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DUE PROCESS OF FOREIGN POLICY: PROPOSALS FOR PRESIDENTIAL GUIDELINES

LUIS KUTNER*

I do perceive here a divided duty.

Othello, Act 1, sc. 2

No man is wise enough, nor good enough, to be trusted with unlimited power.

C. C. Colton

The greater the power the more dangerous the abuse.

Edmund Burke

I. INTRODUCTION

President Nixon's decision to send United States ground forces into Cambodia — without congressional consent — added considerable fuel to the fires of debate over the already inflammable constitutional issue on the scope of Presidential power in the conduct of American foreign policy. In that regard this article examines the proper place of the President *vis-à-vis* Congress in the area of foreign policy decision-making.

The salient question is: Who determines foreign policy? President Truman boldly asserted to a visiting group of Jewish War Veterans, "I make American foreign policy."¹ However, Edward S. Corwin suggested "What the Constitution does, and all that it does, is to confer on the President certain powers capable of affecting our foreign relations, and certain other powers of the same general kind . . . on Congress."² On the question of who shall have the "decisive and final voice" on foreign

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policy, Corwin added that “. . . the power to determine the substantive content of American foreign policy is a *divided* power, with the lion's share falling usually, though by no means always, to the President.”³

The President has the initiative in foreign policy, with vast powers; in the words of Bernard Schwartz, “It is the President who gives the lead to the nation in matters touching foreign affairs.”⁴ But this does not mean that the power of the President in foreign policy should be unrestrained, nor is it intended to be so. For example, on such an important feature of foreign policy as whether or not to go to war, the American people want an opportunity to be heard on a decision so vital to their interests and welfare. The people find that voice through their duly elected representatives in Congress. If an arbitrary ruler has the power to engage a country in war at any time, then war will be more likely. As Dwight D. Eisenhower wrote, “In 1776, Americans flatly rejected the theory of government by an autocrat of vast powers . . .” and they confirmed that eleven years later in the Constitution.⁵

II. THE CONSTITUTION AS A COMPASS

The men who drafted the Federal Constitution deliberately limited the powers of government because they feared that a government where all powers were concentrated in one man or one group of men would, before long, result in a dictatorship. The Framers set out their checks and balances in a *written* Constitution, carefully separating powers between the three branches so that no one department would be able to exercise all the powers given the Federal Government.

Thus, in the field of foreign affairs, the Federal Government had inherent, exclusive and plenary powers, though, the control over foreign relations was not conferred upon any single branch. The Founding Fathers decided against delegating all powers in foreign affairs to the legislature, which had been the case under the Articles of Confederation, and they likewise rejected the theories of Blackstone, Locke and Montesquieu that the executive should have the sole power in foreign relations.⁶

While the conduct of external relations with other nations was a function confided to the executive arm of government under the Constitution,⁷ it was the intent of the Founders to explicitly grant to Congress the power to do certain things. These *exclusive* powers are enumerated in Section 8 of Article I. Congress alone is given the power “To declare

War . . .". This is a limitation on the President to order the armed forces to commit an act of war. Abraham Lincoln spoke of the necessity of conferring the right to declare war upon Congress:

The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally if not always, that the good of the people was the object. This our convention understood to be most oppressive, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.⁸

Furthermore, a safeguard against the suspected possibility that a President might desire to create a permanent military force is found in the power of Congress "To raise and support Armies, but no appropriation of Money to that Use shall be for a longer term than two Years." Congress also has the power "To provide and maintain a Navy" and "To make Rules for the Government and Regulation of land and naval forces."

As for the President's relationship to the armed forces, Article I, Section 2, states that "The President shall be Commander in Chief of the Army and Navy of the United States. . . ." The Constitutional Convention, in making the President Commander in Chief, sought to place the tactical control of troops in the field under a single civilian leader.⁹ Clearly the Congress could not order battles to be fought on a certain plan, nor direct parts of the Army to be moved from one part of the country to another. Senator Sam Ervin underscored that point when he declared,

. . . the Founding Fathers were not foolish enough to place the command of American troops engaged in combat operation in a Congress of the United States. . . . I cannot imagine anything that would more nearly resemble bedlam than to have a council of war composed of 100 Senators and 435 Representatives to determine where the enemy is going to be undertaken, or how to protect American forces from destruction of an armed enemy.¹⁰

The President is properly limited in the exercise of his constitutional power as Commander in Chief to the defense of the United States, its citizens and their property. The President's authority to protect the lives of Americans and their property with the Army and the Navy grows out of his control over foreign relations, as well as his duty to

enforce the obligations of the Government to its own citizens.¹¹ While Presidents have sent United States troops into different countries more than 150 times in the past without a declaration of war from Congress (according to the *Washington Star*, May 17, 1970),¹² in most cases those forces were landed to protect American lives and property. The Supreme Court has upheld that the citizen abroad is entitled to the same protection as the citizen at home, and under the canons of international law, which recognize the right of persons and property, action of this sort is not considered an act of war.¹³

The examples here are numerous. Henry Steele Commager cites actions taken by Presidents William McKinley and Theodore Roosevelt as "most interesting," but they were not, as he contends, "examples of the exercise of Presidential powers that brought the nation to the verge of war."¹⁴ During the Boxer Rebellion, McKinley dispatched American troops into the "heart of China" because the legations in Peking were besieged and the legitimate Government of China was unable to defend them against the rebelling Boxers. The various nations sent expeditionary forces to rescue their nationals who were in the legations. McKinley sent 5,000 soldiers into China without consulting Congress; he maintained that his action "involved no war against the Chinese nation," and, therefore, required no congressional authorization.¹⁵ The President's use of the troops were specifically limited to the protection of American citizens—those American diplomats whose lives were threatened contrary to international law. This was a clear effort to save American lives and property, and it was not an action that would have involved this nation in war. Moreover, the Chinese Imperial Government formally acknowledged that fact.¹⁶

"The modern expansion of the President's power to use troops abroad," claims Merlo J. Pusey, "began under Theodore Roosevelt."¹⁷ When Roosevelt seized Panama to acquire a canal zone, he proclaimed with his usual bravado, "I took Panama and let Congress debate, and while the debate goes on the canal does also."¹⁸ While those words were, in themselves, an admission by the President that his action was unlawful, it cannot be considered the exercising of "war" powers.

The act of President Woodrow Wilson in seizing Veracruz was an act of war without congressional authorization at the time it was committed. However, a resolution authorizing that action was pending at the time; it had already passed one House of Congress, and the other House was in the course of taking action to ratify that act.¹⁹ The joint resolu-

tion was approved a short time after the landing was made at Veracruz. The relevant portions of it read:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is justified in the employment of armed forces of the United States to enforce his demands for unequivocal amends for certain affronts and indignities committed against the United States.

*Be it further resolved, That the United States disclaims any hostilities to the Mexican people or any purpose to make war upon Mexico.*²⁰

In the more recent case of the Dominican intervention, President Johnson's move to land the Marines in Santo Domingo for the initial purpose of protecting American lives was justified without congressional approval. Although the act of the President was later denounced in Congress on the grounds that "the real purpose of intervention was the defeat of the Dominican revolution,"²¹ it was defensible under the Monroe Doctrine to assist in meeting such a growth of Communist aggression from within by sending forces to a state under attack in the Americas, the net result of which was the maintenance of peace and protection in the Western Hemisphere.²²

It was never intended by the Founders that the President have complete, arbitrary control over the disposition of the military and naval forces.²³ The power of the President to send troops anywhere in the world rests on the condition that he cannot send said troops abroad if the sending of same amounts to making war. Writing in the *Virginia Law Journal*, W. Taylor Reverly, III, notes in his article on the war-making power:

It seems reasonably clear from proposals made and rejected at the Constitutional Convention, from debates there, subsequent statements by the Framers and from practice in early years that the Drafters intended decisions regarding the initiation of forces abroad to be made not by the President alone, not by the Senate alone, nor by the President and Senate but by the entire Congress subject to the signature or veto of the President.²⁴

It is held in some quarters that the President has the power to begin war as the Commander in Chief of the Army and Navy.²⁵ Because the

President is Commander in Chief, if he wants to send the Army and Navy anywhere in the world, they will obey him. In that respect, then, the President may have it within his power to make war, without the authority of Congress, on a foreign land by ordering the Army to land on a foreign coast. William Howard Taft concluded in an article on Presidential power: "Of course, the President may so use the Army and Navy to involve the country in actual war and force a declaration of war by Congress. Such a use of the Army and Navy, however, is a usurpation of power on his part."²⁶ Thus, it is one thing to say that the President has the power to order the Army into action, and quite another, indeed, to say that he has any legal or constitutional right to do so. Corwin has pointed-out that "the President has been able to gather to himself powers with respect to warmaking that ill accord with the specific delegation in the Constitution of the war-declaring powers to Congress."²⁷ The mere fact that power may be usurped does not mean, nor does it offer any conclusive evidence, that the President has any legal right to precipitate open warfare.

The objection may be raised here that if a President can do certain things, he cannot be prevented from usurping power, so why bother to challenge his right to do so. Richard Neustadt, who served in advisory capacities under both Presidents Truman and Kennedy, holds that a President creates his own role as leader by the way in which he acquires and uses power; if the Executive were only to rely on his formal powers, according to Neustadt, it would seriously cramp the potentials for leadership in the Presidency.²⁸ Louis Koenig, of New York University, refers to the President "struggling with great difficulties under the confines of our political system to develop an imaginary and vigorous foreign policy" and asserts that in the nuclear age the office of the Presidency has adapted itself to become one "in which the largest decisions in foreign affairs repose . . . that allowed Truman to order the use of the atomic bomb against Japan . . . that can act on an instant's notice in defense of the nation . . . and utilizes the Commander-in-Chief's powers to conduct the enterprise that might well be called Presidential war-making."²⁹ In a sweeping claim for Executive power, Koenig concludes that this "independent" Presidency

possesses a maximum autonomy, in which the President in relative privacy can make decisions that choose between war and peace, that commit treasures and lives, and that may determine the nation's foremost priorities for years to come. The President may make these

decisions in secrecy and freedom, beyond the reach and even knowledge of Congress and the people. Or, if Congress or the people are related to that decision, they can act only marginally. They have no real choice but to ratify what the President has done or will do.³⁰

In effect, Congress no longer has any power to act. Congress is merely given the right to support the President after he has already acted. Without allowing for full and free discussion of foreign policy—so essential to the preservation of the nation's constitutional liberties and democratic tradition—Congress would simply be handed pre-determined plans and then the lawmakers asked to ratify *faits accomplis*. It would mean the people's representatives in Congress were being dealt out of foreign policy planning. This does not square with the constitutional system based on the division and limitation of powers.

In viewing the true Executive functions, the powers a President can exercise have their source in the Federal Constitution and in the laws of Congress passed in pursuance thereof. The ambit of power in which the Executive can operate is plainly marked for him, if in general terms. The President, then, can exercise no power which is not granted to him expressly or impliedly by either the Constitution or an act of Congress. Simply, if a power cannot be reasonably traced to a constitutional or statutory provision, it does not exist. Judge Augustus N. Hand expounded on that view in his opinion in *United States v. Western Union*:³¹

If the President has the original power sought to be exercised, it must be found expressly or by implication in the Constitution. It is not sufficient to say that he must have it because the United States is a sovereign nation and must be deemed to have all customary national powers. . . . I cannot regard a failure of Congress to exercise its unlimited powers as proof that some other branch of the government has the right to do what Congress might readily authorize.

While the Constitution says that the President shall be Commander in Chief, that certainly does not include the right to make war by sending American soldiers overseas.

The President does have the right and duty to resist insurrection and invasion of the United States. If a nation makes or declares war on the United States, it is the President's duty to carry on that war. The "path to duty," however, has indeed become "a road to power."³²

III. PRESIDENTIAL WAR-MAKING

Before the Mexican War the relationship between Congress and the President had been one of co-operation in the formulating of foreign policy. President Polk's use of the Army against Mexico marked the beginning of the practice whereby the President presented a *fait accompli* to a subservient Congress.³³ In the case of the Mexican Rebellion, Polk ordered United States armed troops, under the command of General Taylor, across the Nueces, and by that action began the Mexican War.³⁴ In his message to Congress, Polk said:

After reiterated menaces, Mexico has passed the boundary of the United States, has invaded our territory and shed American blood, upon the American soil. She has proclaimed that hostilities have commenced, and that the two nations are now at war.

As war now exists, and not withstanding all our efforts to avoid it, exists by the act of Mexico herself, we are called upon by every consideration of duty and patriotism to vindicate with honor, the rights, and the interests of our country.

In further vindication of our rights and defense of our territory, I invoke the prompt action of Congress to recognize the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace.³⁵

The United States was at war by order of the President. On the floor of the Senate, Calhoun charged that Polk had carried on a foreign war against Mexico before Congress had authorized it. "In the sense of the Constitution," Calhoun reminded, "war could be declared only by Congress."³⁶ Another to challenge Polk's right was Abraham Lincoln, who in a letter dated the 15th of February, 1848, wrote his law-partner, William Herndon: "Allow the President to invade a neighboring nation whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose— and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect. . . ."³⁷ Lincoln continued his analysis of the situation, saying:

If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him "I see no probability of the British invading us," but he will say to you, "Be silent: I see it, if you don't."³⁸

A cursory examination of the pre-war foreign policy of Franklin D. Roosevelt also provides an example of how the President took persistent efforts to involve America in war, albeit paying lip-service to the Congress' "power to declare war." Mr. Roosevelt, in June 1940 before the presidential election of that year, encouraged Premier Reynard to stand up against the Germans who had already broken through into France—yet, the President was careful to qualify the promise of aid" in his message of June 15, 1940, to Reynard:³⁹

In these hours which are so heart-rending to the French people and yourself, I send you assurances of my utmost sympathy, and I can further assure you that so long as the French people continue in the defense of their liberty, which constitutes the cause of popular institutions throughout the world, so long will they rest assured that material and supplies will be sent to them from the United States in ever-increasing quantities and kinds.

I know that you will understand that these statements carry with them no implications of military commitments. Only Congress can make such commitments.⁴⁰

Roosevelt, however, proceeded to do exactly what he said he had no power to do. In 1941, less than five months after he had pledged *not to send American forces of the Army, Navy, or Air Force to fight in foreign countries except in case of attack*, the President requested the Lend-Lease Bill, giving him the unlimited personal authority to loan out across the seas as much as he saw fit, without coming to Congress for appropriations or further authority. A dangerous aspect of the bill was its provisions giving the President unlimited power to carry on an undeclared war against any nation in the world—which could have eventually catapulted the nation into the shooting end of the war, along with the *service-of-supply end as justified by the bill*. There were other actions of the Administration's foreign policy, following Lend-Lease, designated to lead the country into war: the seizure of Axis ships while we were supposed to be neutral, the sending of American ships into the combat zone, the occupation of Iceland, and the repeal of the Neutrality Act.⁴¹ None of these had any relation to the national defense; all were acts of war.

In the Iceland adventure, Roosevelt's arbitrary action of usurping authority to send the United States Navy to Iceland to replace the British contingent stationed there was strenuously protested by Senator Robert A. Taft:

It would be a tremendous stretching of the Constitution to say that without authority from Congress the President of the United States can send hundreds of thousands of American soldiers to Europe when a war is raging over the entire continent, and the presence of American troops would inevitably lead to war. The President cannot make aggressive war. Neither can he intervene in a war between two nations, because such intervention, even though it does not immediately involve a physical attack on one of the combatants, is clearly the making of war. . . .⁴²

Since 1945 the two major wars in which the United States has become involved—Korea and Vietnam have been what Louis Koenig calls “Presidential wars,” where Congress has not exercised its constitutional power to declare war.⁴³

In the Korean intervention, President Truman responded to the unprovoked attack of the North Korean Communists against the Republic of Korea when he announced in a statement released to the press on June 27, 1950: “. . . The Security Council of the United Nations called upon the invading troops to cease hostilities and to withdraw to the 38th parallel. This they have not done, but on the contrary have pressed the attack. The Security Council called upon all members of the United Nations to render every assistance to the United Nations in the execution of this resolution. In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support.”⁴⁴

There is no doubt that the President usurped powers as Commander-in-Chief where he had no constitutional authority to send forces into Korea, thus, bringing about a *de facto* war with the Government of North Korea. At no time was Congress consulted for its approval to use American armed forces in Korea. Before the issuance of his June 27th statement, Truman did call in a handful of Senators and Representatives, “so that I might inform them on the events and the decisions of the past few days,” according to his *Memoirs*, “and I asked the views of the congressional leaders . . . [and they] approved of my action.”⁴⁵ But this was hardly a formal assembly of Congress.

Nor was there anything in the United Nations Charter to authorize the intervention in Korea, though it has been contended that the entire Korean matter was changed by the obligation into which this nation had entered under that Charter.⁴⁶ The obligation to send troops on the call of the Security Council is limited by Article 43, requiring that troops

can only be called for when an agreement has been entered into with the Security Council; Section 6 of the United Nations Participation Act of 1945, whereby the Senate accepted the Charter, determines the circumstances under which the President may provide military aid in support of the Security Council: the President is authorized to negotiate special agreements with the Security Council, subject to the approval of the Congress.⁴⁷ As emphasized by Corwin,

[T]he controlling theory of the act is that American participation in the United Nations shall rest on the principle of departmental collaboration, and not on an exclusive presidential prerogative . . . not only is this a sound constitutional principle . . . it is the only practicable principle unless we wish to establish outright presidential dictatorship.⁴⁸

In the case of Korea, however, Congress never acted because no agreement on the matter was ever submitted to it, contrary to the law that, in the absence of prior congressional approval, there is no authority to use armed forces in support of the United Nations.

Unlike Truman, who by-passed the Congress when he committed American troops to war in Korea, President Eisenhower obtained direct authority from Congress to use armed forces to prevent a Chinese Communist take-over of Formosa and to assist in defending the Middle East as another means of preventing the spread of Communism.⁴⁹

In parallel, many people purport the Tonkin Gulf Resolution, adopted almost unanimously by Congress, August 7, 1964, at the request of President Johnson, to be "an unqualified Congressional endorsement of the war in Vietnam."⁵⁰ The Gulf of Tonkin Resolution, or South East Asia Resolution, authorized the President ". . . to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggressions."⁵¹ Wayne Morse, one of the two Senators to vote against the resolution, warned, "We are in effect, giving the President of the United States war-making powers in the absence of a declaration of war. I believe that to be a historic mistake."⁵² In retrospect, Senator J. William Fulbright condemns the resolution as a "blank check," and emphatically stresses,

. . . The fundamental mistake . . . was in the giving away of that which is not ours to give. The war power is vested by the Constitution in the Congress, and if it is to be transferred to the

executive, the transfer can be legitimately effected only by constitutional amendment, not by inadvertency of Congress.⁵³

This raises a crucial constitutional caveat, for the adoption of such a resolution gave direct authority from Congress to the President to carry on an undeclared war. While President Johnson did ask Congress for approval to use armed forces in South East Asia, he did not seek a declaration of war.⁵⁴ Yet, there can be no retreat from reality; the conflict in Vietnam found the United States in her longest and most costly military campaign, and there is no longer any doubt that it was involved in a *de facto* war. Clearly, as the operation in Vietnam began to take on the dimensions of war the Constitution required that Congress be consulted for a declaration of war. Of course, it was not.⁵⁵

As a matter of moral principle, the actions taken by Presidents Truman in Korea, Johnson in Vietnam, and Nixon in Cambodia are unassailable. Still, as a matter of legal principle, if a President's usurpation of power to send American soldiers into war without congressional approval is permitted to go by unopposed in the Senate, then it will vitiate for all time the authority specifically reserved to Congress to declare war by the Constitution of the United States. Again Senator Fulbright points out:

A Senator has the obligation to defend the Senate as an institution by upholding its traditions and prerogatives. . . . Whoever may be President, whatever his policies, however great the confidence they may inspire, it is part of the constitutional trust of a Senator to defend and exercise the advice and consent function of the Senate. It is not his to give away.⁵⁶

In 1970, the Congress began to flex its long dormant "constitutional muscle" by clearly asserting its right to properly limit the President's power to send troops abroad without congressional approval. The Cooper-Church Amendment, as modified by the Byrd Amendment, adopted by the Senate, and its companion proposal offered in the House, the Reid Amendment, as amended by the Findley Amendment, presented a definite statement by Congress that it has the right, through the implementation of its appropriation power, to pass on the question of sending troops to Asia. Taken together, the proposals prohibited the use of funds to introduce American ground forces into Cambodia — or Laos, or Thailand — except to protect the lives of American troops still remaining in South Vietnam. From the standpoint of due process, the proposals, as

amended, were consistent with congressional authority, as well as the inherent powers of the President in the defense of our forces. The clear assertion of this position by Congress demonstrated that while its power has oft times lain dormant, this did not mean its power had been abandoned: "for in the constitutional scheme of things Congress cannot abandon it."⁵⁷ The presumption is that a President will follow the laws passed by Congress, and he acts at his own peril, then, if he chooses to usurp authority which the people's representatives in Congress have asserted he does not possess. With considerable White House support, congressional opponents turned back the Senate's legislative attempt to curb Presidential power. At the urging of the House, the controversial Cooper-Church Amendment was totally excised from the *Foreign Military Sales Act and the issue was temporarily defused*.⁵⁸

Another most relevant proposal was the McGovern-Hatfield Amendment, the "Amendment to End the War." Howard K. Smith commented that "Congress has plenty of control, above all the power of the purse. It can stop cold any military action by denying funds."⁵⁹ "A Legal Memorandum on the Amendment to End the War," prepared under the direction of the *Harvard Law Review*, went considerably further in discussing the constitutionality of the Senate proposal:

The debates in the Constitutional Convention clearly indicate one thing: Congress was given ultimate control over the war-making power, with a variety of means at its command to enforce its views. At the minimum the framers would have viewed an appropriation restricted in use to disbanding an army and bringing it home as a proper exerciser of Congressional power The Constitution, read in the light of historical context and the framers' fear of a military establishment, thus establishes that the President could command the tactical operation of an army while engaged, but that Congress had the power through appropriations to provide an army, to disband it, or to disengage it from a particular theater of operations.⁶⁰

That Congress has the constitutional power of appropriations cannot be argued; but neither can it be argued that, by appropriating money for additional action in Vietnam, Congress ratified a *de facto* war as *de jure*. Recognizing a war was on, there seemed to be little room for independent congressional action. The only available choice was to back-up with wholehearted and unstinting support, and with every available resource, the men in our armed forces fighting in South East Asia at the direction of the President. In a letter to Senator Gordon Allott, Franz Michael,

director of the Institute for Sino-Soviet Studies, also cautioned that a complete withdrawal from Vietnam "would not protect us from enlarged problems of the same kind. What is at stake is not only the issue of the Communists' further advance into new areas, but also our whole standing and credibility with all our allies in Asia . . ." ⁶¹ Predictably, supporters of the McGovern-Hatfield Amendment were to experience defeat at the hands of the legislative process. But the debate stirred by the Amendment was still another indication of the continuing congressional concern in this constitutional area. ⁶²

The continuing debate surrounding the apparent abdication by the Congress of its constitutionally-mandated responsibility to declare war, was finally resolved in its favor. The Congress forcefully confronted the constitutional issue and passed, over a Presidential veto, the "War Powers Act." As indicated earlier, American troops have been committed in various armed conflicts by the President, without his seeking any formal declaration of war from the Congress. Criticism of this seeming usurpation of legislative power further crystalized following the Cambodian incursion. During the 93rd Congress, aided by the public awareness sensitized by the debates over the Cooper-Church and McGovern-Hatfield Amendments, 16 bills were filed in the House to specifically limit the President's ability to send US fighting troops abroad without congressional approval. A bi-partisan bill with numerous sponsors was introduced in the Senate by Senator Jacob Javits. (S-540).

On October 12, 1973, the Congress sent to the President for his signature the so-called, "War Powers Act". The crux of the legislation was to require the President to notify the Congress within forty-eight hours of the reasons why he committed United States troops abroad. If the Congress has not affirmatively approved his action by the passage of a declaration of war within sixty days following the commitment - with the possibility of a thirty day extension - the Congress could halt operations by the passage of a concurrent resolution that need not be submitted to the President. The President vetoed the bill on October 24, 1973, and the Congress successfully overrode his veto on November 7, 1973. ⁶³ It would seem clear from the constitutional viewpoint that the Congress had merely statutorily verified what the Constitution clearly required. It remains a prerogative of the Congress to decide whether or not the United States should send her troops to war.

Many critics of the legislation agreed with Senator John Tower that, "the sooner a constitutional challenge is launched, the better." ⁶⁴ In

his veto message, President Nixon detailed why he felt the legislation would be deemed unconstitutional:

House Joint Resolution 542 would take away by mere legislative act, authorities which the President has exercised for almost 200 years. One of its provisions would automatically cut off certain authorities after 60 days unless the Congress extended them. Another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution which does not normally have the force of law since it denies the President his constitutional role in approving legislation.⁶⁵

Other critics have argued that the legislation would effectively "hand-cuff" the President and render him unable to successfully meet the kinds of "crises" faced by U.S. Presidents during the past decade. Presidential handling of the crises in Berlin, Cuba, the Congo, Jordan and the Middle East are cited as examples of the kinds of responses that may be limited under the new legislation to the detriment of the United States.

From the legal point of view, it seems unnecessary to respond to much of the criticism. It seems clear the Congress has boldly asserted its power without encroaching upon that of the Executive. This congressional awakening is long overdue in an area for which it has sole responsibility. As Senator Javits stated before the final Senate vote to override the Presidential veto;

. . . (we are) not impairing the President's authority to carry out the foreign policy of the country. But we are affecting materially his authority, in the name of foreign policy, to take this nation into war . . .⁶⁶

IV. THE TREATY-MAKING PROCESS

Treaty-making is also meant to be a joint function of the executive and legislative branches. The Constitution provides in Article II Section 2, that "The President shall have Power . . . to make Treaties," but only "by and with the Advice and Consent of the Senate," a two-thirds vote of the Senate being requisite. Moreover, Article VI states, "This Constitution and the Laws of the United States made in pursuance thereof; and all Treaties made, or which shall be made under the authority of

the United States, shall be the supreme Law of the Land." Thus, treaties made by the President and two-thirds of the Senate, without any concurrence by the House of Representatives, have the status of laws on domestic issues which require a majority of both houses.

The President, however, has encroached on the power of the Senate—"sapped the Senate's role in treaty making,"⁶⁷ so that many things which used to be done by treaty are now done by employing executive agreements, made by the President alone and not absolutely requiring any congressional approval.⁶⁸ Executive agreements to commit the United States in relations with other nations are now resorted to more freely than in the past,⁶⁹ and the theory has developed that almost anything—from Franklin Roosevelt's destroyer-to-Britain deal during World War II, to fishing rights, boundary disputes, or annexation of territory⁷⁰—can be done by executive agreements.

Treaties, as part of the law of the land under Article VI, may supercede former laws regarding domestic policy to the extent they are in conflict with them; however, executive agreements should not change existing domestic law—or, if they would agree to change diplomatic law, it would still take a majority of Congress to effect that change. Executive agreements, on such matters as extradition or postal laws, for instance, are important and have been used since the beginning of the Constitution. So it is not a question of whether or not the President can enter into executive agreements with other governments; rather, the question is what scope they may validly take today.⁷¹

Executive agreements may be binding on a President as long as he is President, but they could not be considered as binding on the state. For example, during World War II this country agreed by the United Nations Agreement not to initiate peace without the consent of all the Allies, but the President could hardly have bound a future President so. While the President is Commander in Chief of the Army and Navy, with full power to make all agreements dealing with war, he must watch his step when he comes into the post-war period. Peace-making is a function of Congress. The secret international arrangements made at Yalta and Teheran, momentous political agreements which "were to form the *de facto* settlement of World War II," were never submitted to Congress for approval.⁷²

In the field of trade, also, an executive agreement known as the General Agreement on Tariffs and Trade (GATT) assumed that the

Executive could go beyond his power to raise or lower all tariffs by reciprocal trade agreements,⁷³ although the power to make changes in our tariffs rests with the legislative branch.

A proposal providing for the approval of all executive agreements in order to curb the tendency to take almost any action by such agreements—in lieu of the treaty method prescribed in the Constitution—is suggested by a constitutional amendment containing the basic principles Senator John W. Bricker had incorporated in his amendment:

SECTION 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

SECTION 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.

SECTION 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.⁷⁴

The Bricker Amendment, introduced January 7, 1953, during the 83rd Congress, was co-sponsored by sixty-three other Senators, and received the active support of the American Bar Association. The Senate Judiciary Committee studied the amendment, and recognized the dangers inherent in "treaty law" and the importance of a constitutional amendment to more clearly define the scope and effect of treaties and executive agreements.⁷⁵ In its report the Committee stated:

This Amendment will not affect the present method of negotiating and ratifying treaties. Treaties will continue to be negotiated by the President and ratified with the advice and consent of two-thirds of the Senators present and voting. This Amendment will not interfere with legitimate activities of the United Nations. The Amendment will not prevent the Senate from concluding a treaty otherwise valid under the Constitution on any subject whatsoever, nor will it affect in any manner treaties which do not make internal law in the United States, but it will make impossible the participation of any foreign nation, by the treaty method, in the affairs of the citizens of the several States of the United States.⁷⁶

Due to the importance of the issue, Senator Bricker should have had more co-operation. It was reported that "President Eisenhower's

attitude was first mildly favorable but ultimately strongly averse to the Ohio Senator's enterprise," and when the Senator attempted to re-introduce a similar resolution in 1957, *The New York Times*, on January 26, expressed the hope "that Mr. Bricker will not be able to surmount those difficulties in amending the Constitution any better this year than he has in the past and that the Administration will give him no encouragement."⁷⁷

In point of fact, the Constitution has become clouded in doubt and uncertainty over Article VI, setting-up treaties on a par with the Constitution itself. The very definite danger of a treaty suddenly superseding the Constitution ought to be dealt with. John Foster Dulles spoke of such dangers in an address delivered before the Regional Meeting of the American Bar Association at Louisville, Kentucky, April 12, 1952:

The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and also make domestic law. Under our Constitution treaties become supreme law of the land. They are indeed more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas treaty laws can override the Constitution. Treaties . . . can take powers away from Congress and give them to the President . . . can take powers from the State and give them to the Federal Government or to some international body and . . . can cut across the rights given the people by the constitutional Bill of Rights.⁷⁸

There is some merit in the suggestion that a revision of the method by which treaties are made be considered. The present system requires a two-thirds vote that has been very difficult to obtain at times. This fact has led many advocates to favor the executive agreement as a means of side-stepping the severities of treaty-making requirements. This is a reason for concern in a "democratic form of government" where matters of foreign policy should be adopted with the consent of the people's representatives. Critical examination and full discussion of any policy by members of Congress is essential if the best programs possible are to be formed. There may be modifications or other changes in policy suggested that the President follow, and this would certainly improve the chance of a policy becoming the permanent policy of the American people. What is needed, in any event, is a more exact definition of treaties and executive agreements than exists at present.

V. CONCLUSION

As the world has grown smaller, this nation has become more and more caught up in the problems of foreign affairs. The increased importance of foreign policy has had its effect on every feature of American life. Commensurate with this has been the claim of Chief Executives for more power in the field of foreign policy—until the powers now claimed far exceed those held by President Roosevelt during the second World War.

The now-customary policy of making secret executive agreements, such as the vital decisions made at Yalta, has circumvented the treaty-making powers of the Senate in freely debating and examining the wisdom of fundamental principles in our foreign policy which might commit the country to important, though dangerous, obligations. Woodrow Wilson denounced such secret diplomacy and demanded open covenants openly arrived at.

The action of Presidents to commit United States land forces to Asia—in Korea, in Vietnam and in Cambodia—or, conceivably, to Europe under the North Atlantic Pact, is an usurpation of the power to make war in clear violation of the Constitution.

The Founders of the Constitution expected the character of the office of President of the United States to be one of initiative. It was expected that the Executive assume and display a certain amount of *initiative through wielding his administrative powers*. The Presidency was so created because the weakness of a government without an executive head had been revealed under the Articles of Confederation. The Congress, as a legislature, was not a body for prompt, decisive action. It is *a deliberative body and moves more slowly, as it should do*. Like a good, sound jury, passing on matters that come before it, Congress considers all points of view on a matter so that it may act intelligently. In the very nature of Congress lies its essential weakness.

The Constitution intended, however, that *both* the executive and legislative branches co-operate in the conduct of foreign policy. While the powers of the President are granted in general terms so as not to embarrass the Executive within the wide possible range of policy he may operate, his field of action is plainly defined under the Constitution or existing law. The system of constitutional limitations imposes certain restraints on the exercise of government power which have prevented

democracy from destroying itself. This constitutional balance between power and responsibility in foreign policy, may be summarized, as follows:⁷⁹

The President makes treaties, but two-thirds of the Senate is required to give them legal life.

The President, as Commander in Chief, may send the armed forces abroad, but only Congress can declare war.

The President may control the governmental instruments for the making of foreign policy, but Congress, through its appropriation powers, provides the funds enabling those instruments to operate.

Congress, representing the people, provides a method of finding out what a majority of those people want. In shaping policy, it is a part of our democratic system that basic elements of foreign policy shall be submitted to Congress and the public for debate. Indeed, members of Congress have an obligation under the Constitution and their oaths of office to offer constructive criticism on policies which may lead to unnecessary war, weaken the internal economy of the country, or commit the nation to other obligations it is utterly unable to perform, and, thus, discredit it in the eyes of the world. This serves as a safeguard against such fatal errors in foreign policy as might bring about the destruction of a state and a people.

The general practice of cloaking in secrecy all initial steps of foreign policy has deprived the Congress of the substance of the power conferred upon it by the Constitution. One may consider that the criticism directed at the President here is not a criticism of the President's initiative, but a criticism of Congress itself for acquiescing. Recently, Congress has moved impressively towards reasserting its rights and prerogatives by re-establishing constitutional guidelines for the President's field of action. If the arbitrary and unlimited powers of a President are not barred, the President stands to become a complete dictator, disregarding the Constitution and every fundamental principle upon which the country was founded, with the power, even in the realm of domestic activities, to force upon the Congress policies necessarily related to any foreign commitment.

Mr. Justice Jackson, in his opinion in the *Steel Seizure Case*, wrote that "no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign

affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country. . . . ”⁸⁰

The implications of circumscribing freedom at home are disquieting to those who understand the primary purpose of United States foreign policy to be maintaining the liberty of the American people. While it is easy to delegate the powers of government to a dictator, it is difficult to recover those powers once they have been delegated. The student of history knows that the delegation of legislative powers to an executive was the first step toward autocracy in Germany. Such a thing will not happen in this country if the essential restraints which the Founding Fathers so wisely imposed are not construed away, for to construe away constitutional limitations until they have no meaning is to destroy the Constitution itself.

Benjamin Franklin said the Framers of the Constitution had given the people a Republic if they could keep it so. That is the vital question the government must decide. It is time to return to what John Marshall called a government of laws, not of men, and where the duly elected representatives of the people in Congress should have a determined and decisive voice in decisions of foreign policy. Happily, Congress has recently shown itself willing — if not eager — to embrace its constitutionally-mandated role as spokesman for the American people in deciding whether or not American soldiers should be sent to war. It is the one encouraging flicker in an area that requires the intensity of a beacon.

NOTES

¹Louis W. Koenig, *The Chief Executive* (N.Y., Harcourt, Brace & World, 1968), p. 209.

²Edward S. Corwin, *The President: Office and Powers* (N.Y., New York University Press, 1957), p. 171.

³*Ibid.*

⁴Bernard Schwartz, *The Power of Government*, vol. II: *The Powers of the President* (N.Y., Macmillan, 1963), pp. 100, 102.

⁵Dwight D. Eisenhower, *The White House Years: Waging Peace, 1956-1961* (Garden City, N.Y., Doubleday & Co., 1965), p. 631.

⁶Schwartz, pp. 98-9.

⁷*Ibid.*, p. 100.

⁸Robert A. Taft, *A Foreign Policy for Americans* (Garden City, N.Y., Doubleday & Co., 1951), pp. 29-30.

⁹“A Legal Memorandum on the Amendment to End the War,” *Congressional Record* (May 19, 1970), p. S7477.

¹⁰*Congressional Record* (May 18, 1970), p. S7332.

¹¹See William Howard Taft, "The Boundaries between the Executive, the Legislative, and the Judicial Branches of the Government," *Yale Law Journal* (June 6, 1916).

¹²"The War Power: Congress versus the President," *Congressional Record* (May 18, 1970), p. E4419.

¹³Corwin, p. 198.

¹⁴Henry Steele Commager, "Presidential Power: The Issue Analyzed," *New York Times Magazine* (Jan. 14, 1951), p. 23.

¹⁵*Ibid.*

¹⁶Corwin, *loc. cit.*

¹⁷Merlo J. Pusey, *The Way We Go to War* (Boston, Houghton Mifflin, 1969), p. 66.

¹⁸Commager, *loc. cit.*

¹⁹W. H. Taft, *loc. cit.*

²⁰Corwin, p. 439.

²¹J. William Fulbright, "Congress and Foreign Policy," *Congressional Record* (July 31, 1967), p. 20704.

²²Pusey, p. 20.

²³"Legal Memorandum on the Amendment to End the War," p. S7478.

²⁴W. Taylor Reverly, III, "Presidential War-Making: Constitutional Power or Usurpation," *Virginia Law Journal* (Nov., 1969), pp. 1283-4.

²⁵Koenig, pp. 214.

²⁶W. H. Taft, *loc. cit.*

²⁷Corwin, p. 198.

²⁸Richard E. Neustadt, *Presidential Power* (N.Y., John Wiley & Sons, 1960) pp. 2, 7, 10.

²⁹Koenig, pp. 209-10.

³⁰*Ibid.*

³¹See *United States v. Western Union Telegraph Co.*, 272 Fed. 311 (1921).

³²Corwin, p. 194.

³³*Ibid.*, p. 185.

³⁴Commager, *loc. cit.*

³⁵Corwin, pp. 199-200.

³⁶*Ibid.*, p. 200.

³⁷Fulbright, *loc. cit.*

³⁸R. Taft, p. 29.

³⁹Corwin, pp. 201-2.

- ⁴⁰R. Taft, pp. 31-2.
- ⁴¹Corwin, pp. 202-4.
- ⁴²R. Taft, p. 31.
- ⁴³Koenig, pp. 213-4.
- ⁴⁴Harry S. Truman, *Memoirs*, vol. II: *Years of Trial and Hope* (Garden City, N.Y., Doubleday & Co., 1956), pp. 338-9.
- ⁴⁵*Ibid.*, p. 338.
- ⁴⁶Commager, p. 24.
- ⁴⁷See Arthur V. Watkins, "War by Executive Order," *Western Political Quarterly* (Dec., 1951).
- ⁴⁸Corwin, pp. 221-2.
- ⁴⁹Koenig, pp. 214-5.
- ⁵⁰Fulbright, *loc. cit.*
- ⁵¹*Congressional Record*, (May 18, 1970), p. 7333.
- ⁵²*Ibid.*, p. 57334.
- ⁵³Fulbright, *loc. cit.*
- ⁵⁴*Congressional Record* (June 16, 1970), p. S9135.
- ⁵⁵Koenig, p. 214.
- ⁵⁶Fulbright, p. 20706.
- ⁵⁷"Legal Memorandum on the Amendment to End the War," p. S7479.
- ⁵⁸*Congressional Record*, Vol. 116, Part 33, p. 44642.
- ⁵⁹*Congressional Record*, *loc. cit.*
- ⁶⁰"Legal Memorandum on the Amendment to End the War," p. S7478.
- ⁶¹*Congressional Record* (July 16, 1970), p. S9136.
- ⁶²*Congressional Record*, Vol. 116, Part 27, p. 36540.
- ⁶³*Public Law 93-148* 93rd Congress, H. J. Res. 542, Nov. 7, 1973.
- ⁶⁴*Congressional Record*, Vol. 119, #170, S-20105, Nov. 7, 1973.
- ⁶⁵*US Congress*, House Document No. 93-171 (93rd Cong., 1st Sess.) (Washington: GPO, Oct. 25, 1973).
- ⁶⁶*Congressional Record*, Vol. 119, #170, S-20105, Nov. 7, 1973.
- ⁶⁷Corwin, p. 207.
- ⁶⁸Koenig, p. 212.
- ⁶⁹Corwin, p. 213.
- ⁷⁰Koenig, *loc. cit.*
- ⁷¹Corwin, *loc. cit.*
- ⁷²Fulbright, p. 20703.

⁷³R. Taft, p. 22.

⁷⁴Frank E. Holman, *Story of the "Bricker" Amendment* (N.Y., Committee for Constitutional Government, Inc., 1959), pp. 19-20.

⁷⁵*Ibid.*, p. 20.

⁷⁶*Ibid.*, pp. 78-90.

⁷⁷Corwin, pp. 421-2.

⁷⁸Holman, pp. 14-15.

⁷⁹Schwartz, *loc. cit.*

⁸⁰*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), at 642.