

## II. MICHAEL TIGAR

### A. Introduction

Nearly twenty years ago, I wrote an article entitled *Judicial Power, the "Political Question Doctrine," and Foreign Relations*.<sup>77</sup> I wrote in the shadow of significant military activity in Vietnam, and the incursion into Cambodia. I asked what, if any, role the Constitution required, or permitted, the federal judiciary to play in finding, declaring, and enforcing the rules of domestic and international law

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75. 1 W. GOLDSMITH, *supra* note 70, at 376-77. Commodore Dale described the circumstances in a letter to the Secretary of the Navy written shortly after their occurrence, and enclosed a copy of the action report of *Enterprise's* commanding officer, Lieutenant Andrew Sterrett. See Letter of Commodore Dale to the Secretary of the Navy (Malta Harbor, August 18, 1801), including Copy of Letter from Lieutenant Andrew Sterrett to Commodore Richard Dale, dated on board the United States' schooner *Enterprise* (At Sea, August 6, 1801), No. 165, ASP, *Foreign Relations II*, 360, 7th Cong., 1st Sess. (1801).

76. Jefferson informed Congress of the Dale mission in his First Annual Message to Congress, December 8, 1801. See 11 ANNALS OF CONG. 11 (J. Gales ed. 1801), reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 314 (J. Richardson rev. ed. 1908).

77. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135 (1970).

that limit military action by the executive branch.<sup>78</sup> Today we live in the shadow of other conflicts. Therefore, we must once again measure the roles of the executive, legislative, and judicial branches in the areas of foreign and military affairs.

In the years following the publication of my article, Presidents representing both of our nation's political parties have claimed the unreviewable power—a power that the Constitution seems to forbid—to take action, and then have justified that action by invoking a vaguely defined concern for national security and a theory that the Court ought to keep its hands off. For example, President Nixon sought to justify warrantless domestic electronic surveillance.<sup>79</sup> President Carter made a more extensive claim in the context of alleged espionage.<sup>80</sup> The Reagan administration has taken the argument several steps further, claiming a broad immunity from both congressional and judicial scrutiny of its actions.<sup>81</sup>

There are three questions that I want to address: First, what role does the Constitution assign to the judiciary in the conduct of foreign and military affairs? Second, what are the sources of law that the judiciary might apply in its sphere of competence? Third, what are the implications of these conclusions in today's international situation? The basic theme of my 1970 article was that the political question doctrine is all too often a judicial code word for avoiding a judicial duty to protect litigants from unlawful exercises of executive power.<sup>82</sup> Unfortunately, all too often that definition holds true today.

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78. *Id.* at 1147-52, 1167-78. See Henkin, *Is There a "Political Questions" Doctrine?*, 85 YALE L.J. 597 (1976) (concluding political question doctrine is "deceptive packaging").

79. *United States v. United States District Court for the Eastern District of Michigan* (Keith), 407 U.S. 297, 303, 320-21 (1972) (18 U.S.C. § 2511(3) does not confer power on President to conduct warrantless electronic surveillance based on national security grounds, and the Fourth Amendment requires prior judicial approval for Executive to conduct domestic security surveillance.).

80. See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *appeal after remand*, 667 F.2d 1105 (4th Cir. 1981), *cert. denied*, 454 U.S. 1144 (1982). The Fourth Circuit held that the "foreign intelligence" exception to the Fourth Amendment permits warrantless electronic surveillance so long as (1) the object of the surveillance is a foreign power, its agent, or collaborators, and (2) the surveillance is primarily for foreign intelligence reasons. When the investigation becomes criminal, however, a warrant is then required. *Id.* at 915-16.

81. See *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987); *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *aff'd in part, rev'd in part sub nom.*, *Boos v. Barry*, 108 S. Ct. 1157 (1987); *Von Avlock v. Smith*, 720 F.2d 176 (D.C. Cir. 1983). As to the objections to Congressional scrutiny, see *United States v. Lavelle*, 751 F.2d 1266 (D.C. Cir. 1985). See also Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 AM. J. INT'L L. 854-77 (1986); Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L. REV. 683, 711-12 (1984).

82. Tigar, *supra* note 77, at 1165-67.

### B. *The Constitution, Foreign Affairs, and the Judiciary*

In *Marbury v. Madison*,<sup>83</sup> Chief Justice Marshall acknowledged that some executive acts are beyond judicial review.<sup>84</sup> Since that dictum was pronounced, Presidents and judges have tussled about its meaning. In *United States v. Burr*,<sup>85</sup> however, Chief Justice Marshall made it clear that the President was not immune from the judicial process.<sup>86</sup> Marshall's opinion in *Burr* formed the cornerstone of Dean Wigmore's treatment of executive privilege,<sup>87</sup> and is an implicit term in arguments about the role of the rule of law in matters of state.

Harry Truman thought that he could seize the steel industry and run it during the Korean conflict because he was the President, there was shooting in Asia, and the steel industry was threatened with a shutdown.<sup>88</sup> The Supreme Court, however, had no trouble spelling out some truths about constitutional governance. First, Presidents must obey the law.<sup>89</sup> Second, in our society, the laws are not silent,

83. 5 U.S. (1 Cranch) 137 (1803).

84. *Id.* at 165-66.

85. 25 F. Cas. 30 (C.C.W.D. Va. 1807) (No. 14,692d) (cited with approval in *United States v. Nixon*, 418 U.S. 683 (1974)).

86. *Id.* at 34.

87. 8 J. WIGMORE, EVIDENCE §§ 2369-79 (McNaughton rev. ed. 1961 & Supp. 1987).

88. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

89. Speaking for the Court, Mr. Justice Black delineated the President's role in the "law life" of our Nation with succinctness. He stated:

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. . . . In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute. . . . The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

*Id.* at 585-88. Mr. Justice Frankfurter, at least on this point, phrased it somewhat more bluntly:

'The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress see fit to leave within his power.' The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution give essential content to undefined provisions in the frame of our government.

*Id.* at 610 (Frankfurter, J., concurring) (quoting Mr. Justice Holmes in *Myers v. United States*, 272 U.S. 52, 177 (1926)).

Mr. Justice Clark, in his concurrence, concluded that:

[W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis;

even in times of war.<sup>90</sup> Third, the judiciary has the power to declare the law, regardless of who the parties are, when a real case or controversy requires such a declaration in order to decide who wins and who loses.<sup>91</sup> Recently, a majority of the District of Columbia Circuit, sitting en banc, echoed these principles when an American citizen sued the Secretary of Defense because the United States Government had taken over his land in Honduras to help mount covert military operations in Central America.<sup>92</sup>

These cases reflect a proper judicial attitude towards executive claims of unreviewable power to conduct foreign and military policy. After all, some who opposed the adoption of the Constitution did so because the executive branch appeared to possess too much unfettered power. In the Virginia debate, Patrick Henry wondered whether a lawless President would really obey the Supreme Court, or whether he would use his power as Commander-in-Chief to defy it.<sup>93</sup> Similarly, many people may recall that Abraham Lincoln, as a Congress-

but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation.

*Id.* at 662.

Mr. Justice Burton also concurred based upon the President's failure to follow the congressionally prescribed procedures. *Id.* at 660. Mr. Justice Jackson's three bases of presidential authority are discussed *infra* in text accompanying note 193.

90. Mr. Justice Black phrased the second truth as follows:

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. . . . Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

*Youngstown*, 343 U.S. at 587.

91. *Id.* at 583-84. Mr. Justice Frankfurter was more explicit on this point:

To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action.

*Id.* at 596.

92. *Ramirez de Arrellano v. Weinberger*, 724 F.2d 143 (D.C. Cir. 1983), *rev'd and remanded*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (The destruction of a United States citizen's Honduran cattle ranch by construction of United States military base presented justiciable case, and the act of state doctrine did not bar judicial relief.), *vacated and remanded for reconsideration*, 471 U.S. 1113 (1985) (mem.) (vacated and remanded in light of enactment of Pub. L. No. 98-473, 98 Stat. 1884, 1893-1894, which provided compensation for Americans in Honduras whose property was taken by United States government action).

93. 3 J. ELLIOT, *THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787* 59 (3d ed. 1941) [hereinafter *ELLIOT'S DEBATES*] (remarks by Mr. Henry at the Virginia ratification convention, June 5, 1788), *quoted in Tigar, supra* note 77, at 1172.

man from Illinois, inveighed against the idea that the President could make himself like a king, "involving and improvising" the people in war.<sup>94</sup> Patrick Henry's concern, whether one agrees with it or not, expresses a contemporaneous understanding that the original purpose of the judicial branch was to ensure that the laws were faithfully executed.

Of course, Congress was also empowered to restrain foreign military activity through the control of appropriations,<sup>95</sup> declaration of war,<sup>96</sup> and grant of letters of marque and reprisal.<sup>97</sup> In addition, the Senate's power of concurrence in treaties<sup>98</sup> gave it a role in shaping foreign policy, although sadly, some are arguing that the Senate can consent to a treaty without understanding what the executive branch thinks the treaty means.<sup>99</sup> Although the President may embark upon a course of foreign policy, or step down the road of foreign military adventure, however, the judiciary will presumptively have power to fashion some remedy when that conduct infringes upon a private right.

The opposition to this view, as expressed by the dissenters in *Arellano*,<sup>100</sup> is based on both factual and legal solecisms. *Arellano* did not involve a presidential decision to respond to a sudden attack, so the hypotheticals conjured out of such imaginings by the dissenters exult drama over common sense. The dissenters went on to question why non-elected judges should be telling an elected President that he was trampling private rights in his march towards a military objective.<sup>101</sup> The answer is plain in the Constitution's text, and in the "law life" of the nation. The text recognizes that war is so calamitous an event, for both public and private interests, that the President, alone, is not supposed to propel us into one. Justice Story said as much in his *Commentaries on the Constitution*.<sup>102</sup> Our national experience

94. U.S. CONST. art. I, § 8, cls. 1, 12.

95. U.S. CONST. art. I, § 8, cl. 11.

96. *Id.*

97. Goldman, *The President, the People and the Power to Make War*, 21 AMERICAN HERITAGE, April, 1970, at 28, reprinted in 3 R. FALK, *THE VIETNAM WAR AND INTERNATIONAL LAW* 489 (1972).

98. U.S. CONST. art. II, § 2.

99. For a discussion of this dangerous "constitution busting" tactic, see Glennon, *Interpreting "Interpretation": The President, the Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U.C. DAVIS L. REV. 913 (1987).

100. 745 F.2d at 1545-74.

101. *Id.* at 1546-49 (Tamm, J., dissenting); *id.* at 1561-62 (Scalia, J., dissenting).

102. See J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 1166, 1171, at 95-97 (3d ed. 1858); see also THE FEDERALIST NOS. 24-26 (A. Hamilton) (G. Carey & W. Kendall ed. 1966); Comment, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968); Comment, *The President, the Congress, and the Power to Declare War*, 16 U. KAN. L. REV. 82 (1967).

demonstrates that the rush towards improvident armed conflict is often associated with jingoistic rhetoric, systematic assaults on the right of dissent, and a public atmosphere of intolerance.<sup>103</sup> Non-elected judges are supposed to restrain such things in the service of the countermajoritarian values built into the Constitution by the framers.<sup>104</sup>

### C. *The Sources of Law*

What do I mean by "law" in this context? Article VI of the Constitution makes supreme the "Constitution," "laws" and "treaties" of the United States.<sup>105</sup> I am sorry to have to say something that sounds tautological, but the point appears to have been lost in recent days: Military activity in violation of "laws" of the United States is unlawful.

I am not talking solely about the so-called Boland amendment,<sup>106</sup> but also about the network of laws that limit the use of United States funds, territory, and personnel to conduct hostile actions against countries with whom we are at peace.<sup>107</sup> Nothing in the text, history, or authoritative interpretation of the Constitution gives the President a shred of justification for violating, or purporting to authorize violation of, such laws. To argue the contrary is to sunder the most basic understanding upon which the Constitution was ratified: namely, that the states party to this compact were not installing as head of state a king by some other name.<sup>108</sup> Certainly, then, these parties did not intend to create a "king" free to disregard the law. As Lord Coke explained in *Dr. Bonham's Case*,<sup>109</sup> the law stands indifferent between sovereign and citizen and binds them both.<sup>110</sup> Military activity under-

103. See generally 1 T. EMERSON & D. HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 254-338 (2d ed. 1958).

104. For a more extended discussion of this question, and a detailed response to such authors as Alexander Bickel, who rather derided the idea of a countermajoritarian institution asserting itself in this way, see Tigar, *supra* note 77, at 1136.

105. U.S. CONST. art. VI.

106. The Boland amendment provisions have appeared in various statutes. See, e.g., Further Continuing Appropriations Act, 1983, Pub. L. 97-377, § 793, 96 Stat. 1830, 1865 (1982). The Congressional Research Service compiled a legislative history and summary of the "Boland amendments" through the summer of 1987, and the report was subsequently published in the Congressional Record. See 133 CONG. REC. H4585-4987 (daily ed. June 15, 1987); see also H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 395-410 (1987) (Chapter 26 of the Iran-Contra Report, "The Boland Amendments and the NSC Staff").

107. Relevant statutes are legion. Some examples include the Neutrality Act provisions codified at 18 U.S.C. §§ 956, 959, 960, and the War Powers Resolution provisions codified at 50 U.S.C. §§ 1541-1548. See J. STORY, *supra* note 102, §§ 1163-82, at 94-102.

108. See authorities cited *supra* notes 97 & 102.

109. 77 Eng. Rep. 646 (1610).

110. *Id.* at 652 ("[W]hen an Act of Parliament is against common right and reason, or

taken without affirmative congressional approval may also be unlawful, depending on one's interpretation of the Constitution.<sup>111</sup> I have defended the view that all presidential military activity, other than repelling a sudden attack, requires congressional authorization, at least if the activity involves what are, under international law, acts of war.<sup>112</sup>

Treaties, such as the United Nations Charter,<sup>113</sup> and agreements on arms limitation,<sup>114</sup> also define the limits of lawful executive power. But there is another, long recognized source of "law" in the United States—namely, customary international law. For example, when the Spanish-American War broke out, the United States Navy put a blockade around Cuba. Two Cuban fishing vessels, returning with their cargoes of fish, were seized by the Navy, claimed as prizes of war, and taken to Key West, Florida. There, they were forfeited to the United States by judicial order. In *The Paquete Habana*,<sup>115</sup> however, the Supreme Court reversed the seizure order, holding that the rules of customary international law were part of the "laws" embraced within the supremacy clause.<sup>116</sup> Under customary international law, fishing vessels peaceably engaged in their trade were exempt from seizure as prizes of war.<sup>117</sup> Therefore, the Navy was

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repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."); see Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

111. The most complete collection of material from the Vietnam War era is the series of volumes edited by Richard Falk, *supra* note 97. More recent military incursions have added urgency to the debate, but not much to the scholarship in the area.

112. See Tigar, *supra* note 77, at 1170 nn.152-54. See generally authorities cited in R. FALK, *supra* note 97.

113. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (entered into force October 24, 1945).

114. See, e.g., Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, 23 U.S.T. 3435, T.I.A.S. No. 7503 (entered into force Oct. 3, 1972); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, February 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337 (entered into force May 18, 1972); Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (entered into force March 5, 1970); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, August 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (entered into force October 10, 1963).

115. *The Paquete Habana*, 175 U.S. 677 (1900).

116. *Id.* at 700. See Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321 (1985); see also Agora, *May the President Violate Customary International Law?*, 81 AM. J. INT'L L. 371 (1987) (comments by Kirgis, D'Amato, Paust); Agora, *May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986) (comments by Charney, Glennon, and Henkin); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

117. *The Paquete Habana*, 175 U.S. at 686.

ordered to restore the proceeds of sale to the vessel owners, with damages and costs.<sup>118</sup>

Since 1900, international law has undergone enormous change. Its content has grown to embrace new rights of persons, entities, and nations.<sup>119</sup> Most courts have agreed that individuals as such are beneficiaries of rights granted by international law, and may enforce such rights in judicial proceedings.<sup>120</sup> Some judges, such as Judge Bork in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*,<sup>121</sup> have doubted that individuals, who are not subject to obligations under international law in their individual, as opposed to official, capacities, may enforce such rights. Such views, however, are inconsistent with a growing international consensus.<sup>122</sup>

118. *Id.* at 714.

119. *See, e.g.*, African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58 (not yet in force); Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (Organization of American States (OAS) Convention) (entered into force Oct. 20, 1976); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, Jan. 7, 1970 (entered into force June, 1978); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. A/777 (1948); Articles 1 and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (entered into force Oct. 24, 1945). *See also* Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, § 511, 101 Stat. 1329, 1329-155 (prohibiting expenditure of funds to aid any government's effort to "repress the legitimate rights of the population of such country contrary to the Universal Declaration of Human Rights.").

120. *See* Tigar, *The Foreign Sovereign Immunities Act and the Pursued Refugee: Lessons from Letelier v. Chile*, 1982 MICH. Y.B. INT'L LEGAL STUD. 421, 426-27; *see also* Bassiouni, *International Criminal Law and Human Rights*, in 1 INTERNATIONAL CRIMINAL LAW 15 (M.C. Bassiouni ed. 1986).

The principle that international law may of its own force confer individually enforceable rights has long been a part of American law. *See* *United States v. Rauscher*, 119 U.S. 407 (1886) (violation of the rule of specialty under an extradition treaty violates the rights of both the requesting state and the prisoner).

121. 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring).

122. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (Deliberate torture under color of official authority violates international norms of human rights behavior so that Alien Tort Statute (28 U.S.C. § 1350) provides jurisdiction over alleged torturer found and served with process within United States borders, regardless of nationality of parties.); *see also* *Government of Costa Rica (In the Matter of Vivian Gallerdo et al.)*, No. G101/81, 2 Inter-Am. Ct. H.R. 12 (1982) (Decision of Nov. 13, 1981) (Determination of whether death of citizen in prison constituted human rights violation was responsibility of Inter-American

In sum, Presidents and their agents—including military commanders and troops—are subject to the commands of customary international law that limit violations by one nation of another nation's sovereignty and territorial integrity, and that limit interference in another nation's internal affairs. My summary of the sources of law is quite independent of my earlier discussion of the proper role of the judiciary. Even if one believes that judges should not interfere with particular kinds of executive decisions, the rules of law are still there, and a President's obedience to them is at least a function of the oath of office.

Let me make no mistake about my meaning. I tremble for my country when I see the President proclaim that he and his staff are not bound by congressional restrictions on how appropriated funds are spent, even though article I of the Constitution clearly gives the Congress the power over the public monies.<sup>123</sup> Similarly, the supremacy clause makes binding on the United States those treaties to which it is a party, including those provisions that accord jurisdiction over disputes to international tribunals. The President, as with the spending of the public monies, cannot choose to ignore or deride these provisions. Everyone who takes the supremacy clause seriously must insist that the President not be permitted to pick and choose which parts of the Constitution, laws, and treaties he will obey.

For example, in *Nicaragua v. United States*,<sup>124</sup> the United States

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Commission on Human Rights.); *Case of X v. United Kingdom*, 62 Eur. Ct. H.R. (ser. A) (1981) (scrutinizing procedures for confinement to mental institutions); *Golder Case*, 18 Eur. Ct. H.R. (ser. A) (1975) (European Convention creates right of access to courts and right to counsel); *Lawless Case*, 1 Eur. Ct. H.R. (ser. A) (1961) (Detention without trial under unusual circumstances did not violate Articles 5 and 6 of European Convention.). *But see* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring) (rejecting *Filartiga*, arguing congressional grant of jurisdiction did not create a cause of action, and concluding treaties do not confer privately enforceable rights unless treaty self-executing).

For a discussion of the issues raised by the erection of an international human rights standard, see HUMAN RIGHTS, AN INTERNATIONAL AND COMPARATIVE LAW BIBLIOGRAPHY (J. Friedman & M. Sherman eds. 1985); HUMAN RIGHTS IN INTERNATIONAL LAW (T. Meron ed. 1984); E. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1973); L. SOHN & T. BUERGENTHAL, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973); THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (L. Henkin ed. 1981); THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS (K. Vasak ed., P. Alston trans. ed. 1982); Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231 (1982); Henkin, *International Human Rights as "Rights,"* 1 CARDOZO L. REV. 446 (1979); Lillich & Paxman, *State Responsibility for Injuries to Aliens Caused by Terrorist Activity*, 26 AM. U.L. REV. 217 (1976-1977); Schwelb, *The International Court of Justice and the Human Rights Clause of the Charter*, 66 AM. J. INT'L L. 337 (1972); Watson, *Legal Theory, Efficacy and Validity of Human Rights Norms*, 1979 U. ILL. L.F. 609.

123. U.S. CONST. art. I, § 8, cls. 1, 12; art. I, § 9, cl. 7.

124. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*

attempted to revoke its long standing acceptance of jurisdiction by the International Court of Justice. Laudably, despite the opening provided by the United States' continued insistence that the International Court of Justice lacked jurisdiction, the court fulfilled its duty by accepting the case, investigating the facts, finding the law, and ruling on the merits.<sup>125</sup> By a lopsided majority, the court proclaimed that the United States' actions violated settled rules of international law, regarding the conduct of nations.<sup>126</sup>

The President and his advisers first derided, then ignored, the Court's decision<sup>127</sup>—a defiance that sets them against the supremacy clause, and weakens an already fragile, though decisively important, participant in the quest for peace and freedom in the international community. I would add that in grasping at the prerequisites of the imperial presidency, the incumbent has sought to curb dissent by imposing far reaching curbs on free access to governmental information, all in the name of national security, and supposedly insulated from meaningful judicial review.<sup>128</sup>

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(*Nicar. v. U.S.*), 1986 I.C.J. 14 (Judgment on Merits of June 27, 1986), *discussed in Highet, Evidence, the Court and the Nicaragua Case*, 81 AM. J. INT'L L. 1 (1987); *see also Maier, Appraisal of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (1987) (comments by Briggs, Boyle, Christenson, D'Amato, Falk, Farer, Franck, Glennon, Gordon, Hargrove, Janis, Kirgis, Moore, Morrison, Reisman, Teson).

125. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, at 17, 22-26 (Judgment on Merits of June 27, 1986). On November 26, 1984, the court found that it had jurisdiction and accepted the Nicaraguan application. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Judgment of Jurisdiction and Admissibility of Application of November 26, 1984). In response, the Agent of the United States, on January 18, 1985, informed the court that the United States would no longer appear. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1985 I.C.J. 3 (Memorial Order of Jan. 22, 1985). Although expressing its regret, the court did not refuse to further hear the case. The court recalled to the United States:

Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. In the normal course of events, for a party to appear before a court entails acceptance of the possibility of the court's finding against that party. Furthermore the Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to "reserve its rights" in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision.

*Nicaragua*, 1986 I.C.J. at 23-24.

126. *Nicaragua*, 1986 I.C.J. at 146-50.

127. *See Highet, supra* note 124. *See also Maier, supra* note 124.

128. *See, e.g., Federal Polygraph Limitation and Anti-Censorship Act, 1984: Hearings on H.R. 4681 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the*

### D. *Implications for Today*

More years ago than I care to remember, I studied with the French conservative political theorist Bertrand de Jouvenel. I was eager to judge political decisions of the past and present as right or wrong by my perhaps dim, but always unwavering, lights. Professor de Jouvenel reminded me that the most enduring lesson of great controversies, such as Truman's steel seizure and the commitment of troops to the Korean conflict, was that in our passion to see a decision made in a particular way, we too quickly forgot our most cherished convictions as to who was competent to make that decision.

Now, as then, that is the first lesson. Agreement or disagreement with the policies of a particular President cannot blind us to the duties of the legislative and the judicial branches to play their important parts. It is no answer to say, "The President is elected to make these decisions." The members of Congress are elected for this purpose as well. And, as the very structure of the Constitution makes clear, the non-elected judges are put in place precisely to enforce constitutionally based principles of supremacy of law, even when those principles are rooted in countermajoritarian values.

A corollary principle is that the political question doctrine, invoked at times by the courts as a barrier to deciding the legality of foreign and military affairs decisions that touch on private rights, is unprincipled and illegitimate. I argued this in 1970 and am more than ever convinced of this fact by the laudatory terms in which the doctrine is described by its adherents. They like it precisely because of its "flexibility," although they concede that its "contours are murky and uncertain."<sup>129</sup> For me, this flexibility and uncertainty translates in practice into an unfettered judicial discretion to duck the duties and surrender the powers that article III clearly confers.

The second lesson is this: In the criminal law of Texas, if you have suffered an indignity or endured a threat, you can go home, stew about it for a while, return to the scene hours, or days, or weeks later, blow away your antagonist, and still have a good defense to a murder charge.<sup>130</sup> In the 19th-century, it was sort of like that for big powers.

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*Judiciary*, H.R. REP. NO. 123, 98th Cong., 2d Sess. 16 (1984) (statement of Michael E. Tigar, Raybourne Thompson Centennial Prof. of Law, Univ. of Texas, Austin).

129. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring).

130. While Texas adheres to the requirement that only "the immediate influence of sudden passion" will reduce a homicide offense from murder to manslaughter, TEX. PENAL CODE ANN. § 19.04(a) (Vernon 1974), that is not the end of the story. The accused will generally be entitled to an instruction that he had the right to carry arms "to the scene of the difficulty and seek an explanation." See *Ruiz v. State*, 747 S.W.2d 535, 538 (Tex. Ct. App. 1988); *Mathews v.*

If William Randolph Hearst and Teddy Roosevelt thought we should go down into some small Latin American or Caribbean country, avenge some insult, grab some territory, and further our theory of government, well, that was the way it was. But in today's world, we are all—to my regret, at times—living a little closer together and the armament is a little more powerful.<sup>131</sup>

In the wake of World War II, the dozens of newly independent nation-states asserted their rights to develop along their own lines, perhaps in ways that we have disapproved. They are reshaping not only domestic politics, but also the landscape of international law. The principles of international law are coming to dictate what common sense should have told us: The new age requires more, and not less, restraint in foreign and military policy. It requires more, and not less, attention to the principles of domestic and international law, which the Constitution makes the supreme law of the land. That is why we must pay renewed attention to the law and its enforcement. That is why the Reagan administration has failed America.