Denver Journal of International Law & Policy

Volume 7
Number 2 *Spring*

Article 3

May 2020

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I. INTRODUCTION

> The very heart of our identity as a nation is our firm commitment to human rights. We stand for human rights because we believe that the purpose of government is to protect the well-being of its citizens. The world must know that in support of human rights the United States will stand firm. We expect no quick or easy results, but there has been significant movement toward greater freedom and humanity in several parts of the world. Thousands of political prisoners have been freed. The leaders of the world—even our ideological adversaries—now see that their attitude toward fundamental human rights affects their standing in the international community and their relations with the United States.[1]

In his first State of the Union Address, President Carter thus reaffirmed the human rights position that had played an important part in his presidential campaign. Significantly, Carter did not mention the role of Congress or of legislation in the formulation of American foreign policy. Instead, he spoke as if United States policy was the expression of a single, unified view of the world held by the Executive, Congress, and the general public. In practice, of course, the views of both Congress and the public frequently conflict with those of the President, even to the extent of frustrating the Executive's foreign policy efforts.

In the area of human rights, and in foreign policy generally, the Carter administration has been attempting to fashion

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1. State of the Union Address by President Jimmy Carter, N.Y. Times, Jan. 20, 1978, § 1, at 12, col. 1. President Carter stressed human rights, but his address left the status of that policy somewhat in doubt: It was not one of the three "goals" of U.S. foreign policy (security, peace, economic growth and stability), *id.* at col. 5-6, but it was included as one of the "purposes" of foreign policy, which were "to insure economic justice, to advance human rights, to resolve conflicts without violence and to proclaim our constant faith in the liberty and dignity of human beings everywhere." *Id.* at col. 6. Despite President Carter's concern for human rights, after one year in office he is beginning to face criticism from both liberals and conservatives in Congress who think he has not acted strongly enough in using U.S. influence to advance human rights. *See, e.g.*, N.Y. Times, Feb. 10, 1978, § 1, at 14, col. 2.

a workable relationship with a Congress newly active in foreign affairs. The contours of that relationship are just now beginning to emerge.

Although Congress' assertion of its role in foreign relations can be contrasted with earlier lassitude, the question of the respective foreign policy roles of Congress and the Executive is as old as the nation itself, and is in a state of continual flux. When George Washington proclaimed American neutrality in the war between France and Great Britain in 1793, for example, French sympathizers claimed that this action was beyond the President's constitutional powers. The Constitution, they maintained, gave him as the Chief Executive power to conduct or execute foreign policy. Power to make substantive foreign policy, on the other hand, was thought to reside in Congress. That incident gave rise to the first great debate, the Pacificus-Helvidius articles by Hamilton and Madison, over the respective foreign policy roles of Congress and the President under the newly ratified Constitution.[2] Since that time the two branches have often struggled for control of United States foreign policy, each asserting that the Constitution, extra-constitutional powers, or necessity gave it authority to act in a particular instance. While the Constitution itself carefully divides foreign policy powers between Congress and the Executive[3] (and, to a lesser extent, the judiciary), the Executive has for a multitude of reasons come to dominate American foreign policy.[4]

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2. *See* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 178-82 (4th ed. 1957). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 158-67 (1978); Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROB. (No. 2) 12 (1976).

3. Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 486-88 (1976). Corwin notes that while the framers closely adhered to the constitutional prescriptions of Locke, Montesquieu, and Blackstone in most respects, they deviated radically and intentionally from those theories in their distribution of foreign affairs powers. E. CORWIN, *supra* note 2, at 416-18.

4. E. CORWIN, *supra* note 2, at 185. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37-65 (1972); Johnson & McCormick, *Foreign Policy by Executive Fiat*, 28 FOREIGN POL'Y 117 (1977); Patterson, *The Rise of Presidential Power Before World War II*, 40 LAW & CONTEMP. PROB. (No. 2) 39 (1976). Despite this dramatic increase in presidential power, in many areas the President's ability to control policy is severely limited. For example, appropriations from prior years and the costs of ongoing programs mean that approximately three-quarters of the federal budget consists of "uncontrollable outlays," and for political reasons much of the remaining one-

In recent years, however, Congress has begun to reassert its constitutional role in the conduct of foreign policy with new legislation relating to war powers[5] and oversight of executive agreements.[6] Additionally, in the less exotic area of foreign and military aid Congress has attempted to control what it has perceived as unchecked executive discretion and error. In these endeavors Congress appears to have been motivated both by a desire to correct "erroneous" substantive policies of past Presidents and to redress a procedural imbalance, a deviation from the constitutional plan. For example, the War Powers Resolution was a response to the substantive policy of the war in Indochina, but its form is general and procedural; it is framework legislation which implements constitutionally prescribed powers.[7] So, too, in the field of foreign aid, Congress has become increasingly sensitive to criticisms that the United States too frequently supports the "wrong" side in foreign military conflicts and that U.S. development assistance stabilizes repressive or dictatorial regimes abroad.[8] Consequently, Congress has moved to cut off aid to particular countries that, for example, consistently violate human rights[9] and has also attempted to make general statutory changes to improve the procedure by which human rights issues are made a part of the foreign aid decisionmaking process.[10] While the new foreign aid legislation is not fundamental framework legislation in the sense that the War Powers Resolution is, it serves the dual purposes of injecting new substantive policies into aid decisionmaking and of increasing congressional participation in that process.

One of the more interesting means by which Congress has attempted to alter executive practice in foreign aid is the imposition of conditions on aid. By such conditions Congress pro-

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quarter is uncontrollable as a practical matter. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 280 (1977).

5. Act of Nov. 7, 1973, Pub. L. No. 93-148, 87 Stat. 555.

6. 1 U.S.C. § 112b (Supp. III 1973).

7. Casper, *supra* note 3, at 481-82.

8. *Hearings on S. 1816 and H.R. 9005 Before the Subcomm. on Foreign Assistance of the Senate Comm. on Foreign Rel.*, 94th Cong., 1st Sess. 424 (1975) (statement of Sen. Humphrey); Gelb, *Arms Sales*, 25 FOREIGN POL'Y 3, 14 (1976-1977).

9. *E.g.*, Uruguay. *See* Foreign Assistance and Related Programs Appropriations Act of 1977, Pub. L. No. 94-441, § 505, 90 Stat. 1473 (1976).

10. *E.g.*, Foreign Assistance Act of 1961, § 502B, added by International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 301, 90 Stat. 748-50 (codified at 22 U.S.C. § 2304 (1976)).

vides that a country which engages in certain activities may be denied foreign or military aid. While Congress had imposed conditions of one sort or another on foreign aid for many years, only recently have conditions become a detailed and important part of every major foreign aid bill.

How effective are these congressional efforts? To date congressional attempts to control foreign relations through legislation have produced mixed results in terms of articulating a coherent foreign policy and advancing American foreign policy goals. Most notably, the constant stream of amendments to foreign aid legislation, many in the form of conditions on aid, indicates continuing congressional dissatisfaction with the operation of military and development aid programs. This article will focus on several such conditions on aid that have been enacted in recent years. The constitutional background of this practice and the structure of current foreign aid programs will be discussed; then the mechanics of some of these conditions clauses will be examined in detail. In particular, this essay will examine the operation of such a clause in the Turkish arms embargo of 1974-75 and some of the more recent attempts by Congress to relate foreign aid to human rights by the use of conditions clauses.

The analysis of these statutory conditions on aid reveals persistent problems, but also points to several considerations which could guide Congress to more effective use of legislative conditions. The greatest difficulty with such conditions is their pervasiveness. So many different kinds of conditions are imposed upon so many different types of aid that it is doubtful that either Congress or the Executive knows exactly what is or is not prohibited. This proliferation of conditions may serve to diminish the respect for and adherence to those prohibitions which are most important to U.S. foreign policy.

Assuming that it is impossible, or, if not impossible, undesirable for Congress to control the daily conduct of foreign policy, it should be sufficient, in most cases, for Congress to:

1. Ensure that a particular consideration (*e.g.*, human rights or prevention of nuclear proliferation) is made a part of foreign aid decisionmaking;

2. Require the Executive to collect necessary information and transmit it to Congress; and

3. Provide itself with some means of reviewing and modifying Executive action.

These guidelines are necessarily somewhat vague. But, as the examples in this article show, rigid formulas are frequently counterproductive, while "flexibility" without at least general goals leads only to undirected pragmatism. It is between these twin hazards that the path towards constitutional and effective foreign policy decisionmaking lies.

II. THE CONSTITUTIONAL BACKGROUND

While a full analysis of the constitutionality of conditions in foreign relations legislation is beyond the scope of this article, much of the debate over such conditions takes place within the framework of the Constitution, and several major themes recur.

A. *The Language of the Constitution*

Unlike legislative-executive controversies in some other areas of foreign relations, the constitutional underpinnings of foreign aid are quite clear:

> The Congress shall have Power to . . . provide for the common Defence and general Welfare of the United States . . . [and] to regulate Commerce with foreign Nations.[11]
>
> No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .[12]

And perhaps most importantly, Congress has the power to make all laws "necessary and proper" to carry out the powers vested by the Constitution in the federal government.[13]

The President's foreign aid powers are more ambiguous. His powers to make treaties and to appoint ambassadors (with the consent of the Senate)[14] may certainly influence foreign aid decisions. However, his more general powers to execute the laws,[15] appoint officers of the United States,[16] veto legislation,[17] and his inherently "executive" powers[18] are probably more important in his impact upon foreign aid. Looking simply at the language of the Constitution, then, the President's power over foreign aid is seen to be incomplete and indirect.

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11. U.S. CONST. art. I, § 8, cls. 1, 3.
12. *Id.* § 9, cl. 7.
13. *Id.* § 8, cl. 18.
14. *Id.* art. II, § 2, cl. 2.
15. *Id.* § 3.
16. *Id.* § 2, cl. 2.
17. *Id.* art. I, § 7, cl. 2.
18. *Id.* art. II, § 1, cl. 1.

The spending power and the necessary and proper clause give Congress control over grants of money and assistance to other countries, and Congress could constitutionally end all foreign and military aid programs whenever it desires. It has the power to authorize or not to authorize foreign aid, to appropriate or not to appropriate funds at will. If Congress authorizes and appropriates foreign aid funds, the Executive is probably obligated to spend them.[19] As Professor Henkin has written:

> However unhappy the consequences of division of authority in this context, one must conclude that Congress could insist on its spending power as on other express powers, and in foreign, as in domestic matters, can spend (or not spend) according to its views of the general welfare of the United States.[20]

Foreign assistance may be contrasted with congressional efforts to control, by means of its spending power, foreign policy powers vested elsewhere than in Congress. In 1940, for example, there was an effort in the House to sever relations with the Soviet Union by striking from the appropriations bill the salary of the U.S. ambassador to that country. The measure was defeated 105-108.[21] Since the Constitution explicitly vests the power to appoint ambassadors in the President and the Senate,[22] and not in the Congress, an attempt by Congress to control this aspect of foreign policy by means of its legitimate spending power might be unconstitutional. If Congress is constitutionally unable to regulate some aspect of foreign policy directly, arguably it cannot regulate it indirectly by refusing to appropriate necessary funds.[23]

B. *Constitutional and Unconstitutional Conditions*

Beyond the clear power of Congress to control foreign and

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19. *See* Train v. City of New York, 420 U.S. 35 (1975).

20. L. HENKIN, *supra* note 4, at 110. The congressional spending power is independent of the enumerated powers, and spending decisions although theoretically limited by the general welfare requirement are essentially unreviewable on that basis. *See* United States v. Butler, 297 U.S. 1, 65-66 (1936).

21. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 ANNALS 145, 156-57 (1953). For other examples of congressional attempts to control foreign policy through the appropriations process, *see* L. HENKIN, *supra* note 4, at 353 n.52 and sources cited therein. *See also* Schlesinger, *Congress and the Making of American Foreign Policy*, 51 FOREIGN AFF. 78 (1972).

22. U.S. CONST. art. II, § 2, cl. 2.

23. This is particularly true in cases where the power sought by Congress is explicitly vested in another branch of government. *See* Myers v. United States, 272 U.S. 52, 164 (1926) (addressing the presidential removal power).

military aid appropriations, Congress' powers become more uncertain. It can be argued that the greater power, to cut off funds completely, necessarily includes the lesser power to appropriate funds with certain conditions attached. This reasoning, however, has been challenged in the area of domestic spending, where the doctrine of "unconstitutional conditions" may operate to prohibit Congress from using its power to spend for the general welfare to legislate unconstitutionally over matters left to the states.[24] A similar argument can be made in foreign affairs legislation: Congress cannot regulate indirectly by conditions on appropriations that which it could not regulate directly.[25] As with the question of the constitutional use of the power not to appropriate, the issue becomes: What can Congress regulate directly? Where the Constitution vests a particular power in another branch of government, Congress cannot usurp that power by attaching conditions to appropriations legislation. Thus Congress could not condition appropriation of a salary for the ambassador to the Court of St. James on the appointment of a particular person to that position. The President and the Senate have the power to appoint ambassadors, and Congress cannot encroach upon that power indirectly. To use Professor Henkin's term, this expenditure is "obligatory" and conditions may not be imposed.[26]

Foreign aid spending, on the other hand, is voluntary, and decisions to appropriate or not, to attach conditions or not, do not generally conflict with powers given to the President. Foreign aid spending results from a determination by Congress that such spending is in the interests of the country; no constitutionally based power of the President would give him the authority to conduct a foreign aid program without enabling legislation and financing by Congress.

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24. United States v. Butler, 297 U.S. 1, 68 (1936). *See* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U.L. REV. 293 (1975). *See also* Frost & Frost Trucking Co. v. Railroad Comm. of Cal., 271 U.S. 583, 593-94 (1926) (discussing unconstitutional conditions in state legislation).

25. L. HENKIN, *supra* note 4, at 113-16.

26. *Id.* at 115. The appointments clause, U.S. CONST. art. II, § 2, cl. 2, "seeks to preserve an executive check upon legislative authority in the interest of avoiding an undue concentration of power in Congress." L. TRIBE, *supra* note 2, at 184-85. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).

Attempting to limit this conclusion, one writer asserts that, while Congress may refuse appropriations for foreign aid, it cannot interfere with the President's conduct of foreign aid programs.[27] Professor Wallace claims that "the Constitution, as it has developed, has conferred upon the executive branch exclusive powers over a 'core area' of decisions in this field of foreign affairs,"[28] a core that includes the making of policy and "*all* diplomatic and Commander-in-Chief foreign affairs decisions except for the following particular classes: . . . the withholding of appropriations altogether."[29] Under this extreme view of presidential power, virtually all restrictions in present foreign aid legislation would be found unconstitutional.[30]

This conception of presidential power is based almost entirely on the "gloss of life" interpretation of the Constitution[31] and has little relation to the text itself. The mere fact that a practice has been followed for some years does not make it constitutional; much less does it make it constitutionally required. While a President would surely think it convenient to the conduct of foreign policy to have a large fund available to disburse to other countries at his discretion, there is no constitutional reason why Congress cannot, if it chooses, attach valid conditions to the use of such money. "Valid" conditions would seem to include the naming of countries to which foreign aid may be given, the people in those countries who are to benefit, and the activities of countries which should result in termination of aid. Since the power to grant foreign aid rests solely with Congress, virtually any conditions would be constitutional unless they trenched upon some power explicitly given to the Executive by the Constitution. An example of such an unconstitutional condition might be a foreign aid bill conditioned on the appointment of a particular person as administrator of the program. This might be found to interfere with the power of the

27. Wallace, *The President's Exclusive Foreign Affairs Powers over Foreign Aid, Parts I & II*, 1970 DUKE L.J. 293, 453. *See also* Note, *The Appropriation Power as a Tool of Congressional Foreign Policy Making*, 50 B.U.L. REV. 34, 45-50 (Special Issue 1970).

28. Wallace, *supra* note 27, at 294-95.

29. *Id.* at 320-21 (emphasis in original).

30. *Id.* at 472-80.

31. The phrase is Justice Frankfurter's. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (concurring opinion). *See* Casper, *supra* note 3, at 477-80.

President and the Senate to appoint officers of the United States.[32]

It is true, as the gloss of life interpretation would emphasize, that foreign aid is now an integral part of United States foreign policy as a whole, and that foreign aid policy has generally been formulated, within broad limits, by the Executive. Such an observation, however, does not rise to the level of a constitutional objection to legislative conditions in foreign aid programs. As Professor Henkin puts it:

> Congress has insisted and Presidents have reluctantly accepted that in foreign affairs, as in domestic affairs, spending is expressly entrusted to Congress and its judgments as to the general welfare of the United States, and it can designate the recipients of its largesse and impose other conditions upon it.[33]

Few court decisions have dealt with the constitutionality of conditions imposed in foreign affairs legislation. As we have seen, some conditions might be unconstitutional while others would not be. One lower court dealing with wartime economic regulation broadly stated that:

> Congress in making appropriations has the power and authority not only to designate the purposes of the appropriation, but also the terms and conditions under which the executive department may expend such appropriations.[34]

But the only important decision actually dealing with a condition on foreign aid is *Banco Nacional de Cuba v. Farr.*[35] There, the Second Circuit rejected a claim that the Hickenlooper Amendment, requiring termination of aid to countries which expropriated American-owned property without compensation, was an unconstitutional legislative interference with executive power.[36] The court noted that the Constitution commits foreign

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32. U.S. CONST. art. II, § 2, cl. 2. But Professor Henkin doubts that the President could completely ignore the improper condition unless he could "assume that Congress would have made the contribution unconditionally if it had known the condition would fail." L. HENKIN, *supra* note 4, at 115.

33. L. HENKIN, *supra* note 4, at 114. *See* E. CORWIN, *supra* note 2, at 129: "Of course, I am not suggesting that Congress may not stipulate any terms it chooses as the conditions of making an appropriation and thereby limit the scope of the inherently executive prerogative of planning and directing expenditure."

34. Spaulding v. Douglas Aircraft Co., 60 F. Supp. 985, 988 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946).

35. 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

36. 383 F.2d at 182-83. *Accord*, D'Angelo v. Petroleos Mexicanos, 317 A.2d 38 (Del. Ch. 1973). In Aerotrade v. Agency for International Development, 387 F. Supp.

relations powers both to the Executive and to the Legislature and found the condition valid under the commerce and necessary and proper clauses.

C. *Concurrent Resolutions*

Another constitutional issue in the control of foreign relations is the use of the concurrent resolution as a legislative veto of executive action.[37] The administration and much of the daily policymaking within programs such as foreign aid is necessarily delegated to the Executive. In its attempts to regain some of this power, Congress has increasingly enacted legislation which allows it in effect to veto a President's action by a concurrent resolution of both houses.[38] Such resolutions present constitutional difficulties in that they purport to make law (or have the effect of law) without being signed by the President or fulfilling the alternative requirement of passing each House by a two-thirds majority.[39]

Although it is unlikely that the constitutionality of the concurrent resolution will be definitively resolved, the constitutional arguments are intimately involved in Congress' struggle to assert foreign affairs power, and they provide a framework for bargaining between the Executive and the Legislature. Congress' first attempt in 1976 to enact S. 2662, the International Security Assistance and Arms Export Control Act, was vetoed by President Ford,[40] largely because of its seven provisions providing for congressional veto of presidential action by concurrent resolution. Congress retreated somewhat and deleted five

974 (D.D.C. 1974), a corporation involved in a financial dispute with the government of Haiti sought a writ of mandamus to compel AID to terminate development assistance because Haiti had expropriated the corporation's property without compensation. The court held that the plaintiff lacked standing and that there was no subject matter jurisdiction. A claim that the Foreign Assistance Act of 1961 contained an invalid delegation to the Executive of Congress' power to wage war was rejected as a political question in Sarnoff v. Connally, 457 F.2d 809 (9th Cir.), *cert. denied*, 409 U.S. 929 (1972).

37. *See generally* S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 112-23 (1975) and the authorities cited therein; Note, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976).

38. *See, e.g.*, War Powers Resolution, Pub. L. No. 93-148, § 5(c), 87 Stat. 556-57 (1973); Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 617, 75 Stat. 444 (codified at 22 U.S.C. 2367 (1970)).

39. U.S. CONST. art. I, § 7, cls. 2, 3.

40. S. 2662, 94th Cong., 2d Sess. (1976). *See* President Ford's veto message, 12 WEEKLY COMP. OF PRES. DOCS. 828 (1976).

of these provisions in the substitute bill, H.R. 13680, which was later passed and signed by the President.[41] While neither the President nor Congress "won" in the dispute over the constitutionality of the legislative veto, the issue was an important part of the legislative debate and did emerge as a bargaining chip in reaching a compromise.

III. THE FOREIGN AID BACKGROUND[42]

A. *Historical Summary*

Large grants of military and economic aid to other countries are a relatively recent aspect of American foreign policy. The Marshall Plan was the first large-scale program of grants of economic aid to other countries, and its remarkable success led to other efforts to support U.S. interests abroad with economic and military grants and loans.[43] Foreign aid, which had at first been looked upon as a temporary necessity, became a permanent feature of U.S. foreign policy during the 1950s. In this period,

> foreign aid was justified primarily as a national security measure, needed to strengthen allies and to build up low-income countries so that they would be less vulnerable to communist invasion or takeover.[44]

Many of the same purposes continued to guide foreign aid policies during the 1960s, although the program itself received smaller appropriations, making it less important "both absolutely and in relation to other sources of assistance."[45]

Foreign aid today is in a state of flux. It suffers from public animosity, with recent polls showing that 56% of the American people favor cuts in aid.[46] As a percentage of our Gross National Product, "development assistance has fallen from 2.79% at the

41. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified in scattered sections of 22 U.S.C.). *See also* the Senate debate on joint and concurrent resolutions, 122 CONG. REC. S9022-29 (daily ed. June 11, 1976).

42. Unless the context indicates otherwise, the term "foreign aid" means bilateral economic and military grants, loans, guaranties, and credits.

43. K. WALTZ, FOREIGN POLICY AND DEMOCRATIC POLITICS 182-85, 210-17 (1967).

44. R. ASHER, DEVELOPMENT ASSISTANCE IN THE SEVENTIES 4 (1970). For a concise summary of the traditional purposes of foreign assistance *see id.* at 19-38.

45. *Id.* at 4. *See id.* at 78.

46. *Hearings Before the Senate Subcomm. on Foreign Assistance, supra* note 8, at 74 (testimony of Joseph Nye, Jr.), citing a Dec. 1974 poll by the Chicago Council on Foreign Relations.

height of the Marshall Plan to 0.23% in 1974-75."[47] With more funds being disbursed through multilateral organizations, traditional bilateral programs have accounted for an increasingly smaller share of U.S. assistance to Third World countries,[48] and in fiscal year 1978 U.S. multilateral foreign assistance funds may for the first time exceed bilateral funds.[49] Among the reasons for this shift towards distribution of funds through international agencies was the feeling that such agencies were "apolitical" and "neutral" and, therefore, better conduits for foreign aid money. Congress has recently discovered, however, that such institutions are less susceptible to its control and has moved to add conditions to its appropriations to multinational agencies.[50]

Despite these difficulties, Congress in the last few years has attempted to set "new directions" for foreign assistance, emphasizing aid that actually gets to the neediest people,[51] the implementation of "intermediate technology,"[52] and providing for the phase-out of military assistance grants.[53] Furthermore, despite reduced funding, appropriations for foreign aid remain significant, particularly in the eyes of the countries that receive such aid.[54]

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47. *Id.* at 506 (testimony of Roy Prosterman). This low level of foreign aid funding continued into 1978. Despite a campaign promise to increase aid to one-half of one percent of the Gross National Product (G.N.P.), domestic economic pressures have forced President Carter to postpone any increase above the present one-quarter of one percent. The Administration still hopes to raise this figure to one-third of one percent by 1982. The United States is now twelfth on the list of nations in the percentage of G.N.P. given as foreign aid. N.Y. Times, Jan. 22, 1978, § 1, at 11, col. 1.

48. For a detailed comparison of multilateral and bilateral expenditures, *see* Center for Int'l Policy, *Foreign Aid: Evading the Control of Congress, reprinted in* 123 CONG. REC. S3630-40 (daily ed. Mar. 7, 1977).

49. *See* 35 CONG. Q. WEEKLY REP. 620 (1977).

50. For an excellent discussion of this and other recent developments relating to human rights and foreign aid, *see* Drew, *A Reporter at Large (Human Rights),* THE NEW YORKER, July 18, 1977, at 36, 44-52. *See also* text accompanying notes 157-63 *infra.*

51. 22 U.S.C. § 2151(b) (Supp. IV 1974), as amended by the International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 304, 89 Stat. 857-58.

52. International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 306(2), 89 Stat. 858-59 (codified at 22 U.S.C. § 2151(d) (Supp. V 1975)).

53. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 105, 90 Stat. 782 (codified at 22 U.S.C. § 2321j (1976)).

54. Military assistance outlays, including grants, training, and credit for arms sales, totalled $1.1 billion in FY 1976; security supporting assistance outlays were $601 million for FY 1976 and are estimated at $1.5 billion for FY 1977. Bilateral develop-

B. *Congress and Foreign Aid*

With the exception of the rapid congressional response to Truman's European Recovery Program in 1948, the relationship between Congress and the foreign aid program has been uneasy at best. Congress is often criticized as provincial and isolationist, continually obstructing executive efforts to construct an internationalist, bipartisan foreign policy.[55] Recent studies have given greater emphasis to the constructive role that Congress has often played in foreign aid policy,[56] but the fact remains that foreign aid is a favorite target for congressional budget cutting. One writer found that of seventeen foreign affairs agencies studied over a twelve year period, the Agency for International Development (AID)—the main channel for nonsecurity foreign assistance—consistently received the largest budget cuts. The AID appropriation averaged nineteen percent below the administration-requested figure.[57]

In addition to maintaining foreign aid at a fairly low level of funding, Congress has used the annual aid bills to express its approval or disapproval of the administration's conduct of foreign policy and to direct foreign policy in ways it thinks desirable. This is understandable, given that

> the aid program is the one item on the legislative agenda where questions of money, administration, and the content of policy come together in a way that permits Congress to get at them.[58]

Foreign aid is one of the few areas of foreign affairs where Congress can legislate as it wishes without raising constitutional questions.

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ment assistance, mostly through the Agency for International Development (AID), hovers at approximately $1.2 billion per year, and other aid grants including Food for Peace (the "P.L. 480" program) account for another $1 billion annually. U.S. GOVERNMENT, BUDGET FOR FISCAL YEAR 1977, at 75, U.S. GOVERNMENT, BUDGET FOR FISCAL YEAR 1978, at 89. It should be noted, however, that "[t]he United States as recently as 1965 furnished about 60 percent of all the aid donated by the world's nations. This now has fallen to the 25 percent range; most aid recipients currently depend on the United States for less than 15 percent of their total foreign aid." 35 CONG. Q. WEEKLY REP. 620 (1977).

55. *See, e.g.*, Wallace, *supra* note 27; Brown, *A Cooling-Off Period for U.S.-Soviet Relations*, 28 FOREIGN POL'Y 3, 16-17 (1977).

56. *See, e.g.*, A. FRYE, A RESPONSIBLE CONGRESS: THE POLITICS OF NATIONAL SECURITY 172-73 (1975); K. WALTZ, *supra* note 43, at 196-224.

57. Davis, *The Price of Power: The Appropriations Process for 17 Foreign Affairs Agencies*, 18 PUB. POL'Y 355 (1970).

58. K. WALTZ, *supra* note 43, at 197.

Congress has communicated these policy preferences through general precatory language, in conditions attached to the receipt of foreign aid, and by actions terminating aid to specific countries. In the early years of foreign aid, general expressions of policy predominated. The Mutual Security Act of 1951 required as a condition of eligibility for military, economic, or technical aid that a recipient country, among other things, "join in promoting international understanding and goodwill and maintaining world peace."[59] The Act also declared the policy of Congress that aid be used to eliminate barriers to free enterprise, discourage cartels and monopolies, and encourage free labor unions and collective bargaining.[60] A 1955 amendment added that prior recipients of aid should be encouraged to help in aid programs because "certain other friendly nations of the world remain in need of assistance in order that they may defend themselves against aggression and contribute to the security of the free world."[61] This statement of policy was amended in 1956 to dramatize Congress' concern that world peace and U.S. security

> are endangered as long as international communism and the nations it controls continue by threat of military action, use of economic pressure, internal subversion, or other means to attempt to bring under their domination peoples now free and independent and continue to deny the rights of freedom and self-government to peoples and nations once free but now subject to such domination . . . .[62]

Even in the 1950s such general language was not the only direction given by Congress to foreign aid policy. An amendment in 1956 required that aid to Yugoslavia be cut off after ninety days unless the President determined, *inter alia,* that Yugoslavia remained independent of Soviet control and was not engaged in any program for communist world conquest.[63] The President did make such a determination, but, as Kenneth Waltz comments, "The Congressionally prescribed procedure

59. Act of Oct. 10, 1951, Pub. L. No. 82-165, § 511(a)(1), 65 Stat. 381, this section repealed by Pub. L. No. 83-665, 68 Stat. 861 (1954).

60. *Id.* § 516, 65 Stat. 382.

61. Mutual Security Act of 1955, Pub. L. No. 84-138, § 549(a)(3), 69 Stat. 289.

62. Mutual Security Act of 1956, Pub. L. No. 84-726, § 2, 70 Stat. 555.

63. *Id.* § 5, 70 Stat. 556, this section repealed by Pub. L. No. 87-195, 75 Stat. 460 (1961).

placed Yugoslavia in a position of dependence upon an uncertain benefactor in a fashion she found insulting."[64]

Five years later the foreign aid program was completely overhauled by the Foreign Assistance Act of 1961.[65] This Act included examples of all three of the means by which Congress has controlled foreign aid. There was a lengthy statement of general policy,[66] an absolute prohibition of aid "to the present government of Cuba,"[67] and a conditional provision, prohibiting assistance to any country "unless the President determines that such country is not dominated or controlled by the international Communist movement."[68] The 1961 Act, still the major foreign aid statute, has been repeatedly amended, often for the purpose of imposing new conditions on the granting of U.S. aid or of injecting new policy considerations into the making of aid decisions.[69] In a single section of the Act as codified,[70] an informal count found six separate factors which are to operate absolutely to prohibit aid to a country, ten factors which are to prohibit aid in the absence of a contrary presidential determination, and four other factors which are to be "considered" in making aid decisions. Congress has also acted in recent years to impose expenditure limits on aid that will go to a particular country.[71]

C. *The Controversy over Conditions on Foreign Aid*

The executive branch has usually resented congressional restrictions on foreign aid, whatever form they have taken. President Nixon in particular criticized the imposition of "counterproductive conditions on specific programs," and said that he would "strongly resist efforts by the Congress to impose unreasonable demands upon the necessary prerogatives of the

64. K. WALTZ, *supra* note 43, at 199.

65. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified at 22 U.S.C. § 2151 *et seq.*).

66. *Id.* § 102, 75 Stat. 424-25.

67. *Id.* § 620(a), 75 Stat. 444.

68. *Id.* § 620(b), 75 Stat. 445.

69. For a review of these amendments, particularly those related to humanitarian concerns, *see* Farer, *United States Foreign Policy and the Protection of Human Rights: Observations and Proposals*, 14 VA. J. INT'L L. 623, 641-46 (1974).

70. 22 U.S.C.A. § 2370 (Supp. 1977).

71. For example, economic aid to Chile for fiscal year 1976 was limited to $90 million. International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 320, 89 Stat. 868.

executive."[72] Some commentators support the assertion that such conditions unconstitutionally hinder the President's conduct of foreign policy.[73] More disinterested observers have also criticized the heavy-handed use of legislative restrictions on foreign aid. As Robert Asher writes:

> [R]estrictive amendments and provisions considered offensive by self-respecting nations have made this country's bilateral development assistance program progressively more difficult—almost impossible—to administer.[74]

Indeed, a major effort is now underway to overhaul the entire foreign aid program.[75]

Presidents worry not only about the ways in which foreign aid conditions may limit their diplomatic flexibility, but also about the effectiveness of using U.S. "leverage" in this manner. A frequently cited example of a congressional restriction that backfired is the Jackson-Vanik amendment which denied "most favored nation" status to the Soviet Union until all restrictions on emigration of Soviet Jews were lifted.[76] The result was a decrease both in the number of annual emigrants from 35,000 to 10,000 and in the volume of Soviet-U.S. trade.[77] The Nixon and Ford administrations generalized the "lesson" of that experience into a theory that U.S. influence over other countries is greatest when military and economic ties remain close. As Secretary of State Kissinger testified:

> Certainly we cannot—and we do not—ignore domestic practices of countries receiving security assistance which deny those human rights that civilized states commonly agree are inalienable . . . . We make our views—and those of Congress—known to the governments concerned. We are convinced, however, that withdrawal of security assistance is an extreme measure that harms other objectives while holding little promise for effecting

72. National Legislative Goals, The President's Message to Congress, 9 WEEKLY COMP. OF PRES. DOCS. 1074, 1099 (1973). *See also* President Carter's opposition to conditions on U.S. contributions to multilateral aid agencies, note 160 *infra*.

73. Wallace, *supra* note 27; Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

74. R. ASHER, *supra* note 44, at 4.

75. 35 CONG. Q. WEEKLY REP. 620 (1977).

76. Trade Act of 1974, Pub. L. No. 93-618, § 402, 88 Stat. 2056-60 (codified at 19 U.S.C. § 2432 (Supp. IV 1974)).

77. Kissinger, *American Ideals and American Foreign Policy*, STATE DEP'T NEWSLETTER, Nov. 1976, at 12; Yergin, *Politics and Soviet-American Trade: The Three Questions*, 55 FOREIGN AFF. 517 (1977).

> desirable changes. Indeed, experience has shown that our influence with other nations depreciates as we cut the bonds that hold us together.[78]

Following this prescription during the Nixon and Ford years, although the State Department privately expressed to certain countries disapproval of human rights violations and apparently considered that factor in making aid decisions, they never altered any aid decisions because of such violations.[79]

Recent policy statements notwithstanding, there are indications that at least some legislative conditions are sometimes effective. The Hickenlooper Amendment, requiring termination of aid to any country that expropriated American-owned property without compensation, "did encourage Brazil to compensate American power companies for property that had been taken"[80] and induced Honduras to abandon a plan to redistribute uncultivated property owned by the United Fruit Company.[81] Of course, it is impossible to tell what actions by other countries may have died in the planning stage because of the deterrent effect of the Amendment. Leslie Gelb, in surveying U.S. arms sales, reaches a conclusion exactly contrary to Kissinger's "don't cut the bonds" approach. He states that, although arms sales provide only limited leverage with which to influence buyers' domestic policies,

> the United States seems to have gotten better leverage from denials or threats to deny sales than by completing sales. Threats to deny sales appear to have convinced South Korea not to buy a reprocessing plant, to have persuaded Turkey not to invade Cy-

78. *Hearings on FY 1977 International Security Assistance Programs Before the Subcomm. on Foreign Assistance of the Senate Comm. on Foreign Rel.*, 94th Cong., 2d Sess. 8 (1976).

79. *Id.* at 108-09 (testimony of Philip Habib, Assistant Secretary of State); *Hearings on the International Security Assistance and Arms Export Control Act of 1976 Before the House Comm. on Int'l Rel.*, 94th Cong., 2d Sess. 14-17 (testimony of Carlyle Maw, Under-Secretary of State for Security Assistance), 140-43 (testimony of Lt. General Howard Fish, Director, Defense Security Assistance) (1976).

80. K. WALTZ, *supra* note 43, at 199.

81. Lipson, *Corporate Preferences and Public Policies: Foreign Aid Sanctions and Investment Protection*, 28 WORLD POL. 396 (1976). The rigidities of the Hickenlooper Amendment may have been counterproductive in Peru, where the cutoff of aid to a slightly left-leaning government may have contributed to a coup which brought a leftist military dictator to power. *See* A. FRYE & P. SZANTON, REMAKING FOREIGN POLICY: THE ORGANIZATIONAL CONNECTION 34-36 (1976). (The Hickenlooper Amendment discussed here should not be confused with the "second" Hickenlooper Amendment, now 22 U.S.C. § 2370(e)(2) (1970), which modified the "act of state" doctrine.).

prus in 1964 and 1968, and perhaps made Israel more amenable to negotiations with Egypt.[82]

Another difficulty with legislative restrictions on foreign aid has been the need to combine policy direction by Congress with flexibility. International conditions change; many different considerations are involved in a given aid decision. To avoid the twin hazards of ineffective policy statements and rigid prohibitions, Congress has often turned to presidential "determinations" to implement its foreign aid policies. A typical provision is section 33 of the Arms Export Control Act (formerly the Foreign Military Sales Act)[83] which limits the total amount of military assistance, credits, and loans to African countries to $40 million per year. This section also provides that "the President may waive the limitations of this section when he determines it to be important to the security of the United States, and promptly so reports to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate."[84] The section was amended to its present form in December 1974 and was waived by President Ford in both 1975 and 1976.[85] Since these waivers included absolutely no discussion of the reasons for making the determinations, they offered a convenient way for the administration to evade the congressional policy of limiting arms sales to Africa. While the fact that such waivers are made does not necessarily mean that the statutory policy is being ignored, it does indicate that waivable restrictions may not be an effective means for Congress to exercise direction over foreign policy.[86]

Several points emerge from this survey of recent foreign aid restrictions. Congress is seeking to increase its control over foreign aid, and one means of control is the imposition of conditions on recipients of aid. The executive branch has resisted such conditions on the grounds that they interfere with needed flexibility in foreign policy and may, in fact, backfire. While

82. Gelb, *supra* note 8, at 20.

83. 22 U.S.C. § 2773 (Supp. IV 1974).

84. 22 U.S.C. § 2773(b) (Supp. IV 1974).

85. *See* 40 Fed. Reg. 24887 (1975); 41 Fed. Reg. 25879 (1976). For a more egregious example of executive evasion of a legislative condition by waiver, see note 110 *infra*.

86. In addition to numerous specific waiver provisions, the President has the authority to make annual grants of up to $50 million per country (with an overall limit of $250 million) which are not subject to the statutory conditions discussed here. 22 U.S.C. § 2364a (Supp. IV 1974).

there is evidence that some conditions may have been effective at one time or another, most may be evaded by presidential "determinations" over which Congress has exercised little review.

With this background we examine in detail several recent cases of legislative conditions.

IV. THE TURKISH ARMS EMBARGO

A. *The Chronology of Congressional Action*

The Foreign Assistance Act has long included a provision stating that military assistance is "furnished solely for internal security, for legitimate self-defense, [and] to permit the recipient country to participate in regional or collective arrangements or measures consistent with the Charter of the United Nations."[87] Similarly, grants of defense articles and sales by the United States government will not be made unless the recipient country agrees that it will not use or permit the use of such articles for purposes other than those for which they were furnished.[88] A country which is in "substantial" violation of these provisions "shall be immediately ineligible for further assistance."[89] There is, however, a statutory means by which these restrictions can be avoided: The President has authority to make annual grants, free from the statutory restrictions, of up to $50 million per country, if he determines that such grants are important to United States security.[90]

On July 20, 1974, Turkey invaded Cyprus, ostensibly for the purpose of protecting Turkish Cypriots in the instability following a July 15 coup.[91] This invasion involved the use of United States defense articles and services for purposes other than those for which they were supplied. Security assistance to Turkey had been based on a 1947 agreement in which the gov-

87. 22 U.S.C. § 2313 (1970).

88. 22 U.S.C. § 2314(d)(1) (1970) (grants); 22 U.S.C. § 2753(a)(2) (Supp. IV 1974) (government sales). General power to regulate and license commercial, as opposed to government, arms sales has been delegated by Congress to the President. 22 U.S.C.A. § 2778 (Supp. 1977). This delegation was held to be constitutional in United States v. Gurrola-Garcia, 547 F.2d 1075 (9th Cir. 1976). Congress, of course, frequently acts to prohibit commercial sales to particular countries, as it did in the Turkish embargo.

89. 22 U.S.C. § 2314(d) (1970); 22 U.S.C. § 2753(c) (Supp. IV 1974), *as amended by* the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 304(b)(1), 90 Stat. 754.

90. 22 U.S.C. § 2364(a) (Supp. IV 1974).

91. N.Y. Times, July 20, 1974, at 1, col. 8.

ernment had agreed not to use such assistance for purposes other than those for which it was given.[92] The problem arose of what, if anything, to do to enforce the statutory mandate.

An initial difficulty with the statutory restriction was the mechanism for enforcement. In the eyes of Congress the invasion made Turkey "immediately ineligible" for further military grants, credits, or government sales. However, termination of such assistance required affirmative action from an executive branch that never admitted that Turkey had violated the restrictions in the first place.[93] Thus, contrary to the intent of the Foreign Assistance Act, the President neither halted military aid to Turkey, nor did he make a determination that despite Turkish violations continued assistance was important to the security of the United States.[94]

Frustrated by presidential inaction and supported by public opinion in some sectors,[95] Congress moved to cut off aid to Turkey. The first major action was a sense of the Senate resolution which passed on September 19, 1974, by a vote of 64-27.[96] Senator Eagleton, the main Senate proponent of the cutoff, discussed the statutory conditions and, in language reminiscent of the then recently concluded impeachment inquiry, stated:"[T]he amendment I propose today is intended to demonstrate that the rule of law in this Nation must prevail over the policies of men."[97]

In the following weeks both Houses of Congress debated and voted numerous times on various provisions which would have cut off aid to Turkey until the President certified that Turkey was in compliance with U.S. foreign aid laws and that

92. Agreement on Aid to Turkey, July 12, 1947, United States-Turkey, art. IV, 61 Stat. 2953, T.I.A.S. No. 1629. 22 U.S.C. § 2370(i) (1970) requires denial of assistance to any country which engages in or prepares for aggressive military action against a country which receives aid from the United States. In 1974 Cyprus was receiving both P.L. 480 food assistance and regular foreign aid. 120 CONG. REC. 31915 (1974) (remarks of Sen. Eagleton).

93. 30 CONG. Q. ALMANAC 548 (1974).

94. Some Congressmen suggested that the President could not in good faith make such a determination. 120 CONG. REC. 31914 (remarks of Sen. Eagleton), 31916 (remarks of Sen. Stevenson) (1974).

95. *See, e.g.*, editorial, N.Y. Times, Sep. 14, 1974, at 28, col. 1. There was also a well-organized lobbying effort by Greek-Americans.

96. See the debate in the Senate, 120 CONG. REC. 31913-23 (1974).

97. *Id.* at 31913.

substantial progress had been made toward a settlement of the Cyprus conflict.[98] These provisions, which took the form of amendments to continuing appropriations resolutions, met extreme opposition from the administration—President Ford twice vetoed the measures.[99] The President objected to the aid cutoff because he said that it undercut his "ability to act" and did not provide the "flexibility needed to carry forward the foreign policy of the United States."[100] He warned that the absolute cutoff might lead to Turkish reprisals including possible withdrawal from NATO or interference with U.S. intelligence operations there. It was also claimed that the cutoff would make a peaceful solution to the Cyprus question less likely.

A compromise was reached on October 17 with a measure which prohibited further aid to Turkey, but allowed the President to delay the prohibition until December 10, 1974.[101] The regular foreign aid bill, passed December 18, allowed a further delay of the cutoff until February 5, 1975.[102] On February 5, President Ford reluctantly suspended arms shipments and other military assistance[103] because he could not make the required findings that Turkey was in compliance with the statutory conditions and that there had been substantial progress towards a Cyprus settlement.

Arms shipments to Turkey remained at a standstill for the next eight months. During that time attempts were made to move towards a resolution of the Cyprus problem, and the administration continually urged Congress to lift the embargo. There was a close Senate vote, 40-41, on May 19 on a bill which would have completely lifted the embargo. In supporting the bill, Senator Sparkman expressed what appears to have been the feeling of many Congressmen regarding the embargo: "I cannot help but feel that we did not realize the lengths to which

98. For a detailed summary of the House and Senate actions, *see* 30 CONG. Q. ALMANAC 533-53 (1974).

99. H.J. Res. 1131, H.J. Res. 1163, 93d Cong., 2d Sess. (1974). For President Ford's veto messages, *see* 10 WEEKLY COMP. OF PRES. DOCS. 1282, 1316-17 (1974).

100. *Id.* at 1283.

101. Act of Oct. 17, 1974, Pub. L. No. 93-448, § 6, 88 Stat. 1363 (1974).

102. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 22, 88 Stat. 1801 (codified at 22 U.S.C. § 2370 (Supp. IV 1974)).

103. *See* 11 WEEKLY COMP. OF PRES. DOCS. 155 (1975).

we went, under Foreign Assistance Act provisions, in cutting off military equipment deliveries to Turkey."[104]

Before the House in turn considered the Senate bill, Turkey had announced a thirty day timetable for the shutdown of some twenty-seven U.S. military and intelligence operations there.[105] In an effort to assure House passage, a compromise bill had been agreed upon in committee which prohibited direct military grants, allowed government-to-government credit sales only to fulfill NATO responsibilities, and allowed commercial cash sales of arms.[106] The bill would also have allowed delivery of $185 million of arms purchased from the government before the February 5 embargo. Despite these changes from the Senate's complete lifting of the ban, and despite intensive lobbying by the administration,[107] the House on July 24, 1975, rejected the bill, 206-223. As in the original embargo vote in the Senate in 1974, debate focused on the problem of condoning violation of U.S. law versus the need for a flexible, pragmatic foreign policy.

One day after the House action, Turkey closed down joint Turkish-American bases and post exchanges on American military installations and declared the 1969 bilateral defense agreement dead.[108] These developments were viewed with extreme dismay by the administration. They tended to support fears that the arms embargo would not solve the Cyprus problem and would weaken NATO and undermine intelligence-gathering efforts.[109]

Following its August recess, the House, with a contrite heart, passed a bill similar to the one it had rejected in July.[110]

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104. 121 CONG. REC. S8624 (daily ed. May 19, 1975).

105. N.Y. Times, June 18, 1975, at 6, col. 4.

106. S. 846, as amended, 94th Cong., 1st Sess. (1975). *See* H.R. REP. No. 365, 94th Cong., 1st Sess. (1975).

107. *See* 33 CONG. Q. WEEKLY REP. 1607 (1975).

108. N.Y. Times, July 26, 1975, at 1, col. 8.

109. *See, e.g.*, 11 WEEKLY COMP. OF PRES. DOCS. 845 (1975).

110. Act of Oct. 6, 1975, Pub. L. No. 94-104, 89 Stat. 508 (codified in various sections of 22 U.S.C.). *See* 121 CONG. REC. H9522 (daily ed. Oct. 2, 1975). The partial lifting of the embargo is another example of the difficulties inherent in allowing presidential "determinations" that waive congressional restrictions. The bill permitted U.S. Government arms sales to Turkey if the President determined that they were necessary in order for Turkey to fulfill its NATO commitments. President Ford made several such determinations allowing Turkey to obtain up to $125 million of arms in both fiscal years 1976 and 1977. N.Y. Times, Apr. 22, 1977, § 1, at 7, col. 1. Some have

After an embargo of eight months, there had been no substantial movement towards a Cyprus settlement, U.S. intelligence operations in Turkey had been severely curtailed, and Turkish-Greek relations remained hostile. By the end of 1975, Turkey had purchased sixty military helicopters from the Soviet Union and the two countries had signed a long-range cooperation agreement.[111]

B. *Evaluation*

Many commentators and politicians have criticized the Turkish arms embargo. It has been viewed as an embarrassing example of congressional over-involvement in the conduct of foreign affairs and as a substantive policy that continues to have a serious adverse effect on U.S. security. I will not discuss the ultimate wisdom of the arms embargo in detail, but will focus instead on several of the factors that led to its passage.

In addition to the myriad pressures of constituents, the Executive, and the dictates of diplomacy, three aspects of the statutory framework within which Congress acted contributed substantially to the passage of the arms embargo. First, as noted above, the cutoff of arms to a country that used them for aggressive purposes did not occur automatically or by congressional action; it required an affirmative act by a reluctant President. Second, neither the statute nor any other mechanism had kept Congress abreast of relevant diplomatic developments or possible consequences of various courses of action; Congress did not have the information it should have had to make the decision regarding arms sales to Turkey. Third, and most importantly, the statutory condition was absolute: If a recipient country used U.S.-supplied arms aggressively, shipments were to be cutoff. Period. These aspects of the statutory framework will now be examined in more detail.

1. *The Burden of Going Forward*

By putting the burden of instituting cuts in military grants and sales on the President, the Foreign Assistance Act required a reluctant Executive to act affirmatively or to appear to coun-

viewed these determinations as excessive and as a clear executive evasion of the statutory restriction. *See, e.g.*, G. BALL, DIPLOMACY FOR A CROWDED WORLD 309 (1976).

111. *Hearings Before the Subcomm. on Foreign Assistance, supra* note 78, at 250; N.Y. Times, Dec. 30, 1975, at 3, col. 1.

tenance violation of the statute. This, coupled with an absence of active and imaginative diplomacy by the President, contributed to a situation where Congress felt that it had to act by the passage of a legislative embargo. The President could have—some would argue should have—cut off aid and arms to Turkey on his own; the statute gave him that authority. Alternatively Turkey could have been threatened privately with a cutoff; the administration could have expressed its opinion that Turkey had violated U.S. law; a partial embargo could have been imposed. Such affirmative presidential action would have preserved flexibility. If these efforts failed, the President would have been put in the uncomfortable position of having to cut off aid to carry out the threat—and the law—or to use some other means to get around the statutory restriction.[112] Still, this position could hardly have been more awkward for the country than what actually happened, and it would have allowed more time for quiet diplomacy.

Although the facts are difficult to come by, the State Department apparently did *not* threaten Turkey with a cutoff of military aid in its attempts to settle the Cyprus dispute.[113] The consistent administration position was that it would seek a Cyprus cease-fire and a Turkish withdrawal, but that military aid to Turkey was a completely unrelated issue, involving U.S. and NATO security interests.[114] While neither the old President nor the new had much time to devote to Cyprus in July and August of 1974, the lack of presidential action probably reinforced congressional uncertainty as to the Executive's intention to enforce the law. When Kissinger was asked at a news conference on August 19, 1974, about his interpretation of the statutory cutoff language, he stated that he would have to get a legal opinion on the matter,[115] despite the relative clarity of the statute. It was probably not any ambiguity in the statute that bothered the administration, but the unpleasant fact that the statute required the President to take the initiative.

112. Such as his power to make unconditional limited grants under 22 U.S.C. § 2364(a) (Supp. IV 1974).

113. *See, e.g.*, Kissinger's July 22, 1974, press conference, 71 DEP'T STATE BULL. 257, 258, 261 (1974).

114. *See, e.g.*, Kissinger's Dec. 7, 1974, press conference, 71 DEP'T STATE BULL. 909, 916 (1974).

115. 71 DEP'T STATE BULL. 353, 357 (1974).

That some of the blame for the embargo must rest with the Executive has also been expressed by Alton Frye:

> Very early, before there were votes on the Turkish cut off, senior members of the House were advising the administration not to let the matter be pressed to a vote. They urged the President to use his emergency authority to sustain some flow of arms, to allow some time for diplomacy to show progress on Cyprus, and to let the House delay action . . . . Had he used the emergency authority, I think the contretemps could have been avoided or at least muted.[116]

The consequences of presidential inaction are particularly striking when compared with President Johnson's effective threats of arms cutoffs in 1964 and 1968. President Johnson's use of the statutory condition in the context of traditional diplomacy helped prevent a Turkish invasion of Cyprus on both those occasions.[117]

A statute which contained the nonagressive use condition, but which required Congress to act to cut off arms to an offending country might have avoided some of these problems. The administration, operating through traditional diplomatic channels, would still have considerable leverage to pressure a country not to use the arms aggressively, but it would not be forced to label a country as an aggressor and to cut off its grants and arms sales. The final embargo, after all, was the result of congressional action; if the statute had made clear that that was to be the procedure all along, the conflict over the respective roles of the President and the Congress might have been avoided.

A more clearly drawn statute which put the burden of initiating a cutoff on Congress rather than on the President would not necessarily have prevented the diplomatic failures that led to the embargo. By putting the burden on the Executive, however, the statute helped create a situation in which executive inaction appeared to be a conscious policy choice and a violation of the law, and Congress felt compelled to react legislatively.

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116. *Hearings on Congress and Foreign Policy Before the Special Subcomm. on Investigations of the House Comm. on Int'l Rel.* 94th Cong. 2d Sess. 31 (1976).

117. Gelb, *supra* note 8, at 20. *See also* F. VALI, THE TURKISH STRAITS AND NATO 93-95 (1972); President Johnson's 1964 letter to Turkish Prime Minister Ismet Inönü, *reprinted in id.* at 309-13.

2. *Lack of Information*

The second deficiency in the statute, Congress' lack of information, caused many Congressmen later to feel that they had acted without enough understanding of the complex relationships between Greece, Turkey, and Cyprus.[118] These complaints may be to some extent rationalizations for a policy choice that went awry; but it is nonetheless true that at the time the embargo was voted Congress did not have all the information needed to make the decision. To take one example, when the House International Relations Committee recommended that the embargo be lifted, it noted that under the Treaty of Guarantee of 1960[119] Turkey had responsibility to maintain the independence, territorial integrity, and security of Cyprus.[120] If this fact had come out during debate over the initial aid cutoff, it might have made Turkey's action seem somewhat less aggressive and less violative of U.S. restrictions on military aid.

Other informational lacunae were more the fault of the Executive than of the statute or of Congress' lack of diligence. For example, even when the embargo was partially lifted in 1975, Congress had not been informed of the exact nature of the intelligence gathering installations that Turkey had closed down. The House International Relations Committee was told that "several installations cannot be duplicated" and that "others can be duplicated at considerable expense,"[121] but the Committee was not given any facts with which to make its own conclusions regarding the importance of the installations to U.S. security.[122]

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118. *Hearings, supra* note 116, at 94 (remarks of Rep. Lagomarsino).

119. Treaty of Guarantee, Aug. 16, 1960, between United Kingdom, Greece, Turkey, and Cyprus, 382 U.N.T.S. 3.

120. H.R. REP. No. 500, 94th Cong., 1st Sess. 10, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 965, 973. However, the Committee still concluded that Turkey had violated the statutory restrictions.

121. *Id.* at 2.

122. As Representative Rosenthal stated:

> I would have thought ordinary procedure would have been that Mr. Sisco or others such as the Joint Chiefs of Staff or CIA, should have come here and told us what the effect of the loss of the Turkish bases has been? Rather, we get conclusions without any testimony or supporting documentary material at all.

Hearings on S. 2230 before the House Comm. on Int'l Rel. 94th Cong., 1st Sess. 11 (1975).

3. *Absolute Nature of the Condition*

Perhaps the heart of the problem with the statutory framework was that the Foreign Assistance Act and the Foreign Military Sales Act were absolute in requiring termination of assistance or sales if the recipient country used the defense articles for prohibited purposes. The statute provided for no alternative or compromise: The country was to be "immediately ineligible" for further assistance. The combination of the statute cast in stark black and white terms with the executive inaction noted above set the stage for a confrontation between Congress and the President. Furthermore, coming at a time when many Congressmen already wondered whether presidential policies could be kept within the bounds of law, the Turkish question seemed to be a test of legal restraints on the conduct of extralegal diplomacy. It was perceived as a contest between principle and pragmatism:

> [T]o pass this bill [lifting the embargo] would give a sign to the world that a principle in our aid legislation for over a quarter-century is without significance. Passing this bill will show the countries which last year bought $10 billion in United States arms that realistically no restrictions apply to their use.[123]

The absolute language of the nonaggressive use condition thus put Congress in a position where its policy choices were severely limited.

Consequently, in light of the circumstances and the congressional desire to enforce its statutory condition both against the President and against Turkey, Congress had little choice but to act legislatively or allow the restrictions to be flouted. If one concedes that conditions should be attached to U.S. aid, then those conditions must—on occasion at least—be enforced. Inaction would have frustrated goals which were perceived to be of particular importance, such as the principle of using U.S.-supplied weapons for defensive purposes only and the idea that foreign policy must be conducted according to law. However, legislative action frustrated other important goals: It did not lead to a Cyprus solution; it led instead to the closing of U.S. bases in Turkey.

123. H.R. REP. No. 500, *supra* note 120, at 31-32 (Opposing views of Reps. Fascell, Rosenthal, Yatron, Harrington, Collins, and Bonker).

Disregarding one's evaluation of the embargo itself, it is evident that at least to some degree Congress suffered from its own self-imposed rules. The statutory language making violating countries "immediately ineligible" for further assistance introduced rigidity into a situation which demanded flexibility.[124] Compounding the error, the condition put the burden of finding a violation and cutting off aid on an unwilling Executive, thereby forcing Congress to impose the prescribed penalty. As so often happens when the tool is legislation, the effect is that of a sledge hammer rather than of a scalpel.

The characteristic rigidity of legislation, however, is present whenever there is a statutory cutoff of aid or arms sales to a particular country. Nonetheless, despite this inherent handicap Congress frequently makes such legislative determinations without adverse consequences. Consequently, it was not the means, legislation, by which Congress acted that was at fault. Criticism is more appropriately levelled at the statutory framework that helped lead to the embargo. By attaching an absolute condition to aid, by failing to require that information be transmitted to Congress, and by putting the burden of implementing the cutoff on the President, these statutes forced Congress to act through a predetermined inflexible remedy when other alternatives might have been more effective.

V. HUMAN RIGHTS CONDITIONS

A. *The Evolution of Statutory Conditions*

Concern over what many have viewed as a worldwide deterioration of respect for human rights has prompted Congress to try to relate United States foreign assistance to the preservation of such rights.[125] American foreign policy, for better or worse, has frequently exhibited a strong moral emphasis. During the Cold War, foreign aid measures were directed towards combatting communism and maintaining "independence" and "self-government." Failures of old policies, large gaps between

124. It should be noted, however, that Congress *did* compromise on the cutoff date and did in fact give the President over three months to work for a settlement through diplomatic channels.

125. *See, e.g.*, Fraser, *Freedom and Foreign Policy*, 26 FOREIGN POL'Y 140 (1977). On Congress and human rights generally, *see* Salzberg & Young, *The Parliamentary Role in Implementing International Human Rights: A U.S. Example*, 12 TEX. INT'L L.J. 251 (1977); Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT'L & COMP. L. 231 (1977).

theory and practice, a new definition of what is in our "national interest," and humanitarian concerns have led to "new directions" in American foreign aid programs, including statutory recognition of human rights.[126]

The first legislation regarding human rights in foreign aid was a sense of Congress provision added to the Foreign Assistance Act in 1973 stating that "the President should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes."[127] While this provision applied to all assistance, later congressional efforts to incorporate human rights considerations distinguished between military aid and aid given for nonmilitary purposes, and went beyond simple expressions of policy.

The International Development and Food Assistance Act of 1975 contained a detailed human rights provision, added as section 116 of the Foreign Assistance Act,[128] which applies to development assistance, but not to disaster assistance or food aid programs. Under the section, no assistance may be provided to the government of a country which "engages in a consistent pattern of gross violations of internationally recognized human rights . . . unless such assistance will directly benefit the needy people in such country." The proviso ensures that while human rights are to be linked to American assistance, aid that actually reaches needy people should not be "conditioned on their having political freedom."[129]

The mechanism by which the provision operates is considerably more sophisticated than the statute that led to the Turkish arms embargo. A conference committee rejected an earlier provision which would have put the burden of declaring

126. While moral values are an essential part of American foreign policy, some writers have warned that the United States must do more than merely substitute human rights platitudes for anticommunist platitudes. As the United States moves away from its old role as the world's military policeman, it must avoid setting itself up as the world's "moral policeman." *See* Szulc, *The Limits of Linkage*, NEW REPUBLIC, Mar. 5, 1977, at 19.

127. Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 32, 87 Stat. 733. For a discussion of Congress and human rights before 1973, *see* Weissbrodt, *supra* note 125, at 232-40.

128. International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 310, 89 Stat. 860 (codified at 22 U.S.C. § 2151n (Supp. V 1975)).

129. S. REP. No. 406, 94th Cong., 1st Sess. 35-36 (1975).

human rights violations on the President:

> In the view of the committee the House language was deficient in that unless and until the President made a determination in effect condemning an aid recipient government, the provisions of the section were not operative. The committee has noted that the executive branch is reluctant to make such determinations.[130]

In the measure as adopted, the Senate Foreign Relations Committee or the House International Relations Committee may require "assurances" from the AID administrator that assistance directly benefits needy people in a particular country and "a detailed explanation of how that is being accomplished."[131] Annual reports on the steps taken to carry out the provision are required from the President.[132] If Congress then disagrees with the executive report, it may initiate action to cut off aid by concurrent resolution—an alternative that has always been available under section 617 of the Foreign Assistance Act.[133] By this relatively mild provision, Congress has sought to have human rights factors taken into consideration in foreign aid allocations, but without requiring the President to brand a country as a violator or to cut off aid whenever a violation is found. And, to prevent the Executive from ignoring the statutory direction, Congress has given itself oversight powers and access to information gathered by the Administration.

Congress has taken a harder line in attaching human rights conditions to military and security supporting assistance. In 1974 a human rights provision was added as section 502B of the Foreign Assistance Act and the Foreign Military Sales Act.[134] The section stated that it was the sense of Congress that "the President shall substantially reduce or terminate security assistance" to countries which consistently violate human rights. "Security assistance" included military assistance, security supporting assistance, and government and commercial sales under the Foreign Military Sales Act. The only really operative part of the 502B amendment required

130. *Id.* at 35.

131. International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 310, 89 Stat. 860 (codified at 22 U.S.C. § 2151n(b) (Supp. V 1975)).

132. *Id.* (codified at 22 U.S.C. § 2151n(d) (Supp. V 1975)).

133. 22 U.S.C. § 2367 (1970).

134. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 46, 88 Stat. 1815 (codified at 22 U.S.C. § 2304 (Supp. IV 1974)).

that: "Whenever proposing or furnishing security assistance to any government falling within the provisions of paragraph (a) [*i.e.*, violating human rights], the President shall advise the Congress of the extraordinary circumstances necessitating the assistance."

The language of 502B contained two obvious implications which limited its effectiveness. First, and most importantly, it put the burden on the Executive to make a determination that a particular country was a gross violator of human rights. Second, it allowed, in effect, evasion of the human rights condition on the basis of "extraordinary circumstances" without further defining that term.

Practice under 502B confirmed its deficiencies. One major stumbling block was resistance in the State Department towards identifying any country as a violator of human rights. The following exchange between Representative Fraser of the House International Relations Committee and Carlyle Maw, Under-Secretary of State for Security Assistance is illustrative:

> Mr. Fraser. Mr. Secretary, could you give me a single instance in which this weighing of human rights or shared values or the lack of them has altered a decision on security assistance or modified the decision? Can you give me a single instance?
> Mr. Maw. I have to answer you, Mr. Fraser, by saying that is one of the factors that has gone in and is weighed in all cases. You cannot quantify one factor as against another.
> Mr. Fraser. Can you point to any country where you can tell us that weighing in the question of shared values or the lack of it or the human rights—
> Mr. Maw. I would like not to point the finger at particular countries but I think you appreciate that we might feel much more strongly about helping countries if their human rights were more compatible with our own ideas.
> Mr. Fraser. Well, you don't have very much money to work with.
> Mr. Maw. That is correct.
> Mr. Fraser. There are some countries that you might do more for if they had some shared values with us?
> Mr. Maw. I prefer not to get into the position of having to point a finger at any particular countries . . . .[135]

A similar style is evident in the Administration's "Report

135. *Hearings on the International Security Assistance and Arms Export Control Act*, *supra* note 79, at 15.

to the Congress on the Human Rights Situation in Countries Receiving United States Security Assistance."[136] The Report does not mention a single foreign country or a single specific violation of human rights. Senator Humphrey said of the Report, "It was about as bland, may I say, as swallowing a bucket of sawdust."[137]

Congressional unhappiness with the operation of 502B led to an effort at substantial revision in 1975-76. After President Ford vetoed S. 2662, which included a lengthy new version of 502B,[138] a somewhat different version was included in the International Security Assistance and Arms Export Control Act of 1976, signed by the President on July 1.[139] The new 502B makes the "increased observance of internationally recognized human rights" a "principal goal" of United States foreign policy and declares that no security assistance will be provided to gross violators of human rights except under specific circumstances stated in the section. A yearly report to Congress on the human rights practices of each recipient country is required. Upon the request of either House or its relevant committee, the Secretary of State is to transmit, within 30 days, "all the available information" regarding a country's human rights practices, the steps the United States has taken to discourage human rights violations and to dissociate itself from such violations, and "extraordinary circumstances" which "necessitate a continuation of security assistance for such country," a description of such circumstances, and whether "on all the facts it is in the national interest of the United States to provide such assistance."[140] If a requested statement is not delivered within 30 days, "no security assistance shall be delivered . . . except as may thereafter be specifically authorized by law."[141] After a

136. *Report to the Congress on the Human Rights Situation in Countries Receiving U.S. Security Assistance, reprinted in* 122 CONG. REC. S1895-96 (daily ed. Feb. 18, 1976).

137. 122 CONG. REC. S1895 (daily ed. Feb. 18, 1976) (remarks of Sen. Humphrey). Senator Cranston commented: "This law has been totally ignored." 122 CONG. REC. S9060 (daily ed. Jun. 11, 1976).

138. S. REP. No. 605, 94th Cong., 2d Sess. 63-65 (1976).

139. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 301, 90 Stat. 748-50 (codified at 22 U.S.C. § 2304 (Supp. IV 1974)). For an exhaustive discussion of section 502B, *see* Weissbrodt, *supra* note 125, at 241-50.

140. 22 U.S.C. § 2304(c)(1) (1976).

141. 22 U.S.C. § 2304(c)(3) (1976).

requested statement is transmitted, Congress may terminate or restrict security assistance by joint resolution.[142]

The improvements of this section over earlier efforts are obvious. The provision requires executive reports and information gathering, but moves toward termination of assistance may be triggered independently by Congress. Unlike the old 502B an executive determination of a violation is not required. Pressure to label a country as a violator of human rights is thus removed from the State Department. While a congressional request would elicit an opinion from the administration as to whether continued assistance was in the national interest, Congress would also receive facts concerning the human rights violations and the circumstances which "require" continued assistance.[143] With the facts in hand Congress presumably will be able to arrive at its own determination of whether security assistance should be terminated or not. The provision for congressional termination by joint resolution was a change from the concurrent resolution provision of the vetoed S. 2662, and was made in the spirit of compromise. As noted above Congress has long had the power to terminate any foreign assistance by concurrent resolution,[144] but, according to Senator Cranston, that power has never been used.[145]

B. *The Present Provisions in Practice*

A revealing look at section 116 of the Foreign Assistance Act in practice is provided in recent hearings on the relationship between foreign aid and human rights in Chile.[146] While Congress had deliberately not placed the burden of determining whether a country had violated human rights on the Executive, that strategy made it difficult to discover exactly what the State Department's view of human rights in Chile was. An AID official stated that no determination had been made of whether Chile violated human rights within the meaning of the statute, but it was AID's position, in any event, that the assistance was directly benefitting needy people and was therefore allowable

142. 22 U.S.C. § 2304(c)(4) (1976).

143. 22 U.S.C. § 2304(c)(1)(C)(i)-(ii) (1976).

144. 22 U.S.C. § 2367 (1970).

145. 122 CONG. REC. S9060 (daily ed. June 11, 1976) (remarks of Sen. Cranston).

146. *Chile: The Status of Human Rights and its Relationship to U.S. Economic Assistance Programs: Hearings before the Subcomm. on Int'l Organizations of the House Comm. on Int'l Rel.* 94th Cong., 2d Sess. (1976).

regardless of human rights violations.[147] In fact, the official asserted, virtually all aid is presently structured so that it benefits needy people.[148] AID, therefore, was not required to make any determinations about human rights violations in recipient countries. If the Executive feels that the aid comes within the "needy people" proviso, the burden is on Congress to investigate further.

Practice under the new human rights conditions on military aid has been more encouraging.[149] The State Department has complied with the new 502B, at least to the extent of compiling reports on human rights violations in countries that received U.S. military aid. Under pressure from several Congressmen, the reports on Argentina, Haiti, Indonesia, Iran, Peru, and the Phillippines were partially declassified in December 1976.[150] The reports found varying degrees of violations of human rights but the State Department concluded that American military support for each country should continue.[151] Based on these reports, the Carter administration, with some impetus from Congress, announced cutbacks of assistance to Argentina, Ethiopia, and Uruguay.[152] However, President Carter apparently chose to follow the State Department's recommendations regarding countries such as the Philippines, where U.S. bases might be closed if aid were cut.[153]

Of potential significance in future aid decisions, the first complete State Department report on human rights was sent to Congress in March 1977 containing information on 82 countries which received security supporting assistance.[154] While

147. *Id.* at 20-21.

148. *Id.* at 24. *See also id.* at 92-93.

149. Salzberg & Young, *supra* note 125. *But see* Note, *U.S. Military Exports and the Arms Export Contol Act of 1976: The F-16 Sale to Iran*, 9 CASE W. RES. J. INT'L L. 407 (1977).

150. *Human Rights and U.S. Policy: Argen., Haiti, Indonesia, Iran, Peru, and the Phil., Reports Submitted to the House Comm. on Int'l Rel. By the Dep't of State*, H.R. Doc. No. 462, 94th Cong., 2d Sess. (1976). *See* 123 CONG. REC. H452-53 (daily ed. Jan. 19, 1977) (remarks of Rep. Drinen).

151. N.Y. Times, Jan. 2, 1977, at 1, col. 2.

152. N.Y. Times, Feb. 25, 1977, at 1, col. 6.

153. *See* 76 DEP'T STATE BULL. 326 (1977).

154. *1977 Human Rights Reports*, prepared by the Dep't of State for the Subcomm. on Foreign Assistance, Senate Comm. on Foreign Rel., 95th Cong., 1st Sess. (1977). *See* Weissbrodt, *supra* note 125, at 263 n.111.

The 1978 report was released in February, and gave information on 105 countries

not satisfying all critics, the report did bring together data from the State Department and from various nongovernmental organizations and will provide a basis for later human rights discussions.

Moreover, it appears that human rights conditions in addition to their "negative" aspects—the cutting of aid—have a positive impact in the decisionmaking of foreign nations as well. For example, following the release of the State Department reports and the administration's decisions to reduce aid to several countries, Indonesia released several thousand alleged communists, some of whom had been detained for up to ten years. This move was seen as linked to possible cuts in U.S. aid.[155]

The efficacy of these new human rights provisions depends to a large extent on the policies of the executive branch. The human rights condition on development assistance allows a great deal of executive flexibility; aid is always allowed if it reaches needy people. Conditions on military aid and security supporting assistance are more tightly drawn, but they too allow room for maneuvering. As in the Turkish embargo, executive action or inaction may be as important as the statutory language, and it remains to be seen how closely, within the statutory parameters, the new administration will link aid to human rights. The Kissinger policy of nonlinkage meant a complete separation of human rights concerns from aid decisions, but there are any number of ways short of complete linkage for President Carter to use foreign military and economic aid to further human rights goals.

VI. THE FIRST YEAR OF THE CARTER ADMINISTRATION

Insight into the present use of statutory conditions by Congress and the Executive may be gained by a short survey of developments during 1977. The year was marked by a decided

receiving U.S. aid. N.Y. Times, Feb. 10, 1978, § 1, at 1, col. 3. While the report notes some improvement in human rights situations as a result of U.S. efforts, "the overall picture described for Congress again was a bleak one, with rights reportedly violated in all but a few non-Western countries." *Id. See Human Rights Practices in Countries Receiving U.S. Security Assistance,* Prepared by the Dep't of State for the House Comm. on Int'l Rel., 95th Cong., 1st Sess. (Apr. 1977).

155. N.Y. Times, Feb. 28, 1977, at 27, col. 1. For a listing of favorable acts by foreign governments in reaction to U.S. human rights initiatives, *see* Drew, *supra* note 50, at 59-60. *See also,* N.Y. Times, Feb. 10, 1978, § 1, at 1, col. 3.

shift in the rhetoric of American foreign policy. President Carter's concern for human rights was stressed early in his administration and was incorporated into a statement of principles which were to guide American foreign assistance.[156] That statement expressed two occasionally conflicting goals of Carter's foreign policy. On the one hand, the administration was "reforming" policies which at times "awarded liberal grants and loans to repressive regimes which violate human rights."[157] On the other hand, the President sought $2.7 billion for international financial institutions in fiscal year 1978, in part because "[t]hey help remove political considerations from development efforts, and they encourage developing countries to pursue sound domestic policies."[158] Thus, at the same time Carter wanted to use U.S. aid to encourage respect for human rights and to channel a large amount of aid through international agencies where control of aid decisions would be substantially diminished.

This potential conflict surfaced in congressional action on legislation authorizing increased participation in the International Bank for Reconstruction and Development, the International Development Association, and other multinational funds.[159] The Senate Committee supported President Carter's position that human rights provisions in the Statute should require American representatives to express concern by "vote and voice" about the human rights records of loans and grant applicants. The Committee, however, felt strongly "that directives not be issued which would place the U.S. in a position of a mandated 'no' vote, thus obviating U.S. negotiating strength and influence in an institution."[160]

This reaction was in part a response to the apparent ineffectiveness of a condition placed on International Development Association funding in 1974 which required the American rep-

156. *Message from the President of the United States on Foreign Assistance*, H. Doc. No. 104, 95th Cong., 1st Sess. (1977), *reprinted in* 123 CONG. REC. H2297 (daily ed. Mar. 21, 1977).

157. *Id.*

158. *Id.*

159. Act of Oct. 3, 1977, Pub. L. No. 95-118, § 101, 91 Stat. 1067 (to be codified at 22 U.S.C. § 262c (Supp. 1977)).

160. S. REP. No. 159, 95th Cong., 1st Sess. 16 (1977).

For President Carter's views, see his letter to Senator Humphrey, *id.* at 82-83.

resentative to vote against loans to countries which had detonated nuclear devices. In practice, that provision had required the United States to vote against all loans to India. "The effect of the Long provision had not been to stop India loans, as the United States does not have veto power, but to negate the necessity for consultation with the United States about India loans."[161] The Senate Committee's broader, nonmandatory provision on human rights and multinational agencies did not prevail, however, and the legislation that passed put more restrictions on U.S. aid than the President wanted.

As passed, the statute contains a broad, general statement that the United States should use its voice and vote to "advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in [certain violations of human rights]."[162] In section 701(f), however, the language was more imperative:

> The United States Executive Directors of the institutions listed in subsection (a) are authorized and instructed to oppose any loan, any extension of financial assistance, or any technical assistance to any country described in subsection (a)(1) or (2), unless such assistance is directed specifically to programs which serve the basic human needs of the citizens of such country.[163]

This section is based on prior statutes such as section 116 of the Foreign Assistance Act, which allows development aid to countries where human rights are violated, if that aid goes to the neediest people. Again, there may be some problems of interpretation. A new airport or government-built hotel may not serve "basic human needs," while direct grants of food or distribution of farming tools presumably would; but there is a large gray area including dams, rural electrification projects, and other elements of an economic infrastructure which are essential to any serious improvement in the well-being of the population. Section 701(f) also illustrates potential problems that may result from transfering a condition placed on U.S. grants of development aid to U.S. participation in an international loan agency. The two types of assistance are structured

161. *Id.* at 17.

162. Act of Oct. 3, 1977, Pub. L. No. 95-118, § 701(a), 91 Stat. 1069 (to be codified at 22 U.S.C. 262d (Supp. 1977)).

163. *Id.* § 701(f), 91 Stat. 1070.

and operate differently, finance different development projects, and may require conditions more closely tailored to their respective functions.

A further change in the conditions on multinational appropriations came in section 507 of the Omnibus Foreign Assistance Appropriations Act. In an apparent attempt to strengthen section 701(f), Congress declared that it was the "sense of the Congress" that where other efforts at promoting human rights had been ineffective, the U.S. representatives "should oppose loans" or other financial assistance to countries which systematically violate human rights.[164] However, such opposition was not required if the President determined that "the cause of international human rights is served more effectively by actions other than voting against such assistance or where the assistance is directed to programs that serve the basic needs of the impoverished majority of the country in question."[165] This section is somewhat difficult to fathom in that it appears to restate in substantial part section 701(f) which Congress had enacted less than a month earlier. Although couched in strong and detailed language, it is not mandatory and represents only the sense of Congress. More than anything else, perhaps, it indicates that Congress would like to exercise closer control over foreign aid, but that such control might well be impossible or unwise.

In other areas of human rights legislation, 1977 was a year for extending some provisions and refining others. For example, the International Development and Food Assistance Act extended section 116 of the Foreign Assistance Act to agriculture commodity credit sales.[166] The statute also amended the provision of section 116, as applied to such sales, which allowed sales to countries which violate human rights if the sales benefit needy people. The amendment attempts to clarify, though without a great deal of success, the possible ambiguity in the meaning of "benefit," and "specifies that the Public Law 480 credit sales will not be deemed to benefit needy people unless

164. Foreign Assistance and Related Programs Appropriations Act of 1978, Pub. L. No. 95-148, § 507, 91 Stat. 1240 (1977) (to be codified at 22 U.S.C. 262d-1 (Supp. 1977)).

165. *Id.*

166. International Development and Food Assistance Act of 1977, Pub. L. No. 95-88, § 202, 91 Stat. 545 (to be codified at 7 U.S.C. § 1711 (Supp. 1977)).

either the commodities themselves or the proceeds from their sale will be used for specific projects or programs which will benefit the needy."[167] The House Report, however, does add a helpful gloss on the statute, noting that such projects "should be mainly in the areas of agricultural development, rural development, nutrition, health services, population planning, food distribution, education and training, housing, public works, conservation and storage, and credit and marketing facilities."[168] Another section of the International Development and Food Assistance Act contained a small, but possibly significant authorization of not less than $750,000 for studying and carrying out programs to encourage adherence to political and civil rights. The House saw this as a positive expression of U.S. concern for human rights as opposed to the sanctions of actual or threatened reductions of aid.[169]

More than previous years, the first year of the Carter administration was one of attempting to implement existing human rights conditions, rather than of enacting sweeping new legislation. The termination of aid to several countries, based upon reports prepared pursuant to such legislation, was the most direct effort by the administration.[170] Perhaps more important in the long run is the currency that the term "human rights" has gained and the new awareness that those rights are threatened in many parts of the world. This change in American attitude may have been important, for example, in encouraging the recent general strike in Nicaragua protesting alleged violations of civil and political rights by the dictatorship of General Somoza. Although the United States did not actively support the strikers, the fact that the United States remained neutral and did not immediately come to the aid of the military ruler was seen as a major departure from past policy and as tacit approval of the strike.[171]

Events of 1977 have also shown that foreign policy achievements such as increased international concern for human rights can come even in the absence of legislation, when Congress and

167. H.R. REP. No. 240, 95th Cong., 1st Sess. 10 (1977).

168. *Id.* at 49.

169. *Id.* at 30-31.

170. *See* text accompanying note 150 *supra*. *See generally* Weissbrodt, *supra* note 125, at 278-79; Drew, *supra* note 50, at 59-60.

171. N.Y. Times, Feb. 5, 1978, §1, at 3, col. 1.

the Executive share certain goals. Indeed, during President Carter's first year Congress repealed two important statutory directives concerning foreign policy.[172] Implicit in this was a recognition that the complexities of foreign policy require at least some room for Executive discretion and maneuvering. In a comment that applies to foreign affairs generally, Secretary of State Vance noted: "In the end, a decision whether and how to act in the cause of human rights is a matter for informed and careful judgment. No mechanistic formula produces an automatic answer."[173]

VII. CONCLUSIONS

The examples of the Turkish arms embargo and recent human rights legislation allow some cautious generalizations about the use of conditions in foreign relations legislation. The Turkish arms embargo shows the rather blunt operation of legislation directed at a particular country in response to a particular action by that country. This statutory embargo was in part the result of an absolute statutory condition—that the aggressive use of U.S. arms made the country ineligible for further aid—and of executive inaction. Whether the embargo was "right" or "wrong," it is beyond question that it did not allow room for flexible diplomacy that could have (though not necessarily would have) used the leverage of a threatened arms cutoff to the greatest advantage. Yet, in the circumstances, it may have been a necessary action to enforce a statutory policy that the Executive showed little interest in pursuing.[174] Occasional

172. Pub. L. No. 95-118, § 702, 91 Stat. 1070, repealed the requirement that the U.S. representative vote against loans from multinational agencies to countries that had detonated nuclear devices. *See* text accompanying note 161 *supra*. Pub. L. No. 95-88, § 123, 91 Stat. 541, repealed various provisions of the Foreign Assistance Act which prohibited aid to countries which furnished assistance to Cuba. *See* H.R. REP. No. 240, 95th Cong., 1st Sess. 41 (1977).

173. Vance, *Human Rights and Foreign Policy*, 7 GA. J. INT'L & COMP. L. 223, 226 (1977).

174. As Representative Fraser, one of the major backers of human rights legislation, has written:

> In recent years Congress has struggled with a recalcitrant executive branch over [the issue of human rights]. When the executive branch failed to implement the legislative mandate on human rights the only recourse open to Congress was to act in specific situations. Congress will welcome a clear declaration of intent by the executive branch to stress human rights in its foreign policies, and will be ready to accept quiet diplomacy as the most effective way to give expression to the deep-seated

congressional action such as the Turkish embargo may be necessary to put both the Executive and foreign countries on notice that conditions on aid will be enforced. If a statutory condition is to be effective, the sanctions for violation must be credible. However, frequent use of absolute conditions on aid may force Congress into other situations where its flexibility is limited.

To be truly influential, Congress must move beyond the simple "yes/no" character of an embargo and devise legislation that meets the complexity of foreign policy. The new human rights conditions seem to be an attempt to do just that. This succession of statutes has led to one provision, section 502B, which does appear to be effective in requiring the State Department to compile reports on human rights violations in countries which receive military assistance and to make recommendations for aid decisions. In late 1976, for example, Congress was instrumental in getting several such reports released, and the Executive subsequently reduced aid to three countries. Even if the administration had not acted, Congress would have had before it the information on human rights violations and on the security or other reasons for not terminating aid, and Congress would have been able to act on its own to reduce or terminate aid.

Recalling the guidelines for legislative conditions suggested at the beginning of this article,[175] a strong argument can be made that Congress has done all it should by way of a general statutory framework in the area of human rights and military aid:

1. It has introduced a new consideration into foreign military aid decisions;
2. It has required the Executive to gather necessary information and transmit it to Congress;
3. It has equipped itself with a means of reviewing administration action and modifying by legislation when necessary.

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desire of the American people that their government be devoted to furthering decency in the conduct of human affairs.

Fraser, *supra* note 125, at 156.

175. *See* text following note 10 *supra*.

Congress can of course engage in various other kinds of human rights activism, such as publicizing violations through hearings. But if Congress regularly goes beyond these functions, making absolute conditions a large part of foreign aid legislation and passing special statutes to deal with a multitude of discrete and transitory foreign relations matters, there will doubtless be more cases like the Turkish embargo.

When the human rights views of Congress and the Executive are in harmony, of course, defects in the statutory language will not be as apparent; the Executive will not (presumably) try to evade the legislative mandate by strained interpretations of the law. It is possible, however, that in such a situation congressional attentiveness to human rights will atrophy, and its oversight role under the new legislation go unfulfilled. If Congress is to play the more vital role in foreign policy that it has created for itself, it must continue to be involved in the process even when the glamour has faded. The present 502B provides a workable framework for considering human rights within the context of military aid; it is now up to Congress to make that mechanism work.

Congressional involvement in foreign assistance will bring it face to face with the hard questions of foreign policy. Aid is one area where the Constitution gives Congress almost complete control over policy issues normally reserved to the President. There, it can attach the conditions it wishes and encourage or discourage practices it chooses. In its recent human rights legislation, Congress has begun to arm itself with needed information and to infuse human rights considerations into executive policymaking. In this fashion it has started to exert its influence in these difficult decisions. Congress can take credit when U.S. actions advance human rights and international peace and must accept part of the blame when policies fail.