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# PI SIGMA ALPHA REVIEW

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# THE PI SIGMA ALPHA REVIEW

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# **THE PI SIGMA ALPHA REVIEW**

**Volume VII**

**Spring 1989**

**EDITOR'S ACKNOWLEDGEMENTS i**

**NOTES ON THE CONTRIBUTORS ii**

## **WHY THE INITIATIVES FAILED: ELECTORAL TRENDS AND THE FEMALE VOTE**

**Matthew Holland**

**1**

## **INDO-PAKISTANI NUCLEAR PROLIFERATION AND THE U.S. RESPONSE: A POLICY PROPOSAL**

**Mark Freeman**

**17**

## **THE "PRIMACY" OF THE FIRST AMENDMENT: DOES IT HAVE A JUSTIFICATION IN NATURAL LAW, HISTORY, AND DEMOCRACY?**

**James G. McLaren**

**65**

## **CITIZENSHIP'S LEGAL FOUNDATIONS: CONVENTION AND NATURAL RIGHTS**

**Kif Augustine**

**87**

## **COMRADES IN ARMS: CHINA AND VIETNAM, 1949-1979**

**Kristyn Allred**

**125**



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Katherine McLaughlin

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# WHY THE INITIATIVES FAILED: ELECTORAL TRENDS AND THE FEMALE VOTE

Matthew Holland

Three things seemed likely to Utah voters in the early summer of 1988: Michael Dukakis would be their next President, Ted Wilson would be their next Governor, and the 1988 Utah tax initiatives would pass with overwhelming support. But on November 8, 1988, Dukakis was glad he had a job in Boston, Wilson offered congratulations to a surprised Norm Bangerter, and the initiatives were defeated by the same margin with which they were originally favored to pass. There has been, and will continue to be, considerable discussion about the upsets of Dukakis and Wilson, but few are asking, "What happened to the initiatives?" Some answers to that question can be determined by analyzing the current theories about the politics of direct legislation, considering some new research on demographic factors that influenced this year's initiative election, and studying the various campaign tactics both sides used on this issue.

To place an initiative on the ballot, Utah State law requires that a petition be submitted with a number of signatures equaling ten percent of the vote for the last gubernatorial election in two-thirds of the counties. According to this formula, proposed petitions for the 1988 ballot needed about sixty thousand signatures. Last spring three initiatives - A, B, and C - were submitted with the necessary endorsements. Initiative A was a tax and spending limitation which would have lowered limited property taxes. Initiative B would have reduced income taxes and the taxes on sales, motor fuel, and tobacco to 1986 levels. Initiative C would have given tax credit to parents who wanted to send their children to private schools.

In June 1988 a KSL*Deseret News* poll conducted by Dan Jones and Associates (hereafter referred to as the Jones poll) reported that 56% of Utah residents (not necessarily registered voters) favored Initiative A, 23% opposed it, and 21% were undecided. According to the Jones poll, Initiative B had the best chance of winning: 58% said they were in favor, 34% were opposed, and 9% were undecided. The public seemed less enthusiastic about Initiative C, but it was still favored to pass, with a margin of 51% for, 41% against, and 9% undecided.

The question as to why the initiatives failed after starting with such great support is further complicated by an examination of the attitudes of the Utah electorate the day of the election. According to the KBYU Utah Colleges Exit poll (hereafter referred to as the KBYU poll) conducted the day of the election by Drs. David Magleby and Howard Christensen of Brigham Young University, 61% of voting Utahns believed property taxes were too high, only 29.5% believed taxes were about right, and a smattering of others either felt they were too low or did not have an opinion.

The KBYU poll indicated at least 40% of the voters in Utah felt "tax cuts were good for other states," 30% disagreed with that statement and 29% did not know. Results of the poll also showed a vast majority of the voting public -- 92% -- believed there was at least "some" to a "great deal" of waste in Utah government. Probably the major argument of the groups supporting the initiatives was that this legislation was needed because bureaucrats were squandering public funds.

Some have tried to explain the defeat of the initiative process. However, the KBYU poll seems to disprove that theory. A question on the poll defined the process as one where "citizens can write laws which voters can reject or pass thus bypassing

## WHY THE INITIATIVES FAILED <sup>3</sup>

the legislature," and asked voters how they felt about it. A clear majority -- 65% of the voters in Utah -- felt the initiative process was a "good thing," only 12% thought it was a "bad thing," 8% said it made "no difference" and 13% said they "did not know."

Despite these general attitudes that the process is good, taxes are too high, there is waste in government, and tax cuts were good for other states, two-thirds of Utah voters cast ballots against the tax initiatives. To determine why the initiatives failed in the midst of circumstances that seemed so favorable to their passage one should probably start with a brief study of the current hypothesis about voting behavior on direct legislation. Dr. David Magleby, professor of Political Science and Public Opinion at Brigham Young University, has done extensive research and writing on the topic of direct legislation. I will identify several determinants that Dr. Magleby suggests influence the vote on ballot propositions and show how Utah's 1988 initiative election and campaign support his thesis.

First of all, "there is a predictable movement from general support for the proposition in the early campaign to its rejection as the campaign proceeds" (Magleby 1984, 170). Professor Magleby's reasoning is that at the start of the campaign "most voters are willing to state a preference for or against a proposition even if they know very little about it" (1984, 170). Therefore an issue that is currently popular -- like tax cuts -- has an early appeal but in time as the campaign moves on and the shortcomings and problems of the initiative become more and more evident, support wanes. The 1988 initiatives in Utah followed that natural trend of early appeal, followed by steadily decreasing support which is characteristic of most initiatives.

Part of the reason for such a high frequency of "mind-change" on the issue is because voters on

propositions tend to be "less sure of their voting intentions, less knowledgeable about the proposition contests, and probably more susceptible to campaign appeals" (Magleby 1984, 172). As a result they usually vote for the side "that spends the most money" (Magleby 1984, 145), is "endorsed by the media elite" (Magleby 1984, 145), and "best defines the issue" (Magleby 1984, 168).

Mickey Gallavin, an advertising consultant with Harris and Love Inc. Advertising hired by Tax Payers for Utah (the group which mobilized to defeat the initiatives), estimates that approximately \$350,000 was spent on the campaign against the initiatives. Mills Crenshaw, a local radio talk show host and leading member of the Tax Limitation Coalition (which fought for passage of the initiatives), estimates their group probably spent around \$50,000. These figures vary somewhat depending on the source of information, but it is safe to say that the anti-initiative group outspent the proponents of the initiatives by at least three to one.

Tax Payers for Utah almost had a monopoly on media and elite endorsements. According to Mickey Gallavin, the campaign strategy was that each week a well known public figure in Utah representing a particular organization would make a public announcement in opposition to the initiatives. Republican Senator Orrin Hatch, former Democratic Governor Scott Matheson, Salt Lake County Sheriff Pete Hayward and a host of other visible Utahns discouraged other Utahns to vote for the initiatives. The only noticeable public figure endorsements for the initiatives were from the above mentioned Mills Crenshaw and Merrill Cook, the Independent candidate for Governor. Neither could be considered two of the more conspicuous citizens of the state.

The principal news media in the state -- the *Salt Lake Tribune*, the *Deseret News*, the *Ogden Standard*

## WHY THE INITIATIVES FAILED <sup>5</sup>

*Examiner*, KSL television and radio, and KUTV television -- all publicly took a position in opposition to the initiatives. The only media publication to come out with an editorial opinion in support of the initiatives, according to Mickey Gallavin, was a newspaper in Manti, Utah. The amount of money spent, the quality and quantity of media opposition and the number of elite endorsements were undoubtedly keys to the success in defeating the initiatives.

According to findings from the KBYU poll, the opponents of the initiatives also did a better job at "defining the issue," and the side which can do that "usually wins" (Magleby 1984, 168). Several themes from both sides were publicized as a way of defining the issue. The Tax Limitation Coalition group accused the government of waste and mismanagement, which the KBYU poll showed most people agreed with to some degree. Their corollary to this accusation was that because there is so much waste, tax cuts would streamline the government and improve the economy. Therefore "prosperity follows tax cuts." According to the KBYU exit poll, 40% of the voters believed that idea but 47% did not.

Those fighting the initiatives realized that the majority of the electorate felt tax cuts in general were needed. Deciding they could not win by suggesting tax cuts per se would be damaging to Utah, they pushed the theme that perhaps some kind of tax cuts were necessary but these particular initiatives "go too far." The KBYU poll indicated that 63% of the voters believed this theme while 31% did not. Perhaps because of (or at least in addition to) their ability to outspend and gather more visible support than their opponents, those working to defeat the initiatives were more effective in convincing the public of their point of view.

These theories, facts and figures indicate a few

of the reasons the initiatives failed in 1988. However, results from the Jones and KBYU polls suggest that there were also some important demographic factors which influenced this election, the most notable of which was gender. In June 1988 the Jones poll showed that only 17% of women were planning to vote against Initiative A while 30% of men indicated they would vote against it. However, on November 5, 1988, just three days before the election, 68% of women, a decisive majority, said they would check a "No" on the initiatives and 57% of men anticipated they would vote "No" as well. This means that women voting against the initiatives increased by 50% whereas male support for the propositions increased by 17%. This pattern was consistent on all three initiatives, but it was more evident on A and B than it was on C. The younger voters (ages 18-34) demonstrated a similar phenomenon compared to the older age groups (although the frequency of change was not as substantial as it was for women, it was still significant).

It is also interesting to note that the Jones poll showed that demographics like income, party affiliation, ideology and education -- which are usually the most important influences on voting behavior -- did not make much difference on the initiative vote. In other words, in June 1988 a roughly equal majority of both Republicans and Democrats, conservatives and liberals, those who made over \$60,000 a year and those who make \$20,000, and college graduates and those with an eighth grade education were planning to vote for the initiatives. In November 1988 the same groups were equally opposed to the legislation. Why such a disparity, then, between men and women on this issue? This question demonstrates the utility of public opinion polls. With data from the KBYU poll it is possible to examine the similarities and



## WHY THE INITIATIVES FAILED <sup>7</sup>

differences of the influences on the voting behavior of both men and women.

According to the KBYU poll, 64% of male voters felt they paid a great deal of attention to the initiatives and 66% of women said they did as well. Thus men and women were equally attentive to the issue. An exact parity -- 49% -- of both male and female voters, said they felt that the tax cuts would make intrusions into state services. Men and women were fairly equal in how much they thought about the initiatives; 28% of men said they thought a great deal about the legislation and 23% of women said they did too. Both men and women agreed that television and newspaper were their most important sources of information on the initiatives. It seems that neither sex was quicker to make up their mind; roughly an equal number of men and women made up their minds on how they would vote on the initiatives a month before the election.

Despite these many similarities, women differed from men on several ideological stances, on the way they gathered information and on the way they were influenced by the various themes of the campaign. According to the poll a greater percentage of women would be willing to pay taxes to help finance higher wages for teachers. Figures show that 51% of women would support a tax increase for teachers' wages while just 42% of men would favor such an increase. It is possible -- and would be worth studying -- that in Utah more men than women pay the taxes for their family and as a result would tend to be more conservative in what they agree to raise taxes for. Perhaps women have a stronger maternal/domestic instinct and issues like education for their children are slightly more important to them than they are to men. Whatever the motivation, the idea of cutting back on education to save money does not appeal to women as much

as it does to men. Only 29% of women thought that current funding for education should be cut or stay the same whereas 46% of men felt such cuts would be appropriate. As far as a possible increase in spending for education was concerned, 61% of women would have supported it while only 47% of the male vote advocated such a step.

Women were slightly less trusting of the initiative process than men. About 61% of women felt that direct legislation was a good thing compared to 68% of men who felt it was a good thing. It would seem logical that those who distrust the initiative process would tend to vote against the initiatives. If this is the case it would influence more women than men.

While the majority of both men and women claimed that television and newspapers were their best sources of information on the initiatives, one-third of the women polled said that their most important source of information was word of mouth or some other source besides television, radio, newspaper, or voter pamphlet. Only 18% of men said that word of mouth or another source was their best source of information. The significance of these statistics becomes even more evident in light of the campaign strategy of those opposing the initiatives.

As I mentioned before, the side that defines the issue the best usually wins and the anti-initiatives group was the most successful in convincing the public of their point of view. The KBYU poll shows that the themes behind the campaign for the initiatives were less influential than the themes their opponents used; furthermore, the campaign for the initiatives was particularly ineffective with women.

One of the themes the proponents of the initiatives desperately tried to drive home was that "prosperity follows tax cuts." This idea went over fairly well with men, 47% of whom agreed that a reduction in taxes would fuel the economy.

## WHY THE INITIATIVES FAILED <sup>9</sup>

However, only 29% of the women that voted were convinced prosperity would come from tax cuts and 18% said they "did not know," whereas just 8% of men were undecided. This is perhaps another indictment against the effectiveness of the initiative campaign; they failed to convince a significant block of undecided voters of their position. On many of the themes there is a higher rate of indecision among women than men. Dr. Magleby suggest that where doubt or decision lurk, there is a greater tendency to vote against the initiatives and maintain the status quo (1984).

Another question on the KBYU poll asked the voter if they felt Utah schools were doing a good job. The advocates of the initiatives felt that if the voters could be convinced that Utah schools were doing a good job then cuts in funding would not seem so critical. Certainly few people would vote for cuts if they felt that Utah schools were doing a bad job and lacked the funds to improve. Almost 11% more men than women felt that Utah schools were doing a good job. Both men and women were about equal on the "don't know" response.

Another point the Tax Limitation Coalition tried to put across was that "tax cuts were good for other states," believing that if they could convince the voters of this the initiatives would pass. Again, more men than women agreed with this idea by a margin of 44% to 33% respectively.

A message the Coalition probably should have used more extensively, but for some reason did not, was that "tax cuts send a message to government." This would have been an effective argument because it would have pulled debate away from whether or not these particular initiatives were good or bad and moved it toward general consensus that taxes -- particularly higher taxes -- are unacceptable to the voting public. Even with the meager attempts of the Coalition to put this idea across to the public,

## 10      PI SIGMA ALPHA REVIEW

54% of men agreed with it. Women were not quite so sure the cuts would send such a message; only 37% thought that it would and 21% (versus 10% of the male vote) were undecided.

The single most effective campaign slogan of this campaign -- which happened to be generated by the opposition -- was that the initiatives "go too far"; 63% of the electorate agreed with that statement. This was also the only theme that women believed more than men by a rate of 65% to 60%. It is also interesting that this was one of the few issues where both men and women were well decided; very few of either sex checked the "don't know" response. Compared to the proponents of the initiatives, the opponents did a much better job at persuading the public -- and particularly women -- from an opposing or undecided point of view to their position.

These data from the KBYU poll indicate that in Utah, women seemed to have different attitudes from men about spending and education, often received their information from different sources than men did, and were more convinced by the anti-initiatives themes and less convinced by the pro-initiative themes than men were. Why?

According to consultant Mickey Gallavin, those working to defeat the initiatives "focused their campaign on women." He said that the reason for doing so was because polls showed that "most people defined this as an education issue more than anything else, and that women were generally more concerned with education than men." Because at the start of the campaign more women than men were voting for the initiatives, and research showed this legislation was being interpreted as an education issue (which women cared about more than men), the opponents saw that female vote as large and winnable.

The first step in their opposition strategy, according to Gallavin, was to get every organization

## WHY THE INITIATIVES FAILED<sup>11</sup>

that would be affected by these cuts -- from Project 2000 to the Chamber of Commerce -- to publicly announce their opposition to the initiatives and join forces with Tax Payers of Utah to defeat them. Three of the largest and most prominent groups they enlisted were the Parent-Teacher Association (PTA), the Utah Education Association (UEA), and the League of Women Voters, all three of which are predominantly female. Gallavin said his research showed that if they could get 90% of their own constituents, many of which were female, they could defeat the initiatives. By striving to win the votes of the members of these organizations they were focusing on female voters.

The next big push, and according to Gallavin the most effective, was the two-pronged effort of the PTA. Their first project was to break every city up into precincts and assign each member to a certain precinct, where they would visit every home at least two or three times until they spoke to someone face to face. Starting at the end of August and continuing right up through election day, these PTA members, armed with piles of pamphlets and the powers of persuasion, began to visit each home in their precincts to convince people of the damage they thought would be done to education in Utah if the initiatives passed. Though this is not conclusive, it would seem probable that because the majority of PTA members are women and because women are generally more free and flexible during the day, women would be going to house to house during the day and probably speaking to women that were home during the day. This, however, is only conjecture.

The PTA's next tactic was to devote their regularly allotted portion of time on "Back-To-School Night" to information about the initiatives. Each PTA representative was instructed not to tell parents how to vote on the initiatives but to inform

the parents as accurately as they could how that particular school would be affected by these tax cuts. Supporters of the initiatives were given -- and encouraged to take -- equal time to present their point of view. Sometimes this led to very heated debate, but more often than not, says Mickey Gallavin, the pro-initiative people failed to make an appearance or give an adequate argument at these meetings. Though statistics are not available, it would probably be a safe and important assumption to say that more women than men attend the "Back-To-School Night" sponsored by the PTA each fall.

The hypothesis that these efforts directly affected women more than men is partially supported by the fact, as was mentioned earlier, that according to the KBYU poll women were persuaded by word of mouth or another source more than men. Certainly the efforts of the PTA would fall under either of those categories.

That the campaigning of the PTA had a significant impact on voters is powerfully confirmed by the Jones tracking poll. Jones's poll shows that through most of the summer months support for the initiatives declined, but it was a very, very gradual decline. Using Initiative A as an example, in the beginning of June 1988 56% of the electorate favored it and only 23% opposed it. By the end of August 1988 support had only dipped to about 53% and opposition had only risen one or two points. However, between the end of August and October 18, 1988 (only seven or eight weeks), support sagged to 40% while opposition skyrocketed to 49%. Though perhaps less dramatic, the voting behavior on the other two initiatives demonstrated similar phenomena (see Table A -- Jones poll). In other words, from the start the initiatives gradually lost support but something happened in late August or early September to begin to change dramatically the

## WHY THE INITIATIVES FAILED<sup>13</sup>

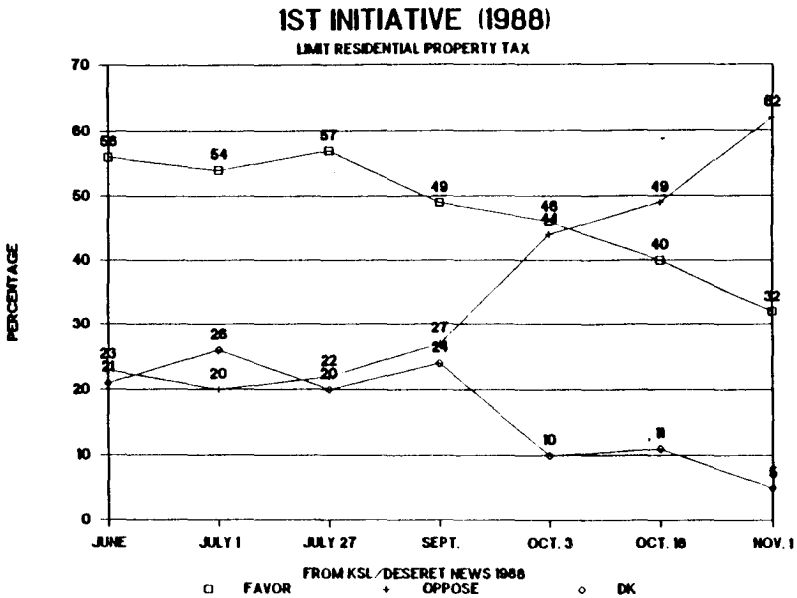
attitude of Utah voters about the initiatives. It was the last week in August when the PTA started their door-to-door campaigning and it was in the middle of September when Back-To-School Nights began.

An additional evidence that these initiatives were most effectively defeated by the work of the PTA is that members of the Tax Limitation Coalition who sponsored the legislation claim that the PTA's efforts are what did them in. In a conversation with Mills Crenshaw, he said, "We did not have the money or the resources the other group had but what really killed us were the Back-To-School Nights" (December 16, 1988). Undoubtedly the PTA's efforts had a significant impact on the electorate.

In summary, it is clear the initiatives started with considerable support and, as with most initiatives, support naturally declined. This decline can partially be attributed to the campaign efforts of Tax Payers for Utah who were able to outspend the Tax Limitation Coalition by at least three to one, were able to secure a plethora of elite and media endorsements, and were very effective in defining the issue. Women were particularly affected by the efforts of this group. The reason for this may perhaps be that women have a strong maternal instinct and as a result responded with greater conviction against legislation they thought might affect their children's education negatively. Another more provable reason is that the campaign to defeat the initiatives was staffed by organizations which were primarily female and concentrated on the women voter. One of these organizations, the PTA, was probably the most effective at really influencing the public to change their minds about the initiatives, especially among women.

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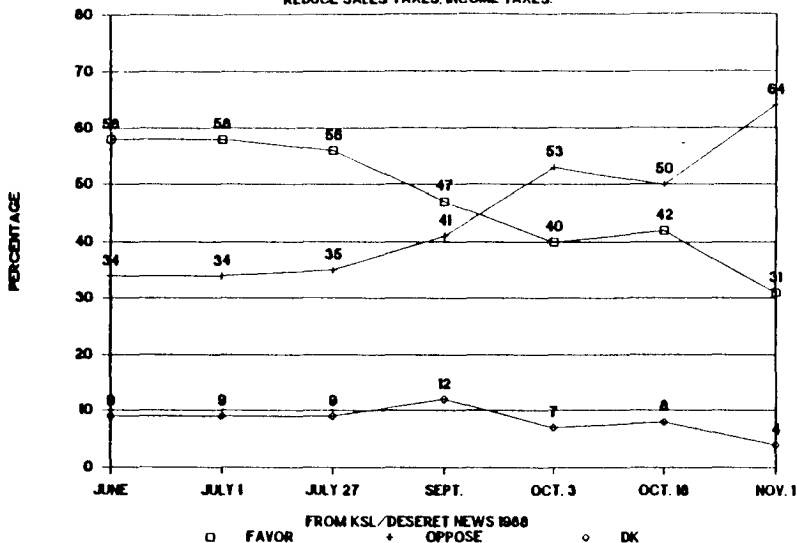




# WHY THE INITIATIVES FAILED<sup>15</sup>

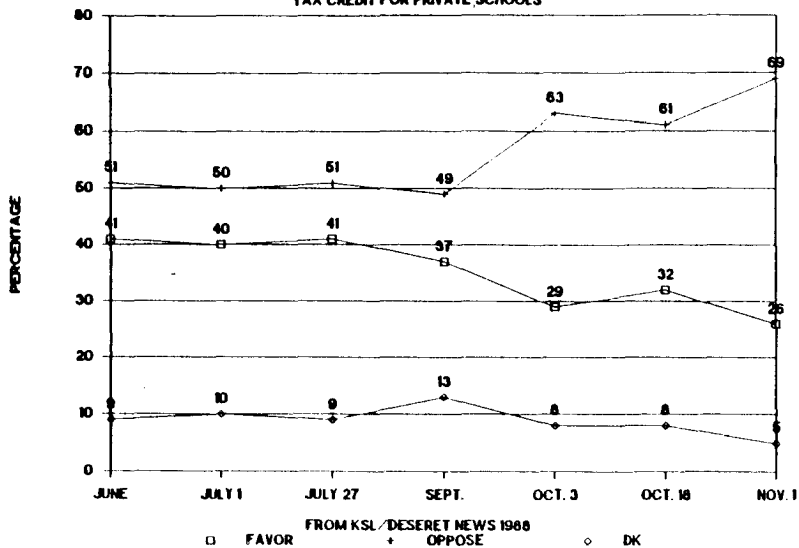
## 2ND INITIATIVE (1988)

REDUCE SALES TAXES, INCOME TAXES.



## 3RD INITIATIVE (1988)

TAX CREDIT FOR PRIVATE SCHOOLS





# INDO-PAKISTANI NUCLEAR PROLIFERATION AND THE U.S. RESPONSE: A POLICY PROPOSAL

Mark Freeman

In 1947 India gained independence from Great Britain. As a condition of independence the nation of Pakistan was created in an effort to resolve a centuries-old religious and social conflict between India's Moslems and Hindus. Despite this effort, Moslem Pakistan and Hindu India have fought three separate wars since 1947, the most recent in 1971. Following the 1971 war, both nations embarked on the development of a nuclear weapons capability. Today, there is a general consensus that both nations are nuclear-capable. This consensus was voiced by Ashok Kapur of the University of Waterloo: "It must be recognized that the nuclearization of India and Pakistan has occurred; the capability to make one or more nuclear bombs exists, and has existed for some time" (Kapur in DeWitt 1987, 208). However, nuclear capability cannot be confused with deployment. States Kapur, "The nuclear posture and the nuclear activities of both countries are calculated to keep nuclear weapons options open, and yet not to develop and deploy nuclear arms. This adds up to the practice of nuclear ambiguity" (Kapur in DeWitt 1987, 208). Nuclear proliferation in South Asia is a serious problem. Even though India and Pakistan have probably neither developed nor deployed nuclear arsenals to date, there is no guarantee that the "practice of nuclear ambiguity" will persist indefinitely. If weapons are eventually deployed, the potential for nuclear holocaust in South Asia is frightening.

As a superpower and one of the leading nuclear weapons states, the United States has a responsibility to address the problem of Indo-

Pakistani nuclear proliferation. Indeed, as Douglas Makeig of the U.S. Department of Defense observes:

With the evolution of a quasi-alliance system that pits India and the Soviet Union against Pakistan, China, and the United States, and a regional arms race that could escalate to the nuclear level, the rivalry between India and Pakistan has taken on immense significance in the global security environment of the 1980s (1987, 271).

But in recent years, U.S. policy has either ignored or exacerbated the problem. American policy needs to be adjusted to better manage the problems of South Asian proliferation in the short term, with the goal of eliminating the threat of South Asian nuclear proliferation in the long term. Before an adjusted U.S. policy can be rationally proposed, it is necessary to discuss both the proliferation problem and past U.S. policy.

## **THE NUCLEAR CAPABILITIES OF INDIA AND PAKISTAN**

Part of discussing the proliferation problem includes an analysis of the nuclear capabilities of India and Pakistan. As considered briefly above, both countries probably have the capability to develop and deploy nuclear weapons. It is important to describe these capabilities in more detail. Nuclear capability is a function of four different factors: access to fissile weapons material (either plutonium or enriched uranium), ability to produce and deploy a workable weapon, a capability to deliver the weapon (missiles, warplanes, or submarines), and the political will and power to exploit these capabilities.

## India's Nuclear Capabilities

India has significant access to fissile weapons material in its development of an extensive plutonium-extraction capability. Currently, there are four facilities capable of extracting weapons-grade plutonium from spent uranium fuel: one in Trombay, one in Tarapur, and two at Kalpakkam. Currently, these facilities have the capacity to reprocess 255 metric tons of spent fuel per year (Spector 1987, 97-8). More significant is that, since 1983, India's Madras I reactor at Kalpakkam has provided a supply of spent fuel free from international regulation. This means that India can extract plutonium from Madras I spent fuel "without the risk of violating any international agreement" (Spector 1987, 85). Not including plutonium from the Madras I reactor, India has probably stockpiled approximately 300 kilograms of weapons grade plutonium since the inception of its nuclear program (Spector 1987, 85).

India clearly has the capability to produce and deploy a workable nuclear weapon. In 1974 India exploded what it called a "peaceful nuclear device." The bomb was similar to the U.S. atomic weapon dropped on Nagasaki in World War II. Since 1974, India's nuclear production capabilities seem to have expanded. The Carnegie Endowment for International Peace concluded in 1984 that India "could make a thermonuclear device in three years" (Seth 1988, 718). The newest report from the Carnegie Endowment estimates that India has the available materials to produce twenty to fifty atom bombs of the type tested in 1974 (CSM 17 November 1988, 32). By 1991, India may be able to produce over 100 (Spector and Stahl 1988, 32). The 1984 Carnegie Endowment report predicts, "Expanded reprocessing capability, which is already

planned, and the introduction of heavy water power reactors in this decade and the next could give India a warhead potential of well over 1,000 by the turn of the century" (Seth 1988, 718). India has a broad array of delivery capabilities. There are a variety of Indian warplanes capable of delivering a nuclear bomb--the Canberra, the Jaguar/GR-1, the MiG 21, the MiG-23 BN, the Mirage 2000, and the SU-7BM. In all, India possesses over 270 of these aircraft (Spector 1987, 99). Although not intended for the delivery of nuclear weapons, India also possesses a nuclear powered submarine, which it leased from the Soviet Union in January 1987. In addition to the planes and submarine, India announced in March 1988 the development of a ballistic missile capable of delivering atomic weapons. Although India claims that the missile is only for conventional purposes, it is too inaccurate to be a useful conventional weapon. But armed "with a nuclear warhead it would be a serious weapon" (*Economist* 26 March 1988, 31-2).

Clearly, India has extensive technical capabilities to develop and deploy nuclear arms, but does it have the political will to exploit these capabilities? In 1980 former Indian Prime Minister Indira Gandhi said that India will "not hesitate from carrying out nuclear explosions...or whatever is necessary in the national interest (WP 14 March 1980, 1). Leonard Spector of the Carnegie Endowment for International Peace suggests that the reprocessing of unregulated Madras I spent fuel provides "strong evidence that, at a minimum, Rajiv Gandhi [India's current prime minister] is taking steps to ensure that India will have the option to [deploy nuclear weapons] rapidly if circumstances require" (1987, 86). Gandhi claimed in June 1985 that his country could deploy within "a few weeks or a few months (FBIS/SA 5 June 1985, E1). On August 8, 1985 the ruling Congress (I) party joined the right-wing opposition

in calling for a firm response to Pakistan's nuclear program (*FBIS/SA* 8 August 1985, E2). K. Subrahmanyam, director of the Indian Institute for Defence Studies and Analyses, argued in 1987 that a nuclear Pakistan is inevitable, and so India should move ahead with its own nuclear arsenal (Seth 1988, 720). Although the pressure to develop a nuclear deterrent is strong, it has not yet had a decisive effect on Indian nuclear policy. In fact, S.P. Seth, director of the Strategic Planning, Research, Information & Consultancy Service in Australia, reminds that "it would be wrong to assume that the nuclear hawks rule the roost in India... India's anti-nuclear lobby is fairly strong and articulate" (1988, 721).

While there is significant political will to maintain a credible nuclear option in India, the full exploitation of India's nuclear capability through deployment will probably be forestalled, barring significant changes in the South Asian security environment. Probably the most significant influence on this security environment for India is Pakistan's nuclear ambitions.

## Pakistan's Nuclear Capabilities

Pakistan's access to fissile weapon's material has been more problematic. Because France terminated assistance in the construction of the Chashma reprocessing plant in 1978, Pakistan has generally pursued a much more costly uranium enrichment process to acquire weapons-grade material. Furthermore, a *de facto* international nuclear technology embargo has forced Pakistan to pursue uranium enrichment technology covertly. In the past decade Pakistan has been able to produce a workable enrichment facility at Kahuta, East of Islamabad (Spector 1987, 101). U.S. intelligence sources claim that the Kahuta facility "has enriched

## 22 PI SIGMA ALPHA REVIEW

uranium to 90%, suitable for [atomic] weapons." There have also been reports of a second enrichment plant under construction at Golra (CSM 14 December 1987, 7). Overall, some estimates claim that the Kahuta facility could produce a maximum of forty-five kilograms of weapons grade uranium a year (Cranston 1984, S7901).

Even though most observers believe that Pakistan has produced weapons-grade uranium, some experts are skeptical. I.H. Usmani, the former chairman of Pakistan's Atomic Energy Commission, explains the basis for this skepticism:

It takes 7,000 centrifuges to work day and night for one year at velocity of 32,000 mph to produce 10 kg. of uranium-235 of 99.9% purity, required for producing one Hiroshima-type bomb. Even in Europe they have only been able to achieve enrichment of 2.7%... One day somebody is going to call our bluff (Seth 1988, 715).

Other experts concur. Dr. Raja Ramanna, former chairman of India's Atomic Energy Commission, does not "think Pakistan's existing nuclear infrastructure qualifies it to make an atom bomb." Dr. H.N. Sethna, Ramanna's predecessor, expressed a similar view in 1982 (Seth 1988, 715).

Nevertheless, even if Pakistan has failed to produce weapons-grade uranium, they may have recently developed a plutonium extraction capability. In 1980 Pakistan started construction of a clandestine reprocessing facility at Rawalpindi near the Pakistan Institute of Science and Technology. If the facility is operational, it could be producing approximately fifteen kilograms of weapons-grade plutonium a year (Seth 1988, 713).

Because Pakistan has never conducted a nuclear test, it is not entirely certain that it is able to use



its weapons-grade uranium and plutonium in the production of a nuclear weapon. However, from 1982 to 1984 anonymous sources were quoted in the press claiming that China had provided Pakistan with nuclear design information, thus allowing Pakistan to develop a workable atomic weapon without testing (WP 28 February 1983, 1; U.S. Congress 1986, 17). But China has denied aiding the Pakistani atomic weapons program. Vice Premier Li Peng said in 1985 that nuclear cooperation with Pakistan "is and will be conducted for peaceful purposes only and not for not-peaceful purposes" (Porter in DeWitt 1987, 141). Meanwhile, a U.S. intelligence report in July 1985 indicated that Pakistan had successfully tested a triggering device necessary to the production of a workable atomic weapon (Spector 1987, 107).

Pakistani leaders seem to confirm these reports. Dr. A.Q. Khan, the head of Pakistan's nuclear program, was quoted in the March 1, 1987 *Observer* (London): "What the CIA has been saying about our possessing the bomb is correct and so is the speculation of some foreign newspapers." Dr. Khan and the Pakistani government later denied his statement (*FEER* 12 March 1987, 34). But in the same month, former Pakistani President Zia ul-Haq told *Time*, "You can virtually write today that Pakistan can build a bomb whenever it wishes. What is difficult about a bomb? Once you have acquired the technology, which Pakistan has, you can do whatever you like" (30 March 1987, 42). But these statements may simply be political posturing, not reality. Thus, a degree of uncertainty still surrounds Pakistani nuclear capability.

Notwithstanding this uncertainty, Spector concurs with most other experts that Pakistan "either possesses all of the components needed to manufacture one or several atom bombs or else remains just short of this goal" (Spector 1987, 101).

And the 1988 Carnegie Endowment report estimates that Pakistan currently possesses the "essentials for two to four atomic bombs" (CSM 17 November 1988, 32). Pakistan may be able to produce fifteen weapons by 1991 (Spector and Stahl 1988, 32). And according to a 1984 Center for Strategic and International Studies report, Pakistan's present estimated uranium enrichment capability could yield approximately thirty-six warheads by 2000 (Seth 1988, 714).

Unlike India's relatively diverse capabilities, Pakistan's current delivery capabilities are limited to warplanes. U.S.-supplied F-16s and French-supplied Mirage 5PA3s can both successfully carry nuclear bombs. Also, Pakistan's Mirage 3EPs and Q-5As can be modified to carry nuclear weapons (Spector 1987, 123).

Until recently, the political will of Pakistan to exploit its nuclear capabilities has been rather uncertain. Pakistan refrained from significant public discussions concerning its nuclear intentions until late 1985. At a press-sponsored round-table discussion in November 1985 Mohammed Hanif Ranay, leader of Pakistan's opposition Musawat Party, stated, "India's expansionism will make it attack us sooner or later. The only way we can protect ourselves is by developing nuclear weapons" (Spector 1987, 107). The following month Tufail Mohammad, chief of Pakistan's fundamentalist Jamaat-i-Islami Party, called for the production of nuclear weapons (Spector 1987, 108). And in 1986 Dr. Khan published a paper that spoke favorably of a Pakistani nuclear deterrent (Khan 1986, 420-42). This is especially significant given Dr. Khan's position as the head of Pakistan's nuclear program. Despite these statements, the late Prime Minister Junejo and the late President Zia ul-Haq both claimed that Pakistan did not intend to deploy nuclear weapons (WP 18 July 1986, 1).

But Junejo and Zia were both killed in an airplane explosion in August 1988. Since then, the center of political power in Pakistan has been obscured, complicating the analysis of Pakistani nuclear intentions. Following the assassination, Ghulam Ishaq Khan was appointed acting president. The seventy-three year old leader was once Zia's finance minister and later the chairman of the Pakistani Senate. He has been involved in Pakistani politics for twenty years (*Economist* 20 August 1988, 27). Ishaq Khan seems to be rather powerful and experienced. It is not clear how he views the nuclear deployment issue, but his ties with Zia may indicate his preference for a continued policy of ambiguity.

Following general elections in November, Ishaq Khan appointed Benazir Bhutto to be Pakistan's new Prime Minister on December 1, 1988. Bhutto's nuclear intentions are equally unclear. Her father, Zulkifar Ali Bhutto, initiated Pakistan's nuclear weapons program in the early 1970s. He was later executed by the Zia regime, but Bhutto seemed to abandon her father's political legacy following Zia's death (*CSM* 18 November 1988, 36). This may indicate that she does not necessarily intend to further extend her father's agenda, which included a strong commitment to nuclear weapons development. Furthermore, she stated in 1986 that Pakistan's nuclear research program is infeasible and would have to be reassessed (*Spector* 1987, 110). Later the same year she told the *Indian Express* that if she was elected, she would abandon the policy of nuclear ambiguity, settling all doubts concerning the potential military use of Pakistan's nuclear program (*FBIS/SA* 14 August 1986, F2). This may indicate her willingness to submit Pakistan's nuclear facilities to IAEA regulation.

Even though the Pakistani political environment

has probably stabilized since Bhutto's appointment, there is still a strong potential for instability. Inside her Pakistani People's Party (PPP) Bhutto is confronted with a left-wing coalition that is "anti-American, anti-rich, and anti-army" (*Economist* 27 August 1988, 23). With significant pressures from the military to maintain good relations with the U.S. and their own positions of power, it will be difficult for Bhutto to satisfy the far left's agenda. At the same time her authority is challenged by the right-wing Islamic Democratic Alliance, who have vowed to challenge her appointment in the Pakistani courts (*Economist* 26 November 1988, 32). If Bhutto is unable to overcome these challenges, significant instability is not inconceivable as a broad array of interests remain unsatisfied. This instability may increase the role of the military in Pakistani political decisions. While the current military chief, Aslam Beg, is said "to be without political ambitions," observers suggest that "enough blood on the streets would bring the army in" (*Economist* 27 August 1988, 23). Surprisingly, a military takeover may decrease the political will of Pakistan to exploit its nuclear capabilities. Stephen Cohen of Berkeley University in his 1984 study of the Pakistani military has concluded that nuclear weapons are not generally attractive to Pakistan's military leadership (Cohen 1984, 155-60).

The nuclear capabilities of both India and Pakistan are cause for serious concern. Nevertheless, as previously discussed both nations are currently pursuing a policy of nuclear ambiguity where they remain at the nuclear threshold without actually deploying nuclear weapons. But it is clear that deployment cannot be forestalled indefinitely. Spector argues that "even if each side refrains from testing or assembling bombs, they will continue to build stocks of plutonium [or uranium], and internal pressure will grow with each new spat to move

forward with delivery systems" (CSM 14 December 1987, 7). If deployment occurs, a nuclear South Asia will pose several serious problems. But even without deployment, there is still cause for concern.

## THE IMPACT OF INDO-PAKISTANI NUCLEAR PROLIFERATION

There are basically three different effects of nuclear proliferation in South Asia: increased instability in the Indo-Pakistani rivalry, increased risk of nuclear proliferation beyond the region, and an increased pressure on the worldwide nuclear non-proliferation regime.

### Impact on the Indo-Pakistani Rivalry

Nuclear proponents in Pakistan and India both argue that nuclear deployment would enhance military deterrence in South Asia, thus reducing the risk of war. Subrahmanyam, an Indian defense expert, argues, "History shows that the development of nuclear weapons capability among nations having an adversarial relationship has led to stability" (Seth 1988, 720). S.M. Zafar, secretary of former Prime Minister Junejo, added that the development of nuclear weapons will "stop all danger of war in this region just as the nuclear strength of the two superpowers has eliminated the danger of war between them since World War II" (Spector 1987, 107). But this historical argument for deterrence is invalid for several reasons.

Initially, there is a strategic problem. For nuclear deterrence to work, both sides must possess a credible retaliatory capability. If this capability exists, neither nation wants to launch nuclear weapons preemptively because there is little prospect of avoiding nuclear destruction from a retaliatory

strike. This condition is what Western strategists call MAD (Mutually Assured Destruction). Richard Haass of Harvard University has explained the absence of MAD in the Indo-Pakistani rivalry: "Although both India and Pakistan possess a number of advanced aircraft capable of traveling considerable range, and despite India's impressive strides in developing a space program, each country is far away from possessing a stable retaliatory capability" (Haass 1988, 115). The lack of MAD in South Asia is primarily due to the small size of the potential nuclear arsenals and the inability for either side to quickly detect a preemptive strike. In a crisis situation this strategic vulnerability would increase both Indian and Pakistani incentives to preemptively launch their nuclear arms because delaying a launch would risk utter destruction without any prospect for retaliation.

But even if MAD could be established in South Asia, there are still the problems of accidental launch and crisis miscalculation that the superpowers confront in their nuclear rivalry. Few would argue that spreading these problems to South Asia would be desirable. But beyond these common problems, the nature of the Indo-Pakistani rivalry significantly dilutes the utility of nuclear weapons in South Asia. First, the stakes in a typical Indo-Pakistani conflict are much higher than in a typical superpower conflict-national survival versus a particular regional concern. India or Pakistan might risk nuclear confrontation to maintain their national integrity. If the same interests were threatened in a superpower conflict, the Soviet Union or the United States might be expected to act similarly.

Second, India and Pakistan also share a common border. Consequently, "limited confrontations or low-level clashes could spill over quickly into vital national territory and threaten critical national interests, perhaps even survival (Dunn 1982, 70).

The pressure to use nuclear weapons would be great in this situation as Michael Brenner of the University of Pittsburgh explains: "In the atmosphere of a high stakes confrontation where ideology may be the driving force and where the nuclear balance is so easily tipped, there is a fair chance that the psychological balance will tilt towards use of nuclear weapons" (Brenner in DeWitt 1987, 60).

Finally, India and Pakistan share a legacy of direct conflict. They have fought three major wars since 1947. This legacy makes small crises more difficult to diffuse. And even though a major war has not been fought since 1971, India and Pakistan have not left the potential for armed conflict behind them. In January 1987 the two nations came precariously close to rekindling war. Haass chronicles this crisis:

A recent crisis occurred in early 1987, when a large Indian military exercise ("Operation Brass Tacks") in the border state of Rajasthan prompted a Pakistani mobilization. India may have sought to intimidate Pakistan for any number of reasons--to remind Islamabad of India's regional primacy, to persuade Pakistan to terminate alleged support for Sikh terrorists, or simply to provide a foreign distraction for domestic political purposes. What is certain, though, is how events nearly slipped out of control, and a fourth South Asian war was narrowly avoided by last minute diplomacy in a mutual stand-down (Haass 1988, 112).

India and Pakistan clashed again in late September "at positions overlooking four mountain passes [in Northern Kashmir]." Observers called it "the biggest encounter since intermittent clashes began in 1984" (*FEER* 8 October 1987, 10). It may be only

## 30 PI SIGMA ALPHA REVIEW

a matter of time before one of these incidents develops into an all-out war. If nuclear weapons are available, a nuclear holocaust in South Asia is very possible.

Beyond traditional Indo-Pakistani rivalries, the very pursuit of nuclear capabilities might lead to war. As nuclear development proceeds, the two nations might be tempted to preemptively strike the other's nuclear facilities as Israel did in 1981 against Iraq. Some reports claim that Israel has approached India on three separate occasions to offer assistance in a joint attack against Pakistan's nuclear facilities (Bhatia 1988, 106). In late September 1985 rumors surfaced in Pakistan indicating that a preemptive strike had been considered by the Indian military during the administration of Indira Ghandi. However, the Indian government denied these rumors (*FBIS/SA* 6 November 1985, E1). In a 1984 interview with the *International Herald Tribune*, former Pakistani Foreign Minister Sahabzadeh Yaqub Khan warned that Islamabad "would have no alternative but to retaliate" if India attacked its nuclear facilities. Zalamay M. Khalizad of the Institute of War and Peace at Columbia University claimed that "an attack of this kind could set the stage for a larger Indo-Pakistani war" (Khalizad in Goldblat 1985a, 138). A 1985 verbal agreement between the two nations prohibiting preemptive strike against nuclear facilities might prevent this scenario. However, the agreement has not yet been formalized, so its usefulness is limited (Makeig 1987, 291). Clearly, the risk of war is high and probably increasing in South Asia.

If India and Pakistan again go to war, there is no guarantee that a nuclear conflict can be avoided. Probably most frightening is the potential for a broader nuclear war involving the superpowers. Haass suggests that "any nuclear conflict in South



Asia would bring not just devastation to the region but would raise the danger of a broader conflict involving the United States, the Soviet Union, and China" (Haass 1988, 116).

## Impact on Extra-Regional Proliferation

Another problem with Indo-Pakistani nuclear proliferation is the potential spread of sensitive nuclear technology to other Third World nations. In general, an increasing number of emergent nuclear material or technology suppliers increases motives for countries pursuing nuclear capabilities to go ahead with weapons development. Stanley Ing of the Canadian Department of National Defense explains this general phenomenon:

Once a country has decided to develop a nuclear weapons programme, the increased number of exporters becomes an important factor. . . . The availability of nuclear technology and fissile materials means that a country no longer has to spend years developing a nuclear technological infrastructure before proceeding with a nuclear weapons programme. . . . Because the emergent suppliers do not export complete power reactors, and because the nuclear components they do export are easier to obtain, certain threshold countries may be persuaded to establish facilities dedicated solely to nuclear weapons development. Such a route could incur political costs, but this, too, may be acceptable in view of the financial savings and the perceived strategic importance of quickly acquiring nuclear capability (Ing in DeWitt 1987, 127-8).

This analysis may especially apply to the potential beneficiaries of Pakistani and Indian nuclear experience. Former President Zia declared in 1986, "It is [Pakistan's] right to obtain [nuclear] technology. And when we acquire this technology, the entire Islamic world will possess it 'with us'" (*FBIS/SA* 19 March 1986, F1). But Seth argues that these types of statements from Pakistani officials are probably symbolic:

Whether or not Pakistan will make available its 'bomb' or nuclear technology to other Islamic countries is arguable, and even if Pakistan were willing to share the bomb, there are practical problems in terms of [political] divisions in the Islamic world in which Islamabad does not want to get involved (Seth 1988, 716).

While Seth's observation may be valid, Zia's statement nevertheless seems to fit well with Pakistan's 1986 nuclear cooperation agreements with Egypt and Iraq (*FBIS/NA* 9 December 1986, D4).

India could also be contributing to the further spread of nuclear weapons in the Middle East. Ing has documented India's status as an emergent nuclear supplier:

India is emerging as a potentially major nuclear supplier. As the first Third World country to invest significantly in nuclear energy, India is able to convert its experience in this area into an exportable commodity. .

India has gone on to conclude nuclear agreements with some Third World countries. Among these are countries which are in the midst of a war, or are located in a region of some instability. These include Iraq, Syria, and Libya (Ing in DeWitt 1987, 120-1).

Given the increasing evidence of Israeli nuclear capabilities, the nuclear ambitions of these potential Middle Eastern beneficiaries are probably not entirely benign. If these nations were to obtain nuclear weapons capabilities, the risk of renewed Arab-Israeli conflict would increase drastically. If any of these nations were to deploy nuclear weapons, the result could be catastrophic given the volatile nature of the Arab-Israeli conflict. But the potential for the spread of nuclear capabilities from South Asia may extend beyond the Middle East.

## Impact on the Overall Non-Proliferation Regime

Both India and Pakistan are non-signatories to the Nuclear Non-proliferation Treaty (NPT). This treaty established the first formal effort to regulate the spread of nuclear technology by creating the International Atomic Energy Agency (IAEA) to enforce the treaty's stipulations. Other efforts exist to regulate the spread of nuclear technology, including the Nuclear Suppliers Group (NSG). The NSG has formulated nuclear export guidelines adopted by the fifteen major nuclear supplier countries in 1977 (Council on Foreign Relations 1986, 18). While other near-nuclear countries such as Israel and South Africa contribute, India's and Pakistan's nonrecognition of the NPT and its potential disregard of the NSG contribute to the erosion of both nonproliferation measures.

Initially, their nonrecognition (as well as other nations' nonrecognition) of the NPT and continued pursuit of weapons capabilities could cause frustration among complying nations. If these conditions persist, frustrated NPT nations may eventually resign (Moher in DeWitt 1987, 93-4). India's and Pakistan's status as emergent suppliers

### 34 PI SIGMA ALPHA REVIEW

may also undermine the NPT. Ing suggests:

It is still too early to predict whether the increased volume of nuclear transfers that is likely to remain beyond IAEA inspection will bring into question the legitimacy of the NPT/IAEA regime. However, one may begin to wonder about the relevance of a regime that is being partly circumvented by emergent suppliers which do not necessarily share the non-proliferation perspectives contained within the current regime (Ing in DeWitt 1987, 124).

If the NPT were significantly eroded, most would agree that the resulting global security environment would be less stable.

India's and Pakistan's status as emergent suppliers also undermines the NSG. Ing again explains:

Further increase in the market share of emergent suppliers also could have adverse effects on the policies and unity of the NSG. Co-ordination of policies within the NSG is already difficult, and the need to be more competitive as a result of more supplier alternatives could lead to a looser interpretation of suppliers' guidelines (1987, 125).

At the minimum, Ing argues that needed improvements of NSG guidelines could be postponed or abandoned (1987, 125).

Given these problems, it seems clear that nuclear proliferation in South Asia is a significant problem. What has the United States done to address the problem?

## U.S. NON-PROLIFERATION POLICIES IN SOUTH ASIA

Overall, U.S. policy has been ineffective in confronting the problem of South Asian proliferation. At times it has exacerbated the problem. The legacy of U.S. non-proliferation policy in South Asia can be analyzed in two different periods: pre-1979 policies and post-1979 policies.

### Pre-1979 Policies

The problem of South Asian nuclear proliferation probably started in 1974 when India tested a nuclear device. Haass describes the U.S. response to this test as "perfunctory." And although U.S. naval presence in the Indian Ocean modestly expanded, most United States attention was focused on other problems, including "the final throes of war in Vietnam, detente in Europe, volatile conditions in the Middle East, and the impact of the oil price hike" (Haass 1988, 108). However, even if the United States had vigorously condemned the nuclear test in 1974, the influence on Indian policy probably would have been minor because of the Nixon administration's display of naval force during the 1971 Indo-Pakistani war. While the display was too insignificant to satisfy Pakistan, it was "enough to confirm American hostility for Indians" (Haass 1988, 108). The end result was a decreased ability to influence either India or Pakistan on any issue, including the pursuit of nuclear weapons.

Following the Indian nuclear test, Pakistan began seeking reprocessing technology from France. In 1976 President Gerald Ford's concern over Pakistan's nuclear intentions prompted him to send Secretary of State Henry Kissinger to Islamabad. Later, Secretary Kissinger went to Paris to convince the French to suspend reprocessing technology transfers

to Pakistan. In 1977 the French complied with the United State's request. To further underscore its concern, the Ford administration then cut off economic and military aid to Pakistan (Spector 1984, 74-81).

After Pakistan lost access to reprocessing technology, it started pursuing uranium enrichment technology. In 1979 the Carter administration publicly expressed concern over Pakistan's pursuit of enriched uranium. Assistant Secretary of State Thomas Pickering testified before a Senate committee that Pakistan's enrichment program was not consistent with its nuclear energy needs. He concluded, "We are concerned, therefore, that the Pakistani program is not peaceful but related to an effort to develop a nuclear-explosive capability" (U.S. Congress 1979, 10). The administration thereafter again suspended military and economic aid to Pakistan in compliance with the Symington Amendment of the 1978 Nuclear Non-proliferation Act.

It is difficult to assess the impact of U.S. policy on Pakistan's nuclear ambitions during this period. The aid suspensions may have had no effect. After the Ford administration's aid sanctions and France's suspension of technical aid for reprocessing technologies, Pakistan simply refocused its efforts into enrichment technologies. Pakistani political will to pursue nuclear capability also seemed to remain strong as Prime Minister Ali Bhutto said Pakistan would "eat grass" if necessary to equal India's nuclear capability (Haass 1988, 108-9). But on Christmas Day 1979 the Soviet Union invaded Afghanistan and the United States abandoned its hard line position against proliferation in South Asia. As a result, the aid sanctions approach was abandoned, making it unclear if the policy could have affected Pakistani decision-making given sufficient time. The Afghan invasion marked a

turning point in U.S. non-proliferation policy in South Asia.

## Post-1979 Policies

Following the Afghan invasion, the Carter administration moved to restore aid to Pakistan. The administration's offer of \$400 million was rejected by Zia, "suggesting that the United States had to offer much more to persuade him to provoke Moscow or rethink his nuclear weapons commitment" (Haass 1988, 109). Carter was later replaced by Reagan, who then sweetened the offer. In 1981 the Reagan administration extended a six-year \$3.2 billion aid package in return for Pakistan's cooperation in U.S. security policy in Southwest Asia and the Persian Gulf. Pakistan was also granted a six-year exemption from the Symington Amendment (Spector 1987, 104).

But the situation in Afghanistan coupled with Pakistan's nuclear ambitions presented the United States with a policy dilemma. How could Soviet expansionism be checked without abandoning non-proliferation? Haass explains the Reagan administration's resolution of this dilemma:

The administration believed that denying aid to gain access to all nuclear facilities would prove futile. Moreover, the administration argued that a strong security relationship with the United States would provide Pakistan with an alternative means of gaining security while the United States, as the principal source of conventional weaponry, would gain leverage in the process. . . . But nuclear non-proliferation competed with removing the Soviets from Afghanistan. And of the two, the latter was more important to the Reagan administration (Haass 1988, 109).

Even though less important, non-proliferation efforts did not cease entirely. In June 1984 U.S.

officials became aware that Pakistan was continuing to pursue nuclear capabilities, which included work on weapons design and covert acquisition of nuclear materials from abroad. However, resisting pressure from Congress, Reagan aides insisted that the renewal of aid sanctions was impossible given the Soviet presence in Afghanistan ("United States Security Interests in South Asia" 1984). Later the same month, three Pakistani nationals were indicted for trying to smuggle fifty high-speed nuclear weapons switches known as krytons. While the Pakistani government denied any complicity in the affair, it was later shown that the krytons were ordered by S.A. Butt, director of supply and procurement for the Pakistani Atomic Energy Commission (*NYT* 25 February 1985, 1). In response to rumors that China was aiding Pakistan's nuclear program by offering weapon designs, the Reagan administration postponed for almost a year approval of a Sino-U.S. nuclear trade pact (*NYT* 22 June 1984, 1). And in September Reagan wrote a letter urging President Zia to abandon the pursuit of weapons capability. The letter suggested that U.S. aid would be terminated if weapons grade uranium was produced (*WSJ* 25 October 1984, 1). Foreign Minister Khan and President Zia both seemed willing to comply with the Reagan letter's stipulations. Khan assured Reagan of this personally in a mid-November visit to Washington. And when Zia announced in early 1985 that enriched uranium had been produced at Kahuta, he was careful to stipulate that it was not weapons-grade (Spector 1987, 106).

Meanwhile, Congress began insisting that more efforts be made to dissuade Pakistan from pursuing weapons capability. In July 1985 Congress amended the aid package, requiring the President to certify that Pakistan did not possess a nuclear device before funds could be disbursed (Spector 1987, 106). But



Pakistan seemed to be undaunted. As described above, in the same month it was reported that Pakistan had tested a nuclear trigger. In August Pakistan reportedly attempted to buy flash X-ray cameras from the Hewlett-Packard company for use in non-explosive nuclear tests. The sale, however, was blocked by the U.S. government (Spector 1987, 107). Congress again tried to act in the summer of 1985 by passing the Solarz Amendment, which would terminate Pakistani aid if its covert efforts were not ceased. But the Reagan administration exercised discretion granted in another amendment, choosing not to apply the Solarz measure to the case of Pakistan (Spector 1987, 115).

Instead of applying the Solarz Amendment, the administration dispatched Undersecretary of State for Political Affairs Michael Armacost and National Security Council staff member Donald Fortier to South Asia. Their mission was to stall proliferation by encouraging an Indo-Pakistani regional initiative. But India spurned this effort, "claiming that Washington was attempting to avoid its responsibilities for halting the Pakistani nuclear program" (Spector 1987, 79).

Today, the United States seems to have abandoned these types of initiatives, depending on the aid incentives established in 1981 instead. In the spring of 1986 another aid package was negotiated with Pakistan on even more generous terms: \$4.02 billion over six years to begin in October 1987. And in October 1986 the president certified the disbursement of the last installment of aid from the 1981 agreement. This seems to have been done in spite of intelligence reports that Pakistan had produced weapons-grade uranium (WP 4 November 1986, 1).

As the end of the 1981 aid package approached, the non-proliferation debate was again renewed on Capitol Hill in late 1987. And on July 10, 1987,

a Canadian citizen of Pakistani origin was arrested in Philadelphia for attempting to purchase and export twenty-five tons of maraging steel used in uranium enrichment processes. This seemed to alienate some members of Congress (Haass 1988, 114). Nevertheless, a new aid package was eventually approved by Congress in December. Before the aid was approved, Congress passed two nonbinding resolutions calling for Pakistan to submit its nuclear facilities to international regulation in order to qualify for further United States aid. These resolutions were never made law, however, and so they had no effect on U.S. policy. In the end, Congress approved the aid as negotiated by the administration in 1986. The Symington Amendment was once again waived for two and a half years, while a new stipulation was added providing for the automatic rescission of the waiver should India accept international regulation of its nuclear program (Haass 1988, 113). And the stipulation requiring presidential certification for aid disbursements was abandoned (*FEER* 24 December 1987, 24).

U.S. policy since 1981 has had little effect in curbing South Asian proliferation. As described above, Pakistan might currently be capable of assembling two to four nuclear weapons. India might be capable of assembling twenty to fifty. While possibly forestalling a Pakistani nuclear test, U.S. policy may have contributed to the further development of Pakistani capabilities. Spector explains:

U.S. law unambiguously specifies that aid will be terminated if Pakistan fabricates a complete nuclear weapon. Quite possibly, Pakistan will refrain from doing so, since the restriction would not, in any event, prevent Islamabad from obtaining a de facto nuclear deterrent by building all the necessary components and

## NUCLEAR PROLIFERATION<sup>41</sup>

thereby remaining only "a screwdriver away" from nuclear arms. On the other hand, having seen the United States repeatedly back away from terminating assistance because of concerns over the Soviet presence in Afghanistan, Islamabad may reason that if it quietly violates this stricture, U.S. law will be amended to permit aid to continue just as the Symington Amendment was modified in 1981 for this purpose (Spector 1987 118).

While U.S. policy has failed to influence Pakistan's nuclear decisions, it has also increased insecurity among Indian decision-makers. India resents the extensive military aid given to Pakistan since 1981. Haass explains India's fear:

Indians resent U.S. military support for Pakistan even more. American explanations that the aid is provided in the context of Afghanistan and not the Indo-Pakistani rivalry carry little water in New Delhi; similar glosses in the past did not prevent U.S. arms from being used against Indian targets (Haass 1988, 111).

Among India's defense establishment, this resentment extends to insecurity. Indian Defense Minister K.C. Pant in an address before India's Parliament on April 27, 1987, denounced U.S. policy for ignoring Pakistan's search for nuclear capability. He further claimed that "linkages between the U.S., China, and Pakistan, with anti-Indian overtones, have become more and more pronounced" (Seth 1988, 712). These feelings of insecurity add to the pressures for an Indian bomb. Pant's address confirms this: "The emerging nuclear threat to us from Pakistan is forcing us to review our options. I am sure the House does not expect me to detail this option as

also our response which will be adequate to our perception of the threat" (Seth 1988, 712). Clearly, this statement is a thinly veiled reference to the nuclear option.

But even though India feels threatened over U.S. policy toward Pakistan, U.S.-Indo relations have still improved somewhat. After a long drought, the United States began to reevaluate India in 1985. Fred Ikle, then Undersecretary of Defense for Policy, stated that the emergence of India as a world power created an "exciting possibility that opens a new chapter in United States-Indian relations" (WP 4 May 1985, 1). Ikle seemed to be expressing the recognition of the National Security Council's 1984 National Security Decision Directive (NSDD) 147. NSDD 147 advised the U.S. foreign policy establishment to establish better relations with India. A year later a memorandum of understanding on technology transfer signed in 1984 was put into effect. Prime Minister Gandhi viewed the memorandum as an important indicator of improved U.S.-Indo relations (Mukerjee 1987, 601). In addition to the drastically increased industrial cooperation resulting from the memorandum, the United States and India have also pursued military cooperation.

While Gandhi told the U.S. press that American military supply was unreliable (WP 14 June 1985), New Delhi has nevertheless been receiving U.S. military sales since 1986, including its purchase of the GE 404 engine for its newly planned light combat aircraft (Haass 1988, 110). By early 1987 some Indian leaders had become more tolerant of the U.S.-Pakistani security arrangement. Writes Dilip Mukerjee, a long time observer of South Asian politics:

Though official Indian pronouncements continue to describe U.S. military commitments to

## NUCLEAR PROLIFERATION<sup>43</sup>

Pakistan as excessive, the tone has generally been less shrill... New Delhi may be ready to live with a U.S.-Pakistani security partnership provided Washington guards against destabilizing the regional military balance and extends help to India's endeavor to keep up with advances in military technology (Mukerjee 1987, 609).

In October 1987 Gandhi visited Washington. This visit seemed to further allay Indian fears. Writes Seth, "Prime Minister Gandhi detected a distinct shift in the U.S. position on Pakistan's nuclear ambitions, and he reportedly was assured by President Reagan that the United States would take action against Pakistan if it went ahead with its nuclear weapons program" (Seth 1988, 725).

But these assurances seem to have been empty given the current United States aid agreement with Pakistan passed in 1987. The bill that authorizes the U.S.-Pakistani aid agreement also seems to discriminate against India. While exempting Pakistan from presidential certification as described above, it also includes a provision that "no country in South Asia may receive U.S. aid or buy sophisticated U.S. technology unless the president determines that is not producing weapons-grade material" (*FEER* 24 December 1987, 24). While exempting Pakistan from this stipulation, the bill is silent on India's status. To date, the law seems to have little effect on U.S. technical assistance to India. But reports indicated that "the move has angered Indian officials--including Prime Minister Rajiv Gandhi--as, for the first time, the bill would put the Indian and Pakistani nuclear programmes on a par and the onus on India to prevent nuclear proliferation in South Asia" (*FEER* 24 December 1987, 24). This renewed insensitivity seems to threaten improving U.S.-Indo relations. An April

1988 visit to New Delhi by U.S. Defense Secretary Frank Carlucci "gave little satisfaction to India on its concerns over Pakistan." In fact, Carlucci indicated that U.S. military assistance to Pakistan would continue unchanged despite the impending Soviet pull-out from Afghanistan (*FEER* 21 April 1988, 36). This intention to continue providing military aid can probably be explained by skepticism over Soviet intentions in Afghanistan. But the continued emphasis on East-West security issues is undermining non-proliferation efforts in South Asia. The United States must recognize that there is little risk of Soviet expansion into the Persian Gulf and South Asia. Recognizing this should not be too difficult given the pullout of Soviet troops from Afghanistan in February 1989 following a peace agreement reached in Geneva on April 14, 1988. Also, the Soviets have given up any hope of maintaining the communist Najibullah regime after the pull-out, making the stability of this regime a non-issue in terms of the Geneva agreement (*CSM* 22 November 1988, 1). In fact, the Soviets have already begun building relations with the rebels. In October the Soviets extended \$600 million of aid to help rebuild post-war Afghanistan (*Economist* 22 October 1988, 44). Also, prisoner exchange talks started in late November have broadened into wider talks on the post-pullout transfer of power (*CSM* 6 December 1988, 1). Clearly, the Soviets have accepted military defeat and do not intend to persist with the war. Hopefully, U.S. policymakers will be convinced that nuclear proliferation, not Soviet expansionism, is the real security problem in South Asia.

# NUCLEAR PROLIFERATION 45

## NON-PROLIFERATION IN SOUTH ASIA: A NEW APPROACH FOR U.S. POLICY

As argued previously, the problems of South Asian proliferation are real and potentially severe. U.S. policy must be adjusted to more effectively address these problems. Initially, the policy needs to work toward preventing nuclear deployment. Next, the United States must work toward preventing proliferation beyond South Asia. Finally, regional arms control and disarmament should be promoted to prevent further development of Indo-Pakistani nuclear capabilities and the potential demise of the Non-Proliferation Treaty (NPT).

### Preventing Nuclear Deployment

As highlighted frequently throughout this paper, neither India nor Pakistan have deployed nuclear weapons, even though both nations are probably weapons capable. Consequently, a reasonable short term goal for U.S. policy is to prevent deployment.

To achieve this goal, it is important to understand the motives as well as the disincentives for nuclear deployment in South Asia. The primary motives to deploy nuclear weapons in South Asia are security related: India's fears of Pakistani and Chinese hostility, and Pakistan's fears of Indian and Soviet hostility. The disincentives will be described below. To prevent nuclear deployment, U.S. policy must be designed to reduce the motives and enhance the disincentives of nuclear deployment in both India and Pakistan.

Reducing motives requires an improvement in the security environment of South Asia. The most direct way for the United States to enhance the security environment is through its military aid policies. The president should "exercise his discretionary authority to withhold from Pakistan at least selected advanced conventional weapons systems that are not essential for defending Pakistan's

Afghan border" (Haass 1988, 110). This would help to ease Indian fears of an overly armed Pakistan, thus reducing the risk for war. To a point, reductions in U.S. military aid to Pakistan may improve the security environment in South Asia. But these reductions would need to be balanced with Pakistani security perceptions. Pakistani fears must also be taken into account in U.S. military transfers to India. In general, all U.S. military aid and sales to South Asia should be evaluated to determine their effect on Indo-Pakistani security perceptions.

U.S. policy should also help India and Pakistan in their ongoing efforts to improve bilateral relations. After achieving a partial detente in the first half of the decade, Indo-Pakistani relations seem to again be souring. There have been no high-level talks between India and Pakistan since February 1987. Following the February meeting, Indian President Zail Singh referred to Pakistani support of Sikh terrorists in the Northeast Indian province of Punjab as a major obstacle to improved Indo-Pakistani relations (*FEER* 12 March 1987, 36). Since last year over two thousand people have been killed in stepped-up terrorist attacks following India's imposition of direct rule over Punjab. The Indian government also suspects Pakistan of supplying Sikh terrorists with sophisticated weaponry, including US machine guns and Stinger missiles intended for the Afghan resistance (*FEER* 14 April 1988, 36-7). These developments in Punjab seem to have soured Indo-Pakistani relations.

But India may be starting to recognize their own responsibility for the instability in Punjab. In September 1988 Gandhi visited Punjab in an unprecedented effort to reconcile differences with Punjabi Sikhs. During the trip he announced a new government investment package worth \$500 million to Punjab. While the terrorists refuse to negotiate with the Indian government, Gandhi's visit may mark the beginning of a political settlement of



Punjabi instability (*Economist* 24 September 1988, 41-2). Indeed, earlier in the year some factions of the Sikh terrorists seemed to indicate a willingness to reach a settlement with the Indian government (*Economist* 9 April 1988, 39). Progress in Punjab would undoubtedly have a positive effect on Indo-Pakistani relations. Besides Punjab, another recent development may serve to undermine Indo-Pakistani relations. On December 1, 1988, India expelled Pakistan's senior military attache, Z.I. Abasi, on charges of spying. This will undoubtedly hurt relations in the short term, but it may also have a more long term effect. One Western diplomat in Islamabad said, "This could stiffen resistance [to diplomatic overtures] within Pakistan's military. This will certainly not increase [Prime Minister Bhutto's] range in dealing with the Army" (*CSM* 2 December 1988, 9). The newly appointed Bhutto could be effectively prevented from improving relations with India as she works to maintain support from the military.

Even though Indo-Pakistani relations seem to be souring, the United States can still use its influence to encourage the two nations to come to a better understanding. U.S. policy should also be designed to promote specific confidence building measures that enhance the Indo-Pakistani security environment. These might include agreements to "limit the size, number, and locale of military exercises, provide advance notification of exercises, and permit the exchange of observers. Demilitarized zones would also contribute to stability" (Haass 1988, 112). These types of measures would serve to avoid intermittent border clashes that threaten to ignite another Indo-Pakistani war. The promotion of confidence-building measures might also include encouraging the conclusion of a no-war pact and the signing of a nuclear non-aggression treaty agreed to in principle by Gandhi and Zia in 1985. A nuclear

non-aggression treaty would serve to decrease the risk of a military strike on nuclear facilities. All of these measures would have a significant influence in reducing the risk of war between India and Pakistan.

But Pakistan is not India's only security threat. India also feels threatened by China. The nations have been enemies since 1962, when they fought a war along the Tibetan border that India lost. But India and China have begun to improve their relations since 1980. John Garver of the Georgia Institute of Technology documents the "remarkable transformation" of Chinese policy toward India:

Beijing has explicitly acknowledged India's "big brother" role in South Asia, adopted a neutral position on the Kashmir issue, stopped supporting insurgencies within India, begun encouraging amity rather than enmity between India and its neighbors, and sought to expand bilateral Indian-Chinese relations while negotiating on the border question (Garver 1987, 1216).

India has also reevaluated its policy toward China. According to Nancy Jetly of the School of International Studies at Jawaharlal Nehru University, India is "exploring all avenues--political, diplomatic, and unofficial--to speed the border talks with China" (*FEER* 9 April 1987, 40). India also withheld public support for a Tibetan uprising in late 1987, resisting the temptation to encourage instability and create further problems for China (*FEER* 22 October 1987, 13). In November 1987 China and India met in New Delhi to discuss the border question and other issues, both sides agreeing "to avoid conflict and confrontation along their mutual border." In March 1988 they had laid the groundwork for a future settlement of the border issue. They also

agreed to meet again in late 1988 (*FEER* 9 June 1988, 31-2).

Although the improvement in Sino-Indian relations is cause for great optimism, India's defense establishment remains skeptical. An April report to Parliament by the Indian Defense Ministry noted that "China was continuing to upgrade its logistics, communication network and military airfields in Tibet" (*FEER* 9 June 1988, 32).

In its bilateral relations with both nations, the United States should encourage China and India to continue their dialogue, also encouraging them to limit and eventually reduce military activities in the border region. To accomplish this, the United States must bolster its slipping influence with China. Over the past year, U.S. policy makers have expressed frustration over Chinese policy in Tibet and Chinese missile sales to North Korea and Iran. U.S. leaders are also nervous about growing Chinese ties with the Soviet Union (*Economist* 9 January 1988, 29). U.S. leaders need to be aware that pushing China on the Tibet and missile sales issues might decrease its influence on the Sino-Indian security equation, thus in the long term undermining its ability to enhance Indian security and reduce proliferation pressures in South Asia.

Just as Pakistan is not India's only security threat, India is not Pakistan's only security threat. Since the Afghan invasion, Pakistanis have feared Soviet expansionism into South Asia. While these fears have been drastically reduced since the Soviet pullout, Pakistan still feels uneasy. However, Soviet-Pakistani relations have improved somewhat over the past two years partly because of limited Soviet economic aid, which the Soviets have hinted will continue (*Economist* 16 April 1988, 39). Another concrete measure could be taken to allay Pakistani fears. This would be the establishment of a non-aggression pact between Russia and Pakistan.

Both the Soviet Union and Pakistan have expressed the desire for such an arrangement, but neither nation has taken action to formalize an agreement (Council on Foreign Relations 1986, 13). The United States could remind both nations of this option, *encouraging the nations to sign a non-aggression pact. This measure would greatly reduce Pakistani fears, thus relieving a source of pressure to deploy nuclear weapons.* The use of military aid and diplomatic influence described above is designed only to reduce the primary motive to deploy nuclear weapons: insecurity. U.S. policy also needs to be designed to emphasize disincentives to deployment. Fortunately, there are many strong disincentives. India realizes that deployment could lead to the chilling of Russian relations, the destruction of improving American relations, and the imposition of severe economic sanctions from the West (Spector 1987, 89). Pakistan realizes that they are incapable of competing with India in a nuclear arms race. They also fear a potentially adverse reaction from the Soviet Union. In June 1986 the Soviets warned Pakistan that its deployment of nuclear weapons would constitute a threat to Southern Russia to which Moscow "cannot be indifferent" (WP 15 July 1986, 1). Pakistan also fears the more definite prospect of an adverse American reaction translating into an elimination of military aid and an imposition of broader sanctions.

Again, the most direct way to enhance disincentives is through military aid. However, U.S. leaders should not consider renewing the pre-1979 aid sanctions approach to non-proliferation by applying the Symington or Solarz Amendments. Military aid needs to continue to be disbursed while a credible threat is established that sanctions will be applied if the pursuit of nuclear capabilities is not curtailed. Phillip Gummet of the University of Manchester explains how a country's military

bureaucracy can be influenced to forestall nuclear deployment:

Military forces are notorious for their reluctance to accept new technology, especially where this threatens existing missions or roles. There is also plenty of evidence from around the world of resistance by one branch of the armed forces to the acquisition by another of anything which may increase its relative status. Hence, military forces will not necessarily automatically and unanimously support a decision to acquire nuclear weapons... A continuous supply of advanced conventional arms could be offered, on condition that the recipient armed services played its part in delaying a decision to acquire [or deploy] nuclear weapons (Gummet in Simpson 1987, 145-6).

Today, this policy might have a significant effect on Pakistan's nuclear ambitions, since the status of Pakistani armed forces has become increasingly tied to U.S. military aid and the military establishment has also become an important center of power in Pakistan.

Traditional aid embargoes are not the only way to institute aid sanctions. Fluctuating the amount of aid in relation to the pursuit of nuclear ambitions could offer a promising alternative to a complete aid embargo. Provision of aid does not need to be an either-or issue. For instance, with Pakistan a billion-dollar penalty could be levied for failure to halt uranium enrichment programs or a bonus could be offered for yielding the facilities to IAEA safeguards. Aid fluctuations could provide a way to exercise influence without sacrificing flexibility. These measures could have a decisive effect on Pakistan's decision to deploy nuclear weapons.

Unfortunately, U.S. aid to India is too insignificant to have a decisive effect, but concerted multilateral efforts could prove to be quite effective. Initially, India has close ties with the Soviet Union, making superpower cooperation in South Asian non-proliferation policy quite attractive. Spector & Stahl suggest that the issue could be discussed at the next superpower summit (Spector and Stahl 1988, 33). A superpower agreement to combat proliferation in South Asia could consist of a division of labor where the United States would seek to influence its ally Pakistan, and the Soviets would seek to influence its ally India. The efforts could be coordinated to maximize influence, both sides agreeing to consistently apply sanctions and rewards. U.S.-Soviet cooperation could probably be a significant factor in managing proliferation in South Asia given that the deployment disincentives of both India and Pakistan include fear of superpower displeasure.

Multilateral cooperation to enhance deployment disincentives could also include efforts through the Nuclear Suppliers' Group (NSG). The United States should exercise its influence in the NSG to formulate a consensus concerning sanctions in the event India or Pakistan deploy weapons. This could be significant as the Council on Foreign Relations concludes, "The aggregate of all economic and military assistance provided to India by members of the NSG is significant enough to provide a potential multilateral disincentive to further proliferatory acts." (Council on Foreign Relations 1986, 18). NSG policy could also directly affect India's nuclear policies. Spector explains:

India remains dependent on external sources for one key commodity, heavy water, which is essential to the operation of most of its nuclear reactors, including the Dhruva and Madras plants that are central to India's

## NUCLEAR PROLIFERATION<sup>53</sup>

nuclear-weapons capability... Tightened controls on nuclear supplies might have a greater impact on India's nuclear supplies than is generally believed (Spector 1987, 92-3).

Gummet suggests that "elements of the Indian bureaucratic and scientific elite have been prepared to promote 'Western' arguments in order to ensure a continuous supply of nuclear technology and materials" (Gummet in Simpson 1987, 145). Thus, just as the threat of U.S. aid sanctions could be used to influence the military bureaucracy in Pakistan, the threat of NSG sanctions might be used to influence the nuclear power bureaucracy in India as well as other centers of power. In the end, the influence generated by these two sanctions policies may be enough to forestall the decision to deploy nuclear weapons.

This influence might also be used to persuade India and Pakistan to pursue confidence-building measures specifically related to their nuclear programs. One of these measures is a near-nuclear weapons states' code of behavior. Suggested by M.J. Wilmhurst of the British delegation to the IAEA, it could consist of the following points:

1. All imported and indigenous nuclear plants and material would be placed under IAEA safeguards, with the exception of those specified plants and materials that are deemed essential to national security.
2. An undertaking would be given neither to manufacture nor to test a nuclear explosive device except under circumstances of a grave threat to national security.
3. A commitment would be made to adhere to the NPT as soon as obstacles based on questions of national security have been removed (Wilmhurst in Simpson and

## 54 PI SIGMA ALPHA REVIEW

McGrew 1984, 149).

If instituted, this agreement would preclude deployment while at the same time setting the basis for longer term solutions.

Of course, these policies might fail and India and Pakistan could deploy nuclear weapons anyway. If deployment does occur, U.S. policy should shift from prevention to management. Haass describes the appropriate measures of a management policy:

The United States would want to work with both Pakistan and India to promote arms control and to enhance their command and control systems to lessen the likelihood of accidental war. It could even selectively enhance nuclear capabilities to strengthen retaliatory potential and, thus, reinforce mutual deterrence (Haass 1988, 117).

But if the policies to prevent deployment are implemented by the United States, the management of an Indo-Pakistani nuclear deterrent can probably be avoided. But the prevention of deployment should not be the only goal of U.S. non-proliferation policy in South Asia. U.S. policy should also be designed to prevent extra-regional proliferation.

### Preventing Proliferation Beyond South Asia

The primary policy for preventing proliferation out of South Asia is broadening and improving the current NSG. Initially, as the Council on Foreign Relations concluded in 1986, the membership of the NSG needs to be broadened to include India and Pakistan (Council on Foreign Relations 1986, 18). As documented above, both India and Pakistan have



the potential to become significant nuclear suppliers. The United States needs to actively pursue expanding the membership of the present NSG. A new NSG should include all current and potential suppliers, including India and Pakistan. This should be a formal group that meets regularly to discuss nuclear export standards.

Besides expanding the NSG, its current export standards need to be reevaluated. To begin with, existing nuclear safeguards are not consistent among nuclear suppliers. While the United States' export standards are very strict, those of Canada and Western Europe are relatively lenient (Walker in Simpson and McGrew 1984, 97-9). These inconsistencies are complicated by a recession in the nuclear market that "places further pressures on supplier governments to relax their standards or at least to resist any upgrading thereof" (Moher in DeWitt 1987, 94). And the existing standards are not very restrictive to begin with. David Fischer and Paul Szasz of the Stockholm International Peace Research Institute describe the problems of current NSG guidelines, "They place no embargo on the export of the technologies that can be directly used to make nuclear explosives, enrichment and reprocessing. They do not require full scope IAEA safeguards in the importing country as a condition of supply" (Fischer and Szasz 1985, 103).

The United States should encourage the adoption of consistent standards within the NSG. These standards would include consistent criteria for the export of sensitive technologies and consistent criteria to assess when full scope safeguards are appropriate as a condition of export. At the United Nations the NSG should consult extensively with the IAEA and all members of the NPT through U.N. conferences and assemblies. All NPT states should have a chance to contribute to the formulation of NSG standards. This will help avoid perceptions that

NSG countries are formulating a nuclear technology monopoly. U.N. participation will also contribute to the access of relevant technologies for all nations seeking genuinely peaceful nuclear capabilities.

If the NSG is expanded to include Pakistan and India and strengthened to better limit the risk of weapons proliferation, the spread of nuclear weapons from South Asia will be a minor threat. But a complete South Asian non-proliferation policy must promote arms control and eventual disarmament in South Asia.

### Promoting Arms Control and Disarmament in South Asia

Arms control in South Asia should be designed to maintain the nuclear status quo in South Asia. Spector & Stahl suggest three arms control measures designed to maintain the nuclear status quo:

1. A formal, reciprocal ban on nuclear tests, which could be renewed periodically.
2. Fixed duration, reciprocal inspections of key nuclear installations, to verify that nuclear materials are not being used for military purposes.
3. Verifiable, temporary shutdowns of sensitive nuclear weapons materials plants (Spector and Stahl 1988, 33).

The first proposal seems particularly attractive to the South Asian situation. Pakistan has already proposed a regional test ban. It would be "highly advantageous to India since it would preserve India's lead in this field while helping to constrain further Pakistani proliferation." The second measure could be open to periodic renewal, while preventing

"additions to both countries' de facto nuclear weapons stockpiles as long as it was in effect." The third measure could also freeze existing stockpiles "without necessitating on-site inspections, since whether a plant was shut down could probably be determined from satellite data or from agreed photoreconnaissance overflights or other cooperative measures" (Spector and Stahl 1988, 33).

These measures should be promoted by U.S. diplomats in New Delhi and Islamabad. The United States could also offer to help negotiate agreements, provide verification for the measures, or arrange for another more agreeable third party to assist India and Pakistan in their bilateral arms control efforts.

There are also multilateral efforts that would serve to freeze the nuclear status quo in South Asia. One of these efforts could be a multinational fuel cycle center (Fischer and Szasz 1985, 112). This would provide one spent fuel reprocessing plant for the region. And even though both Pakistan and India have built their own reprocessing and enrichment plants, the establishment and use of these facilities could still serve to freeze the stockpiling of plutonium and enriched uranium. In the long term the United States might increase the viability of this proposal by offering financial compensation for the Indian and Pakistani plants that would no longer be needed in the event of a viable regional reprocessing plan. Another multilateral approach might be a multinational spent fuel center. This would provide one facility for the region to store spent fuel (Fischer and Szasz 1985, 113). If established and used, this facility would eliminate the viability of plutonium reprocessing. Again, the United States could offer financial compensation to increase the proposal's viability.

Beyond arms control is disarmament. One way to promote disarmament in South Asia is the establishment of a nuclear weapons free zone

(NWFZ). This would ban nuclear weapons from South Asia. So far, India has rejected Pakistan's proposal for a NWFZ because it does not include China, who has intermediate range nuclear weapons stationed in Tibet (Jian in Goldblat 1985b, 97). To a large extent, a South Asian NWFZ depends on Sino-Indian relations. In addition to encouraging India and China to continue improving their relations, the United States could also encourage China to disarm along the Tibetan border. This would probably go far toward convincing India of the desirability of a NWFZ.

Probably the best disarmament measure in the long term is to integrate India and Pakistan into the international non-proliferation regime--the NPT and the IAEA. However, Pakistan will not join the NPT unless India does. And India has opposed the NPT since its inception. Ambassador Azim Husain presented India's reasons for rejecting the NPT in his 1968 address to the United Nations following the treaty's adoption. Rodney Jones of the Center for Strategic and International Studies provides a useful summary of the ambassador's arguments (Jones in Goldblat 1985b, 104). First, India claimed that the treaty was discriminatory, justifying the possession of nuclear weapons for some states and condemning their possession for others. Second, the treaty does not establish mutual obligations between nuclear suppliers and consumers. Finally, China was not a party to the treaty, so India withheld its support to maintain its nuclear option against a potential nuclear-armed adversary. China also rejects the treaty on the grounds that it discriminates, justifying the possession of nuclear weapons by the superpowers while implicitly condemning the possession of weapons by other powers.

Given this reasoning, it seems that the onus of expanding the NPT into South Asia lies with superpower efforts at arms control and disarmament.

The U.S./Soviet agreement to eliminate intermediate-range nuclear forces (INF treaty) in December 1987 was a giant step toward legitimating the NPT for countries like India and China. Prime Minister Gandhi praised the INF treaty in the *Indian and Foreign Review*, calling it a "truly momentous development." Progress on Strategic Arms Reduction Talks (START) could also have a significant impact on South Asian non-proliferation. Gandhi indicated in October 1987 during his visit to Washington that "progress [towards NPT participation] might be possible in the context of superpower nuclear cutbacks" (CSM 14 December 1987, 7). START calls for a fifty percent reduction in the overall nuclear arsenals of the superpowers. In April 1988 the last difficulties were worked out in terms of weapons ceilings, making the agreement dependent on the signatures of president-elect George Bush and Soviet Premier Mikhail Gorbachev. The START agreement is virtually completed.

After the completion of START between the superpowers, its stipulations should be integrated into Article VI of the NPT. Also, a multilateral summit discussing the positive and negative points of the treaty could be held with all interested world nations. This internationalization of the START treaty could help further reduce perceptions that the NPT does not apply to the superpowers. These perceptions could be further reduced if subsequent superpower arms reductions were worked out in the context of the NPT. The end result of these measures could be an increased spirit of cooperation for world-wide disarmament.

U.S. policy must soon be adjusted to avoid further proliferation in South Asia. While some would say that the full nuclearization of South Asia is inevitable, there is reason to be optimistic that South Asian proliferation can be curbed. The Soviet pullout from Afghanistan, the appointment of Prime

Minister Bhutto in Pakistan and her desires for improved Indo-Pakistani relations, improved Sino-Indian relations, as well as giant steps being made toward superpower disarmament are all cause for hope that nuclear weapons will not be part of the Indo-Pakistani rivalry. But these developments will also require a proper U.S. response if their benefits are to be fully realized. If the United States allows military aid and sales to perpetuate insecurity in South Asia or somehow allows the disarmament process to be derailed, then the situation in South Asia could significantly deteriorate. And if this occurs, there are plenty of reasons to believe that the region will become the second victim of atomic holocaust in Asia.

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# THE "PRIMACY" OF THE FIRST AMENDMENT: DOES IT HAVE A JUSTIFICATION IN NATURAL LAW, HISTORY, AND DEMOCRACY?

James G. McLaren

Justice Cardozo has characterized the protection of speech as a "fundamental" liberty in part because "our history, political and legal," recognized "freedom of thought and speech" as "the indispensable condition of nearly every other form of freedom" (Gunther 1985, 975).

This essay will examine whether or not Justice Cardozo is correct. Is freedom of speech a fundamental liberty and a prerequisite to other freedoms? Is it necessary to the maintenance of free democratic government? If the answer to these questions is in the affirmative, then which one governs our development of the civil liberty of free speech?

It must be recognized that a tension exists between the state and the individual when attempting to posit the genesis of free speech in America. As we contrast the rights of the individual to speak his piece during the Vietnam War with those of his World War One counterpart, we notice a movement in favor of the idea that individual freedom is curtailed if we deny freedom of expression; that an individual can only experience the totality of his other liberties through the State's recognition of his right of free expression. If this view is accepted, the conclusion must be that this "fundamentality" of right has its origin in natural expression, not tied to the State or its institutions, and only susceptible to curtailment under the most extraordinary circumstances.

On the other hand, we may posit as the origin of a right of free expression the necessity of free

speech to open, democratic government. This admits of restraints on free speech in order to protect the democratic institutions which the freedom of speech is intended to foster.

In order to determine which of these two geneses is responsible for our First Amendment freedom of speech, I shall examine the history of freedom of speech in Israel, Athens, Rome, and England. I shall then trace the possible derivation of freedom of speech from natural law, to determine whether or not there is a connection. Based upon my findings, I shall conclude by analyzing the "special treatment" or "primacy" or "fundamentality" of the freedom of speech. Is it based on historical precedent, philosophically rooted in natural law, or a man-made invention of a twentieth century liberal judiciary?

## FREE SPEECH UNDER JEWISH LAW

In Ancient Jewish Law we deal with essentially a theocratic legacy, since the Mosaic law was written down and preserved, whereas the secular legislation of kings such as Manassah, David, and Solomon is all but lost to history (Horowitz 1953, 20). Though the kings were supposed to be subject to the authority of the Torah, the activity of kings tended to displace and weaken that authority rather than enhance it (Horowitz 1953, 21).

In biblical law therefore, there is no democratic tradition, or movement toward liberty of speech to protect democratic institutions. Instead, laws against open expression sought to protect Israel from being drawn away to idolatry. Since idolatry was regarded as rebellion against God, all Israel might forfeit the blessings of God if it allowed a city to turn to idolatry. Thus if a city "falls away by a

whole it shall be investigated and called upon to repent." If the citizens will not repent then all Israel will "attack them by force of arms." Wives and children will be slain by the sword, while those who seduced them will be stoned (Horowitz 1953, 178).

The offense of idolatry posed such a threat to Israel that it was the only offense in Talmudic Law in which evidence obtained by entrapment was admissible (Horowitz 1953, 179). Strict penalties also met "idolatrous prophets" and "false prophets." Those prophesying in the name of an idol could be summarily strangled, "even if his statement coincided with the law." He who prophesied in the name of the law, but falsely, must be tried by the Court of Seventy-One, the Supreme Court of Israel. Even if the prophecy were true, if the prophet did not personally receive it by prophetic revelation he was strangled (Horowitz 1953, 179-80).

Jews were not allowed to curse the deaf or blind (Horowitz 1953, 110). They were not allowed to "cause the face of their neighbor to blush" (Horowitz 1953, 110). The prohibition of injurious gossip and slanderous defamation arose from the commandment to "love thy neighbor as thyself," (Lev. 19: 17-18) (Horowitz 1953, 120). Even if the other party was guilty of an offense, the Rabbi should be told privately so that the offender had a chance to repent privately.

Insulting one's wife in public was a crime in Israel and was grounds for divorce (Horowitz 1953, 258). Spreading an evil report in order to injure a reputation was punishable by a fine and damages. Slander would not be forgiven until apology had been made. There was also an offense of humiliation, chargeable to those who had "done some act directly on the body of the complainant," like spitting on him or beating him (Horowitz 1953, 598-600). Though this offense is more akin to our

modern battery, it was regarded in Israel much like defamation and insult; an offense to the commandment to love thy neighbor.

## FREEDOM OF SPEECH IN ANCIENT ATHENS

The first known use of the word "freedom" occurs in a twenty-fourth century B.C. manuscript in which King Urukagina of Lagash issued decrees proclaiming the freedom of his citizen-subjects (Muller 1961, 40-41). There is no mention of freedom of speech, however. Freedom of speech is said to have been born much later, during the Athenian archaic period 800-600 B.C. (Tedford 1985, 4). During this period, the aristocratic rulers of Athens allowed free communication of opinions without fear to "certain classes of citizens." An expansion of the right occurred under the reforms of Solon (c. 594 B.C.) and Cleisthenes (c. 509 B.C.), reaching a zenith during the golden age under Pericles (c. 443-429 B.C.) (Tedford 1985, 4).

Athenian citizens had wide-ranging freedom of expression, from the governmental institutions of the council assembly and courts, to society at large. Max Radin notes the extent of artistic liberty permitted in Athens by recounting the works of Aristophanes. This dramatist criticized the Athenian politician Cleonymus as a "glutton", "perjurer", "informer", "swindler", and "one who throws away his shield in battle" (1927, 223-24). Calling someone a "shield thrower" or coward was defamation under Athenian law, but the response to the insult is not known (Tedford 1985, 4).

Although Athens was reputed by Plato to be the city with "the greatest liberty of speech in all Greece" (Georgias), there were restrictions upon speakers, content, and the time and place of

utterance. As Radin observes, there never was "a community in which a man might say whatever he pleased. Even those who at various times have pleaded for great freedom of utterance, have always hastened to add qualifications" (1927, 215).

Freedom of speech was at first narrowly confined to a few, then extended in accordance with the numbers of citizens who had a say in government. Before Solon, landowners were eligible as citizens, and could speak with freedom in the assembly. When the Athenian constitution was reformed in 549 B.C., all classes of citizens including non-landowners were permitted to participate in the assembly. With this extension of enfranchisement came the concomitant extension of a right to free speech. Nevertheless, the designation "citizen" excluded sixty percent of the population who were males under eighteen, women, resident aliens, or slaves (Tedford 1985, 5).

The Athenians had measures of "prior restraint" to prevent unworthy orators from participating in public life. If they had been convicted of a crime, did not pay their taxes, or were accused of dishonorable acts they could not speak to audiences (Tedford 1985, 5).

Slander laws provided for fines of those who spoke evil of the dead, or slandered the living during festivals, in temples, in courts of law, or in public offices (Bonner 1967, 81-84). Laws also existed to punish those who deceived the people, gave bad advice, or promoted inexpedient or unconstitutional legislation." The "bad advice" mentioned above was meant in the context of misleading an audience after being bribed by an enemy. In essence it acted much like the Espionage Act of 1917. One colony in Greece was so protective of its democracy and constitution that:

The original code of laws . . .

## 70 PI SIGMA ALPHA REVIEW

contained a provision to prevent tampering with the laws, namely that the person wishing to propose an amendment of an existing law must speak with his head in a noose; if he or she failed to convince, the noose was tightened instantly and the complainant was strangled (Freeman 1950, 35).

Despite the legal restrictions, freedom of expression still flourished because it was necessary to protect the democracy which the Athenians treasured. As Robert Bonner states, "no laws or penalties could have fully enforced responsibility for public utterances . . . . Popular government would have languished and failed if every citizen stood in danger of the law every time he ventured to speak in public" (Bonner 1967, 84). One who did flaunt the warnings of his legislators was Socrates, who was (unjustly) put to death for sedition in 399 B.C.

## FREEDOM OF SPEECH IN THE ROMAN REPUBLIC

The free and responsible citizen in Rome, to whom the assembly was open, possessed certain rights which the state could protect as long as the citizen exercised civic responsibility. Romans believed in social responsibility and obeying the law, and therefore tolerated a higher degree of state control over their lives than Athenians (Momigliano 1942, 124).

There were no legal guarantees of freedom of speech; however, a tradition of tolerance developed during the Republic that permitted a high degree of free expression by the population. Laura Robinson notes that writers of satirical verse, poets, pamphleteers, and historians suffered no state censorship (1940).



Although the assembly was open to all citizens, they only had the right to vote and not to speak. Senators were called upon to speak (and influence the voters) in order of rank. Therefore, although their speech was protected, senators of low rank were seldom allowed to speak (Tedford 1985, 9). Senators could defame without much fear of legal action. Cicero called Piso a "plague", "beast", "dog of Clodius" and a "donkey". Even in the courts it was permitted to call the defendant a "parricide", "lover of his sister", and "desecrator of religious ceremonies" (Robinson 1940, 37).

Roman legal restrictions upon freedom of speech were most prevalent in the state-run theater. It was not permitted to insult a person by name on the stage. The issue of freedom of speech in a state supported enterprise remains with us today. As Tedford notes, one argument to support North Carolina's 1963 "Speaker-Ban Law" was that "known communists" could exercise their freedom of speech in society at large, but tax-supported schools need not provide them with a platform (Tedford 1985, 11).

## FREEDOM OF SPEECH IN ENGLAND

A pattern of "dissent by permission" was established by the Roman emperors who exhibited various levels of toleration of criticism. This pattern "became accepted practice throughout Europe and the British Isles for more than seventeen centuries, during which time no western nation extended to its citizens a legal guarantee of freedom of expression" (Tedford 1985, 12). The established Christian church, having won its battle against persecution by the authorities, made full use of this lack of legal protection by persecuting others whom it deemed

unorthodox or heretical (Pfeffer 1967, 10-20).

In the thirteenth century, as the Inquisition began on the Continent, the Magna Carta was being signed in England. Though it contains no mention of freedom of speech, it laid the foundation of constitutional liberty "by declaring that justice was not to be sold, denied, or delayed and that no freeman could be deprived of life or property except by peer judgment and by the law of the land" (Tedford 1985, 12). Tedford argues that it was subsequent reaffirmations of the Magna Carta which gave rise to a freedom of speech. No direct line of free speech theory passed from Athens and Rome to England (1985, 12).

Freedom of speech evolved in England into a *civil liberty*. This involves legal guarantees that each citizen must be protected by law from arbitrary arrest and imprisonment, and that the law must support each citizen's right to speak and not just a privileged few (Tedford 1985, 12). Arbitrary arrest of outspoken critics has been abhorred in England and the United States, and our critics are protected by writ of habeas corpus. The law protecting freedom of speech spread slowly in England from the monarch and high clergy to the members of parliament in the 1689 English Bill of Rights, and finally to the general population as a civil liberty in the 1860s (Tedford 1985, 13-14).

The English adopted legal constraints over three types of speech: sedition, defamation, and blasphemy (Blackstone 1769, 151). Unlike the Greeks, the English extended blasphemy to cover "immoral" and "lewd" messages under the label "obscene libel" (Tedford 1985, 14-15). The reason the free speech tradition did not pass unfettered into English society may be attributed to the undemocratic nature of the government of England, even in the centuries following Magna Carta. The "crime" of criticizing the King, government officials, laws, symbols, or

policies was punishable as seditious libel under statutes of 1275 and 1379 (Levy 1963, 7). These laws restricted the publication of views critical to government for the next six hundred years.

To control seditious libel, the monarchs established the Privy Council and Star Chamber, infamous for its torture-drawn confessions and executions without trial. The public alienation these practices aroused caused Parliament to abolish the Star Chamber in 1641 (Tedford 1985, 16).

Suppression of political criticism continued however. The rationale was explained in a 1704 sedition trial by Chief Justice Holt, who argued that if speakers and writers "should not be called to account for possessing the people with an ill-opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it" (Levy 1963, 10). This rationale came after the relaxation of licensing of the press, which had persisted in England from 1538 to 1694. This means of prior restraint was the alternative, and companion to, seditious libel as a means of controlling free political expression. Much of the debate about the Framers' original intent revolves around prior restraints and seditious libel.

## THE HISTORY OF FREEDOM OF SPEECH IN AMERICA

Leonard W. Levy has said that the

persistent image of Colonial America as a society in which freedom of expression was cherished is an hallucination of sentiment that ignores history. . . . The American people simply did not understand that freedom of thought and expression means equal freedom

## 74 PI SIGMA ALPHA REVIEW

for the other fellow, especially the one with hated ideas (1963, 18).

Among those helping to perpetuate the myth include Justices Brandeis and Holmes. Justice Brandeis said in *Whitney*:

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth, that without free speech and assembly discussion would be futile (1927, 375).

Justice Holmes interpreted "the theory of our constitution" as belief "that the ultimate good desired is better reached by a free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out" (*Abrams v. United States* 1919, 630).

One way to reconcile these opposing camps is to treat the Founding Fathers and the society in which they lived as separate entities. The Founding Fathers were exceptional men of high ideals and refined thinking. It was Washington who had to convince the populace that "toleration" of other religious groups meant "acceptance;" toleration was more than refraining from hanging the other fellow, "the one with hated ideas."

A distinction could also be drawn between pre- and post-Revolutionary America. Prior to the Revolution, Colonial governors could banish Puritan and Quaker clergymen; some Quakers were even executed for heresy (Tedford 1985, 32). As Justice Hugo Black wrote of the period:

Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail. . . . All of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters (*Everson v. Board of Education* 1947, 10).

The Bill of Rights was a positive attempt to cure these ills, as evidenced by Jefferson's fear that the Constitution itself did not provide adequate protection: "I will now tell you what I do not like. First the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press . . . [etc]" (Lipscomb and Bergh 1903-04, 387).

How the Founding Fathers sought to cure these ills has been the subject of vigorous debate. Zechariah Chafee argues that the framers of the first amendment "intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America" (1941, 21). Levy disagrees, and "remains convinced that the revolutionary generation did not seek to wipe out the core idea of seditious libel, that the government may be assaulted by mere words, that the legislators were more suppressive than the courts, that the freedom of political expression remained quite narrow until 1798. . . ." (1985, 767).

These two arguments characterize my search for the origin of the First Amendment protection of free speech. Was our free speech conceived as "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut* 1937,

319)? Or did freedom of speech evolve as it did in England, as an offshoot of other liberties as the laws of sedition, prior restraint, and licensing were eroded after the Magna Carta?

Since Chafee and Levy have already locked horns in their examination of First Amendment history, retracing their steps would be meritless. I propose instead a novel thesis: Is free speech a natural right? If there is a natural right of free speech, its primacy over other liberties not accorded that status is assured. This would support those who espouse the view that free speech is necessary to freedom and true democracy, since these are fundamental to our happiness and self-realization. If there is no natural right to free speech, then it must have arisen as a residual of eroded protections of the state from disruption of order.

## **IS THERE A NATURAL LAW OF FREE SPEECH?**

The Roman lawyer Cicero stated:

There is in fact a true law - namely, right reason - which is in accordance with nature, applies to all men, and is unchangeable and eternal. . . . Neither the Senate nor the people can absolve us from our obligations to obey this law, and it requires no Sextus Aelius to expound and interpret it. It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor (Wilkin 1947, 225-

26).

The history of free speech in Greece leads us to reject any notion that it conformed to the Ciceronian *litmus* test for natural law. Individual communities within Greece changed the enfranchisement of who could speak and the penalties and conditions of speech. As Eugene Gerhart has noted, any fragment of natural law found in the writings of ancient Greece is no more "than the recognition of man's inherent desire for reciprocal justice" (Gerhart 1953, 34).

Similarly, for the Romans, natural law belonged to the present, and was defined in terms of their present institutions (Maine 1931, 70-71). The "one law, eternal and unchangeable" was in fact a product of the reasoning of the Roman Rulers, subject to change as expediency required. They, like the Greeks, expanded the enfranchisement of participants in government, yet excluded a large population of political eunuchs from expressing their opinions.

"In medieval times the law of nature and the law of God were regarded as similar" (Gerhart 1953, 40). With Rome as the center of the universe, and the Pope the final arbiter of God's laws, successive popes poured out decretals which were formed into statute books. These purposed to be the laws of God in rule format. Every law not in the books was repeated, and "every sentence, every rubric [of the Gregory IX statute book] was law" (Pollock and Maitland 1895, 88-89). Holdsworth noted the effect of these laws on secular rulers: "To disobey the law of God might mean excommunication and a king or other ruler who deliberately continued to defy it might expose his territory to an interdict" (1922-26, 219). Thus there arose legal as well as religious grounds for the revolts of the Franciscan tertiaries of the period

who refused to bear arms for their secular kings (Fortini 1981, 522).

During the Middle Ages however, it would seem that primitive attempts to define and apply natural law served only as a check on the excesses of Church legal jurisdiction. The Dominicans used the writings of St. Thomas Aquinas to arrive essentially at the Ciceronian definition. Much like their Greek counterparts however, theorists of natural law did not use it as a starting point in the creation of law, but as a comfortable justification for ideas of abstract justice and "equity," which would grow into a great body of English law. As Grotius put it, equity was "the correction of that wherein the law [by reason of its universality] is deficient" (Gerhart 1953, 46). Grotius could have drawn from the lesson of the Magna Carta. The grant of individual freedom to Englishmen "evoked immediate opposition and hostility from the papacy," and was seen "as the result of a conspiracy" (Gerhart 1953, 48). Thus, despite an Aquinian and Dominican legacy of natural law, the Roman church did not even recognize the basic rights of property and trial by peers, let alone free speech.

The great principles embodied in the Magna Carta also spurred the break of America from her mother country. Writings on the social contract, the laws governing human understanding, and the reform of government fired the imagination of the framers and formed a basis of "natural rights" the violation of which was used to justify the rebellion (Holdsworth 1922-26, 15). The Declaration of Independence is based on "truths that are self-evident," that man has "inalienable rights."

It is this philosophical (and natural rights) tradition that jurists such as Brandeis, Holmes and Cardozo draw upon when they protect speech. However, they do so erroneously. The only protection of free speech consistent with a theory of



natural law would be absolutism. Justice Black's absolutist thesis is stated in one sentence: "I take no law abridging to mean *no law abridging*" (Kurland 1975, 2). This is the only position consistent with free speech and expression being first among the inalienable rights of man. Yet, as we shall see, the absolutist viewpoint has never been that of United States courts.

After the Revolution, the Americans committed the sin of enfranchisement limitation: ". . . in spite of the high sounding generalities of the Declaration of Independence, [the Americans] did not abandon the institution of slavery; [and] the suffrage in many of the states was very limited . . . ." (Holdsworth 1922-26, 15-16). The first historical limit on speech was thus imposed --*who* had the right. Before the landmark cases resulting from the Espionage Act of 1917 and *Schenk v. United States*, numerous Supreme Court decisions upheld restrictions on speech. Since the Fourteenth Amendment had not been extended to include guarantees of the First Amendment against the states, Antonin Scalia argues that pre-World War One decisions shed light on what the Court conceived the guarantees of the First Amendment to be (1987, 10). An examination of these cases led Rabban to conclude that "[o]nly a few, isolated opinions before World War One indicated that the First Amendment could be more than a paper guarantee" (1981, 540 note 2). Scalia concludes that the "First Amendment is a particularly fragile protection, constantly subject to assault in authoritarian times, and thus constantly in need of zealous defense" (1987, 11).

Scalia is implying that our current "libertarian" stance toward freedom of speech is susceptible of change. Threats to national security, real or misperceived, have seen the heavy hand of authoritarianism suddenly descend to restrict free speech. As Justice Harlan said in *Konigsberg v.*

*State Bar*, " . . . we reject the view that freedom of speech and association . . ., as protected by the First and Fourteenth Amendments are 'absolutes'. . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk . . . ." (1961, 49-50). One of these has been national security. Chief Justice Vinson stated in 1951: "Nothing is more certain in modern society than the principle that there are no absolutes. . . . To those [eleven Communist leaders in this instance] who would paralyze our Government in the face of impending threat by encasing it in a semantic strait jacket we must reply that all concepts are relative" (*Dennis v. United States* 1951, 508).

## CONCLUSION

Any attribution of our First Amendment right (of free expression at least) to natural law suffers from the same defects which we attribute to the Greek and Roman systems; it is tied to our current institutions and values. By inference, this would-be natural right is subject to change in scope as ideas change and institutions shift the balance of their power. By deduction, since the law is not applicable to all times and all places, or even constant within the limited history of the United States, there is no natural law of free speech.

Justice Cardozo's characterization of the First Amendment freedom of expression as being first among the first is a fallacy. We are not unique, but a mere extension of our historical predecessors. Like the Greeks, we value the preservation of our democracy above the right of the individual to speak his mind. Locke's theories of social contract explain that the individual must compromise certain liberties to attain greater security of other liberties. It

would appear that this is the case in America. Like the English then, Americans can make a case that liberty of speech has sprung from the consolidation and assertion of other liberties, rather than being the catalyst of those liberties. The jurists of the twentieth century who have tried to attach a special status to speech have erred in their philosophical origins. The framers saw only the greater democratic freedom envisioned by Locke for the populace as a whole. The theory of a self-realization only attainable through free expression is a creation of our modern jurists. These jurists, unfettered by the practical concerns of our Founding Fathers, may see a different First Amendment than did Jefferson. They may be the greatest natural rights theorists since the Dominicans. However, history tells us, and the message and philosophy of the Founding Fathers confirms, that reversions to a state of nature and natural laws of self realization will inevitably be crushed in any confrontation with the principles of national security and the protection of democratic order. Our recent flirtation with natural law has served merely to temporarily redefine when such a confrontation occurs.

In the penultimate analytical section of this essay I put the Greek, Roman, English and American systems to the litmus test of Ciceronean natural law. The astute observer will have noticed the absence of a Jewish model. The Jewish law, being based on theocratic principles, is the nearest to natural law. The ultimate offense in Israel was idolatry. Offenses against God were the most serious, not those against the government or the people. Offenses against the individual were next in gravity, since they were regarded as vicarious sins against God, who had commanded love for one's neighbor. A cursory examination of the many prohibitions imposed upon Israelites may lead us to dismiss their claims to freedom of speech, or to any

individual rights. Is it not the case, however, that they enjoyed the greatest freedom of any people? The law elevated the person of the individual such that the standard of giving offense was anything less than love.

Could it be that our present day jurist-philosophers convey the ambivalence of our American society toward God and the individual? We started the American republic on the principle of a New Jerusalem, covenanted to God to preserve freedom and democracy, then we immediately turned away from the priorities we shared with the old Jerusalem. *God was not to be protected. Instead, the individual was to be protected in His stead.* As we have refined and expanded the protection given to the individual over two hundred years, we have elevated the status of the individual to a level far below, but perhaps directed toward, that which he held in ancient Israel. While we need not love him, we must increasingly respect his right to act as he pleases.

The euphoria of this elevation of the individual to the achievement of his inalienable rights has intoxicated our philosopher jurists. In canonizing the individual such that he can achieve a self-realization and a fulfillment of all other rights, we are not legislating the fulfillment of the measure of his creation. Cicero mentioned the Senate and the people as subordinates in the natural law. He envisioned no Supreme Court, unelected, unrepresentative, and incapable of ouster, which could decree that instead of God-then-man, "natural law" bids us worship man then God, with the latter optional or it would offend man. The natural law of our jurists is of their own making, and fails to meet any definition of natural law requiring eternality and unchangeability.

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# CITIZENSHIP'S LEGAL FOUNDATIONS: CONVENTION AND NATURAL RIGHTS

Kif Augustine

Citizenship acts as a coordination solution organizing a legal society into members and non-members. Despite this fairly simple definition, the nature of citizenship remains a difficult concept. The primary difficulty in understanding the nature of citizenship resides in the tension between the contractual and the natural rights perceptions of society.

The contractual approach emphasizes the reciprocal duties and rights of individuals and community. The community sets the standard for exclusion or inclusion, terminating or precluding the relationship when it is not beneficial to itself. The citizen also freely terminates the relationship if he finds the particular conditions of membership onerous, but the standards set by the society condition his initial inclusion. As a community member, the individual fulfills duties and participates in the political process. In return, he receives the substantial benefits of community life and government protection. Overall, the community's needs balance against the individual's needs.

The natural rights perception, on the other hand, holds the individual's needs paramount. Man has rights that are inherent in his being and these society cannot violate, no matter the communal needs. Therefore, citizenship carries little weight. The individual does not have any duties to the community; the community exists to benefit the individual.

Whichever theoretical approach one takes, living in a community obviously requires some coordination between individuals. For that matter, any human interaction, however simple, functions on mutual

expectations. The real coordination problem is understanding another's expectations, or rather identifying what that person expects you to expect of him (Schelling 1963, 54). On a societal level, conventional agreements in many forms (laws, traditions, etc.) coordinate individual expectations. As Reynolds points out, coordination solutions in the form of conventions simplify life and reduce uncertainty, thus benefitting the individual (1987, 5). By delineating expectations, coordination solutions provide a practical, conventional framework in which individuals and communities operate.

The consequences of citizenship as a coordination solution will be discussed in light of the contractual and natural rights views of society. In the practical arena, the concept of citizenship developed by the U.S. Supreme Court demonstrates the tension between these two views. Alien participation and expatriation will be two areas of emphasis.

## THE NATURE OF PARTICIPATION

For citizenship to be valuable, it must entail certain privileges that are denied the alien. Essentially, these privileges are embodied in a distinction between roles. The citizen fills many formal roles which the alien may not, while they share the informal role of subject.

Most basically, citizenship itself is a role. Citizenship grants the individual a participatory role in the legal community. Citizens define the legal community as they modify and change it; therefore, they are ultimately responsible for its form in ways non-members are not. Citizenship also allows the individual access to more official roles such as juror, legislator, and judge, roles that further develop and define the community. Citizens can participate in the political process.

In addition to his participatory roles, the citizen

shares the role of subject with the alien. As subject, the individual complies with and supports the conventions of society. He abides by the law, pays taxes, fulfills military duty, participates in the advantages of the system by setting up a business, sends children to school, and is informed on issues. Overall, he contributes to the success of the system. In these instances of everyday life, the alien's actions and duties are indistinguishable from those of a citizen. The citizen, nonetheless, retains a participatory advantage.

While the franchise is often deemed a necessary characteristic of the citizenship role, it is not always a reliable tool for measuring participation. Some citizens are denied the vote while at times aliens are allowed to vote. Children receive protection as citizens but their participation in the political process is severely limited. Convicts retain their membership in the political community--they are still citizens--but not their ability to participate in the political decision-making process because they violate the laws and conventions of that community. Indeed, an ex-felon can be denied the vote even after he has served a prison sentence and completed parole (*Richardson v. Ramirez* 418 U.S. 24 [1974]).

Historically, women were denied the franchise while still counted as citizens (*Minor v. Happersett* Sup. Ct. Oct. 1874 162). Likewise, at other times voting privileges were determined by property ownership, not citizenship status. Currently, Puerto Ricans are U.S. citizens but are not represented by a voting member in Congress; nor do they participate in federal elections. Indeed, the recognition of Puerto Ricans as United States citizens was based on the assumption that their citizenship was substantively different (see 33 Congressional Record 2473-74 as quoted in Cabranes, 1979, 37).

Just as the franchise is sometimes denied to citizens, it has at times been granted to aliens.

Currently, a number of Scandinavian countries grant foreign nationals the right to vote in local and regional elections and even hold elective office (Tung 1985, 453). In the United States, a number of states allowed aliens the vote in the mid-1900s (Roseberg 1977, 1099), and aliens were completely excluded from voting in presidential elections only in 1928 (Aylsworth 1931, 114).

The justification for excluding individuals from the vote varies over time, thus reflecting the tension and interplay between the natural rights and contractual theories. Although it seems unfair to a modern mind formed in a tradition of individualism and independence that women were excluded from the franchise, they were represented and considered full citizens in an era where representation and power were wielded by families rather than by individuals. The family filled the participatory role. With the industrial revolution, the concept of a completely independent woman, especially financially, became a possibility. Such a woman was rare if not non-existent in previous ages. Therefore, a woman, although denied the vote, was fully represented as a citizen through her family, specifically her husband, in the electoral process. The contractual notion prevailed.

The value of citizenship, despite an inconsistent application of the franchise, remains problematic only if a specific definition of citizenship is required and forced upon the past. While the content of citizenship, meaning the privileges and benefits granted to each citizen, changes and may indeed be different for specific citizens at a given time, a citizen is nonetheless an official member of the political community. Citizens are always represented in the political process. They change and modify the legal and political framework that governs their lives even if representation and participation has not always been as specific and directly aimed at the

individual as it is today. The community and the individual define the citizen as an insider. Consequently, he is allowed privileges the community has decided are specifically relevant to membership. The alien is an outsider and denied those privileges, whatever they are.

## CITIZENSHIP AS CONTRACT

The mere existence of citizenship supports a contractual approach to society. Citizenship is not even relevant unless there is a society to be a member of; citizenship defines the political community. Furthermore, citizenship has never been considered an absolute right derived from mere existence, not even in an age committed to individualism. Aliens do not have the right to become citizens. Once a member of the group, one's right to remain a member may be paramount; however, obtaining membership is not the right of anyone.

The Immigration Reform and Control Act of 1986 provides amnesty to many illegal aliens but does so only for those individuals who can meet the standards of residency, English language ability and other criteria set by Congress. Not everyone is admitted, and those who are enter the political process at the community's initiative and discretion.

The Supreme Court expressed this notion more explicitly in *United States v. Ginsberg* (243 U.S. 472 [1917]) and *Johannessen v. United States* (225 U.S. 227 [1912]). *Ginsberg*, emphasizing the decisions reached in *Johannessen*, argues that "an alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications" (243 U.S. at 474). Congress, as representatives of the community, must decide the "terms and conditions"

under which any individual can participate in the political process of the nation. Moreover, "no alien has the slightest right to naturalization unless all statutory requirements are complied with" (243 U.S. at 475). In this case, the Court recognizes that the community decides who will be admitted; the individual has no right to membership unless he complies with the standards set by the community. If the statutory requirements are met, then the individual must be admitted; but as a non-member of the society he has no right and no real way to change the standards the community sets. His membership is dependent on their good will.

## STANDARDS FOR EXCLUSION

The potentially discriminatory nature of citizenship becomes almost immediately obvious. Essentially, the definition of members and non-members of a political community is an arbitrary act, a necessary distinction presently governed by little besides the values and decisions of the community itself. Exclusion of some is necessary to the identity, even the existence, of the community. A community is formed by individuals sharing values and traditions, which naturally implies that there are others who do not share the same traditions and values.

In a specific community, rule of law and constructive unanimity provide a metalegal standard for decision-making, a standard specifically designed to prevent discrimination. Rule of law requires generality, that individuals or individual groups be essentially unidentifiable for privileges or punishment. Under the rules and procedures of the legal system, no one is above the law, as all individuals are treated equally. The rules must be prospective rather than retroactive, sufficiently publicized, and clearly stated (Reynolds 1986, 3, 4). Discrimination against community members is thereby prevented.

Constructive unanimity, substituting for complete unanimity, serves as the most important aspect of rule of law. Constructive unanimity implies a coordination solution where certain individuals such as legislators are entrusted with the decision-making power, but rule of law circumscribes their decisions so that any decision they reach is one that could have been reached by the community as a whole. Rule of law and constructive unanimity are simple, effective coordination solutions to the problem of governing a large body.

Rule of law and constructive unanimity do not, however, answer the question of who should and who should not be included in the community in the first place. Rule of law prohibits discrimination among individuals for specific benefits or punishments, but citizenship itself is discriminatory in the drawing of community lines. Constructive unanimity depends upon a definition of insiders and outsiders, a definition of those whose opinion really matters. Such is not the case of course if the community is all-inclusive and the world becomes the unit of decision. But a world community is not a viable coordination solution to the problems of governance; the world divides itself into competing and distinct legal systems. And any unit less than a world community demands a definition of members. Rule of law and constructive unanimity reduce discrimination, but only within an already defined community.

In its discriminatory nature, citizenship is logically bound to the conventions of the admitting society. The community will admit those whose presence it finds beneficial and exclude those who pose a threat economically, medically, even culturally. The contract of citizenship must benefit both the individual and the community. The alien benefits the society *and* indicates his desire for community membership by complying with its conventions.

## 94 PI SIGMA ALPHA REVIEW

The individual's ability to support community conventions, however, rests on his physical location in the community since territorial boundaries are the current solution to jurisdictional problems. Territorial borders are a simple, effective coordination solution as they define parameters for both jurisdiction and membership. The legal alien's presence in the country is consented to by the members of the community as he met certain standards prior to his physical admittance.

Illegal aliens present a unique problem in that they circumvent the consensual process of the community by entering unlawfully. But the alien's very ability to demonstrate his own consent depends on that circumvention. Once here physically, it becomes increasingly difficult to distinguish between illegal aliens, legal aliens and citizens in the performance of duties to the community, if the alien pays taxes and is law abiding. In some ways they may even embody the ideal of the community more than actual members. In a nation built by immigrants such as the United States, the immigrant family "making it" after years of struggle and hard work stands as a testament to the values and opportunities many consider the essence of America.

An immigrant family becomes American, not only because they identify themselves with the American ideal, but also because of the generous tradition of citizenship the United States offers. Any individual born here, with a few diplomatic exceptions, automatically receives American citizenship regardless of the parents' legal or illegal presence, nationality, race, or religion. Whether an individual alien naturalizes or not, in a generation or two his family automatically becomes American. The citizenship conventions in the United States are broadly inclusive.

If the alien can clearly identify himself with the



core values of the community and demonstrate his commitment to that community through performance of specific duties, does the fact that he entered illegally really matter? If one stresses the natural rights perspective, the answer is no; the individual's right to self-determination weighs heavily. On the other hand, if one applies contract theory, the illegal alien's violation of community standards for entrance undermines the society itself. The present solution to illegal entry in the Immigration Reform and Control Act of 1986 mixes the two views. It is a very practical solution to a difficult problem. Most importantly, as a congressional act, the solution is conventional and bound by constructive unanimity; the illegal alien may legalize his status but only according to community standards.

A like question centers around consent but not physical presence in the community; should not anyone who agrees to the conventions of a community, a legal society, then be considered a member, no matter where they live? In this case, the answer is no, simply because the benefits traditionally associated with a nation-state would be nearly impossible to provide. Protecting a population from enemy attack when that population is scattered around the world would prove extremely difficult. Governments presently issue warnings against travel in specific areas or evacuate citizens from troublesome areas. Physical protection is limited. Of course, exceptions can be given, but it is obviously more difficult to protect a scattered population than one bound by territorial and therefore relatively controllable borders. Other public goods for which government takes responsibility would also be difficult to provide. Citizenship and territorial distinctions go hand in hand as coordination solutions.

Given the necessarily arbitrary nature of territorial boundaries and the lack of a metalegal

standard for inclusion or exclusion, natural rights and contractual theory place competing demands on citizenship. Within the United States, the contractual approach overrides any natural rights presumption of citizenship. Nonetheless, the natural rights approach strongly influences the granting of civil rights and economic benefits to aliens, making citizenship basically a political designation. Consequently, it is impossible to show a consistent application of either natural rights or contractual theory in the concept of citizenship developed by the U.S. Supreme Court. Even the recent tendency towards individual rights in expatriation cases and civil rights cases is mitigated by a contractual approach in alien participation cases.

## CIVIL RIGHTS FOR ALIENS

Although the United States Constitution and Bill of Rights define the nature of the American political community, they are applicable to all those physically present in the United States whether they are official members of the community or not. In 1885, the Supreme Court argued in *Yick Wo v. Hopkins* (118 U.S. 356 [1886]) that

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws (118 U.S. 356 at 369).

Therefore, "all persons," not just citizens, are entitled to the equal protection of the laws of the United States. Even illegal aliens receive equal

rights protection.

In a sense, such a broad application of equal protection seems a denial of a community's distinct responsibility to protect its citizens in return for their strict allegiance, as opposed to all others whose allegiance is limited although they may be present "within the territorial jurisdiction" of the United States government. By its very wording, equal protection becomes the right of the individual, but a right granted to him by a political community that values rights. The right is inviolate but only because the community deems it so. The Fourteenth Amendment grants equal protection to all persons because the American people value such rights.

Given the individual's absolute right to equal protection, what right does the state have when observing its duty to provide equal protection? Is the individual's right to equal protection always trump against the state's needs to define itself? Although *Yick Wo v. Hopkins* grants broad protection to citizens and aliens alike, it does not obliterate the distinction between the two in terms of their respective roles. An examination of two Supreme Court cases citing *Yick Wo* demonstrates that equal protection applies to the alien in his role as subject, as a private individual, but not necessarily in his participation in the political arena. Equal protection does not grant political privileges.

Although political participation is not part of equal protection, the Court finds that welfare benefits are. *Graham v. Richardson* (403 U.S. 365 [1970]) struck down state law denying welfare benefits to aliens since the Fourteenth Amendment applies to all persons, citizens and aliens (403 U.S. 365 at 371). Therefore, the Court held "that a state statute that denies welfare benefits to resident aliens who have not resided in the United States for a specified number of years violates the Equal

Protection Clause" (413 U.S. 365 at 376). *Graham* further maintains that the community's "concern for fiscal integrity" is not a justification for classifications (413 U.S. 365 at 375). In *Graham*, the Court fails to recognize that the community granted equal protection rights in the first place. *Yick Wo v. Hopkins* certainly did not indicate that the community's needs were unimportant. A community which values rights, such as the United States, will obviously grant more rights to individuals than a community without such values. But rights themselves come as a societal grant, not naturally.

*Graham's* decision set a new precedent by emphasizing individual rights as it overturned *People v. Crane* (214 N.Y. 154 [1915]). Previously, as *Graham* notes, *Crane* set a standard emphasizing the integrity of the community over the rights of the individual:

To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful . . . . The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike (214 N.Y. 154 at 161, 164).

*Graham's* concern for the individual overwhelms *Crane's* concern for the community.

*Nyquist v. Mauclet* (432 U.S. 1 [1976]) shows a further emphasis on broad equal protection application for aliens. State financial aids may not be restricted to citizens but must also be available to resident aliens regardless of their intent to become citizens. In a 5-4 judgment, the Court decided that educating the electorate is not a sufficient justification for excluding aliens from student financial assistance. Resident aliens pay their share of taxes and should benefit from contributing to the programs these taxes support (432 U.S. 1 at 11). Lack of citizenship is essentially a political liability: "And although an alien may be barred from full involvement in the political arena, he may play a role--perhaps even a leadership role--in other areas of import to the community" (432 U.S. 1 at 12). Participation in all non-political benefits is not limited.

In their dissenting opinions, Justices Burger, Powell, Stewart, and Rehnquist stress contractual theory. The community does have a special interest in providing education to those who will remain to benefit the community (432 U.S. 1 at 14). Powell argues that "states have a substantial interest in encouraging allegiance to the United States on the part of all persons, including resident aliens, who have come to live within their borders" (432 U.S. 1 at 16). Moreover, the community has made it very easy for the alien to remove himself from the excluded category by declaring an intent to become a citizen or by becoming a citizen if he is currently eligible (432 U.S. 1 at 20).

In this case, the community defines a standard whereby an individual may benefit fully from financial aids if he only declares an allegiance to the community. The alien already receives benefits from the community and his ineligibility for additional benefits rests only on his unwillingness to fully commit to the community. Any investment should

yield a profit or benefit to the investor. The State of New York invests in its citizens and resident aliens who demonstrate a desire to become citizens in a perfectly understandable effort to build the community. In the end, the dissenting opinion supports the community, but the individual wins.

## ALIEN PARTICIPATION

In contrast to civil rights and equal protection, in the political realm the community retains great power in determining the extent of alien participation. *Sugarman v. Dougall* (413 U.S. 634 [1973]) allows exclusion of aliens from jobs that precisely relate to the political process even though the decision struck down a state statute limiting permanent civil service employment to citizens. The judiciary recognized that a state has a special interest "in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community'" (413 U.S. 634 at 642). Therefore citizenship can be a qualifier for participation in a number of occupations. Aliens are not members of the community in the same way that citizens are and hold only those political rights that the community grants them.

*Sugarman's* standard for exclusion of aliens from specific jobs outlines the formal participatory roles. These roles logically reflect the responsibilities of those who define the community and the community's need for self-definition:

And this power and responsibility of the State applies, not only to the qualification of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or

review, of broad public policy perform functions that go to the heart of representative government. There, as Judge Lumbard phrased it in his separate concurrence, is 'where citizenship bears some rational relationship to the special demands of the particular position' (339 F. Supp. at 911, quoted in 413 U.S. 634 at 647).

Citizenship does bear a rational relationship to the demands of political positions. *Sugarman* recognizes the persona, the political role, as distinct from the individual, since it does not deny civil rights to aliens while still limiting political participation (413 U.S. 634 at 641). The responsibilities of that political role are distinct from the rights of the individual but explicitly linked to the rights of the citizen. The alien's obligations to obey the conventions of the society in which he lives are similar to those of a citizen (413 U.S. 634 at 646), even while his alienage limits his participation in the political system.

Although he argues for upholding the citizenship requirement for civil service employment in New York in his dissenting opinion, Justice Rehnquist essentially uses the same contractual theory expressed in the opinion of the court. He argues that citizenship is an important classification, far more important than the majority *Sugarman* opinion expresses. For him, citizenship is "a status in and relationship with a society which is continuing and more basic than mere presence or residence" (413 U.S. 634 at 652). It should have value beyond the political realm (413 U.S. 634 at 659). Ironically enough, in arguing the value of citizenship and the importance of a citizenship requirement for specific activities that greatly affect the community, Rehnquist cites *Afroyim v. Rusk* and *Trop v. Dulles* which value citizenship but primarily from a natural

rights view. *In re Griffiths* (413 U.S. 717 [1973]) decided that the legal profession, despite its close link with the political process, was open to aliens. Although lawyers have traditionally been seen as officers of the court with a moral responsibility to uphold and defend the law, *In re Griffiths* reflects the contemporary view that a lawyer's first obligation is to his client. *Griffiths* argues that lawyers are not officials of the government, although they do occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts (413 U.S. 717 at 729). They may be leaders in the community but being a lawyer does not "place one so close to the core of the political process as to make him a formulator of government policy" which is the standard for exclusion set by *Sugarman* (413 U.S. 717 at 729). In this view, lawyers are protected under the Fourteenth Amendment from a citizenship requirement.

In following *Sugarman*, *Foley v. Connelie* (435 U.S. 291 [1977]) places state troopers in the category of individuals whose important nonelective position and broad discretionary powers allow them to act significantly as policy formulators. Police officers act as government representatives in their employment. In allowing a distinction between citizens and aliens, Justice Burger in the opinion of the court notes that membership is relevant to participation:

A new citizen has become a member of a Nation, part of a people distinct from others [omit citation]. The individual at that point, belongs to the polity and is entitled to participate in the processes of democratic decision-making (435 U.S. 291 at 295).

The difference between aliens and citizens lies in



their membership. That difference affects their ability to satisfactorily fulfill the obligations of a state trooper.

In a dissenting opinion, Justice Stevens states that troopers are implementors rather than makers of policy, an opinion shared by Justices Marshall and Brennan. Therefore, political community membership is not relevant, but the individual's ability to fulfill the job requirements is.

Stevens further dissents by arguing the inconsistency of *Foley v. Connelie* and *In re Griffiths*:

The disqualifying characteristic [in *Foley*] is apparently a foreign allegiance which raises a doubt concerning trustworthiness and loyalty so pervasive that a flat ban against the employment of any alien in any law enforcement position is thought to be justified. But if the integrity of all aliens is suspect, why may not a State deny aliens the right to practice law? (435 U.S. 291 at 308).

Stevens feels that the allegiance of aliens should be as little, or as much, of an issue for police officers as for lawyers.

But allegiance is not what distinguishes lawyers from police officers. The occupations are fundamentally different. The police officer acts as a representative of the government granted specific powers by the community and receives his paycheck directly from its taxes, thereby justifying a citizenship requirement. Jobs that involve public representation such as district attorneys, state prosecutors, and judges could also attach a citizenship requirement, not only because the roles demand the broad public policy formation and implementation of *Sugarman*, but also because they specifically represent the political community.

In contemporary view, a lawyer is significantly

different since his primary responsibility is to the client, not the community of law. He does not represent the political community. He derives his power from employment by the individual; he can be hired or fired according to the will of the individual; he receives his paycheck from the individual. His activities test and evaluate the rules set down by the political community but he derives little power from that community. Lawyers do not represent the public and therefore should not be subject to a citizenship requirement. By these contemporary standards which stress individual rights rather than community responsibility, *In re Griffiths* and *Foley v. Connelie* are not inconsistent.

*Ambach v. Norwick* (441 U.S. 68 [1979]) serves as another example of the community limiting the participation of aliens in the political process. According to Justice Powell's opinion of the court, public school teachers perform a role that goes to the heart of representative government and in accordance with *Sugarman* may be subject to a citizenship requirement. In *Ambach* the intent to become a citizen is sufficient qualification for those who are prevented from becoming citizens due to a length of residence requirement. In furthering *Sugarman*, *Ambach* holds that a citizenship qualification for public school teachers does not violate the Equal Protection Clause since "some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government" (441 U.S. 68 at 74). Relying on *Foley*, *Ambach* deems public education "a most fundamental obligation of government to its constituency," as fundamental even as the police function. Similarly, the influence of a teacher is "crucial to the continued good health of a democracy" (441 U.S. 68 at 79). *Ambach*

recognizes the teacher's powerful though not political role in transmitting the values and traditions of the community and deems the community interest sufficient to its exclusion of non-members from that role.

The dissenting opinion offered by Justice Blackmun and joined by Justices Brennan, Marshall and Stevens, once again argues the inconsistency of *In re Griffiths* and *Ambach*. Why should a state allow resident aliens to take a bar exam and qualify to practice law if teachers are barred from employment in the public schools? Lawyers are significant role models too (441 U.S. 68 at 88). As in the controversy between *Foley* and *In re Griffiths*, the real issue is public versus private roles. The public school teacher acts in a public role, receiving his paycheck from the community, while the attorney does not. Equally important, *Ambach* places a citizenship requirement only on public school teachers. Private institutions may hire whomever they wish, regardless of citizenship status.

Although sensitive to natural rights arguments about the discrimination that may result from categorizing individuals, like *Sugarman, Cabell v. Chavez-Salido* (454 U.S. 432 [1982]) recognizes the community's interest in defining itself:

The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. . . . Aliens are by definition those outside of this community (454 U.S. 432 at 439, 440).

Through its reliance on *Sugarman*, *Foley*, and *Ambach*, *Cabell* subjects probation and deputy probation officers to a citizenship requirement because they are bound up in the basic

governmental process; their participatory role belongs to the citizen. Probation and deputy probation officers perform a function essential to the political community.

*Cabell* provides an interesting insight into when aliens may be excluded and when they may not. The distinction between aliens and citizens is suspect when applied to distribution of economic benefits, but "it is a relevant ground for determining membership in the political community" (454 U.S. 432 at 432). The different roles of subject and citizen underlie this distinction.

On the other hand, many significant occupations do not fall within the standard set by *Sugarman* and extended by *Ambach*, *Foley*, and *Cabell*. The community cannot prescribe rules against alien participation in occupations that are not bound up in the very essence of democratic government. The position of lawyer previously discussed is an example. Nor can the government exclude the alien from distribution of many economic benefits. In the private, non-political realm the alien is as free as the citizen. This inclusion of the alien in the non-political roles of life seems fairly consistent with a conventional approach to membership. The community did not want to exclude the alien from all participation or he would not have been allowed within the boundaries of the nation in the first place. His legal presence is the community's consent to some sort of participation on his part. The community only excludes the alien from those roles where membership is important in a political sense.

Starting in 1915 with *Truax v. Raich* (239 U.S. 33), the Court decided that

It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the

personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words (239 U.S. 33 at 41).

The reference back to *Yick Wo v. Hopkins* along with the defense of alien participation in common occupations, indicates that the alien is primarily excluded from the community's political self-definition but not from activities that are part of everyday life. The issue of discrimination is important because it impinges "upon the conduct of ordinary private enterprise" (239 U.S. 33 at 40). In the political realm, community desire weighs heavily; in the non-political realm the individual's rights, citizen or not, are virtually invincible.

Like *Truax, Takahashi v. Fish and Game Commission* (334 U.S. 410 [1948]) affirms the right of aliens to participate in the common occupations of the community. Initially, Torao Takahashi was excluded from fishing off the coasts of California because he was an alien. The Supreme Court decided that the ability of a state to "apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits" especially in terms of occupations (334 U.S. 410 at 420). If a compelling state interest (an important and justifiable state need such as self-definition of the political community) could be demonstrated, then exclusion of aliens might be justified. Otherwise, exclusion of individuals lawfully admitted to the political community is not justified.

## EXPATRIATION

Natural rights and contract theory not only influence the way an individual becomes a member

of a society, but also whether or not that relation can be terminated. If a community grants citizenship based upon its own specific criteria, can it also take it away? Theoretically, the answer is yes, especially if the contractual approach is emphasized. What one grants, one can withdraw. Nonetheless, court cases indicate that in practice once one receives membership, it is the individual rather than the community that retains the right to sever the relationship. In an strong application of natural rights theory, the Court finds that even acts the community has specifically designated as expatriating cannot deprive an individual of his citizenship. The Court's strong position emphasizes natural rights far more than does the community.

*Afroyim v. Rusk* (387 U.S. 253 [1967]) sets the current precedent for expatriation issues. In this instance, an individual of Polish descent naturalized as a citizen of the United States voted in a political election in Israel. Section 401 (e) of the Nationality Act of 1940 defines voting in a foreign political election as an expatriating act. Afroyim's passport renewal request was denied by the U.S. Department of State based on his violation of this statute. The Supreme Court however supported Afroyim's claim that he was still a United States citizen because he had not expressly renounced that citizenship:

We hold that the Fourteenth Amendment was designed to, and does protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship (387 U.S. 253, at 268).

The Court essentially provides the community no power to sever the relationship of citizenship; the individual's decision is paramount.

Just prior to this recognition of the absolute right of the citizen to retain his membership no matter what his actions, the Court emphasizes the communal nature of citizenship in the United States. Ironically, this statement stands in stark contrast with the powerlessness of the community to determine that membership:

Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship (387 U.S. 253 at 268).

If citizenship is a cooperative affair, the individual has a responsibility towards the community. Community and country imply cooperation in ways that *Afroyim v. Rusk* and its later applications have denied.

Furthermore, what this majority opinion does not recognize even in its valuing of cooperation, is constructive unanimity and rule of law. The Court does not use the term rule of law as a metalegal principle, but more as the rule of a particular law. The distinction is of great importance. If a nation is abiding by rule of law as previously defined, it will not set up discriminatory standards against those who are already members of the community. The nation may, however, choose to protect itself against those actions that would be particularly disruptive to the unit, against those individuals who violate the conventions and do not fulfill their responsibility to maintain the system from which

they benefit. By arguing that one group of citizens might deprive another of citizenship based on "creed, color, or race" the Court assumes that the community follows majority rule rather than constructive unanimity. Minorities of whatever kind could be discriminated against under majority rule. They would not be discriminated against under a system of rule of law and constructive unanimity.

If citizenship is a cooperative affair as the Court agrees, then the individual must have some responsibility to cooperate. Abiding by the conventions of the community is a logical demonstration of cooperation. By arguing that the individual's "voluntary renunciation" of citizenship is required before he can be expatriated, the court denies any responsibility of the individual towards the community. Two cases decided prior to *Afroyim* but following essentially the same logic support the idea that the individual's violation of conventions, or withholding of consent, does not grant the community power to expatriate him.

In *Trop v. Dulles* (356 U.S. 86 [1957]), a native-born American was considered to have expatriated himself by wartime desertion in violation of section 401 (g) of the Nationality Act of 1940. Chief Justice Warren presents his opinion and is joined by Justices Black, Douglas, and Whittaker. He argues that "the duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation" (356 U.S. 86 at 92), and that the citizen who does not fulfill these basic responsibilities, be they tax obligations or the obligation to be honest, may seriously damage the nation. Warren then asks a rhetorical question and bases his further argument on the assumption that the answer is no: "could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship?" Warren's best summarizes his position in "citizenship is not



a license that expires upon misbehavior. . . . citizenship is not lost every time a duty of citizenship is shirked" (356 U.S. 86 at 92).

While granting that citizenship is not revoked for violation of some duties of citizenship, a felony conviction for tax evasion or fraud, severely circumscribes the individual's ability to participate in the political process. He does not lose civil rights but loses all rights of citizenship. Like an alien he cannot participate in the political process, though he retains the title of citizen. Citizenship itself is not lost every time a duty of citizenship is shirked, but the political role is limited to the degree that one has violated the conventions of the community. If a citizen does not violate any conventions or laws, then his participation remains intact.

Since Warren also recognizes that failure to perform the basic duties of citizenship may cause a "dangerous blow" or "serious injury" to the community, one wonders how the community could defend itself against such violence. Warren does grant that "in appropriate circumstances, the punishing power is available to deal with derelictions of duty," but one could hardly imagine a dereliction of duty more serious than the desertion in wartime at issue in *Trop*. If the community has no right to demand the execution of basic duties from its citizens, such as military service, then the nation hardly has a duty to provide benefits to those citizens, such as defense against an enemy. If no one will serve there can be no defense.

In their dissenting opinion, Justices Frankfurter, Burton, Clark and Harlan support the contractual concept of citizenship by demonstrating the desirability of allowing a nation to protect itself against injury from within as well as from without: "One of the principal purposes in establishing the Constitution was to 'provide for the common defense'" (356 U.S. 86 at 120). Moreover,

## 112 PI SIGMA ALPHA REVIEW

possession by an American citizen of the rights and privileges that constitute citizenship imposes correlative obligations, of which the most indispensable may well be 'to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense' *Jacobsen v. Massachusetts*, 197 U.S. 11, 29" (356 U.S. 86, 121).

Their argument is essentially a recognition of the duties of the individual that accompany the benefits provided by the community of the Constitution.

In a similar case, *Kennedy v. Mendoza-Martinez*, military service was once again at issue. Here an individual evaded the draft by living outside of the United States. He then returned to the United States and was convicted of draft evasion pursuant to Section 11 of the Selective Training and Service Act of 1940 and his citizenship was questioned. The Court held that "the Constitution is silent about the permissibility of involuntary forfeiture of citizenship rights" and more importantly that "while it [the Constitution] confirms citizenship rights, plainly there are imperative obligations of citizenship, performance of which Congress in the exercise of its powers may constitutionally exact" (372 U.S. 144 at 159). Just as in *Trop v. Dulles*, these statements seem to recognize the power of the community to exact duties from the citizens it protects. Nonetheless, the Court affirmed the lower court ruling that Mendoza-Martinez did not lose his citizenship, thus in practice ensuring that the community could not exact obligations from its members.

In *Vance v. Terrazas* (444 U.S. 252 [1979]), Section 349 (a)(2) of the Immigration and Nationality Act is called into question. This section states specifically that an American citizen who takes an oath of allegiance to a foreign state will

lose his citizenship. Laurence J. Terrazas, who claimed a dual nationality because of Mexican parentage and U.S. birth place, took an oath of allegiance whereby he swore "adherence, obedience, and submission to the laws and authorities of the Mexican Republic" and "expressly renounc[ed] United States citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of the United States of America" (444 U.S. 252 at 255). While such an explicit oath of allegiance would seem sufficient justification for revocation of citizenship based on the voluntary renunciation requirement of *Afroyim*, the Supreme Court decided that Terrazas really had not *intended* to renounce his American citizenship even while voluntarily performing what Congress had defined as an expatriating act. The burden of proof falls upon Congress; there was not a preponderance of evidence to show that Terrazas intended to relinquish his citizenship (444 U.S. 252 at 270). The community has very little recourse if even such an explicit statement does not demonstrate intent.

A final case decided by the New York Federal District Court on the precedent of *Afroyim v. Rusk* presents a unique example of the individual having it all his own way. *Kahane v. Schultz* (653 F. Supp. 1486 [1987]), Rabbi Meir Kahane accepted a seat in the Israeli Knesset in violation of several immigration and naturalization codes which define serving in a foreign government as an expatriating act. Kahane argues that while he knowingly committed an expatriating act, he never *intended* to relinquish his citizenship. He and his lawyers repeatedly wrote letters to the U.S. Department of State affirming his intent to remain a U.S. citizen. In upholding Kahane's U.S. citizenship, even as he sat in the Knesset and had aspirations to the position of Prime Minister of Israel (F. Supp. 1486 at 1489), the District Court cited the precedent of

*Afroyim* and quoted *Terrazas*: "In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct" (444 U.S. 252 at 260).

May an individual then do what he pleases with total disregard for the will of the community as defined by Congress, desert in time of war, pledge allegiance to a foreign government while renouncing U.S. citizenship, serve a foreign power, vote in foreign political elections? The Court seems to say yes. Such a decision leaves itself open for abuse and goes far beyond the individual rights conception held by Congress, although according to constructive unanimity and rule of law it is Congress, not the Court, who should decide these issues.

In a perfect society certainly no one would lie about his intentions; certainly no one would have bad intentions in the first place. Nonetheless, society is not perfect. An individual could intend to remain a citizen of the United States, or declare that his intent had been to remain a citizen when it really was not, merely for the benefits received rather than out of a sense of community or allegiance.

Kahane serves as a prime example; he freely admits that his intent to retain U.S. citizenship centers around his desire to lecture in the United States, a freedom that would be circumscribed with Israeli citizenship and his extreme political views (653 F. Supp. 1486 at 1490-1). While recognizing this as a "less than commendable motive" the District Court argues that "*Afroyim* and *Terrazas* teach that an intent to retain citizenship for hypocritical or cynical reasons is no less valid--legally--than an intent predicated on the noblest of altruistic motives" (653 F. Supp. 1486 at 1494). Hypocrisy is a lethal tool against the moral character of a nation, no matter how legally valid it may be. The community is forced to underwrite

and protect Kahane's individualism but can place few if any demands on him.

Although the District Court in *Kahane* also tries to preempt analogies of citizenship intent with criminal intent, its arguments are less than satisfactory. The court asserts that criminals may lie about their intent in order to avoid punishment but that "an actor who states that he wishes to remain a citizen is making a statement about *his own status*" and it is therefore impossible for him to lie. The statement "I want to remain a citizen" cannot be a lie (emphasis in original, 653 F. Supp. 1486 at 1492, fn. 7).

Of course the desire to remain a citizen may be true, and from that standpoint the statement not a lie, but if the Court views the intent of the individual as paramount, should not the intent behind such a statement also be examined? Just as the criminal may disguise his intent, so may the citizen. Saying "I am not a murderer" with gun in hand, and "I am a citizen" with expatriating act committed are not that different; in neither case can we know real intentions except as they are communicated to us by the individual. Nevertheless, in the former we allow the community the final decision (manslaughter or murder). In the latter the final decision remains with the individual although his conduct may be as potentially damaging to community integrity as the presence of a murderer is to the community's physical well-being.

The District Court seems to think that either we can know the intentions of criminals by the acts they commit or that intent is at times irrelevant to the fact that a crime has been committed. On the other hand, a citizen's actions do not always reveal intent and intent is absolutely necessary to expatriation. Without intent, nothing has really happened.

Nonetheless, this granting of absolute right of

expatriation to the individual has not always been recognized. Prior to *Afroyim*, the community's demands bound the individual to a much greater degree. Indeed, dissenting opinion in the 5-4 *Afroyim* case cites the majority opinion in *Perez v. Brownell* (356 U.S. 44 [1957]), which was overruled by *Afroyim*. *Perez* recognized the greater ability of the community to define itself and protect itself by requiring allegiance to the laws it established through the legislative process.

*Perez v. Brownell* presents the case of an individual who voted in a political election in Mexico and also remained outside of the United States to avoid the draft. Retention of U.S. citizenship was denied due to his violation of section 401 (e) and (j) of the Nationality Act of 1940 (amended). The Court decided that withdrawal of citizenship was not an arbitrary act but one justified by the "rational nexus" which

must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means--in this case, withdrawal of citizenship--must be reasonably related to the end--here, regulation of foreign affairs" (356 U.S. 44 at 58).

In *Perez*, the Court recognizes the community's need to regulate itself and its members sets a reasonable standard by which the needs of the individual can be balanced with the needs of the community. If Congress has a specific power or responsibility, it must also have a means to carry that power out. In this case, the community's need to carry out foreign affairs coherently justifies the action taken against individuals whose actions threaten the community. The Court's opinion stands in strong contrast to *Trop v. Dulles*, *Kennedy v. Mendoza-*

*Martinez, Kahane v. Schultz, and Afroyim v. Rusk* where the cooperative nature of the community is recognized, but any means of carrying out community responsibilities is valid only if it does not impinge in any degree on the individual's will.

By setting a reasonable standard, the Court in *Perez* neither advocates the extreme individualism inherent in *Afroyim* nor presses an extreme view of community. Rather, the need to balance the two serves as a basic and pragmatic criteria. Voting in a foreign election seems less potentially damaging than the desertion issue in *Trop* and yet *Trop* retained his citizenship and *Perez* lost his. Ironically, *Trop v. Dulles* and *Perez v. Brownell* were both decided on the same day, demonstrating the inconsistent and at times confusing application of contractual and natural rights theories to citizenship.

Significantly, *Perez* cites the precedent set by *Mackenzie v. Hare* (239 U.S. 299) where individual intent was deemed totally irrelevant to community needs. In this case a native-born American woman married an alien and then tried to register to vote. By reason of her marriage to an alien she ceased to be a United States citizen. The need of the government to avoid international entanglements and embarrassments superceded her interest in remaining a citizen. In contrast to *Perez* where Warren recognizes the people as the source of sovereignty, the court in this case views the government itself as sovereign. Rather than sympathizing with the community's need to defend itself and then withdrawing all tools of defense, this Court sympathizes with the individual but upholds the community:

We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved

more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. . . . It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. . . . (239 U. S. at 311-2).

In this case the rights of the individual are subservient to the greater needs of the community. In contrast to more recent cases even her desire and intent to retain citizenship are irrelevant to those greater needs.

Just as he presented a strong case for the individual in the *Trop* decision, so Chief Justice Warren argues strongly for natural rights in his dissenting opinion in *Perez*. Since the sovereignty of the United States government stems from the people, the "citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government" (356 U.S. 44 at 65). He likewise argues that "citizenship is man's basic right for it is nothing less than the right to have rights. . . . In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens. . . ." ( 356 U.S. 44 at 64). Although retention of citizenship may be a basic right granted to the citizen by the community, citizenship is hardly mankind's basic right; not even Warren extends citizenship privileges to aliens. Moreover, citizenship is really not the right to have rights since the equal protection and due process clauses apply quite broadly to all persons (*Yick Wo v. Hopkins*); rather, citizenship is the right to participate and influence the political activity of the community. Such a distinction between the right to have rights in general and the right to participate politically shows the relevance of citizenship and subject roles in the community.



*Luria v. United States* (231 U.S. 9 [1913]), decided long before *Perez*, demonstrates clearly that membership in a community implies reciprocal responsibility on the part of the individual and the community (231 U.S. 9 at 22). Significantly, the Supreme Court expressly recognizes that the granting of citizenship be beneficial for both the individual and the community: "In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself . . . ." (231 U.S. 9 at 23). Conventions and coordination solutions come about precisely because they are mutually beneficial to those involved. One would not enter into an agreement if there were no benefits. Mutual benefit is a valid standard by which we include or exclude individuals from participation in a political community. Despite the strong recognition of community in both *Perez* and *Luria*, the relative paucity of expatriation cases that expressly support the contractual theory of citizenship reflects the Court's stronger tendency towards natural rights theory.

## CONCLUSION

The inconsistent and contradictory application of natural rights and contract theory in the Court's development of citizenship reflects its difficult nature. Nonetheless, the essentially conventional aspects of community in general and citizenship in particular ensure an ongoing balance between the two approaches, despite the Court's recent emphasis on natural rights. Citizenship, as a coordination solution, defines the roles appropriate to insiders and outsiders, in accordance with the values of the community.

In a community that values rights, the conventions of membership will reflect that value, as *Yick Wo v. Hopkins* demonstrates. Even with an

emphasis on rights, it is the community, not the individual, that determines the extent and nature of those rights.

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## 122 PI SIGMA ALPHA REVIEW

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# COMRADES IN ARMS: CHINA AND VIETNAM, 1949-1979

Kristyn Allred

On October 1, 1949 Mao Zedong and his Communist forces defeated Chiang Kaishek and his Nationalist Army to become the ruling party in China. Many a Chinese peasant chanted the popular song "The East is Red," which described the success of Communism in the eastern world. For years Americans viewed China and its Communist neighbors as a strongly unified Communist bloc. However, a deeper analysis of the relationship between China and other Southeast Asian countries illustrates that ideological loyalty is not the only ingredient in a state's foreign policy.

In fact, a study of the relationship between China and Vietnam during the years 1949 to 1979 reveals a great deal of hostility between the two countries. One of the major reasons for this hostility may be attributed to intervention from the two major superpowers, the United States and the Soviet Union. This paper will investigate the reason why Vietnam has been China's most formidable foe in Southeast Asia since 1949. I believe that much of the enmity between the two countries is due to China's shift from the Soviet Union to the United States in the early 1970s, and to the alliance formed between Vietnam and the Soviet Union after the Vietnam War.

Many of the scholars who study Sino-Vietnamese relations have commented on the limitations that exist in approaching this subject. It is more difficult to get reliable information from Communist China than it is from a variety of sources in the free world. Therefore, rather than to relying heavily on official government statements (which may or may not be true) or editorial opinions in the "People's Daily," researchers have traced Chinese foreign policy by observing how China has reacted in

specific situations. The best way to analyze Chinese foreign policy towards Vietnam is by examining what each country has done with respect to their posture towards the superpowers.

## INTERNAL CONFLICTS

Before the argument is made concerning the influence of the United States and the USSR on Chinese foreign policy, it should be noted that there were several other factors which caused tension in Sino-Vietnamese relations after 1949. Overseas Chinese in Vietnam were a major source of conflict and tension. The majority of overseas Chinese wanted a relationship with China that was profitable and friendly (Fitzgerald 1977, 339). However, these foreign residents proved to be a nuisance to both China and Vietnam as their capitalist practices upset attempts at a centrally controlled government in Vietnam. Vietnam was said to be overly harsh with its northern visitors, thus sparking heated debates between the two nations (Ross 1988, 240).

Another problem for China and Vietnam was establishing a common border. While several confrontations were recorded, the most prominent dispute occurred in 1979 when China actually invaded Vietnam (Harding 1984, 129).

Perhaps the greatest tension between China and Vietnam resulted from their power struggle in Southeast Asia. Both countries competed to gain the upper hand in Indochina (Lawson 1984, 4). After the Vietnam war, both China and Vietnam sought domination in Laos and Cambodia (Kampuchea).

## SUPERPOWER INFLUENCE

While all of these problems created tension



between China and Vietnam, they were only symptoms of a much greater problem. I will argue that outside influence from the United States and the Soviet Union was the real problem between China and Vietnam (Lawson 1984, 6). These smaller issues were an affirmation of the deep seated hostility that was already present due to relations with the superpowers. Nations sometimes act as children when they are not getting along; they will use anything as an excuse to fight.

### Lean to One Side Policy

When the Communists took over China in 1949, China turned to its most likely ally, the Soviet Union. During the early 1950s China followed Mao's "lean to one side" policy (Yao 1980, 1). This theory directed China's domestic and foreign policies. Using Soviet technology and funding, China followed the Soviet model of industrialization in its first 5-year economic plan (Harding 1983, 3). In foreign relations with Southeast Asia, China promoted Communist uprisings and anti-U.S. campaigns (Martin 1977, 8).

Chinese relations with Vietnam during this period were quite positive. Both countries were aligned against the United States, who was then fighting in Korea. China provided military and monetary aid to Vietnam in its fight against the French (Ross 1988, 18-19). They also shared the desire for Communist revolution in Vietnam (Lawson 1984, 20). Perhaps the most important factor which led to favorable relations between the two countries was the fact that China was so busy organizing a new government and managing the recovery of a war-torn nation that it had little time for Vietnam.

As long as regional powers were getting along, Vietnam was in a good position to ask for aid and assistance from both China and the Soviet Union.

The Sino-Soviet Treaty of Friendship, Alliance, and Mutual Assistance of 1950 was clearly in Vietnam's best interest (Harding 1984, 180-84).

### The Spirit of Neutrality

These rosy relations soon wilted in 1954 with the Genève Conference. Both China and the Soviet Union supported the division of Vietnam, which upset Ho Chi Minh and his Communist forces who wanted a unified Communist nation (Wang 1977, 75). In the wake of the Geneva talks, a conference of Third World countries from Africa and Asia was held in Bandung, Indonesia. It was here, in the face of anti-Chinese sentiments, that Zhou Enlai presented China's policy of neutrality and unity among the lesser-developed nations (Chen 1979, 15). North Vietnam was the only other Communist country present, but seemed unimpressed with China's proposal for neutrality. Ho Chi Minh might have felt that China was trying to be too independent of the Soviet Union (especially in its foreign policy), which did not bode well for Vietnam.

### Great Leap Forward

Relations began to deteriorate between China and the Soviet Union in 1957 when Mao launched the "Great Leap Forward." Toward the end of the first 5-year plan, Mao Zedong was frustrated by the effects of the Soviet Model on China. The very things he detested were happening: unemployment, a large bureaucracy, a greater division between rural and urban workers, and an elitist education system (Harding 1984, 50). The Great Leap was the first wedge driven between China and the Soviet Union because it emphasized Mao's rejection of Soviet advice. The most extreme Soviet reaction to the

## COMRADES IN ARMS

Great Leap took place in 1958, when Soviet advisors pulled out of China (Harding 1983, 3).

Vietnam reacted negatively to China's Great Leap Forward for two reasons. First, Vietnam had always looked to China as the model on many domestic issues due to its size, culture, and dominating political system (Fitzgerald 1977, 50). Vietnam had also experienced some devastating economic problems during the late 1950s, some of which the Vietnamese blamed on China's bad example. The Great Leap was a disaster for China economically, which made Vietnam leery of Chinese policy and the direction it was taking (Bloodworth 1975, 104).

The second reason the Great Leap upset Vietnam was because China had pulled even further away from the Soviet Union. At the same time Vietnam was criticizing China for the Great Leap Forward, it was quite complimentary of Khrushchev's policies in the USSR. As a result, Ho Chi Minh tilted towards the Soviet Union after the Sino-Soviet split (Bloodworth 1975, 104). Later we will see how Vietnam cunningly shifted back and forth between the Soviets and the Chinese during the war.

### Vietnam War

Probably the most crucial event which affected China and Vietnam in relation to the major superpowers was the war in Vietnam. In 1957 Communist forces from North Vietnam began attacking South Vietnam. During the first year of fighting China was very supportive of the Communist revolution in Vietnam. Mao had always asserted the Marxist idea of continuous revolution, and wanted Communism to succeed in Southeast Asia (Fitzgerald 1977, 65).

However, because China was not on good terms with the USSR, Mao rejected Communist bloc efforts

to provide joint assistance to Vietnam (Harding 1984, 121). China had additional motives for sending money and weapons to the Vietcong. China wanted to protect its own border, and gain favor with the Vietnamese so that they would lean away from the Soviet Union and toward the PRC (Martin 1977, 4).

Nevertheless, by 1958 the Soviet Union had pushed itself into a more favorable position with Vietnam by supplying Vietnam with a substantial amount of financial aid to fight the war (Ross 1988, 20). Mao was caught between a dual policy of encouraging Communist insurgencies, while at the same time claiming that foreign revolutions must be fought by their own people. As a result, ideologically China was hesitant about supporting Vietnam (Yen 1976, 56). However, the biggest reason China did not compete with Soviet foreign aid to Vietnam was a lack of resources.

### Sino-Soviet Split

What had begun in the mid-1950s as a rejection of the Soviet model and a more independent China was by 1960 clearly a Sino-Soviet split. Several factors led to the falling-out between China and the Soviet Union. As far back as 1957 China and the USSR had been quarrelling over atomic warfare (Garver 1981, 22). Following the conflict in domestic policy with the Great Leap, the Soviets added salt to the wound by refusing to support China in the Sino-Indian dispute (Harding 1983, 3).

In spite of all these problems, it was eventually the different interpretations of Marxism that dropped an ideological axe between China and the Soviet Union. After Stalin died in 1953, the Soviets came out with four basic proposals in the 20th Congress of the Communist Party of the Soviet Union. First, the USSR presented a new foreign policy which

relied on peaceful coexistence between all nations, even those supporting capitalism. Second, they wanted to move towards socialism peacefully. Third, Khrushchev denounced the Stalin cult. And finally, the Soviets encouraged self-criticism for all the Communist nations (Smyser 1980, 6). China reacted negatively to all four proposals, and felt that the Soviets had forsaken true Communism. In the eyes of Mao, the Soviet Union had turned revisionist and could no longer be trusted (Wang 1977, 103).

It should be noted that for a brief moment after the Sino-Soviet split, Vietnam had a wave of good feelings for the Chinese (Smyser 1980, 60). China increased its military aid, and convinced Vietnam to unite against the Communist revisionists who had taken over in the Soviet Union. It was the fall of Khrushchev in 1964 that pushed Vietnam back into a neutral camp, from which it could receive aid from both China and the Soviets more easily (Smyser 1980, 76). As mentioned earlier, Vietnam did a fairly good job of maintaining favorable relations with both the Soviet Union and the PRC during the war. It was not until after the war that Vietnam swung decidedly towards the USSR.

### U.S. in Vietnam

The war in Vietnam changed after the Gulf of Tonkin incident. The United States had been involved in the war during the early 1960s, but it wasn't until 1964 when North Vietnam sank two U.S. PT boats that the United States drastically escalated its war efforts. The United States was a common enemy of the USSR, China, and Vietnam, but strangely enough those countries did not unite against the U.S. In fact, by the end of the war China had left the side of Vietnam, and had become somewhat of an ally with the United States.

One explanation of this phenomenon is that China

was greatly influenced by the maneuvering of the superpowers in dealing with Vietnam during the war (Lawson 1984, 6). China shifted in its foreign policy from pro-Soviet in the 1950s to pro-American in the 1970s (Harding 1984, 216). One must look at what happened to China during these two decades to see what caused the change, and what implications this had for Vietnam.

Two major events during the 1960s involving the United States and the Soviet Union caused China's immediate interests to deviate from those of Vietnam. First, the war in Vietnam seemed to weaken the U.S. in both domestic and international arenas (Smith 1985, 6-8). While Vietnam was very pleased by a weakened United States, China began to fear that without a powerful U.S. the Soviets would become too strong.

While the United States seemed to be losing steam in Vietnam, the Soviet Union was reasserting itself as a powerful force in Eastern Europe. In 1968, the Soviets invaded Czechoslovakia to stop a new government that was seeking Communist reforms. With this invasion, China became even more fearful of the Soviets. However, Vietnam was impressed by this display of Soviet strength.

### Sino-U.S. Rapprochement

A further analysis shows these incidents to be some of the beginnings to Sino-American rapprochement. In 1968, President Johnson admitted failure in Vietnam (Harding 1984, 125). The United States appeared to have lost some international power in relation to the Soviet Union. Therefore, China had to realign itself with the U.S. in order to achieve a more secure balance of power internationally (Lawson 1984, 5). Harding

describes China's change in this way:

As we have seen, the PRC's position in the ongoing Cold War between Moscow and Washington has been determined by China's assessment of the shifting international balance of power, as well as by the specific policies which the two superpowers have adopted towards Peking (Harding 1984, 216).

China shifted from the Soviet Union to the United States because the U.S. lost power, and the USSR became the major threat to Chinese security (Harding 1983, 13; Hamrin 1983, 210). China sought rapprochement with the United States so that a powerful bloc would be established to oppose the Soviet Union.

Without opposition from the United States, China was admitted into the United Nations as a third world power and permanent member of the Security Council (Harding 1983, 15). Following this recognition, China joined with the U.S. to support the Association of Southeast Asian Nations (ASEAN). This was a big step for China because previously the PRC had been a supporter of Communist revolution in Southeast Asia, not of world peace (Horn 1978-79, 585).

Clearly Sino-American rapprochement had a major impact on Vietnam. The United States was a long-standing enemy to the Vietnamese, and now their Chinese comrades were actively courting the U.S. Vietnam was stunned by increasing diplomatic relations between the United States and China. Quasi-alliances were then formed between China and the United States, and Vietnam and the Soviet Union (Horn 1978-79, 590). As the Chinese moved towards warmer relations with the United States, they became more indifferent to Vietnamese desires (Garver 1981, 463).

### Anti-Hegemony Campaign

After China had taken moves towards rapprochement with the United States, it took another sharp turn in foreign policy. In 1973, China began an anti-hegemony campaign (Yao 1980, 63). Now China wanted to match the USSR against the U.S. in a power play-off (Yao 1980, 50). China attempted to rhetorically reject both the superpowers in order to be a champion for Third World nations. This change in Chinese foreign policy was in part due to its admittance into the United Nations, which brought renewed world power and independence.

Deng Xiaoping also gave a speech in front of the United Nations in 1974 which was entitled "The Three Worlds" (Harding 1983, 6). In this speech he described the First World made up of the U.S. and the USSR, the Second World made up of Europe, Canada, and Japan, and the Third World made up of China, South America, Southeast Asia, and other developing nations (Yao 1980, 56). China's move to oppose the world powers was critical in communicating its desire for independence and non-expansion in Southeast Asia (Wang 1977, 138). However, China was clearly pointing to the Soviet Union as the principal threat, and not the United States. The United States even signed an agreement with China in 1972 (the Shanghai Communique) that hegemony should be stopped. As evidence of China's decision to oppose hegemony, it decreased its military spending, and the People's Liberation Army lost major political influence (Martin 1977, 19).

In order to see the result of China's anti-hegemony campaign, it is necessary to look at the conflict of interest it created with Vietnam. By January of 1973, the United States had concluded negotiations with Vietnam to end the war, but China



had been pushing to maintain a divided Vietnam (Ross 1988, 24). China, in its anti-hegemony campaign, pushed for peace and concessions on behalf of Vietnam. Vietnam, on the other hand, wanted a big victory over a unified country, the United States, and more power in Southeast Asia. As a result, the end of the war exacerbated Sino-Vietnamese tensions.

Vietnam took revenge on these tactics of Chinese foreign policy by siding with the Soviet Union (Nguyen, 1979, 1051). Vietnam could play the same game that China had started with the United States by increasing its loyalty to the opposing superpower. When a frightened China countered with its anti-hegemony campaign, Vietnam turned even more strongly towards Soviet support. The Soviet Union was able to offer Vietnam economic assistance, military aid, diplomatic support, and ideological unity (Horn 1978-79, 587).

### Postwar Events

From 1973 to 1975 Vietnam pushed to unite North and South Vietnam, and to increase its military power. This was countered by the Chinese surge for peace and neutral relations towards the United States. China's indifference towards Vietnam's goal to end the war was a result of the Sino-American talks which had taken place only a few years earlier. In summary, during the final years of the war, China abandoned Vietnam: first, when China moved towards the United States in 1970, and second when it leaned away from the Soviets with its anti-hegemony campaign.

The events which divided China and Vietnam before the end of the war were the cause of the major conflicts between the two nations after 1975 (Garver 1981, 464). Relations had been faltering throughout the Vietnam conflict, but when the war

ended there was nothing holding the two countries together (Lawson 1984, 303). They were free to face each other in open hostility.

The first source of conflict between China and Vietnam following the Vietnam war was Indochina. Ho Chi Minh had not wanted China to intervene in Southeast Asia for fear of future confrontations (Tai 1965, 431). After his death in 1969, Indochina was an even greater problem than Ho Chi Minh had imagined. Following the war, the power vacuum created by American withdrawal paved the way for Vietnamese dominance in Indochina (Yen 1980, 12). Vietnam was also very confident because of its victory over another foreign imperialist. This confidence, among other things, gave Vietnam several advantages in the quest for Indochina (Harding 1984, 119). Also, with financial and diplomatic backing from the Soviet Union, Vietnam was in a powerful position to overthrow the established governments in Cambodia and Laos (Martin 1977, 64).

China had two demands of Vietnam in the mid 1970s: not to closely ally with the Soviet Union, and not to seek domination in Indochina (Ross 1988, 4). Vietnam frustrated China by violating both of these demands. China had moved closer to the United States during the war, but now that the U.S. was out of Southeast Asia, China had no foreign assistance. China's greatest fear in Indochina was that the Soviet Union and Vietnam would gain control, leaving China sandwiched between two hostile regions (Fitzgerald 1977, 67).

Hostility grew between China and Vietnam when Vietnam joined the Council of Mutual Economic Assistance (COMECON) in 1978 (Lawson 1984, 311). This organization, founded in 1949, was comprised of the USSR, and most other Eastern Bloc countries. However, China was never a member. By this move, Vietnam displayed an even

greater commitment to the Soviets.

Despite Chinese backing, in 1975 Pol Pot fell to Communist forces in Cambodia, and the Pathet Lao were victorious in Laos. This Soviet-supported Vietnamese domination in Indochina was the crucial factor which presaged the armed confrontation between China and Vietnam in February, 1979 (Lawson 1984, 311).

The final blow to Sino-Vietnamese relations was a peace treaty signed by Vietnam and the Soviet Union in November of 1978. Technically this was a Treaty of Friendship and Cooperation between the Soviets and the Vietnamese for the next twenty-five years (Buszynski 1980, 837). This move by Vietnam was perhaps the straw that broke China's back with regards to Soviet-Vietnamese relations. China could not risk a conspiracy between two bordering countries.

Hanoi's actions during the late 1970s encouraged an already hostile China to finally attack in 1979 (Ross 1988, 199). It is clear that Vietnamese relations with the Soviet Union were the provoking factor of the invasion, despite China's claim that it was simply a border dispute (Lawson 1984, 303; Ross 1988, 4). China and Vietnam had shared a border for many years, but never had it caused such a serious problem. This was because the Soviet Union had never been such a threat to Chinese security. The alliance between Vietnam and the Soviet Union, which became even stronger after the Vietnam War, was the most threatening thing China faced in the late 1970s. It was this development that eventually triggered armed confrontation in 1979.

A significant conclusion may be drawn from what has been presented in this paper. Much has been said as to the directions both China and Vietnam have taken in response to U.S. and USSR foreign policy. The answer to the question as to why China

and Vietnam based their foreign policies on superpower politics is simply that China and Vietnam were both trying to protect their own sovereignty and security the best way they could. This would account for the shift China made to the U.S. during the early 1970s, and the shift of Vietnam to the Soviet Union after the war.

China felt that it could not win a war against the Soviet Union and Vietnam (Ross 1988, 266). Therefore, Chinese policy toward Vietnam was based on eliminating Soviet influence and improving diplomatic relations with the United States (Ross 1988, 9). The Chinese would have been able to take a different stand towards Vietnam had the Soviets not posed such a great threat.

Mao was able to sum up Chinese foreign policy in three maxims: identify the primary threat, avoid confrontation with the superpowers, and lean toward the less threatening superpower (Harding 1984, 148). According to this world view, China shifted from the USSR to the U.S. in response to the shift in the balance of power (Martin 1977, 26; Lawson 1984, 6).

Vietnam, on the other hand, had a very different perspective. Vietnam is a small nation that wanted to throw off imperialism, and successfully accomplish a Communist takeover. Vietnam initially needed Chinese and Soviet military aid, but after the Chinese sided with the Americans it had a greater incentive to build stronger ties with the Soviet Union (Smyser 1980, 2). Historically, Vietnam was also defensive about Chinese domination -- a natural response when you are the neighbor of a large regional power such as China.

## CONCLUSIONS

What may be learned from this analysis of Sino-Vietnamese relations between 1949 and 1979 is that

in the international arena states have "fair weather friends." Allies and enemies are continuously shifting in order to maintain a secure balance of power (Hamrin 1983, 209). Kenneth Waltz says in his book about international relations that states form balances of power whether they wish to or not (Waltz 1979, 125). Sino-Vietnamese relations are just another example of states seeking to maintain their positions in the international system.

Also, the fact that the international world is governed by anarchy means that the primary focus of all states is security (Waltz 1979, 126). As a result, often times military clashes are manifestations of the scramble of particular nations for security in the international world (Harding 1983, 6).

It is somewhat difficult to predict what would have happened to Sino-Vietnamese relations from 1949 to 1979 had the superpowers not been so involved in Southeast Asian affairs. However, what may be seen clearly is that the superpowers played a major role in Sino-Vietnamese hostility during the latter part of the 1970s.

## CURRENT EVENTS

Within the past several months the situation has changed in Southeast Asia. China and Vietnam have made an effort to resolve differences and sign a peace agreement in Cambodia. What is highly significant is the fact that China and Vietnam have made these moves without major intervention from the superpowers. The United States and the Soviet Union have finally pulled out of Southeast Asia in order to allow these Asian neighbors the freedom to govern themselves. As a result, the press is claiming that the prospects for peace in Southeast Asia have never been better.

According to the thesis of this paper, the

superpowers were one of the major factors in provoking hostility and unrest between China and Vietnam. Now it seems that China and Vietnam are enjoying warmer relations due to the absence of superpower forces. It would seem to hold true then that the superpowers did play a significant role in Sino-Vietnamese relations during the second half of the twentieth century. They continue to affect the outcome of Asian relations. However, this time their impact is from a spectator position. Perhaps relations in Southeast Asia will quiet down now that the superpowers have turned their attention to other things.

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