a congressional prohibition to the contrary that the President may order, during the course of dealing with such hostilities, the use

of any of the weapons in the inventory that Congress has entrusted to the President. I also do not regard that as constitutionally an area of uncertainty, despite the fact that I am obviously differing on that point with one of my colleagues who has just spoken.

So I would regard the premise of the basic Stone article that somehow there is no constitutional power in the President to use the armed forces in those settings—remember, we are talking now about a case where Congress has not placed any prohibition on such use—I regard that premise as constitutionally incorrect.

Finally, I would say on the generic issue that it is unclear to what extent Congress can, either through a no-first-use merits measure, or a procedural variant of one kind or another, deal with the control of the issue constitutionally. Now let me shift to the specifics.

First, if under the Constitution there is no power to place checks in terms of area restrictions or weapon restrictions, then clearly the Stone proposal would not be constitutional. Let's assume, however, for a moment that there is such power and in that setting it seems to me that the proposal is clearly—and again I don't say ambiguously here—but clearly unconstitutional on two quite separate and independent grounds.

The first of those is that we are not talking about a general kind of legislative no-first-use provision here. We are talking about a proposal that in essence would place the Congress of the United States, or a committee thereof, in the operational chain of command. Whatever the answer to the other issue, it seems to me that is one that virtually any Supreme Court would strike down as an unconstitutional effort to encroach in real time on commander-in-chief decisions.

Violates Chadha Decision

The second is that it violates the bicameral and presentment provisions, as discussed in Chadha, Article I, Section 1 and Article I, Section 7 of the Constitution.

Recall that the reason for the Chadha decision, and the initial provisions in the Constitution as to how Congress acts, were not to create an efficient Congress or an efficient government but to have a variety of checks and balances on the way the United States Government operates. Indeed, that's the premise of the Stone proposal, that those kinds of checks and balances are appropriate or important issues.

Allan Ides

The Supreme Court specifically said in Chadha efficiency was not the key. The key is the specific checks and balances that were placed in the Constitution. It said that one had to act pursuant to the formal rules if one were enacting a legislative act, one "which would alter the legal relations of the parties." And the court chose to be broad, not to confine the issue narrowly to that particular case.

MR. RAVEN-HANSEN: I'd like to turn now to Professor Allan Ides from Loyola Law School. Professor Ides has clerked for Justice White. Professor Ides teaches constitutional law at Loyola. He has written previously on the War Powers Resolution, an article I commend to you that was published last year in the Loyola Law Review, and he has now written for us again. Please proceed.

MR. IDES: One of the most fascinating things about this problem is what, while I obviously come to a different conclusion than Professor Moore does, I think we could sit down and write the same paper together and then just write a different conclusion. I find myself in agreement with much of what he says. As I go through my paper I think we can see that the areas of disagreement, and the areas of doubt as to constitutionality of the proposal, are very narrow indeed.

At the outset I'd like to give my impression of exactly what I think Jeremy Stone's proposal is. Stated very succinctly, the statute is a ban on first use and a delegation to a committee of Congress of the right to lift that ban, to rescind that ban.

The predominant theme of my paper is that Congress is the basic policymaking institution of our government. In establishing that argument I relied upon the Constitution itself, Article I, which describes the powers of Congress in great detail in terms of the areas in which Congress may legislate.

I rely as well upon the arguments of the framers and arguments found in the Federalist Papers indicating that the predominant authority under the Federal government would be Congress and that the President would take his cue from Congress in executing the policies described.

Power of Presidency Does Exist

Now having stated that about Congress, I emphasize that I am not trying to disparage the power of the presidency. The power of the presidency is obviously, as a political science matter and as a practical matter, considerable. What I try to emphasize, however, is that the power of the presidency does not rely on some abstract construct of constitutional law; rather, the power of the presidency derives from action taken by Congress, the accumulated actions of Congress over the past 200 years, as well as the acquiescence of Congress in particular presidential initiatives.

And I describe these congressional actions in essence as delegations. There is nothing in the Constitution, and nothing I have seen written, that suggests that Congress is not free to rescind a delegation. So if Congress delegates authority to the President, it may take that authority back.

The Constitution itself seems to me to give ample authority to Congress not only to declare war but to create a

military establishment. It is quite clear from the Federalist Papers and the Federal Convention that everyone expected Congress to be the body that would create the military, if one was to be created, control the size of the military, choose the weapons the military would use, and so forth. And I think there is no disagreement on that point.

What has Congress done? It has created that military establishment. It has given it to the President. It has created nuclear weapons. It is equally clear that Congress could have refused President Truman, President Eisenhower, Presidents Kennedy, Johnson, Nixon and on down the line any nuclear weapons whatsoever. The President, despite any arguments about the necessity, the appropriateness, the need for nuclear weapons, could have been denied those weapons. Congress could limit the arsenal.

If Congress can say to the President you may not have a particular weapons system, you may not have the B-1 bomber, you may not have the Midgetman missile, you may not have chemical or binary weapons, if Congress can say that, can Congress do what this proposal suggests? Can it say to the President you may not use nuclear weapons?

Can't it say that we think it is sufficiently important as a matter of national policy that we have a stockpile of nuclear weapons, but you may not use nuclear weapons except upon certain circumstances? And one circumstance is not the first use of nuclear weapons.

Although Professor Moore suggest there is some doubt about this, I think quite clearly Congress can do that. And Professor Moore in his testimony before Congress in 1970, and in his book on the Indochina War, says exactly the same thing in terms of chemical weapons. If Congress wants to say that the use of those weapons is so dangerous to our international relations, Congress could tell the President you simply may not use those weapons.

Having said all that, I don't think the resolution of the constitutionality of Dr. Stone's proposal is a simple matter. But I happen to think that this falls in an area, if you will, where we ought to defer to the legislative branch. It is in fact one of those political questions in which Congress ought to be given the discretion to determine the best way it can exercise its constitutional power.

Committee Not Conducting War

In terms of the encroachment upon the power of the President as commander-in-chief, I think this is where Professor Moore and I part. The issue is whether the committee is given the power to conduct war. If the committee is given that power to conduct war, then I think there is a very strong argument that this proposal is unconstitutional. In my paper I suggest that the committee is given no such power; the committee is given a legislative power.

The President, if our country is under conventional attack involving NATO forces and so forth, may go to the committee and tell the committee "I wish to have the power to use nuclear weapons." The committee then may make a policy judgment as to whether the President should be vested with that authority. If the committee says yes, it has done a simple thing; it has rescinded a ban on first use.

It has said to the President you now have the authority to use these nuclear weapons. It has not said to the President that we think it is militarily appropriate to use the weapons. It is not saying to the President you must use the weapons. It is saying you have the discretion. This, it seems to me, is no different than having a statute which would say there is an absolute ban on the first use of nuclear weapons. If you want that ban rescinded, you must come to both Houses of Congress, and the President goes to the Houses of Congress and says I need the power to use those weapons and by joint resolution Congress gives him that power.

Committee Gives President More Power

In terms of encroachment upon presidential authority to conduct war, I see no difference. In fact, the committee probably, if anything, gives the President more power, because the President is able to operate in secret and is able to gain his power or his discretion, outside of the view of the enemy.

So unlike Professor Moore I have little doubt in this area that Congress can pass legislation rescinding a ban on weapon

TWO QUESTIONS OFTEN ASKED

How Enforced? **Would a President obey the law in the world-shaking crisis at issue or would he just do what he thought best?**

The FAS proposal would physically prevent the President from breaking the law unless he persuaded both the Secretary of Defense and the Secretary of State to do so also. This is because the proposal would have the Secretary of Defense instructed not to implement the order without asking the Secretary of State whether the committee had voted affirmatively. Since all three men are sworn to uphold the Constitution and the law, and since all three would be acting in the expectation that the world would not be destroyed, they would have to violate their oaths in full anticipation of a subsequent inquiry into actions taken by them which risked the country unlawfully.

Would Congress Pass the Legislation? **There are several different ways which, in principle, might lead to the result proposed, a committee with authority over first-use. They range from less likely possibilities such as constitutional amendments or litigation, to more likely ones such as arise from Congressional legislation.**

One possibility envisions a future Presidential candidate who vows that—while he cannot endorse no-first-use outright for diplomatic reasons—he would never want to engage in first use on his own authority anyway and that, if elected, he would himself offer the Congress legislation sharing this responsibility with the Congress. Such legislation would likely be approved, coming from the President, and it would be unlikely to be reviewed by the Supreme Court or opposed (were it reviewed) once it was adopted by the other two branches.

This method of adoption does imply a strong no-first-use movement in the country that would make the Congressional Committee proposal a halfway house in which the Presidential candidate would wish to shelter.

use. Congress would have the power to ban the use of the weapon, and Congress would have the power to rescind the ban. And I think that is all this committee proposal does in terms of presidential power. It does not encroach upon anything but the delegated power to the President.

Does this proposal give too much power to a committee of Congress? We have to frankly confront the problem that, in terms of the regulation of the military establishment, the bicameralism requirement clearly was meant to apply.

There is no doubt in the Federalist Papers and the Federal Convention and in historical practice that each policymaking judgment should be made by Congress as a whole whenever possible. On the other hand, I think we cannot ignore the "necessary and proper" clause, and I do think that clause has a power to which it can be connected, namely the power to regulate and govern the military forces.

The "necessary and proper" clause has been interpreted from the time of McCullough v. Maryland to give the legislative branch broad authority to determine the methods through which it would exercise its powers. It seems to me that a case can be developed that the circumstances of nuclear war, the need for a quick decision, and the need for a secret decision are such that Congress ought to be able to devise a method of exercising its authority over the decision to use nuclear weapons, which comes very close, it seems to me, to a declaration of war.

If in terms of practical realities it has become impossible for Congress as a whole to exercise that power, it would be reasonable, it seems to me, for Congress to create a very limited exception to the proposition of bicameralism. Chadha, it seems to me, doesn't answer that question because it did not arise in the context of a narrow exception to the bicameralism requirement.

Statute not a "Veto"

Finally, I think a legislative veto implies that an authority has been delegated to the President. A veto is a power that Congress retains to take back something it gave.

In this case, nothing is being given. We are telling the President you do not have this power. If you want the power, you must come to us and ask for it. I think that is more than a semantic distinction. It is a distinction between a condition precedent and a condition subsequent, and I would hope that the panel this afternoon discusses that, because calling it a legislative veto I think couches the question in the wrong terms.

MR. RAVEN-HANSEN: Thank you very much.

Before I introduce our interrogators, we just want to be clear on what Jeremy proposes.

DR. STONE: I accept Allan's formulation of it. It is, from a legal point of view, a ban on first use coupled with an affirmative right of a committee to authorize the first use. I have used the phrase committee "veto", but I mean veto in quotes because I don't actually think it is a veto.

MR. RAVEN-HANSEN: I understand you to also authorize the President to do a preemptive forestalling attack.

DR. STONE: I consider a retaliatory attack, a launch-on-warning attack and a forestalling attack, to be forms of "second" use. Nuclear war is already being thrust upon us. In all of these cases, the President is facing the fact that nuclear war is already in the works. The first use I'm talking about is what you might call "affirmative" first use, where nuclear weapons are being used in the absence of immediate threat of adversary first use.

MR. RAVEN-HANSEN: Let me now introduce the interrogators. On my left is Paul Warnke of Clifford and Warnke. All of you know him, I am sure, as the Chief Negotiator of SALT and the 1977–78 Director of the U.S. Arms Control and Disarmament Agency. He is also formerly Assistant Secretary of Defense and General Counsel to the Department of Defense.

To my right is Dr. Louis Fisher, specialist in American national government at the Congressional Research Service. Anybody who has researched issues of Congress and the President and separation of powers has encountered his name. I thought he was one of the Founding Fathers until I met him and realized he was too young for that. He is the author of numerous books, and the most recent is called, appropriately enough, "The Constitutional Conflict between Congress and the President".

First Strike is Different

MR. WARNKE: I would think, Jeremy, that there would be nothing unconstitutional about the President using tactical nuclear weapons first in Europe. It seems to me the fact that the Congress authorized those weapons, knows where they are stationed, knows that many of them are right on the central front is a sufficient indication that the President has authority to use them.

But if you get beyond first use of tactical nuclear weapons in a battlefield scenario, is there something different about a first strike, a strategic strike against the Soviet Union? I'd like to ask Professor Ides and the rest of the panelists if they seem some sort of constitutional difference between the first use of tactical nuclear weapons, and a first use of a strategic weapon in an assault on the Soviet homeland.

I think there is one possible difference, whether it reaches constitutional stature or not. It is the inevitable response to a strategic attack is a strategic attack, so that you have, in fact, initiated an all-out nuclear war.

What I would like to ask is, given Youngstown, given Hurley v. Kincaid, is there a constitutional inhibition at the present point on the President's making a first strike rather than just the somewhat less egregious act of first use in Western Europe?

Left to right: Paul C. Warnke, Stephen Carter (Yale), and Edwin Smith (USC)

In center, Arthur Berney, Boston University

MR. IDES: On the first use question, I agree with you. It seems to me that the NATO treaty, coupled with the appropriations for forces, coupled with the NATO policy of first use, has given Congress a very clear message that one potential military decision that may be made by the commander of NATO is going to be the first use of nuclear weapons and congressional silence.

In light of that, it seems to me it falls right into the Dames and Moore type of problem. That is why in my paper I did not address that issue. I don't think the question is whether presidential first use is unlawful. I think the question is whether congressional regulation is lawful.

In terms of first strike, I think the question is resolved really based on the facts. To what extent has Congress acquiesced and articulated a presidential policy of first strike on the Soviet Union? I don't think there is any history of legislation, or anything else, to suggest that this nation has ever adopted a policy of first strike on the Soviet Union. Although some president may attempt something like that, it seems to me it would be on very shaky grounds because there simply isn't—you don't have the same kind of pattern of delegation, and discussion of the issue, that you have in terms of first use.

So I would distinguish them on those grounds.

MR. BERNEY: If this proposal goes up and is vetoed by the President and it is impossible to get a two-thirds override what will that congressional silence mean with respect to the continuing power of the President to use the weapons as he sees fit?

President Has Power Now

MR. WARNKE: It's really academic because, at the present point, the President certainly has the power to launch an attack on the Soviet Union if he feels that this is the appropriate thing to do for the security of the United States.

What we're dealing with is a question as to whether or not it's worth making an effort to take power that now exists in a single man's hands and put it in a somewhat safer sort of context.

Currently, you have the curious phenomenon of Ronald Reagan having essentially eschewed first use. If you read his State of the Union speech of January 1984, he says that the only purpose of either side having nuclear weapons is to see to it that they are never used, which is a pretty sweeping adoption of the strictly deterrence, strictly nuclear retaliation theory.

Is Congress at the present point relying on that as being a statement of the President's intent?

MR. MOORE: I assume that most of the first-strike discussion arises in a setting in which there is an all-out conventional attack against NATO and because of the linkage to the U.S. strategic systems instead of selecting, let's say, a Pershing II or a battlefield nuclear weapon, instead the President decides to fire a Minuteman system against a target in the Soviet Union.

I would separate that issue from the setting in which we are at peace. Then there is no constitutional authority of the President of the United States to make a general first strike against the Soviet Union with or without nuclear weapons. He cannot make a conventional strike against the Soviet Union. He cannot make a nuclear strike against the Soviet Union for the perfectly good reason that he is not authorized to start general hostilities absent a declaration of war and congressional authorization—except for the kinds of settings that we get into when we begin to talk about some of the forestalling attacks that Jeremy has noted.

MR. RAVEN-HANSEN: You argue that the President's command authority pursuant to constitutionally-authorized war cannot be restricted by Congress. It seems to me that begs the question of which constitutionally-authorized war he is fighting. You yourself have said of the Indochina war, assuming it was constitutionally-authorized, that the President was not authorized to order the bombing of Beijng.

What Limits On War?

I would like to know whether it is your contention that a first use of nuclear weapons during conventional war in Europe is distinguishable from an attack on Beijng during the Indochina war. To put it differently, which war is authorized by Congress in the case of conventional attack on the NATO nations?

MR. MOORE: We have to look at a number of the elements in the setting. There has been constitutionally an attack on the United States forces. Secondly, under the NATO treaty, quite apart from any question of what it authorizes, the NATO treaty by law, with Congress participating, said that an attack on the NATO area would be an attack on the United States of America.

Now those are features that are part of the context that have to be taken into account in a massive conventional attack against Europe. I think we also have to take into account that we are dealing with a setting—when we talk about a first use of nuclear weapons—that would only be an extraordinary in extremis situation in which the choice to the United States is the loss of the democracies of Western Europe.

That is an enormous cost to the United States. That is the reason, despite the enormous uncertainties and dangers of use of nuclear weapons, that NATO has wanted the potential, at least for deterrence, of being able to say that the United States may use nuclear weapons. That is why it has not ruled out the question of the use of a U.S. strategic

strike, as opposed to a battlefield nuclear weapon or an intermediate nuclear weapon.

So my answer is there is nothing in the Constitution, given a central front NATO attack, that says the President of the United States may not respond with some of the United States' strategic forces as well as a Pershing II, for example, or as well as a battlefield nuclear setting.

Now let me go to the question of the area restriction, the notion of the President having a nuclear strike capability against Beijing as part of the Vietnamese war. The answer why that clearly was not under the authority of the President is that the United States was not at war with Beijing. Beijing had not attacked the United States.

The second setting is one that deals with the use of chemical weapons and dum-dum bullets. Frankly this is an area where there are good, fair counterarguments to some of the doubts that I have been presenting of the scope of the Congress' power to limit the commander-in-chief power. There is a difference, though I am not sure that it is decisive. I myself have argued that Congress has had the power to limit in that area..

The difference is that, in this area, we are talking about weapons that are internationally agreed as illegal. The President is restricted from using these weapons, or required to use the weapons in an particular way, because the United States concludes that it is the international law view of the United States Government that these are international legal obligations by treaty or otherwise.

A chemical no-first-use ban falls into that and the dum-dum bullets do, and the others do. Now I don't say that that is the necessary total answer. I am not saying, on this occasion, that I think it is absolutely certain Congress has no power to interfere. I am saying there are a variety of very fundamental doubts. I do not regard these particular examples as necessarily resolving those doubts.

MR. GLENNON: Is it your position, John, that the NATO Treaty, taken in and of itself, would authorize the President to use nuclear weapons?

NATO Treaty Unnecessary For First-Use

MR. MOORE: No. There is no need for the NATO Treaty to authorize any use of nuclear weapons or initiation of coercion. In the setting of an attack on NATO involving U.S. forces I see no question whatsoever that the President has the authority to conduct hostilities, including the use of nuclear weapons, unless Congress has in fact acted in some fashion to tell the President that he cannot do certain things—and, another large "if", if those congressional actions are constitutional.

MR. RAVEN-HANSEN: One argument that I think I heard Professor Moore making, but if not just let me make it. You could argue that, if the Russians have attacked in a conventional scenario in Europe, we are in a state of de facto war and we don't need the NATO Treaty to authorize the President to respond because he has the "repel the attack" authority that most of us would concede from reading the Framers' history. The question is what is the scope of the repel the attack authority? The "repel" gives the sense of a defensive measure, so one argument is it's strictly whatever you need to defend against immediate attack.

DoD CLAIMS ALL POWER

On August 23, the General Council of the Department of Defense advised F.A.S. by letter that it would not support our "call for an additional procedural requirement" before NATO could use nuclear weapons because it would have a "probable adverse effect" on NATO deterrence policy.

Referring to F.A.S.'s case in which the president possessed no declaration of war, DoD nevertheless claimed, with no legal argumentation whatsoever, the right to use "conventional weapons, non-strategic nuclear weapons, and strategic nuclear weapons" because the "current deterrence policy rests upon the doctrine of flexible response."

Dear Mr. Stone:

The Secretary has asked me to respond to your request for comments on your paper entitled "Only Congress Can Authorize the First Use of Nuclear Weapons."

Your paper deals with the President's authority to order the first use of nuclear weapons in the event of a Soviet conventional attack on NATO. You contend that the Constitution should be construed as requiring (in the absence of a declaration of war containing no limitation of first use) formal and specific authorization by the Congress before the President could order first use in such a situation.

We do not agree. The long-term success of NATO's deterrence policy is based upon the knowledge that the Alliance has both the capability and determination to respond effectively to any attack. The current deterrence policy rests upon the doctrine of flexible response, which would include the use, as required, of conventional weapons, non-strategic nuclear weapons, and strategic nuclear weapons. To ensure that the flexible response policy actually deters, a potential aggressor must be convinced that NATO is indeed ready to use any of the weapons it possesses, including, if necessary, nuclear weapons. Your call for an additional procedural requirement that would have to be met before a decision could be made for first use of nuclear weapons would threaten NATO's ability to deter Soviet aggression. Thus, it would tend to undermine NATO's deterrence policy.

As you suggest, your view as to what the Constitution requires is not the general view. Given the probable adverse effect of your approach on the long standing and successful NATO deterrence policy, we would not support it.

Sincerely,
Chapman B. Cox
General Counsel
Department of Defense

Secondly, one could argue that, given the structure of the Constitution, the limit in "repel the attack" is that the President can only do what's necessary until he goes to Congress for broader authorization, thus to preserve the status quo until Congress can convene. There is other language in the Constitution that suggests this same model of decisionmaking.

For example, there is a provision about the state legislatures which states that the executives of state legislatures can call out the militia if the legislatures do not have time to meet and, basically, that the executive can act only until the legislature does have time to meet.

A third way to look at the "repel the attack" power is to look at other provisions in the Constitution for congressional support of a war. The "repel the attack" right is clearly limited in duration because ultimately the attack gets starved unless Congress raises and supports armies and appropriates monies to keep them in the field. This is particularly true in the historical sense of the framing of the Constitution, when there were no serious military stockpiles, and no large standing army, and it took a long time to reach the area of hostility.

No unilateral presidential initiative, even of a defensive sort, could long continue without further authorization from Congress. Maybe there is a durational limit to "repel the attack". The question is which of those limits, if any, are there in the "repel the attack" power. Do any of them work today with respect to a 24–hour nuclear exchange where we already have a stockpile and, if not, does Congress have the authority to invent a new check to achieve the same balance?

I am assuming there is a "repel the attack" authority in the Presidency. I realize even that much may be ground for contention, but just to move it along let's assume that he has such authority. What are the limits on it? Is there a principle of proportionality built in to repel the attack? Is there a durational limit or is there any other limit?

MR. MOORE: Once you ask the question of the scope of the President's commander-in-chief power, absent any congressional limitation on that power, I think the answer is reasonably simple. That is that he can use the minimum force necessary to achieve effective defense. The purpose of the commander-in-chief power is to enable the President of the United States to defend against the attack.

If there were simply the occasion of some tiny attack not involving either NATO and the Warsaw Pact, or central issues in Europe, and the President simply decided to use the occasion of some very minor attack to use nuclear weapons or wage a conventional attack, obviously that would be a gross distortion of the commander-in-chief power.

Use Whatever Force Is Necessary

It really is a matter of using force necessary to achieve effective defense. I do not see any area limitation written into the Constitution, and I don't see any nuclear weapons threshold or other weapons threshold automatically written into the Constitution. Remember, the only time this issue realistically arises—and any other setting is just simply not there in the real world—is a case in which there is a massive conventional attack against NATO which the west as a whole has reason to believe that it simply is not going to be able to stop. And the stake for the west as a whole is, "Do we accept the loss of all of Europe and all of the democracies and the enormous economic and political relationship and all the rest?"

And that setting is the only one in which you would seriously talk about some kind of use of nuclear weapons. Whatever the fringe cases are, it is a paradigm setting. Under the Constitution, absent Congress trying to intervene and saying you can't do it, the President does have the authority as commander-in-chief to make the decision.

MR. RAVEN-HANSEN: Can the President by way of repelling an attack abroad place the homeland at risk?

Power to Repel Sudden Attacks

MR. IDES: In my paper I suggest that the President's power to repel sudden attacks is essentially to preserve the status quo so that Congress will be free to exercise its larger authority to determine whether we ought to proceed with a full-scale war.

I think this "repel sudden attacks" question is not at issue here. It's "repel sudden attacks" within the confines of the weapons and the military policy granted to the President by Congress, and it seems to me Professor Moore concedes that.

The question, it seems to me, is not how broad is the power to repel sudden attacks in a vacuum, but how and to what extent can Congress narrow it by saying you cannot use certain weapons when you are attacked by conventional weapons?

MR. RAVEN-HANSEN: As I understood Professor Moore, he suggested that Congress has the power to prohibit the use of dum-dum weapons, or chemical weapons, because international law is the backup. Strangely, that suggests that Congress has less power to fetter the commander-in-chief than the murky source of international law.

Are you suggesting that the President is bound in his choice of weapons by international law but that Congress cannot, absent the backup of international law, be similarly binding? It strikes me as a strange ordering of our legal authority that international law has more clout than Congress in terms of restrictions on the commander-in-chief.

Louis Fisher, Congressional Research Service (CRS)

MR. MOORE: Part of the answer to that is that Congress is given certain additional power in the international law area. I don't regard it as decisive, but Congress does have the power to punish offenses against the law of nations, for example, and presumably an illegal use of weapons, et cetera, is an offense against the law of nations. If Congress can punish an offense against the law of nations, it seems fairly reasonable under that power that that's a specific area that they do have the ability to limit the commander-in-chief power.

I don't regard that issue as necessarily a decisive one in favor of the other side. I admit that it is an issue that somewhat cuts on that side of the equation. I continue to regard this issue constitutionally as one unclear. I have cited a whole set of scholars of Supreme Court language of others that have taken the position that that is unclear.

So far the only argument that I have heard collectively as to why Congress has the power to pass the legislation under discussion—and it may, I am not sure on this point—but the only argument that I have heard on the merits is the argument that because Congress can prevent the President from having an army altogether, or prevent the President from having nuclear weapons altogether, it can conditionally create limitations on uses of the forces.

Begging The Question

Well, that is a classic, ladies and gentlemen, petitio principii logical fallacy of begging the question. That is precisely the issue before us, as to whether those questions are different. That is precisely the one that in Ex Parte Milligan Chief Justice Chase said was different, and it is certainly something that proves too much if we were to use that as a general basis of power. Let me just give you an example.

Congress, of course, has the power to prevent the creation of armies. So can it simply pass a law establishing a committee which said that henceforth all of the individual tactical judgments and determinations—or at least the major tactical judgments and determinations—as to whether we're going to attack Pork Chop Hill or whether we're going to evacuate Khe Son—will be made by a congressional committee.

Now if Congress solely as a matter of having the authority not to provide an army, or weapons to fight, can do that then it can solely, on that basis, decide in the absolute core areas, where I think there would be no debate that Congress can't.

So the only argument that's been advanced so far to define the congressional power is one that I regard as not resolving the issue one way or the other.

MR. IDES: I'm glad we're finally getting to what I think is the issue here. The constitutional provisions I would rely upon are all the provisions in Article I giving Congress the power to raise and support an army, navy, govern and so forth. The simple question I would like to ask Professor Moore is could Congress refuse to fund the MX missile. And I think the answer is quite clearly yes.

My next question is could Congress appropriate funds for the MX missile, but say we're just going to stockpile it and you can't use it? I think if I know his response to that then I think we can start talking about what the constitutional issues are here.

MR. MOORE: I think that does raise exactly the same issue that is posed by the question of area restrictions. I don't know the answer to that, just as I have said I don't know the answer to the generic issue.

But I would say there are a variety of substantial doubts. If Congress provides a particular weapons system, then it seems to me there is a significant doubt as to whether it has the constitutional power to place constraints on the use of it in other than settings where it's illegal. Now again I'm not saying that I know the answer as to what the Court would do on that. I think the other cases are clear.

MR. IDES: Maybe there is no right and wrong answer and, if that's the case, then it is up to Congress to make the political judgment of whether it will do it or not. Maybe this is a classically political question. And if that's the case then I think yes, we can raise doubts on both sides of the issue. Then it is up to an individual Member of Congress to determine whether they are fulfilling their constitutional obligations in voting for the measure.

As you have said, there are substantial doubts about this. But frankly I'm completely confused as to what those doubts are. Congress could stockpile a weapon, in exercise of their powers under Article I, coupled with the very potent "necessary and proper" clause. It could say it wants to stockpile the weapon because it thinks it is sufficiently important that it be available, should it determine that it ever wanted to give the President power to use it, because it knows it will take ten years to put together the stockpile and wants it ready.

I would be astounded if the Court, or a substantial number of commentators, would say that Congress couldn't do that.

MR. RAVEN-HANSEN: And if Congress has stockpiled the weapons with the intent that the President can use it, why can't it change its mind? Suppose it says we changed our mind about the stockpile; now we don't want you to use it. If they can make it in the first place, why can't they alter their view?

MR. WARNKE: Is there any doubt that a President of the United States would be bound by a treaty that banned first use of nuclear weapons, assuming, of course, that the United States were a signatory to the treaty?

Second, if in fact the President would be bound, is there any doubt that Congress could enact legislation implementing that treaty by placing restrictions on the sole discretion of the President to use nuclear weapons?

And then, third, if the treaty would be valid, and if Congress could pass implementing legislation, is it somehow less the law of the land if the Congress on its own initiative passes legislation saying that the President may not indulge in the first use of nuclear weapons? Is it different somehow for chemical weapons? I mean, we store chemical weapons for deterrent purposes, even though we are bound not to use them first—and really the only issue we face now is whether we should modernize that deterrent by going to some sort of binary form.

No First Use Treaty Possible

MR. MOORE: I think the answer to the first part, Paul, is no. Certainly we could have a treaty that would be binding

BRITISH & FRENCH USE

The use of nuclear weapons by the French or the British in a European war would, presumably, free the President to use nuclear weapons. His use would not, in that war, be a first use and, in practical terms, the war could be out of control already in terms of nuclear escalation.

According to the British Government, "The final decision about their (nuclear weapons) use rests solely with the British Prime Minister" who would consult with the Cabinet and the Sovereign depending upon the circumstances, particularly the time available. (See Authority to Order the Use of Nuclear Weapons by Congressional Research Service, Library of Congress, December 1, 1975).

In the case of France, first use is left in the hands of the President of the Republic.

on the President on no first use on any particular weapon system.

Secondly, of course, Congress can enter into a law that would implement that treaty within the United States. Thirdly, yes, there may be a distinction between that case and the setting where Congress simply on its own says to do that. And that is precisely the point that I have been making all along.

In the international law setting, the treaty is an international law issue. That is like the no-first-use of chemical weapons. That does fall under the specific additional area where Congress is given specific power under the Constitution of the United States relating to the law of nations.

Again, I am not arguing that the solution in all of these cases is that Congress doesn't have the power. I am simply saying, even on this starting point proposition, there is a great deal of doubt. I certainly believe those two cases continue to have the doubt and that question is really a variant of exactly a point that has come up in a number of other contexts.

MR. BERNEY: My answer is clearly yes to all of those. If Congress passes such a law the President has the power to veto it. If he vetoes it, and it is overridden, he has expended his constitutional power. And if then that law becomes law under the Constitution, he is bound by it and has been involved in it.

MR. GLENNON: Who seriously can doubt that the Geneva Protocol of 1925, which bans the use of chemical and biological weapons, is constitutional? Why is the ban on the use of chemical and biological weapons any different from a treaty which would ban a first use of nuclear weapons? I don't see the distinction.

Treaty Cannot Amend Constitution

MR. IDES: Yes. As I understand Professor Moore's potential objections to the stockpiling with limitations, they are structural objections that the Congress would be somehow invading the province of the presidency. I think his answer to the question put by Mr. Warnke essentially proves the case in favor of the constitutionality. Because it would be astounding if a treaty could alter the structure of our government, whereas a statute passed by Congress, either with the President's signature or over his veto, could not.

So it seems to me if a treaty could do it, a fortiori, the structure of our government could be tampered with—if you will—under the "necessary and proper" clause by Congress. So his doubts, which he still hasn't explained, and I don't know what they are, must have vitiated in the course of answering this question on the treaty.

MR. MOORE: It is not a matter of a treaty being able to alter the Constitution in any particular setting. Of course it can't do that. Reed v. Covert and lots of other settings tell us that that cannot be done constitutionally. The point that makes that different is because that is an area that Congress has greater ability over, or at least reasonably clear ability to, in fact, enact legislation.

That is, there is a specific grant of power in the Constitution to deal with a setting relating to international law, and offenses against the law of nations. So it is not a matter of altering it. It comes back to the issue of what areas of power they have.

Now the second point on this. Let's assume for a moment that others believe very strongly, which is obviously the case, that in fact Congress does have the power to move forward in this particular case. We have also heard that the Congress has, in the exercise of the individual representatives' judgment in passing this legislation, a right to make its own reasonable judgments about the constitutional requirements. That is absolutely correct.

The problem on the other side is that the President also has such a duty. He is sworn to uphold the Constitution of the United States and to protect his powers under the doctrine of separation of powers. And one of the things that troubles me most about the proposal, generically and specifically, to be quite frank, is that whatever the answers to these things, I rather think there is going to be a great deal of fuzziness about them.

Fusing A Constitutional Crisis?

If there is a great deal of fuzziness about the answers to these things as to precisely where the line is to be drawn, then what we may be doing is fusing a constitutional crisis that would go off precisely at the time when the nation could least afford it. That is, we are really significantly lessening crisis stability. In a particular setting, after it passed this law, the committee might decide that the weapons would not be used. The President looks at it, and in his determination says the act is unconstitutional and that, in fact, he is going to use nuclear weapons.

He does. He uses one nuclear weapon. The other side then is contemplating how it is going to respond in that particular case. Suddenly it sees a constitutional crisis with every member of that committee seeking the impeachment of the President of the United States in the middle of that use. I regard that as one of the most serious problems here—even if there is a significant uncertainty in dealing with the legal issue—of the effect on crisis stability.

DR. STONE: On this question of whether the committee should be involved in operational command decisions, John presumes that it is clear what the factual situation is going to be, "a massive Soviet attack on all of Western Europe,

and the impending loss of all the Western democracies," et cetera.

He makes it seem as if there really isn't any political question here—that we are talking about a scenario so well defined that it isn't even necessary for a special congressional committee to talk about it if we had one.

But his other comments reflect the true fact that there is a big spectrum possible. There are fights over Berlin. There are revolutions in which the West Germans are helping the East Germans and the Soviets cross the line only for a short distance saying, "It is true we fired on your troops, but this is not an attack on America. Don't use nuclear weapons first. We don't declare war on you and if you do use nuclear weapons we will respond in kind." The Russians would make out of any crisis a very specific political problem, one impossible to predict in its precise dimensions.

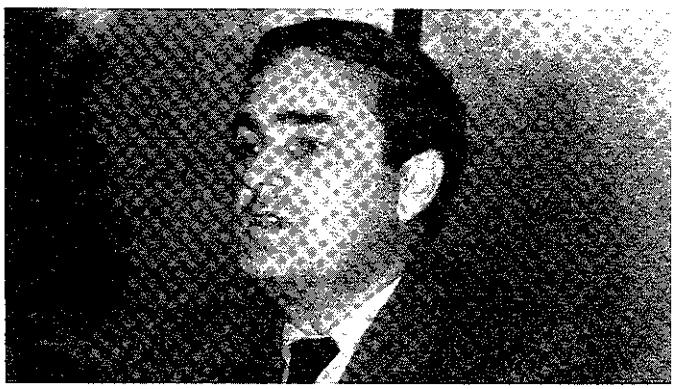
Now the President does have power to repel attacks under the Constitution. This meant, in the last century, arming ships so that they could fire back when fired upon. But it didn't mean then, and I don't think it means now, that the President has the authority to march on Paris or blockade French ports if he couldn't stop the immediate firing on our ships by French ships.

So here again I'd say the "repel the attack" power means you can let the army fire back. But if you are going to try to do something to decide the whole conflict, then it requires more than "repel the attack" rights. It requires more than saying war "exists" because our armies have been fired upon. It cries out for a rather precise discussion of what exactly has happened—of which the committee is capable if it were convened.

This is why Allan is right that, in the use of nuclear weapons, there is a highly political judgment here as to whether to start a general nuclear war. Controlling this matter is not really getting into the operational chains of command, so much as it's trying to decide whether a conflict in Central Europe should be escalated to the level of general war. The first nuclear weapon used—although the President might justify it as an attack on Soviet tanks—would in fact be a gross political decision to face the Russians with the choice of either continuing the war, and going to nuclear war, or giving up on the advance.

First Use Not "Operational" Decision

This is such a gross choice, that I don't think anybody could maintain, it was simply a question of operational command.



William Miller, former Chief of Staff, Senate Committee on Intelligence

This is a question of the whole scope of the war. Congress is being left out of a decision to concede, compromise, or try to reach a halt to Soviet forces in the center of Germany or whether, on the other hand, to risk everything.

So I wonder, John, if you are so sure that first-use would only be used in extremis.

MR. MOORE: No, I certainly accept the point, Jeremy, as a very critical and important point, that the essence of any decision to use nuclear weapons first is an enormously important, critical political and military decision. There is no doubt about that. I have no quarrel with it.

I don't believe, however, that that gets you to the constitutional conclusion that somehow it is a "new" war. The Constitution, as far as I can tell, simply does not draw that line. You may want to advocate a constitutional amendment to do that.

I have substantial uncertainty with respect to the question of whether Congress has the power involved. That's an issue maybe you can persuade me on. I would like to hear continuing argument about that. But there are two areas where I differ very strongly and believe the constitutional issue is clear.

One of those is Chadha. The second is not Chadha but the difference between Congress dealing with a general law on the one hand, as in a no-first-use policy, enacting that the President has no ability to use first use, which I think is the arguable constitutional issue—and the difference of moving from that setting to real time, placing the decision in the operational chain of command.

This is where your point is particularly telling. Can Congress do something in this whole area that really does take account of context, in the specifics, as a check in a variety of enormously complex cases? Congress really does have difficulty with broad general policies ahead of time. It is no doubt one of the reasons Congress so far has not found no-first-use attractive in the nuclear area.

Can Congress Look At All Options?

But if Congress is going to, in a particular case, look at precisely every option available to the President under real time battlefield conditions—as to exactly which weapons system should be used and how—it seems to me it is placing itself in the operational chain of command. There is a very substantial policy reason behind why the framers of the Constitution of the United States didn't want Congress in the operational chain of command.

MR. IDES: I think the language Professor Moore uses about the operational chain of command is very seductive. But I think he is doing the same thing he accuses me of, begging the question. The question is, are they in the operational chain of command? For the purposes of his statement he has suggested that he would concede for the moment that Congress could ban first use of nuclear weapons.

I would assume that he would say that the President would certainly be free to go to Congress in the whole, and ask Congress to rescind the ban, even though we were under attack at the time. The President might tell Congress, or a committee of Congress that would report to Congress as a whole, that the reason I need to rescind the first use ban is because I need to use these weapons for military reasons.

I am not sure how the proximity in time necessarily places what I think is a quintessentially legislative act into the chain of command. Congress is not being asked: "Should I use these weapons? How should I use these weapons? Is this the best weapon to use?" Congress is being asked: "Do you think the situation is sufficiently serious that I should have the discretion to determine whether to use these weapons?" And that is a policy judgment, and that is the kind of judgment Congress makes.

So again I think it just boils down to the real problem of asking a committee to do it.

Congressional Restrictions in Vietnam War

MR. MILLER: We all recall the amendments during the Vietnam War which were aimed at area limitation. It was a conscious series of amendments of the containment type to exclude the war, initially from Thailand and Laos and certainly China, but specifically Thailand and Laos in the first instance, and then after the Cambodian incursion, into Cambodia as well, and then the process was extended to Vietnam itself conditional upon the safe withdrawal of forces.

You are not maintaining that that activity was in any way unconstitutional?

MR. MOORE: That's a good question. I'm glad you're asking it as a question. First let me give a little bit of background and then a specific answer on the Cambodia resolution, and also that restricting of the ability of the President in terms of coming out of Vietnam in a forced withdrawal.

MR. MILLER: I should add, before you go on, that an important element in those amendments was the particular use of force. The bombing was one aspect of it. So in a way, this is analogous to our discussions on other kinds of weapons systems.

MR. CELADA: Weren't they tied to a restriction on funds as well—no money shall be spent for?

MR. MILLER: Yes, the use of the appropriations power.

MR. MOORE: First on the general point, this question of the area restriction as opposed to the nuclear issue, which is a new one, is what in fact has been debated substantially throughout American history, and one can find arguments on both sides of the equation.

I would simply point out the evidence on the other side of the equation, saying the Constitution did not give Congress that power. Mr. Miller, in the record of the North Carolina Constitutional Convention, objected to the Constitution on the grounds that it did not give the Congress of the United States the power to control the motion of the armed forces of the United States.

The second point, we know in one of the debates that Charles Evans Hughes—

MR. MILLER: In time of war?

MR. MOORE: In time of war, precisely. We know that Charles Evans Hughes, one of our great Justices, specifically took the position there was no such power on the area limitation setting. We have at least four different scholars that have spoken to that point and taken that view, including Quincy Wright, which I think frankly did one of the best pieces in 1922 on the overall control of foreign relations in general.

John Kellett, Gettysburg College (left); Raymond Celada, Congressional Research Service

Now appropriations power does not, under the Constitution of the United States, serve as an independent basis for establishing conditions under the separation of powers—I underline "under the separation of powers—which Congress does not otherwise have.

If it did, then the reality is there would never be any separation of powers. Congress could always attach whatever measure it sought to deal with solely on an appropriations measure. There would simply be no separation of powers.

That is no different than the setting in which it cannot unconstitutionally attach a provision on discrimination or denial of due process to an appropriation measure. There are opinions of the Attorney General, by the way, that take exactly that same position on the appropriations power in the separation of powers area generally.

I personally believe, although I realize many, and perhaps most, scholars have different views on this, that the area limitations on President Nixon—during the course of a hostility in which there were 40,000 DRV attacking United States troops from Cambodian territory before the United States incursion—were unconstitutional partly because of the area of restriction, but partly because it went beyond that to directing the commander-in-chief what to do in the battle.

I also regard the provision saying the President could not have the authority—any reasonable period of time, in essence—to withdraw the forces from Saigon after the war was terminated as unconstitutional. Does the President constitutionally have an unimpairable commander-in-chief power to pull the forces out in a reasonable period of time? I think the answer to that is yes.

Vietnam War Limitations Were Unconstitutional

In that context, congressional action was flatly unconstitutional. I might add that the War Powers Act didn't add a bit to it because Congress tried to give him the authority under the War Powers Act. As Bob Turner shows very well in his study, Congress failed miserably in that. They worked for three weeks trying to get something out. The House finally went away for the weekend and the President had no authority in the final crunch. He simply went ahead and did it on his own. There was not a single Member of Congress that said the President of the United States had done something wrong or unconstitutional in that case.

Robert Turner, center

MR. RAVEN-HANSEN: If the Congress decides to appropriate no further funds whatsoever for the continuation of hostilities, under your theory is the President allowed to go to the Treasury himself, and once it's empty, to raise revenues directly? I mean, where is the outer limit?

MR. MOORE: Well, there is a real world checks and balance problem. At some point when the President does not have money the President cannot operate. Things don't work. It's a checks or balance setting. That, however, is not an argument for saying that the appropriations power is a basis for doing things, under either separation of powers or the Fourteenth Amendment, that you could not otherwise do under the Constitution.

So I don't think that solves the problem any more than the "necessary and proper" clause. In fact, I regard those two powers as sort of the classic myth systems in talking about the separation of powers, and where the line should be drawn, in terms of bootstrap arguments for Congress.

MR. RAVEN-HANSEN: It seems to me that was the ultimate check that the founders saw on the President's power to commit to hostilities on his own. Hamilton said, you know, schemes to support the Constitution take time to execute. Well, if the reality today is that schemes don't take time to execute, you can do it in a matter of hours, doesn't that authorize and require the development of a new check that will serve in place of the ultimate check?

You are saying that my extreme hypothetical is a checks and balances question, and I agree with that wholeheartedly. But I say that particular check is completely ineffective in a nuclear war era because of the speed with which he can destroy the world here.

And so the issue is, "Is there constitutional authority, in any of the branches, but particularly in Congress, to devise a narrowly-framed alternative check to preserve the original balance?

Appropriations Power Does Exist

MR. GLENNON: John's theory on the power of the purse, I think, is a radical one. It has no support in the constitutional text, which expressly assigns to the Congress the power over the purse. It provides that no appropriations may be drawn from the Treasury except in consequence of law. It has no support in the case law. The Supreme Court has never overturned any congressional funding limitation. It has no support in the intentions of the Founding Fathers.

The letter from Jefferson to Madison in 1789, we have already given one effectual check to the dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from the body that spends, from the body that pays, he went on to say in the letter. Finally, the theory is in essence one that would rob the spending power—rob the power over the purse of any substantive content.

John's theory is that it has no meaning beyond the substantive limitations in the Constitution. The power over the purse means nothing that the rest of the Constitution doesn't also mean. That's ridiculous.

MR. RAVEN-HANSEN: You reminded me of another section, of the two-year limit on appropriations for standing armies. It seems an odd Constitution that limits the supporter of the army (Congress), and leaves the President, who normally has to have that congressional support, with no limit.

MR. TURNER: There's no question that the President can't fight but with the army that Congress gives him. And if Congress decides to give him no money, he has no army and he can't fight. But a different question is whether Congress can, by putting conditions on appropriations bills, seize control of the independent powers given to the President as commander-in-chief and so forth.

This issue came up in 1826. Daniel Webster made a brilliant statement on the House floor when somebody tried to limit the power of an executive delegation going to negotiations to discuss certain subjects, and Webster got up and said, if this was our money we could put any condition we wanted on it, but we are agents of the people just as the President is an agent of the people. His powers come from the Constitution and we cannot properly use our power of the purse to control him.

Court Cases On Appropriations Power

Mike said there's no court cases on this. There are several that are very appropriate. The commander-in-chief power, and the pardon power, are found side-by-side in Article II, Section 2 of the Constitution. When Congress tried to misuse its power, a very clear power, to set the jurisdiction of inferior courts to deny the President his pardon power in United States v. Klein, the Court said you could completely destroy the Court of Claims if you wanted, but you can't so define its jurisdiction as to deprive the President of his pardon power.

In United States v. Lovette, when Congress claimed its power of the purse was a plenary power and could not be subject to review, the Supreme Court said you cannot put restrictions on a funding bill that violate the Constitution, in this case a bill of attainder.

Let me give you just one analogy. What would happen if Congress were to pass a funding bill for the Supreme Court of the United States—clearly the Court can't work without money—saying no funds in this bill may be expended if and after such time as the Supreme Court holds any of the following listed bills to be unconstitutional?

Now if the Congress, by its appropriations power, can completely gut the President's independent powers as commander-in-chief, why can't they do the same thing to the other co-equal branch of the Supreme Court?

MR. GLENNON: My one sentence answer is the Supreme Court's statement in Martin v. Hunter's lessee—that a power is subject to abuse is no argument against the existence of the power.

MR. TURNER: But it is against the abuse of the power.

MR. CARTER: President Monroe decided it would be a nice thing if we were to have Amelia Island. Amelia Island had been owned by Spain previously and then taken over by smugglers who were raiding shipping, but they were raiding Spanish shipping. They were not attacking American shipping. And he said, nobody's running it; let's run it. And he sent American troops in and they seized Amelia Island.

Now this was not a repulsion of a sudden attack. This is not a repulsion, as far as I can tell, of any threat to the United States. Now was he doing something that was unconstitutional? That's my simple question.

MR. RAVEN-HANSEN: What difference does it make for purposes of the present constitutionality? How many other Amelia Island incidents have we had that have added up to a practice?

MR. CARTER: The reason is that we have had well over 100 uses of troops by Presidents abroad that were not pursuant to congressional authorization and did not involve sudden attacks in which Congress has generally—

MR. RAVEN-HANSEN: I think that is a very difficult argument to make. You would have to lay those out for me and show me how they amount to a consistent practice. The Supreme Court has again and again said that, in this touchy area of congressional acquiescence in a presidential practice, we have to see a consistent practice of which Congress is aware and to which it had an opportunity voluntarily, and ideally before the fact, perhaps after the fact, to acquiesce.

Where Is The Consistent Practice?

And if we take all those instances back to back you will see an infinite variety. Somebody mentioned Grenada—arguably an intervention to protect American lives. You may not accept that, but that distinguishes it from Amelia Island. And then there are hundreds of other instances which are interventions to protect property, where there are responses to threats, to warships.

I just don't think they add up to consistent practice, although I would be willing to explore them one by one. In order for that sequence of practices to amount to constitutional authority for presidential initiatives, they have to be sufficiently similar, and be made sufficiently known to an informed Congress so that you can say its acquiescence amounts to anything.

MR. ARBESS (Lawyers Committee on Nuclear Policy): There seem to be now two theories about the relationship of international law to domestic law. One followed Paul Warnke's question "If there were a treaty that prohibited the first use of nuclear weapons, would the President be bound by it?" Everybody assumed that the President would be.

Now my own feeling is that the Nuremberg precedent should not be discounted. It imposes a positive obligation on individuals to conduct themselves in compliance with international law. To what extent should Congress or the President be considered to be currently constrained by existing international law as found in the U.S. military manuals, as well as in The Hague and Geneva Conventions. That is a question I would like to throw out.

FIRST USE CRIME AGAINST HUMANITY?

In 1961, the United Nations General Assembly voted by 55 to 20 with 26 abstentions that:

"The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations, and, as such, a direct violation of the Charter of the United Nations . . ."

and that:

"Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization."

It seems to me there is a certain unreality in considering these legal questions that we are considering here today in the absence of some thought on the strategic and doctrinal realities. If anyone read Dan Charles' paper, the conclusions in it are fairly clear. NATO's current military plans are more or less inconsistent with the political consultation mechanisms of NATO—for example, the forward-basing of nuclear weapons may create targets that may cause preemption.

And, if we are considering escalating to the use of nuclear weapons, then we must also be considering, at the same time, not only using nuclear weapons to prevail in the theater but limiting the Soviet Union's ability to retaliate against the United States, which means the U.S. must strike military targets in the Soviet Union.

Well, if that's what we're considering, it seems to me Moscow's objective is going to be to preempt our ability to do so, in which case the whole situation is blown right open from the beginning. The question is, do all of these political consultation questions— whether they are by NATO standards or by our own constitutional standards—make any difference if we are not going to start discussing how we have to reorient our strategies, doctrines and capabilities.

Crossing the Nuclear Threshold

MR. MOORE: On the matter of the broader strategic context, I quite agree with you.

On the one hand, you can't sit here in the United States and permit, in a real extremis setting, the total loss of Europe with conventional superiority overrunning you. On the other hand, it is a perfectly horrid, and horrendous option, to use nuclear weapons, and to cross a threshold that I regard as enormously important.

I think that the central issue here really ought to be the effect on deterrence, and considerations of deterrence, and looking at other options as to how we get out of that dilemma rather than stay in it with what I regard as sort of a cosmetic fix that doesn't get out of it. So I totally agree with you on the importance of that point.

But in the settings we are talking about, I do not believe there is an international law constraint on a variety of re-

sponses, provided they are necessary and proportional to effective defense.

MR. RAVEN-HANSEN: Why spend time on a cosmetic fix when the broader strategic issues may be the way the weapons are now deployed in Europe?

One answer is that the device that Jeremy has suggested brings Congress into the middle of strategic planning decisions in a way that is absolutely unavoidable. And without such devices, there is evidence that Congress will continue institutionally to stay uninvolved in resolving these broader strategic issues, which will be resolved instead by members of the executive branch—and some not even by the President, but arguably, by technocrats down the line.

DR. STONE: That was very much my original thinking. When Secretary McNamara set up the Nuclear Planning Group in NATO, the NATO Allies began to understand the fix they were in. And to think that they would understand very well things that our Congress didn't understand—and that 15 chancellories would be debating this first use decision in a way that nobody in our Congress would be debating it—seemed unspeakable.

If we were going to wait around for 15 nations to debate on the first use decision, could not Congress also reflect on this, in parallel—without any upsetting of deterrence that wasn't already upset, by this existing massive, and unwieldy, consultative process in Europe?

CAN A COMMITTEE RESCIND A BAN ON FIRST USE?

MR. RAVEN-HANSEN: Our three speakers are going to address whether or not the FAS committee proposal runs afoul of Chadha. But I don't mean to limit them to that, because I think some would take the position that, even if Chadha hadn't been decided, there is a serious problem with the committee proposal.

Bill Banks will start by arguing that the actions of the committee in approving or disapproving first use do not constitute a legislative veto.

And Steve Carter, as I understand it, will argue that the President has presumptively been authorized to use armed force throughout the world by a sequence of practices since 1789, and that now, to prevent such use, it is incumbent on the Congress to signal its disapproval.

Charles Tiefer is going to argue that Chadha is inapplicable in the foreign affairs and war powers area, or at least less applicable.

Bill Banks is Professor of Law at Syracuse University Law School. He is the Director of the Center for Interdisciplinary Studies there. He teaches a variety of public law courses, has written about the legislative veto before, and about other constitutional law issues.

MR. BANKS: I think this afternoon's question is really the easy question. I come to the conclusion that, without the power to delegate the approval decision to a Congressional committee, the Congress may not be able to exercise its power to participate in the first use decision at all.

Now I also think that, at bottom, this really represents a policy question and probably would not present a justiciable controversy.

Four Points in Favor of Stone Proposal

The points that I'd like to make in support of my position are four. One, that the committee mechanism is a permissible exercise of the Article I powers of the Congress; two, that the committee mechanism is not a legislative veto, as that's been classically defined; three, that whether or not it's a legislative veto the committee mechanism does not violate the form requirements of Article I presentment and bicameralism; and, finally, that the proposal, and the committee mechanism portion of it, may enhance the separation of powers, and the system of checks and balances, that are embedded in the separation of powers.

The committee mechanism is not a legislative veto as it has been defined. A legislative veto has been defined by Judge Breyer in an article in the Georgetown Law Review as involving three essential elements—one, a statutory delegation of power to the Executive; two, an exercise of that power by the Executive; and, three, a power reserved by the Congress to nullify that exercise of authority.

Well, first, the committee mechanism does not involve any initial statutory delegation to the Executive. Instead, the proposal—and I'll quote from it here—contains an initial prohibition: "so long as no nuclear weapons have been used by others, the President shall not use nuclear weapons."

Second, the committee mechanism involves a subsequent resolution of approval which would be initiated by the President—not a resolution of disapproval; therefore, it seems that the mechanism actually empowers the President by lifting a Congressionally-imposed restriction.

My third point is that, sensitive to the insightful comments offered this morning by Mr. Fisher, whether or not you characterize the mechanism as a legislative veto I believe the "veto" does not violate the formal requirements of Article I. The presentment problem that the Chadha case discusses is an easy one here. Nothing could happen under the committee mechanism without not only the President's *approval*, but indeed the President's *initiative*.

After having initiated the committee action which would release the Congressionally-imposed restriction, the President has the further opportunity to "veto" the release of that restriction by simply declining to exercise the power conferred by the committee.

Issue of Bicameralism is Difficult

The bicameralism issue is, I think, a tougher one, a much more difficult one. It's the real problem here. There are some reasons, however, for supporting the FAS proposal notwithstanding the bicameralism problem as they are identified in the Chadha opinion. I have three quick points to make in that regard.

The first is that the Court's record in the separation of powers area would endorse a different reading than the Chadha reading of the separation requirements. I don't believe that the Chadha opinion is the bellwether of the Court's sepa-

William Banks (left), Stephen Carter (right)

ration jurisprudence. I believe it's an exceptional case. It does sweep broadly, but I believe that the Youngstown opinion and the Jackson approach, which have dominated separation jurisprudence since that time, would be likely to control in this area.

Second, consider the purposes of bicameralism as they were identified by the framers. One was the avoidance of legislative tyranny, the avoidance of too much power concentrated in the legislative branch. That might fit very well in the Chadha case, but I don't believe that it fits well in the war powers, or in the first use, context.

In the war powers context, in the Constitutional Convention, it was the fear of executive power that animated discussion. It may therefore serve bicameralism to check the President in this particular context.

No Infringement of Separation of Powers

I don't believe there is a separation of powers infringement in the proposal. There is no Article II intrusion in this case because the committee mechanism itself—if the initial bar on presidential first use is constitutional—the committee mechanism actually empowers the President, does not interfere with presidential power.

The discretion that's being exercised by the committee—which some have characterized as executive discretion—is more properly viewed as legislative branch discretion, the kind of discretion that the Congress would exercise in the full bicameral forum.

MADISON & JEFFERSON ON THE EXECUTIVE AND WAR

The Constitution supposes what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war in the Legislative . . .

—James Madison to Thomas Jefferson, April 2, 1798

"We have already given in example one effectual check to the dog of war by transferring the power of letting him loose from the Executive to the legislative body, from those who are to spend to those who are to pay."

—Thomas Jefferson to James Madison in 1789

I believe that the President is empowered by the committee mechanism in that the mechanism, in tandem with the underlying ban or bar, actually provides more value for the system of checks and balances than the present Congressional silence.

MR. RAVEN-HANSEN: Steve Carter is a professor at Yale University Law School and teaches constitutional law, and a course entitled "Legal Control of Science and Technology" which might be a subtitle for our talk today.

He has written on the War Powers Resolution, on the Presidential immunity case, on constitutional interpretation, and as I mentioned earlier this morning, he clerked for the Supreme Court.

MR. CARTER: Congress has acted in an irresponsible manner by being as uninvolved as it is in decisions about strategic balance, and decisions about deployment of nuclear weapons, and in decisions about how the use of nuclear weapons should be structured.

It is remarkable, and sad, that the Congress has allocated enormous sums of money to pay for these weapons and has virtually abdicated any role in determining how these weapons are going to be used. Because of this, there is an immediate attraction to this proposal, because it seems to be one way for Congress to try to regain its role.

But although the proposal has a certain attraction, a certain appeal, I do think that it has constitutional difficulties that are probably in the end insurmountable. I should add that that does not mean that there is nothing that Congress can do to control the Presidential use of nuclear weapons.

Proposal Has Constitutional Problems

In saying that this proposal has constitutional problems, I don't think one of those problems is that it intrudes too far on the President's inherent authority. As those of you who have read my work on the War Powers Resolution are aware, I do believe the President possesses a substantial inherent authority to use forces, but I don't think inherent authority is an inalienable authority.

I don't think the fact that the President possesses power means that the Congress can't restrict it as it restricts the other powers of the federal government. So I think that is sort of a red herring. I do think that the Chadha problems, and the delegation problems, involved are quite substantial.

I happen to think the provisions of the War Powers Resolution for legislative veto has survived Chadha, and I think they have survived because the Congress of the United States as a whole ought to have the opportunity, under the Constitution, to manifest its consent, or refusal to consent, before the United States gets involved in what it considers war, or ought to have the opportunity to stop that war once it has begun.

But to say that it ought to have that authority, and to say that I read the Constitution that way, doesn't mean that the Congress can do anything it pleases as long as it claims that it is exercising that authority. The point about the War Powers Resolution is that, if Congress adopts a concurrent resolution saying the President must remove troops that he has committed somewhere in the world, then what the Congress is in effect saying is, "We believe a war is going on, and if the President came to us and asked us for a declaration

of war, we would say no, and you can tell we would say no, because we have just voted that way." But this proposal, on the other hand, does not provide for the Congress as a whole to manifest its lack of consent.

It rather provides that 14 members of Congress will announce in effect whether the Congress consents or not. I understand the arguments that the exigencies of time are such that there may be nothing else that a Congress can do. But if the exigencies of time are so great that it is not feasible for the Congress to meet, I think there is a substantial question whether it would be feasible for the committee to meet.

In any case, if it is really true that there would be no time for Congress to do this, then maybe Congress ought to be exploring other ways to get involved in the first use decision. Now, I believe that there would be no constitutional difficulty at all if the Congress simply enacted legislation that said the President of the United States cannot make a first use of nuclear weapons.

Area Restrictions Are Acceptable

I also believe, in spite of some remarks that were made this morning, that there is no problem with area restrictions, and other similar restrictions, the Congress might place on the use of that force that the Congress has created. Because although the President is commander-in-chief, and may have some inherent authority as commander-in-chief, at bottom he is only the commander-in-chief of the forces created by the Congress. So if the Congress wants to define the force it creates, as forces that are not permitted to do certain things, then it seems to me the President cannot do something that is inconsistent with the charter granted to the forces that the President wants to use.

How would this work in a no-first-use situation? In keeping with what I said earlier, the Congress ought to be involved in a major way with the assessment of strategic doctrine. The Congress could, it seems to me, undertake an investigation to determine for itself what are the circumstances, broadly stated, in which first use is appropriate. Congress could perfectly legitimately enact legislation saying the President cannot make a first use of nuclear weapons unless certain conditions are met, and here are the conditions that we as a Congress believe ought to be met.

Charles Tiefer

That is an example of one kind of statute. Another kind of statute, the Congress could say because we currently deploy tactical nuclear weapons so close to the border between NATO and Warsaw Pact forces, we realize that it is impossible to expect the President to consult with anyone else before deciding whether to use them.

Therefore, we, as the Congress, are ordering that those weapons be pulled back. Our legislation is that those weapons cannot be based where they are being based by the President. I do think that Congress has the capability and the responsibility to get involved in long-range planning for the use of the forces that it continues to fund and permit the United States to base all over the world.

That is the kind of thing that I would hope the Congress would get involved in. Those are the sorts of things that would not share what I consider the crucial constitutional difficulty of this otherwise very appealing proposal, namely the delegation of this authority to a group of 14 individuals who—whatever else may be said about them, whatever their standing in Congress, whatever their intellectual and moral capacities—simply are not the Congress of the United States, and therefore not capable of saying we as a Congress decline to fight a war.

MR. RAVEN-HANSEN: Charles Tiefer has already worked both sides of the street. He was formerly the assistant legal counsel to the Senate, and is now deputy general counsel to the Clerk of the House. He teaches as an adjunct at Georgetown Law School and teaches Congressional law and procedure. He has written on Presidential power, and he was on the brief for the Senate in the Chadha case. Charles.

MR. TIEFER: I am going to address the two reasons why I think that Chadha does not make this proposal invalid: the narrowness in the relevant aspect of the Chadha decision, and the fundamental difference in the relevant aspect between the domestic sphere and the sphere of foreign affairs and war powers. Let me start with why the Chadha case matters.

The Chadha Case

The best model we have for this proposed provision is the War Powers Resolution section that says that, by a two House resolution, that Congress can require the President to withdraw troops that are engaged in hostilities.

This proposal shares the really basic premise of the War Powers Resolution, that the best check there is on the Executive branch, and what it decides, is the one the framers set up, Congress, and that if one cannot codify in advance the circumstances under which the Executive branch can act—if one can't make a list and say do it in this situation and don't do it in that situation—then you have to set up a mechanism by which the Congress can be involved.

Now, since Chadha, there has been an extremely strong argument, that the Executive branch has stressed, that that provision of the War Powers Resolution is unconstitutional. They made it before Chadha. It was in President Nixon's veto message on the War Powers Resolution. But now they are unquestionably in a stronger position to make it, and I can emphasize that no more strongly than by quoting from the opinion.

Justice White begins his dissent by saying, "Today the Court not only invalidates Section 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto." For this reason the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well advised to decide the cases, if possible, on the narrow grounds of separation of powers.

This is a war powers statute. What that means is that if one presents this proposal in a hearing before a Congessional committee, those who would critically question the proposal will certainly bring up the points about the commander-in-chief that we heard about this morning. But, because they do not exist, we certainly did not hear this morning about a recent Supreme Court decision directly on point concerning a commander-in-chief clause, and we have not heard a recent Supreme Court decision directly on point concerning a mechanism for Congressional involvement.

JEFFERSON ON "FIRST USE"?

"One cannot help but believe, however, that the Founding Fathers would look down with favor on some return to constitutional practice in, at least, this ultimate case of when and how America is taken into the ultimate war. During Jefferson's presidency, in the midst of a dispute with Spain about the Florida border, he advised Congress, "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have though it my duty to await their authority for using force in any degree which could be avoided." Nuclear force in a conventional war abroad would seem to be precisely force in a degree that "could be avoided" while congressional authority was awaited."

From "Presidential First Use is . . . . Unlawful", Foreign Policy, September 1984,
—Jeremy J. Stone.

This Proposal Is Constitutional

Now, while I say there is a strong question that has been raised under Chadha, I don't think that the provision of the War Powers Resolution for concurrent resolution disapproval is going to go away. I believe it is constitutional, and I believe this proposal, if Congress wishes to enact it, is also constitutional for the two reasons I mentioned: the narrowness of the Chadha opinion, and the fundamental difference between foreign affairs and war powers.

First, the narrowness of the opinion. What I quoted just before—strong language though it was— was in Justice White's dissent. There is similar language in the concurring opinion of Justice Powell, but there is no similar language in the majority opinion, in the opinion for the Court, which is where we look for what law was established.

The Supreme Court did not list, itself, the statutes it was invalidating or say anything specifically about other statutes. There is a list of statutes that are legislative vetoes that is attached to Justice White's dissent—the statutes that he is talking about. It is not attached to the majority opinion. The more important point is to look at what the decision was based on.

I am not saying that the only provision it indicated was unconstitutional was the particular provision in the opinion. Clearly, there was some broad language in the Chadha opinion. But what the opinion is based on, in its key part, is the model of strict delegated powers which we find in the domestic sphere. The precedents in the language, and the reasoning of the Chadha opinion in the critical part of the opinion which is Part 4, is thoroughly strict delegational language. Let me read some of the relevant points.

"Congress made a deliberate choice to delegate to the Executive branch the authority to allow deportable aliens to remain in this country."

"This choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Article I."

"Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."

"Disagreement with the attorney general's decision no less than Congress' original choice to delegate to the attorney general the authority to make that decision involves determinations of policy that Congress can implement in only one way."

And Chief Justice Burger is quite specific on what he means by the delegation model when he talks about the kind of executive action that he means that was involved in that case, and that he means to cover, he says, "That kind of executive action is always subject to check by the terms of the legislation that authorized it, and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely."

Delegation Requires Standards

That is the essence of the nondelegation doctrine—that statutes have to have standards in them to check the use of the power, and to ensure that the activity under the statute by the executive is subject to judicial review. That is classic nondelegation.

Now, we heard this morning from Lou Fisher, and I can't disagree with it, that the nondelegation doctrine hasn't been used to strike down a statute in 50 years. There are some who think that what is said in Chadha presages a tightening up of the standards. There are others who think that this is another empty roar for the Supreme Court, as a couple of years ago, in that they are not going to do it.

I don't really worry which way it is going to go for purposes of this argument. The point is that when the Supreme Court is analyzing the question of whether this legislative veto was unconstitutional, it had the nondelegation doctrine and the delegation model in its mind. That is the way it was reasoning through the problem. And that is how it sees the problem.

So, when I say that the opinion is narrow in the relevant point, the relevant point is that it is restricted in its logic and reasoning to the strict delegation model. Now, that is not a narrow opinion. Just about most things, if not everything domestically, falls under the delegation.

Lori Damrosch (Columbia) and R. Gordon Hoxie (President, Center for the Study of the Presidency)

But now I will move to my second point, and my second point is simply this: The conduct of foreign affairs and war powers doesn't fall under the strict delegation model.

I will turn to the case law in a second, but first I will point to the factors that make this obvious. One is the absence of judicial review. We had heard some snippets in this morning's discussion. We heard some snippets taken from some cases that were decided during the Vietnam war era, and some snippets that were taken from some recent war cases.

Those dicta from cases that were reversed on appeal are of great interest. We peck at what comes from the judicial table that they provide to us. But judicial review is when the courts are there to protect you. And in foreign affairs cases we went through the entire Vietnam war era without a decision of the Supreme Court. They sat the war out.

Courts Duck Political Questions

In the recent cases concerning El Salvador, Grenada, Nicaragua—and there have been cases on each of these, Sanchez, Espinoza, Crockett, Conyers—the courts have on political questions grounds ducked every one of them with some interesting language saying, "Well, we might do this and we might do that if Congress did this and Congress did that," but it didn't take the case. We simply don't have a parallel situation in foreign affairs and war powers to what we have domestically. Sometimes it gets judicial review, sometimes not, but it is a wholly different situation.

More important, there is reason, apart from the political question doctrine, why we don't see such judicial review. And that is the lack of standards in legislation, the other half of the nondelegation doctrine, and perhaps the more crucial half.

Now, that isn't to say that there are never statutes in foreign affairs or never statutes concerning war powers that have limitations in them. We heard a couple this morning. One that was alluded to was the Cooper-Church amendment that said that President Nixon could no longer use ground troops in Cambodia.

I would add the Clark amendment that said we would not involve ourselves in Angola, and the Boland amendment, which said that we were not going to support overthrow of the government of Nicaragua. There certainly are some limits that are placed, but again, that is not the model for foreign affairs and war powers. That is the exception rather than the rule.

For the reasons that the courts recognized and discussed, the War Powers Resolution is an example of this. The Congress discussed, particularly the Senate side coming up with the real codification, a real set of standards for when the President could commit troops.

Well, yes, he could commit them to protect American lives, soldiers overseas, and certain kinds of interests, and we debate whether he could do it this time or that time. But while the Senate came up with that proposal, the House would not look at such a list, considering it unworkable, and in conference the Senate's list was reduced to a statement of policy purposes and real war powers checks were quite different. The reasons that the conference came to this conclusion, and Congress accepted it, are quite clear from the legislative history, and could be reasoned through even if we had a blank history.

This is not an area where you can codify in advance that which shall be done. What occurs is too contextual, and there are additional factors, such as the fact that in contrast to insisting that one give notice to domestic citizens as to what is going to transpire under the law, there is a certain limit in foreign affairs and war powers about how much you can signal to those who are going to be, shall we say, on the other side.

Court Recognizes A Different Model Here

The Supreme Court recognizes that there is a fundamentally different model at work in the foreign affairs, and war powers sphere, as opposed to the domestic sphere. The Curtis Wright case, which was mentioned this morning, is where the Supreme Court gave this recognition.

The Supreme Court in that case assumed "that the challenged delegation, if it were confined to internal affairs, would be invalid" because of the lack of standards being complained about by the persons who were being pursued under the law, being challenged in that case. It assumed that, under the delegation model that applies in domestic affairs, that statute would have been unconstitutional, just like a committee provision of the kind proposed here in purely domestic affairs would be unconstitutional.

Nevertheless, in that case the Court upheld the statute in foreign affairs, saying, we first considered the differences between the powers in the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs, that there are differences between them, and that these differences are fundamental, may not be doubted.

Now, a further question is presented. Assume that we are in the political sphere and in the foreign affairs sphere and that, accordingly, the War Powers Resolution is constitutional. But that involves two houses passing a concurrent resolution of disapproval. This is not a two house disapproval provision, and Professor Carter has stated only too eloquently the kind of critique that can be made—a critique that says we should have two houses in there, the way the framers had in mind.

I would simply make two points. There are general reasons for considerable suspicion about provisions that give power to a committee of Congress, but they don't apply with the same force to a group of the leadership of Congress

working with the President on the matter of fundamental importance.

The leadership of Congress is elected by all the people of the United States. It is elected indirectly. The people choose their representatives. The representatives of each party choose the leader of that party in the House or the Senate, as the case may be.

I could give quotes from scholars going back at least a century that, in a sense, the Speaker of the United States is elected indirectly by all the people. All the representatives spend a great deal of thought choosing who it is who is going to represent them in the crunch. The leadership of Congress is the group that, if you can't get the whole Congress into a meeting room, you get the leadership there.

And so we come to the fundamental question. Is it practical to have all 535 members make the decision? If the Congress chooses to enact a provision that says: "Before the first use of nuclear weapons there has to be action by both Houses", that in my belief would be, a fortiori, constitutional as opposed to this one. But if the judgment of Congress is that this isn't workable—both because of the number of people involved, and the time, and a further argument of secrecy—that is a judgment for the Congress. We are in the sphere not of the strict delegation model, but of the models of shared inherent powers and of delegation that are not strict delegations, and in that sphere a judgment can be made by the Congress.

Interrogators Introduced

MR. RAVEN-HANSEN: Thank you very much. Let me introduce the two interrogators for this afternoon.

On my right is Stanley Brand, formerly General Counsel to the Clerk of the House. He began as an aide to Tip O'Neill, went to law school at the same time, and went from there to the SEC. And he then graduated to the General Counsel position in which he argued several of the legislative veto cases, notably in consumer energy, which many scholars think had a much more sophisticated treatment of the issue than the Supreme Court eventually gave it in Chadha and Atkins. You argued that as well? And the used car case.

And on my left, you have already met, most of you, Bob Turner, who is now senior fellow with the Center for Law and National Security. He had numerous positions in the government, most recently principal Deputy Assistant Secretary of State for Legislative and Intergovernmental Affairs. He is maybe one of the few interrogators or panelists who have had combat experience in Vietnam.

He is author of a book on the War Powers Resolution, and a forthcoming book called "Congress, the Constitution and Foreign Affairs."

MR. TURNER: I think that the Stone proposal, as well motivated as it is, is both bad policy and bad law. I think it would increase the likelihood of war, and I think it is flagrantly unconstitutional. But that is not my purpose here today, and for anybody interested in my views on that, there is a speech I gave at Brookings earlier this week available over there in copies. Let me instead talk a little bit about the way I view the distribution of powers under the Constitution.

Left to right: Louise Hoxie, Stanley Brand, Peter Raven-Hansen

Most of the papers on this panel refer to the war power as being a shared power, and I think a better view is, there is not a war power. There are several powers given to different branches connected with the war making or the war process. It seems to me that the Founding Fathers very clearly wanted to ensure that a majority of both Houses of Congress acted formally and affirmatively before the United States could initiate a war against any other state.

I find nothing in the historical record to suggest that the Founding Fathers wanted to put up impediments in front of the commander-in-chief in resisting a war thrust upon the United States by another state.

Now, Professor Banks says that although the Founding Fathers were very concerned about legislative aggrandizement, that was not the case in the war powers area. I would argue to the contrary that they were very upset about the failure of the Articles of Confederation, and the Continental Congress, in trying to micromanage war in the absence of secrecy and dispatch and so forth, and indeed, John Jay in Paper 64 clearly spells that out.

Only Congress Can Authorize Offensive War

But basically they would have made a tremendous mistake had they not tried to correct that problem, so I would argue there are two different situations. The United States can be put in war by the action of the United States Congress, and without that, the President can't go out and start a war although he can use force short of war.

And secondly the United States can be put into war by the action of a foreign state which, as much as the Founding Fathers would like to have controlled that, they could not. Indeed George Washington once suggested, as you may know, when somebody proposed that the Constitution put in a restriction that the standing army could never exceed more than 3,000 men, Washington, who was in the chair, said, can we also add a provision to the Constitution that no foreign state could ever invade the United States with more than the same number of men.

And of course the fact is the Constitution cannot control the action of foreign states. A big debate on this issue came up in 1801 during the Barbary Pirates War, when Alexander Hamilton wrote, "It is the peculiar and exclusive province of Congress when the nation is at peace to change that state into a state of war, whether from calculations of policy or from provocations or injuries received."

In other words, it belongs to Congress only to go to war, but when a foreign nation declares, or openly and avowedly makes, war upon the United States, they are then by the very fact already at war and any declaration on the part of Congress is nugatory. It is at least unnecessary.

In discussing this whole period, the Library of Congress, in a very thick analysis of the Constitution, concluded that Congress apparently accepted Hamilton's view in the debates. We have Madison's notes that tell us that the language was changed from giving Congress the power to make war, to giving them the power to declare war, and this was, among other things, to leave the President free to respond to sudden attacks or, as Mr. Sherman said, "The executive should be able to repel and not to commence war."

Now, the reason this is important is that under the United Nations charter virtually all of the uses of force that would have required a declaration of war prior to the UN charter are now unlawful.

When the Constitution was written, the United States could declare war against any sovereign state for virtually any purpose, and the Founding Fathers wanted to tie the President's hands so he couldn't do that. But, the only type of force that is legal is defensive force, and a declaration of war has never throughout history been considered necessary for offensive hostilities.

FAS Statute Not A Veto

I have a question for Professor Banks. In your paper you argued that "The committee veto proposed by FAS, the Federation of American Scientists, is not a legislative veto, and it is thus not a fortiori unconstitutional after Chadha."

The point was made this morning also. It seems to me that this totally misses the point of Chadha. At issue is not the fact that this particular process involved a veto. It was the fact that it involved, as the Court said, legislative action. The decision centered on the fact that the statutory provision in question, and I quote from the Court, "was essentially legislative in purpose and effect." The House had taken "action that had the purpose and effect of altering the legal rights, duties, and relations of persons outside the legislative branch."

Indeed, making the point that it doesn't matter whether it adds to or detracts from the President's power, the Court expressly noted that "amendment and repeal of statutes no less than enactment must conform with Article I." That is to say, it must conform with the presentment clause, among other things.

By your reasoning, since this is not a veto per se—and I would agree technically it is not a veto—Congress could pass a law that said the Commander and the National Commander of the Veterans of Foreign Wars shall have the power to overrule the President's exercise of his commander-in-chief powers, whatever that is.

Now, that is not a legislative veto. But clearly the principles enunciated in Chadha that the only way Congress can act to influence rights and powers outside of Congress, other than in a few expressed areas like Constitutional amendment, that are set forth separately, is by following what the Court called the single finally wrought and exhaustively considered procedure.

PAST CONGRESSIONAL STIRRINGS; A WAR POWERS COMMITTEE

The notion of a Joint Committee that would deal with war powers issues in general has been advanced before. In 1971, Congressman Frank Horton (D-NY) proposed adding to a Senate version of the War Powers Act the creation of a Joint Committee on National Security.

His Committee was composed of 24 members, with a core composition similar to that advocated in this newsletter. The President would have been required by his legislation to convene the Committee within 24 hours of any relevant hostilities and to report to it. It was to become "the officially designated body of the Congress to be consulted by the President and his national security and military advisers, and to receive and transmit information to other committees of the Congress concerning actions taken and reports received . . ."

This bill specified, among other things, an expedited procedure in which the sponsorship of one-third of the membership of either House for a bill to terminate military activity could have brought that bill to the floor of that House within 24 hours and set up a second vote, within a second 24 hours, in the other House of Congress.

So, my question is, do you really consider that the procedure set forth in Dr. Stone's proposal would not involve legislative action?

MR. BANKS: No. At least I think that while an argument could be made, I don't think that it need be made, and I might we wasting my time to make it. I think that you can concede that quote from Chadha is good constitutional law, and still not have the problem you describe with Dr. Stone's proposal. I identified the principal reasons that one can live with that definition of legislation and distinguish the committee mechanism in this proposal. The presentment problem really does not exist because the President initiates the release of the Congressionally imposed restriction. But the bicameralism problem, while it is real—in that there is not literally bicameral action here—is certainly subject to an exception in this case.

I am referring first to the purposes of bicameralism that identified legislative tyranny, and the fact that, in the foreign affairs context, which of course was not the Chadha context, the Court has not construed legislation, or the definition of legislation, in the same way.

MR. RAVEN-HANSEN: Charles.

Chadha Opinion Specific In Context

MR. TIEFER: I will be quite brief. There is one sentence in the Chadha opinion which you quoted half from which states in full length that "in purporting to exercise power to find in Article I, Section 8, Clause 4, to establish a uniform rule of naturalization, the House took action that had the purpose and effect of altering legal rights, duties, relations and persons, including the Attorney General, Ex-

ecutive branch officials, and Chadha, all outside the Legislative branch."

The whole sentence quite clearly refers to the specific statute in that case and the specific power in that case.

MR. TURNER: Which was under discussion. They don't qualify and say this would not apply in other Article I, Section 8 cases, does it?

MR. TIEFER: What they then do after that sentence is go on through the rest of Page 952, 953, 954, and 955 discussing things concerning the delegation model. I have to understand that one sentence not to be the whole opinion, but to be a lead into the full reasoning, and I would welcome a response.

MR. TURNER: In the Stone proposal as I read it, you are exactly right. It is not a delegation. But the difference is, in the Chadha case, you have got an Article I, Section 8 exclusive grant of this power to Congress. Congress is giving the President authority to make rules in this area under certain constraints while reserving a veto. In the Stone proposal, there is no delegation because the President's power as commander-in-chief comes directly from the American people through the Constitution. Instead, Congress is saying we have the right to take away the President's power given by the Constitution, and allow to exercise it a committee of Congressional leaders which we might pretend to be elected by the American people.

They are really elected from those people who survive the longest, and are from the safest districts, and have less competition. But the point is, they are not delegating because they don't have the commander-in-chief power to delegate. So instead they are giving a veto over a power the President already has been exclusively given by the Constitution. I think that is the real distinction.

MR. RAVEN-HANSEN: Of course, that collapses our questions. That is not a Chadha question. You are simply rearguing the one this morning; that is a fair argument but it is not a Chadha argument.

FAS Statute Not One Of Strict Delegation

MR. TIEFER: Mr. Turner, we are making a little progress, because you agreed that there was a fundamental difference between the statute involving Chadha and the statute here. You agreed that was a strict delegation statute.

But this is not a strict delegation statute. The point at which you disagree with the people on the panel this morning is whether you are in the area of shared powers or not. You believe it is a solely Presidential power because he is commander-in-chief. The people who are talking this morning took the opposing view—that because the Congress has the power to declare war, and the Congress provides the troops, then we are talking about a shared power.

Now, you would have to admit, after what we heard this morning, that that is a debatable point as to whether the Congress has a share in that power or not.

MR. TURNER: Professor Carter, in your paper you say a one house veto would be acceptable because both houses must approve a declaration of war. I'm a little bit lost because, as I understood it, the power to control naturalization, and the power to declare war, are both set forth in a long list with the same introductory clause in Article I, Section 8. And I always thought that the power to control naturalization also required a vote of both houses of the Congress.

Why is it that there is something special about the power to declare war that's different from the power over naturalization?

MR. CARTER: Well, there may not be. In my longer article on the War Powers Resolution I argue the case for the specialness of the war power. I might add I think if this case is rejected it's impossible to save the constitutionality of the War Powers Resolution. The specialness of the war power can be understood, in part, if you ask yourself whether the President has or ought to have the authority to veto a declaration of war.

In the past this has never been an issue because although Congress has sometimes talked about declaring war when the President doesn't want it done, especially in the early years of the republic, this has never happened, and as a result there has never been a question whether the President would veto a declaration of war.

If the power to declare war is just another Article I, Section 8 power like all the other powers contained therein, then I suppose there is no question, but Chadha applies with full force. There is no specialness to it. My own view is that it may be different and that the Supreme Court has certainly acted in the past as though there were some Congressional powers that are different.

War Power A Special Issue

And the only thing I will say about the specialness is that I think that's something like 40 percent of the Federalist Papers—I think I am correct in that number—are devoted in one way or another to the war power or national security. Thirty-five to 40 percent of them are devoted to it or discussed at length in the course of discussing other things.

All that suggests, at least in the view of the framers, that this was a power that merited lengthier consideration than other powers that were also contained in Article I, Section 8 or elsewhere in the Constitution.

DR. STONE: If the statute were passed, would it in fact be reviewed by the Supreme Court? And what would they decide from an operational point of view? How likely is it that the courts would duck throwing out an accommodation on this issue between two branches?

MR. BRAND: The courts sat out cases during the Vietnam war era and sat out all these cases that were brought by Members of Congress over Nicaragua and aid to El Salvador. I think the likelihood is higher that they won't get involved in a battle between the Congress and the President over war powers. You may never get an adjudication of the proposal.

MR. TURNER: Obviously the Court does not understand the political question doctrine. If you go back to Goldwater v. Carter, you could not get a majority for any conceivable view. They were split so far across the board that, right now, I don't think there is a majority for any one view on that. But I think what you seem to be hinting at is, even if this is unconstitutional, couldn't we pass it and keep the Court from reviewing it.

But my concern is, particularly after Chadha, the President's advisors might just say look, this is so flagrantly unconstitutional you should ignore it.

DR. STONE: Just to clarify the record, if I may, Mr. Chairman, I don't imagine that the Legislative branch would pass this statute without help from the Executive branch, without the Executive branch either proposing it, or agreeing to it as part of a deal to avoid an absolute bar on the first use of nuclear weapons.

What If Two Branches Agree?

If it were a part of a deal, or offered voluntarily from the Executive branch, then it is what I was calling an accommodation between the two branches. In that case, it seems unlikely that there would be a combination of that standing necessary to raise this case before the Court, and the Court's willingness to throw out what is, after all, a common sense prudential preparation for shared powers in a national emergency very unlikely to come, but one in which both branches have an obvious interest.

Viewed operationally, if we say what's unconstitutional is what the Courts will throw out as unconstitutional, then if the two branches went along with this, it would very likely be constitutional in a practical sense.

MR. BRAND: The problem is that the time has passed when one can count on the Executive to keep his word on a political deal. While the Chadha case was being litigated in the Supreme Court, and the Justice Department was saying that every statute with a veto was unconstitutional, the President was coming to the Congress and proposing legislative vetoes as part of political tradeoffs.

MR. TURNER: Even if it's one President's word, the problem is that one President cannot surrender constitutional powers in a way to bind a future President. Thus, the statute in Chadha was presumably signed by the President, not passed over a veto.

JUDGE SHUBOW: It doesn't make any difference if something is constitutional or not if nobody's aggrieved by it. Somebody has got to be mad or unhappy in order to invoke the jurisdiction of the Court. The problem I see in this discussion is that the panel is predicting that some form of the Stone proposal could be upheld, but it is only a prediction.

The question that troubles me, and I think, Dr. Stone, who is going to ask the Court to rule on the question? What court and, mostly importantly of all, before the event or after the event? And since the Supreme Court of the United States does not grant advisory opinions, and since there is no way to invoke the Court's attention until after the event, if the event is a strategic nuclear response, what difference does it make if it is constitutional or not after the event?

Judge Lawence Shubow (Brookline District Court) and Dan Charles (FAS)

In other words, it seems to me the constitutional argument is largely a semantic one, simply a make-weight during a political struggle. If the Executive branch is necessary to passage and you win the agreement of it, that's the end of it.

Judicial Review Unlikely

MR. CARTER: I think it unlikely that one could construct a scenario in which judicial review of this statute would actually take place. But I don't think that spares Members of Congress from their own independent responsibility to uphold the Constitution, which includes, I think, trying to make a fair and honest assessment of the constitutionality of legislation that is proposed to them.

MR. BANKS: I remember reading in Stone's article that there was some talk about a reporting requirement which might be used as a trigger to induce a justiciable controversy. I took a bit of a look at that question before I decided it was too much for me to get into, and it seems to me that you might set up some way to test the constitutionality of a reporting requirement. But I don't think you will get beyond the reporting requirement into the rest of it.

MR. MOORE: I'd like to go back for a moment to the real central thrust of this panel, which I think has been very interesting and provocative, and that is the extent to which the Stone proposal would be constitutional, would be upheld, by the theoretical court that it gets to under the Chadha decision.

I am puzzled by some of the optimism on that point. First, although we have talked about a possible differentiation on the grounds of non-delegation, and a possible differentiation between foreign affairs and national affairs, the Court surely was aware of the possibility of narrowing its decision.

You have pointed out, in fact, that Justice White spelled that out. Justice Powell, you will also recall, spelled it out absolutely clearly in his concurring opinion and in essence sought to get the Court to narrow. The Court, in the face of two members of the Court that sought them to narrow, clearly with an opportunity to differentiate its views on foreign affairs, instead deliberately chose a very principled option. That option was that the presentment clauses and the bicameral clauses mean what they say in terms of the way Congress makes laws.

It talked about, as a test, whether the parties have the ability to change the law, and the jural relations, but for this particular kind of law. And, secondly, it talked about whether they were going to be changing jural relations outside of the Congress of the United States. It seems to me fairly reasonable to take as a starting point that one should take the Court at what the Court said was the principle in this case.

Some assume that what we are talking about is some kind of delegation in foreign affairs to the Executive. That would be fine if, in fact, either this case or the war powers case,

were a delegation. But they flatly are not. They are the opposite. Therefore the very policy that supports the delegation is a policy that cuts against it. This proposal would take away a power from the President which he currently has.

This is not a delegation. This is basically a reversal of the setting of constitutional power in the President, rather than a fundamental delegation setting.

MR. TIEFER: Professor Moore, there is no question but we're making definite progress here. We are recognizing that there is a basic difference between the type of power issue that was involved in Chadha and the type of power issue we are addressing here. Now where we part is trying to carry over certain notions from the strict delegation model to this new context, particularly the model of jural relations in which the President has certain absolute rights and then the Congress comes in and by statute takes those rights away.

President's Authority Rests On Acquiescence

We have a situation here where, instead of having clear rights, the President's authority depends on the history of acquiescence from the Congress, what the history is of claims by the President, what certain silences have taken place, and what took place in the enactment process when certain relevant statutes were being considered and not being considered.

Indeed, we have a realm like the relations between nations. Signals, indications, custom begin to define the relation between the branches in that zone. The model of jural relations, and of a strict presidential right, that is taken or not taken is simply not applicable in this model.

And when we come to the first point you made, which is that surely the Supreme Court was aware of the problem, I could not agree with you more. I tried. I wrote the Senate's brief in Chadha. I laid out all the statutes and I laid out what would happen if they took a broad view. But I don't see that the Supreme Court spurned me. What I see is that Chief Justice Burger decided not to touch it, that it was too hot for him to touch.

He has his brethren who are saying these Congressional people are right. One of them is saying they are right and the statute is right; the other one is saying the statute is wrong but they are right, we should do it narrowly. Instead of speaking to the problem, he refuses to deal with it. He says I have a case in front of me. I can reason through it. And I will reason through it. And then I will let others judge from the way I reason through it whether it covers other situations or not.

And I am saying from the way he reasoned through it, it does not appear that it covers these other situations. But we have pure silence from him. We do not have something which implicitly speaks to these other situations.

MR. BRAND: What about the summary affirmances two weeks later with two other cases?

MR. TIEFER: Both of those cases were domestic rulemaking cases. One was a FERC case and one was an FTC case. They tell us nothing about a separate sphere.

MR. FISHER: I have a question for Charlie. I agree with Charlie that Chadha concerns delegated power and if Congress wants to recapture delegated power it has to go through the whole bicameral presentation processes. I don't think the Stone proposal is dealing with delegation in that sense, and I don't think we have to spend a lot of time on delegation or on Chadha.

Dycus of Vermont Law School and Koplow of Georgetown University Law Center

I would feel more comfortable if Charlie would narrow his case a lot more. You can delegate foreign affairs. You can delegate foreign trade. You can delegate foreign commerce. So this is not really delegation, it's not really foreign affairs versus domestic.

You are talking here about a very special case. And even though the power to declare is next to immigration matters in Section 8, you are talking about a one-of-a-kind power, the power to declare war.

I think we are talking in the Stone proposal just about the power to declare war, and foreign affairs is just too murky a topic to be a category.

War Powers Resolution and Chadha

MR. TIEFER: What I was going to say is I have a quote in my paper from the Chairman of the House Foreign Affairs Committee, who joins with a number of scholars in saying that the War Powers Resolution provision is constitutional under Chadha, so there are some. In fact, if we decided these things by counting up the citations, there are more scholars who have been saying that the War Powers Resolution is constitutional than not.

We don't settle it that way. But I think this brings us back to something that Judge Shubow was mentioning earlier, which is how do we get this settled if not by taking it to the courts. I think that what we may well enter in the next ten years, fifteen years, is a period in which one has the same kind of tension between the President and Congress over their powers that, for example, there was in the critical year before we entered World War II concerning just how far Franklin Roosevelt could go in an undeclared naval war, in occupying Greenland, and in the destroyer deal with Great Britain.

JUDGE SHUBOW: It is too abstract to ask the broader question "is a given proposal constitutional or unconstitutional?" We have got to get the exact proposal, the context, and to decide whether one is deciding an issue before the event or an issue after the event, because different considerations come into play. The question is just too broad. With all due respect, gentlemen—I haven't been to a law

Left, George Bunn (LANAC), and Steven Raikin (ABA)

school class for some time—is it not a law school exercise to ask "is this proposal constitutional?"

I think that the positive part of this discussion that does warrant support is the notion that the decision about these momentous questions should be shared between the two major branches of government, Congress and the Executive, and that it is not a question of legal powers. It is a question of the fate of our civilization. And there is a constitutional answer—to share this power.

Statutes Need To Be Plausible

MR. IDES: The constitutional issue is important for one reason. If you are going to have a proposal like this, which I think is a creative proposal, pass Congress then I think you have to be able to tell the Members of Congress that what they are doing has a plausible constitutional basis.

If one reads Chadha's majority opinion on its face, along with the dissenting opinions, I think Professor Moore is right. But if we are going to apply Chadha on its own terms, we are in a lot of trouble here. I don't think the Supreme Court law is a mechanical process. I think you have to look at the majority of the Court in the Chadha case.

Who was in that majority? We had Stevens in there, we have Blackmun, we have Marshall, we have Brennan. And what motivated them to join that opinion, which was urged by a number of consumer groups, may be very different from the factors that would motivate them into distinguishing Chadha here. I could see them writing a creative opinion along the lines Mr. Tiefer has suggested. So I don't think we can read Chadha for being the final word on this question.

MR. RAVEN-HANSEN: George Bunn.

MR. BUNN: We have been spending much too much time on Chadha. It offends me to think that an immigration case might start a nuclear war. I realize what the Court or the dissenting opinions said and that the majority opinion is sweeping in the way it is written, even though there is the sentence that Charles Tiefer referred to which seems to limit its application.

And in addition to the distinctions which we have heard, if you think about the consequences of a wrong decision in Chadha, there is judicial review and one guy is hurt. In the nuclear war there is no potential for judicial review and, my God, the consequences. It seems to me that the Court faced with that is bound to look again. I don't know that that produces a different result. John Moore may be right that it may not produce a different result. But it does seem to me that the analysis ought to be a little bit different.

My second point is your bill could say first the President is required to report to this leadership committee before he uses nuclear weapons first. Just a reporting requirement as with the intelligence committees would be one way to go.

I don't see that that would be—I don't see any constitutional problems with that.

MR. BRAND: That's what he violates now in the War Powers Resolution. He doesn't report. They told him to report by law, and he doesn't do it.

MR. BUNN: Well, he files something and says it's not a report, and we can debate that.

Unlimited Appropriations Barred

MR. RAVEN-HANSEN: I mentioned at the end of my comments this morning the two-year limitation on appropriations for standing armies. Obviously after two years expire if they don't reappropriate there is no money for standing armies, raising and supporting armies generally or the governance and regulation of the armed forces generally. There are a whole series of checks which would operate, and historically could have operated effectively, to constrain the President even if starts under the sudden attack power, if there is one.

Now, if you accept the factual assumption that the first use of nuclear weapons imposes an enormous risk of prompt escalation, then none of these historical checks are effective at all. The entire kind of long-term structure that the framers designed for the control of war collapses. Everything is decided in 24 hours and there is no day after.

In these circumstances, isn't there a constitutional authority for Congress to design a new check so long as it is the least intrusive check they could come up with on the President in this instance? Since the proposed check allows him to determine, after the committee has voted, whether he wants to act on an approval, and since it, in fact, delegates authority to him that some would argue he doesn't have to begin with, isn't it the least intrusive check? And isn't it within the necessary and proper clause in these unusual circumstances of the ineffectiveness of every other check?

I cite in support of the notion of new checks the tapes case, United States v. Nixon, the GAS case involving presidential materials, and at least dictum in the Fitzgerald case, where the Court declined to create a new traditional check because they thought that impeachment and the electability of the President were sufficient checks on his abuse of powers vis-a-vis employees.

MR. TIEFER: I would express agreement that the absence of alternative checks is in many respects fundamental to why one can have a provision like that. When I am speaking of the history of 40 years of concurrent resolution disapprovals in the area of broad war power delegations it was partly because, even in the conventional war sphere, the number of checks that the Congress has on the President's activity are vastly minimized compared to the normal ability to check abuse.

I think the Vietnam war is evidence of that. It took a large number of years for a national consensus to make itself felt against presidential resistance, which in any other context would have been felt much sooner.

I want to address the notion that the Supreme Court logic in Chadha is so automatically sweeping and conclusive that it must apply to this statute and that a new opinion must be written by the Supreme Court before we know otherwise. There was, before the Supreme Court's decision, a very similar decision by Judge Wilke of the D. C. Circuit striking down a legislative veto in the FERC case, the one that was summarily affirmed that Stan Brand referred to.

Judge Wilke's reasoning was just like the Supreme Court's—the presentment clause, bicameralism, sweeping. But Judge Wilke saw absolutely no inconsistency between reasoning through it that way and including this in his opinion. He adds, citing the War Powers Resolution:

"Congress has often combined its delegation of foreign affairs authority to the Executive with provisions for disapproval of actions by concurrent resolution. As with the veto in the reorganization statute, the constitutionality of these provisions has not been resolved. The foreign affairs veto presents unique problems since in that context there is the additional question of whether Congress or the President, or both, have the inherent power to act." Now if that sentence had been in Chadha, we wouldn't even be debating here whether Chadha had settled the matter because it would have been expressed. Chadha didn't settle the matter.

Chadha Logic and War Powers Sphere

The only difference is that Wilke put it in, in addition to the types of reasoning the Supreme Court had, whereas the Supreme Court left it out. Now that makes a difference. It makes a big difference, but it does not make a decisive difference. The logic was the same—presentment, bicameralism, sweeping—and that logic—as one of the finest judicial minds to focus on the problem saw it—that logic does not extend to the foreign affairs and war powers sphere.

MR. RAVEN-HANSEN: Miss Collier.

MS. COLLIER: I feel confident that there should be some kind of council that we could figure out that would serve the purpose at hand and wouldn't bring down the whole proposal under Chadha. But I did want to point out things Congress has done this year about restricting weapons use.

They prohibited the testing of ASAT unless the President made a certain certification that it wasn't violating the ABM Treaty. They have authorized research on SDI but prohibited the deployment of SDI unless Congress further authorizes it. And so they do have "says."

MR. TURNER: I would just like to pick up just briefly on two points. Ellen Collier pointed out that Congress has recently put some constraints on the testing of weapons and so forth, but that seems to me to be core raising and supporting armies. It doesn't interfere with the President's use of finished weapon systems or troops that are provided him as commander-in-chief, so I think those are interesting but I don't think they are dispositive.

Also, Peter made the point that if the existing checks don't work it may be constitutional to invent new checks. I would argue that, in the area of conducting campaigns,

Left to right: Alfred Rubin (Fletcher School), Ellen Collier (CRS), and Clark McFadden (Dewey, Ballantine, Bushby, Palmer and Wood)

the Founding Fathers did not intend that there be checks directly on the President.

Nukes And B-52's Constitutionally Comparable

Now it is my view that if we started using tactical battlefield nukes, or whatever you want to call them, the likelihood of the other side escalating and building into a big war is great. But that is not constitutionally significant, I don't think, because it is also true that if we start using B-52s the other side might start using something bigger than that. And that decision is better made by the President with his experts, his intelligence and so forth, than by a bunch of Congressmen.

MR. RAVEN-HANSEN: I think Jeremy would not be adverse to reformulating the statute so that it reached not just first use, but any other collossal escalation of the existing armament. I mean, the notion here of first use is an instance, but he also gives us an example of firebombing of Moscow during the Vietnam war or during a conventional attack in Europe.

There are other gross escalations that may transform the character of the war. We might win it, too, but it may be for Congress to make that determination.

We should be drawing to a close. But I would like to give Jeremy, I think, a few words in rebuttal if he wants, since we have critiqued his proposal all day.

DR. STONE: I do welcome the opportunity to sum up—thus to say a few things without any risk of successful contradiction!

One problem with this proposal is that some who know quite well whether this is really practical aren't sure it is legal, and some who know quite well that this is legal aren't quite sure it is practical. There are two cultures here dealing with this problem and the legal community is polarized in its attitudes on the rights of Presidents versus the rights of Congress.

So it is no accident that there is such a division here. I am surprised that there is such a good area of agreement, actually, considering the underlying predilections which are brought to it. I was really surprised at how far the opponents have to reach, from my point of view, to carry out a thoroughgoing opposition to the proposal.

They have got to say that the Congress couldn't even bar the first use of nuclear weapons, which is a surprise to me. I had always thought you could say "no money shall be spent to drop chemical weapons or biological weapons or nuclear weapons in any conflict in which they hadn't already been dropped" or any one of a number of other legal formulations, some given here, which would permit the Congress to say what it wanted done with a given class of weapons.

Second, I was surprised that anybody would allege that it was an operational decision for the President to use the first nuclear weapon—the fourth one, certainly, but not the first one. Instead, this is the most widely advertised non-tactical decision in the history of mankind.

As far as Chadha is concerned, I hadn't realized that there was a full-scale defense that distinguished Chadha from foreign policy issues. But do I have to drive such a large hole in the Chadha decision to get the FAS proposal? Mr. Tiefer has been brilliant in explaining his view, and he has persuaded me of it. But the simple thing that struck me about the Chadha case was that when the Court said that the one house veto was a "convenient shortcut" it meant that, in the fullness of time, Congress could have its way anyway, so why on earth should it be permitted this shortcut?

Committee Role: "Convenient" Or "Necessary"

But in cases like this one where it isn't a "convenient" shortcut but a "necessary" way to implement the power given to Congress, it seems a wholly different matter. None of the 200 statutes allegedly thrown out were time urgent.

Finally, the opposition takes the view that war already exists because it presumes a full-scale attack on NATO that chews up our armies. But we don't know exactly what the scenario will be. And even if the army is being chewed up, that it is not the same as a direct attack on the United States, even though much law, with not much precedent to draw on, may have often assumed so.

In many cases, the President will want this committee and would want to discuss the matter with the committee.

It is well understood by strategists that if conventional deterrence fails in central Europe there isn't going to be unanimity there for using nuclear weapons. The President is thus going to be faced with a very difficult political problem. He may be thinking the way President Kennedy was thinking, when he talked to Robert Kennedy in the Cuban missile crisis and said, if I don't solve this crisis I could be impeached. He is going to have political considerations impinging on his decisions about what is right for the country.

And these Presidents are going to want to have a committee to help share the responsibility with them. I firmly believe it.

In a world in which a special committee of Congress is getting close to special authority on covert operations, it is hard for me to believe that we are not drifting closer to a day in which Congress will prepare for national emergencies that involve overt operations-- overt operations much more likely to draw us into general war. Let's face it, Congress ought to know more about these possibilities and giving them responsibility would help them learn.

Does This Have Constitutional Color?

In calling for this conference, the Federation and the Lawyers Alliance were asking the honest question, could there be sufficient constitutional color for this proposal to honestly ask Congressmen whether they want constitutional practice to move in this direction?

To my mind now, if a presidential candidate wanted to shelter in this proposal—and tell conservatives that he had preserved the right of first use in Europe while he told the liberals and the doves that he had put a lock on first use—he could in good conscience and, under the Constitution, survive in this political shelter.

Or, as presidential candidates are wont to do, he could produce this as a middle ground between the first users and the non-first users. He could then, if elected, sell it to Congress. Because if a President proposed to share this responsibility, the Congressmen would be happy to take it.

So I see a route by which this is more than an academic enterprise. If it went through this route, maybe supporters of presidential power might be less upset. The President would have, after all, blessed it. In addition, it would have a useful educational effect on the Congress, as in fact the Nuclear Planning Group has already had with our allies.

And it would comport at least with the sense that many citizens have, that this is, after all, a pretty big decision and that it would be better if one could have a few more people involved in it. So I am encouraged by everything that has been said. The critical comments haven't been as strong as expected, and the supporting ones broader than expected. □

Anthony Sager, LANAC director

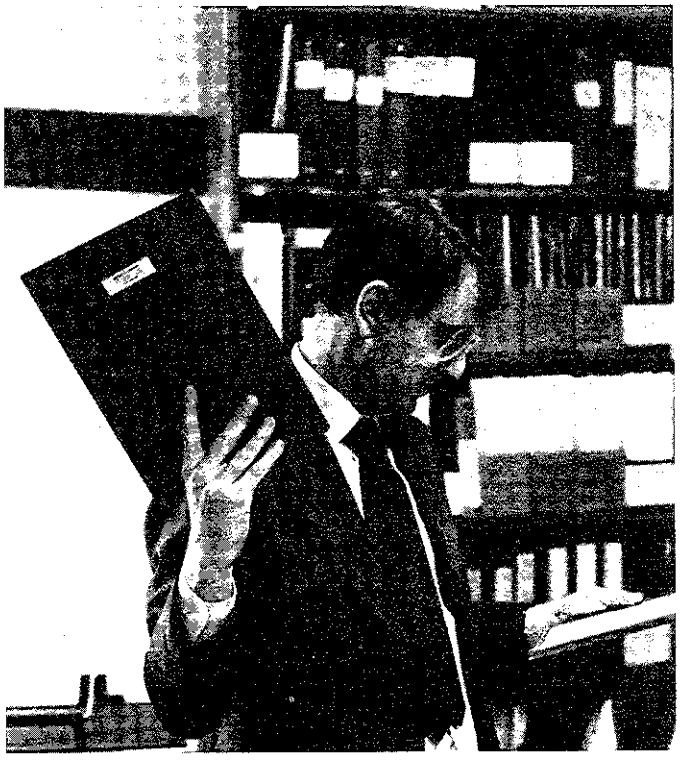
Left to right: Jeremy J. Stone, Robert Turner, Allen Ides

Sagan Given Public Service Award

At the annual Council meeting on December 14, FAS presented Carl E. Sagan with its 1985 Public Service Award. A plaque characterized Sagan as: "Most Visible Member of the Scientific Community of the Planet Earth". Sagan, who is, among many other things, an FAS Council Member, has used his influence as a scientist, and as a public personality, to importantly advance a number of goals shared by FAS members.

In the light of Sagan's cosmic interests, the Council could not forebear from embedding its sincere reflections and regards in a citation that had a science fiction flavor.

What follows therefore is a purloined, but otherwise accurate, message from an Earth-based Alien:



Carl Sagan

PUBLIC SERVICE AWARD—1985

Carl Segan is certainly the most visible spokesman of the scientific community of the planet Earth. Through the device they call television, fully five percent of the planet's four and one-half billion humans have actually seen his face and heard his words describing the nature of the Cosmos. His book relating these lectures is the best selling book on science in English, the planet's major language for such discussions.

Professor Sagan's efforts to sensitize his fellow Earthlings to the nature of their cosmic condition, coupled with the psychological relationship inspired by television, have given him unprecedented influence. He has used this influence to catalyze and disseminate a major study warning that warfare might produce totally disastrous climatic and ecological conditions even if a fraction of stockpiled atomic weapons were used. He has championed efforts to prevent the militarization of the near space area around the planet.

As part of his efforts to prick the tribal conscience, he has pioneered in reaching out to other species via primitive messages on interplanetary and interstellar craft. He is also a distinguished scientist.

As a consequence of his international exposure, Sagan has ever greater potential for leading humans away from destruction. All things considered, therefore, our researches suggest that, if any Earthling is to be seized by our galactic scouts, as an intermediary, hostage, and spokesman, Sagan would almost certainly be the most plausible and effective, the only other choice for attracting real attention being an Italian actress Gina Lolobrigida who has reached more people but in a less intellectual way.

This information is deemed highly reliable, having been provided by the Federation of American Scientists, an organization containing one-quarter of mankind's greatest scientists and one which is sworn to the same goals pursued by Sagan.

Signed: XZDWA; Galactic Resident Agent in Hiding, Planet Earth ☐

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