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Foreign Affairs and the Constitution by Louis Henkin

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FOREIGN AFFAIRS AND THE CONSTITUTION, Louis Henkin. Mineola, New York: The Foundation Press, Inc., 1972. Pp. xi, 553.

During the early years of this Republic the study of American constitutional law tended to include, as its integral part, the constitutional law of American foreign policy. This invariably meant that the student of American constitutional law devoted a part of his academic research to the related questions of the constitutional regulation of the foreign policy making processes.

But as the discipline became more sophisticated and its subject matter more intricate, as the foreign policy making process itself grew to include many intangibles and political considerations began to play an ever-increasing role in the shaping of that policy, it became increasingly clear that U.S. foreign relations can no longer be subjected to the meticulous constitutional regulation that had come to surround the various domestic aspects of our constitutional system. This resulted in an undesirable compartmentalization of constitutional law into "pure" constitutional law (i.e., the constitutional law of domestic relations) and external constitutional law. The result of this was that the pure constitutional lawyer felt "unqualified" to discuss the questions of foreign policy and the foreign relations of the United States while on the other hand the international lawyer moved away from any in-depth examination of the constitutional foundations of the powers of the executive department in the conduct of foreign relations.

At the losing end of this process was the student. The average student of American constitutional law knows that there are provisions in the U.S. Constitution regulating the behavior of the President on the international scene but he cannot tell you much about them. A traditional course in constitutional law in an average American law school would tend to leave off the sections of the course dealing with foreign policy regulations with the hope that the class in public international law will fill in the gap. But for a combination of reasons this gap filling never takes place.

This "passing of the buck" between teachers of constitutional and international law has for a long time created some uneasiness among research scholars. Professor Louis Henkin has finally decided to do something about it and his book, *Foreign Affairs and the Constitution,* is a very timely relief.[1] This book is perhaps the most successful

[1] There have been other attempts in the past to focus attention in the constitutional regulation of foreign policy. Among such works are: E. CORWIN, THE PRESIDENT, OFFICE AND POWERS 1787-1957 (4th ed. 1957); W. WILLOUGHBY, PRINCIPLES OF CONSTITUTIONAL LAW OF THE UNITED STATES (2nd ed. 1929); Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922).

bridgebuilder between what one might call the domestic and the external aspects of U.S. constitutional law.

In an eleven chapter essay the author discusses such wide-ranging topics as the constitutional authority of the federal government, the distribution of political power between Congress and the President, the constitutional law of international cooperation, federal judicial power over foreign affairs matters and the various limits imposed by the Constitution on the powers of the President as the sole organ charged with the conduct of overall U.S. foreign relations.

In matters of domestic policy the three departments of the federal government are separate but equal. In matters of foreign policy, however, it appears at first glance that these three departments are integrated into one—the Executive Department as the "sole organ". In the *United States v. Curtiss-Wright Export Corp.* decision,[2] the U.S. Supreme Court spoke of "the very delicate plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." Thus "[f]rom the beginning the President has been the organ of communication with foreign governments and had control of the channels of information—the voice as well as the ears of the United States."

The near absolute consolidation of all federal powers in one department of government in matters of foreign affairs is more apparent than it is real. The author in a most brilliant fashion discusses the theories and the realities of the U.S. foreign policy making processes. For most of the foreign affairs powers of the President there is a residual check available to Congress. It is true that Congress does not always avail itself of this opportunity to intervene in matters of foreign policy. The President has, therefore, progressively built up what have come to be known as his foreign affairs powers and his war powers.

The so-called foreign affairs powers which were asserted by the President and acquiesced in by the other departments of the federal government "have come to describe a constitutional 'power', supplementing if not subsuming those specified, supporting a variety of Presidential actions not expressly authorized by the Constitution." In fact, under the "sole organ" doctrine the President can do anything he considers necessary and proper to further the foreign policy goals of the United States so long as such power is not specifically denied him under the Constitution. The result of these unilateral assertions of power by the President is that in the area of foreign policy the

[2] 299 U.S. 304, 320 (1936).

office of the President progressively grows fatter while the other two departments grow thinner.

At the moment the only meaningful controls that Congress has over the President in the making of foreign policy include the power of the purse, the power to legislatively override the President on any matters of foreign policy with which it disagrees and the power to deny its consent to any U.S. treaty-in-making.

On the other hand the courts in an effort not to "embarrass" the Executive Department in the latter's conduct of U.S. foreign policy have almost completely abdicated their judicial powers on matters of foreign relations of the United States. It is true, of course, as Professor Henkin points out in chapter 8 of his book, that the courts have been more willing to judicially legislate in some areas of foreign policy than they are in other areas.

To the extent that the author sought to provide a supplementary reading material for students of constitutional law and international law it is my opinion that that objective has been very successfully achieved. The book is very well researched, the issues raised are very current ones and on the whole Professor Henkin has no doubt produced one of the best essays of our time on the external constitutional law of the United States *de lega lata.*

Looking at the book, however, from another perspective one cannot but say that it left out yet another aspect of the constitutional law of U.S. foreign relations which is of equal currency—the question of the urgent need to constitutionally re-define the scope of presidential prerogative in the conduct of the foreign relations of this republic. Admittedly such a discussion would be *de lege ferenda* but it is certainly not out of place for a book of the stature of Professor Henkin's *Foreign Affairs and the Constitution* to come up with proposals for curtailing some of the excesses of the Chief Executive in the area of foreign policy.

As it now stands too much discretion is vested in the President in foreign affairs matters and the urgent task now is for students of constitutional law, international, and possibly administrative law to team together to define, structure, and confine this presidential discretion. Ours is still a government of laws and of men and there is no reason why this cannot apply, *mutatis mutandis,* to the conduct of our foreign relations. The conduct of U.S. foreign policy is recognized to lie within the President's exclusive domain: he alone and without the advice and consent of Congress shall decide whether to recognize a new state or government, to appoint and recall U.S. ambassadors, to enter into talks with foreign governments, to sign executive agree-

ments, to determine the general principles of U.S. participation in various international organizations, etc. This authority has been said to be expressly enumerated in the clause vesting the executive power on the President.

In all of these actions the President exercises almost absolute discretion. Thus whereas the executive department is a co-equal branch of our government in matters of domestic affairs, it is unquestionably the only authority that conducts our foreign affairs. Certainly the founding fathers did not intend to make the President a "czar" in the area of foreign policy.

It is equally true that the entire area of foreign policy is not amenable to any detailed legal regulation and as such some measure of discretion should be left to the "sole organ" charged with the conduct of such policy. But if that discretion is not to be abused by the Chief Executive, it should be structured, defined and confined. Whether through legislative or executive guidelines, some method should be found for placing reasonable checks on the presently uncontrolled authority of one department of government to run the entire foreign relations of this Republic.

By the same token, while accepting the argument that foreign relations are political relations to be conducted only by the political department of the federal government and that as such the courts should not interfere unless substantial constitutional law questions are involved, it is submitted that a way could be found in which the courts can get more involved by acting as a brake over the excesses of the executive department in the conduct of U.S. foreign relations. After all, the judiciary is still "the least dangerous branch"[3] and its power lies essentially in its being able to supply a judicial brake to the motive power of the two political branches.

In attempting to confine the discretion of the Chief Executive in the area of foreign policy, constitutional lawyers cannot be closed-eyed to what is happening in some other areas of American public law. Administrative agencies possess quite some discretion both under their various enabling statutes and under the Administrative Procedure Act.[4] But at least some effort, though not always as successful as one would expect, was made to place some legal checks on these agencies. In this regard the provisions of Sections 701 and 706 of the Administrative Procedure Act on the scope of review of the actions of administrative

[3] Alexander Hamilton's phrase popularized by Professor Alexander Bickel in THE LEAST DANGEROUS BRANCH (1962).

[4] Administrative Procedure Act, 60 Stat. 237 (1946); U.S.C. Title 5.

agencies by the courts can be instructive. Under Section 701, para. a(2) an action committed to the discretion of an agency by law cannot be reviewed by courts except if, under Section 706, it is shown that the agency grossly abused that discretion or behaved in an arbitrary and capricious manner. The determination of what constitutes abuse of discretion is a matter for the courts.

There is no inherent reason why the U.S. Supreme Court could not be granted the same power of review over some of the capricious and arbitrary actions of the President in foreign affairs matters particularly if such actions do not in any meaningful way promote the national interests of the Republic.

Professor Henkin discusses some of the many problems facing judicial review of the conduct of foreign policy. I would tend to agree with the author's position on all of those problems, but the central point to be borne in mind is that the principle of "political question" is a judicial creation and the Supreme Court, if it so chooses, may modify that doctrine to permit it to review any arbitrary and capricious move that the President may make in the area of foreign relations. Such a modification would only be a rejection of the extravagant version of the principle of non-justiciability, and the entire constitutional system would be better off for it. To argue that such a move on the part of the Supreme Court would be embarrassing to the Chief Executive is not sufficiently convincing.

The Constitution of the United States created three equal departments of the federal government without spelling out in much detail their powers in the area of foreign relations. What has come to be known today as the President's "foreign affairs powers" or "executive powers" or "war making powers" are all a result of progressive and unilateral executive assertions with the benign acquiescence of the other two departments. All of this can be undone without necessarily depriving the President of the much needed discretion in the conduct of our foreign relations, and it will need no constitutional amendment to do so.

The discretionary powers of the President in foreign affairs must be confined, structured, and checked. Most political questions have constitutional underpinnings and therefore are amenable to judicial legislation. Professor Henkin shared this concern when he wrote: "In a nation turning inward to face deep domestic problems the old constitutional assumptions that foreign affairs are different and special may not survive unexamined." The time is overdue for their re-

examination: the courts should speak out and Congress should begin to reassert some of its long abdicated authority in the sphere of foreign affairs.

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