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## American Foreign Policy: Constitutionality of Congressional Initiatives into Presidential Prerogative—Who Controls the War Powers?

Jay F. Donaldson

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**AMERICAN FOREIGN POLICY: CONSTITUTIONALITY OF  
CONGRESSIONAL INITIATIVES INTO PRESIDENTIAL  
PREROGATIVE--WHO CONTROLS THE WAR POWERS?**

**by**

**Jay F. Donaldson**

**A Thesis  
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Faculty of The Graduate College  
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**Western Michigan University  
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Jay F. Donaldson

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**Jay F. Donaldson, M.A.**

**Western Michigan University, 1994**

**This paper examines the executive-legislative relations on foreign policy formulation, debate, authorization, funding and implementation. The research shows that the founding fathers never intended one branch to totally control the “war powers.” Inter-branch rivalry and conflict were intended.**

**The research establishes a pattern this inter-branch relationship has taken since the Constitutional Convention. This “pattern” clearly indicates the natural ability of the executive branch in handling foreign affairs especially those key events involving the use of force or where the potential for violence exists.**

**The paper also examines the surge of congressional authority (1970’s) which attempted to apply restraint on what were considered foreign policy excesses by the executive. Historical practice and constitutional interpretation shows these are congressional overreactions, Particularly the War Powers Act of 1973, that now seriously impede effective foreign policy execution. These restrictions are unconstitutional and demonstrate that presidential prerogative should not be binded by congressional restraint.**

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## CHAPTER I

### CONDUCT OF FOREIGN POLICY WITHIN AMERICAN GOVERNMENT

Foreign policy may be seen as the goals that a nation's government officials seek to attain abroad, the values that give rise to those objectives, and the means or instruments through which they are pursued (Kegley & Wittkoph, 1982). Seen another way, foreign policy can be viewed as a nation's preferred path for maintaining self-preservation or security, economic sufficiency and national power and prestige.

The number one goal of foreign policy is not necessarily peace but the preservation of the existing political system. To preserve the existing political system a nation should have extensive control over domestic matters in order to prevent hostile takeovers, revolution etc. It would be impossible to commit people to war or to an agreement concerning trade or economic sanctions without this control over domestic matters. It would be safe to say that foreign policy can be greatly affected by the structure of domestic government (Scruton, 1982).

When events occur within a particular political system that question or threaten its ability to deal adequately with foreign situations, then that system's efficiency or effectiveness is in some doubt. One need only review any of several recent foreign policy episodes to see the problems United States Government is having in the conduct of foreign affairs.

One example is the Iran-Contra Affair where members of the National Security Council secretly sold arms to Iran despite the existence of an arms embargo in an attempt to free hostages taken earlier by a terrorist group associated with the Ayatollah Khomeini. This included financial support to Nicaraguan Contra rebels from the

profits of the arms sales despite the Boland Amendment prohibiting such aid. These types of activities raise many questions about the conduct of overall U.S. foreign policy. Other related questions have been raised over the years as a result of other conflicts between the President and Congress. Future chapters deal more with the use of military forces abroad.

The following questions describe some of the issues that are raised. Is a formal declaration of war necessary before the President may begin any military action against a foreign nation? Is it enough if Congress knowingly provides the funds for a military excursion? What actions may the President take without any form of prior authorization from Congress? Does the power to defend the nation extend to preemptive strikes? Can the executive engage in actions short of war to protect citizens, property, or the interests of the country? Can the President engage in covert activities in order to subvert foreign governments or political parties? To what extent may Congress reverse the actions of the executive? To what extent can Congress control foreign policy and by what means? Is it possible for funds to be denied? Under what circumstances may the President enter into arrangements with other nations without submitting them to the Senate for approval as he does with treaties? Can the President refuse to give information to members of Congress? If so, what measures may Congress take to obtain this information themselves? Some of these questions will be approached directly in the chapters that follow. Others may be addressed in a general fashion as specific answers are elusive and are still the focus of constitutional arguments today.

With each succeeding decade there is an increasing number of world crisis situations. Add to this the growing interdependence of nations and you have all the ingredients for potential catastrophes. Often decisions must be made with little or no

time for contemplation or consultation. For the United States to speak with one single voice is important in order to maintain a degree of both respectability and credibility.

When the foreign policy of past administrations is presented in a proper historical context, especially key events or crisis situations, it becomes evident who has participated where and to what extent. This is not something which can be too broadly interpreted i.e. Congress either did or did not participate, the executive did this and this etc. Records of American foreign policy are quite accurate and one can see clearly which branch has participated, in what way and quite often why it was that way.

### Chapter Descriptions

1. Chapter II will provide a historical background in constitutional foundations on conducting foreign policy. It will discuss the concept of “shared” and “mixed” powers along with general governmental structure and show how certain concepts began and what may have been the original intent of the founding fathers regarding foreign policy.

2. Chapter III documents a growing influence in foreign policy by the executive branch in the 19th and early 20th centuries during a period recognized as one of congressional dominance, despite the belief held by some interpreters of the Constitution that no single branch was supposed to dominate.

3. Chapter IV examines twenty-one individual foreign policy acts in a miniature case study format which runs from the 1930's to the 1960's. This examination further documents heavy congressional participation, however, it also shows those key or crucial events that the executive has come to dominate to also be the events where the use of force or where the potential for violence was present.

4. Chapter V examines the actual tools used by the U.S. Government in implementing foreign policy decisions (treaties, executive agreements, statutory agreements). This examination also suggests that Congress has participated extensively in foreign affairs but that the executive has come to dominate foreign policy making through the control of key or crucial events. Also examined is the executive's unique ability to gain access to funds needed to complete foreign policy objectives. This chapter increases understanding of how the instruments of foreign policy have been shared between the legislature and executive and how money is almost always available to the executive even though Congress controls the purse strings.

5. Chapter VI will show many of the structural weaknesses within Congress which limit its ability to respond to crisis situations in a timely or appropriate manner. It is these structural weaknesses that have given the executive branch the leeway it has enjoyed in taking the initiative in those situations where quick and decisive action is needed or where Congress has failed to act or chosen not to act. It also documents the congressional surge of power to gain influence in foreign affairs during the 1970's.

6. Chapter VII represents the primary focus of this paper. All preceding chapter's intentions were to give a historical understanding and, partially, a mechanical view of how American foreign policy has been and is conducted. This background helps in comprehending the views of this chapter which deal with the constitutionality of the War Powers Resolution of 1973.

This act represents one of the most controversial attempts by Congress to gain influence through their interpretation of the war powers expressed in the Constitution. Along with being examined as a "legislative veto", it looks at foreign policy events related to the act since its passage and its relation to war powers expressed in the Constitution.

7. Chapter VIII returns to the source where many believe the answer to who should control the war powers, at least partially, lies. A general discussion on war powers precedes a presentation on the principles of free government and presidential prerogative. These topics are discussed both in a current context and from the view of the founding fathers and those who influenced them, particularly John Locke. It is a fitting way to conclude and affirm the ideas and opinions given in the previous chapters.

This paper will present several different arenas of executive-congressional relations in foreign policy. They are brought together first to give an overall view of such relations and second to examine, specifically, the constitutionality of congressional initiatives relating to the president's powers as Commander-in-Chief. This will include basic American government concepts regarding foreign policy and historical foreign policy practice by various administrations. This body of information is coupled with:

1. Foreign Policy Case Studies

- Neutrality Legislation - 1930's

- Lend-Lease Act - 1941

- Aid to Russia

- Repeal of Chinese Exclusion - 1943

- Fulbright Resolution - 1943

- Atomic Bomb - 1944

- Truman Doctrine

- Marshall Plan

- Berlin Airlift - 1948

- Vandenburg Resolution - 1948

**North Atlantic Treaty - 1948-49**

**Korean Decision - 1950**

**Japanese Peace Treaty - 1952**

**Bohlen Nomination - 1953**

**Indo-China - 1954**

**Formasan Resolution - 1955**

**International Finance Corporation - 1956**

**Foreign Aid - 1957**

**Renewal of Reciprocal Trade Agreements Act**

**Monroney Resolution - 1958**

**Cuban Decision - 1961**

**These case studies are analyzed through tables which demonstrate:**

- 1. General congressional involvement and decision characteristics.**
- 2. Congressional involvement and violence.**
- 3. Preponderant influence and violence.**

**International agreements (executive agreements, statutory agreements, treaties)**

**are also examined in both discussion and tables in areas such as:**

- 1. International Agreement Making - A Continuum of Executive Discretion (showing "more" or "less" executive discretion).**
- 2. Form of U.S. Agreement by Administration, 1946-1972.**
- 3. Form of U.S. Agreement by Content Areas, 1946-1972.**
- 4. Executive Agreement Index, 1946-1972, (various administrations emphasis in different policy areas).**
- 5. Dominance of Executive Agreements Over Treaties in the Making of Significant Military Commitments Abroad.**

In an effort to add to the study of Congress and foreign policy, internal structures of Congress are looked at i.e. parochialism, organizational weakness and controlling the flow of information. These topics are viewed as inherent congressional weaknesses vis-a-vis foreign policy. What follows is legislative attempts to strengthen these weaknesses. These attempts were considered by many to be a response to what Congress considered foreign policy excesses by the executive branch during the Vietnam War.

1. Cooper Church Amendment
2. McGovern-Hatfield Amendment
3. Eagleton Amendment
4. Fulbright Amendment
5. Foreign Assistance Act
6. Nelson-Bingham Amendments to Arms Export Act
7. Tunney Amendment to Defense Appropriations Act of 1976
8. Clark Amendment to Arms Export Act of 1976
9. Hughes-Ryan Amendment to Foreign Assistance Act.
10. War Powers Resolution of 1973

The War Powers Resolution is examined via:

1. Sections
  - a. Section 2(c) limiting circumstances of involvement
  - b. Section 3 prior consultation with Congress
  - c. Section 4 providing detailed reports
  - d. Section 5(b) time limit and forced withdrawal of troops
  - e. Section 5(c) direct conflict with Article One, Section Seven of Constitution

**2. Implementation of Resolution:** Twenty examples are given ranging from Richard Nixon in 1974 to Desert Storm in 1990.

**3. Summations and Conclusions** focusing on Resolution's effectiveness and constitutionality.

The paper closes with a return to discussion on constitutional origins concerning war powers, presidential prerogative and current congressional viewpoints on the Resolution's import in today's changing foreign affairs climate.



## CHAPTER II

### ORIGINS AND SPECIFICATIONS OF POWERS IN FOREIGN AFFAIRS WITHIN THE UNITED STATES CONSTITUTION

What does the Constitution actually say in allocating power in foreign affairs between the executive and legislature? Constitutional clauses regarding foreign affairs are taken out of Articles One and Two and are presented here with a brief discussion following each clause. These discussions sometimes involve comparisons with the British Parliament or assessments of the original intent of the articles.

#### Article One

Article One, Section One states "All legislative powers herein granted shall be vested in a Congress of the United States." That means Congress has no legislative power except those "herein granted" i.e., those actually expressed in the Constitution. In examining this article with respect to foreign affairs, Jack Peltason writes;

The field of foreign relations provides the principal exception to the general rule that Congress has only those legislative powers granted to it by the Constitution. As a necessary concomitant of nationality, the Congress, along with the President, has full power to deal with the external relations of the United States. Congress has the power to authorize the acquisition of territory by discovery and occupation and to adopt legislation denying certain kinds of aliens entrance into the United States, even though these are not among the legislative powers specifically granted by the Constitution to the Congress. For the source and scope of such powers one must turn to international law and practice, not to the Constitution (Peltason, 1982, p. 33).

The ability of Congress to deal with external relations, therefore, is limited. This distinguishes Congress from the British Parliament which has total and exclusive legislative powers. Succeeding chapters will more accurately show the areas of foreign affairs Congress has actually participated in.

Some of the specific powers of Congress identified in Article One, Section Seven that relate to foreign policy are, for example, raising revenue which begins in the House of Representatives. Much of what the Executive desires costs money and it must be appropriated by the Congress. Section Eight is probably the most significant section. It grants Congress the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. Section Eight also allows Congress influence over piracies or felonies committed on the high seas. Congress can make any crime under international law a crime under national law. In the past this has not been important because international law has dealt mostly with governments instead of individuals. Today, more recent developments place individuals under these obligations and hence, give this paragraph more importance.

For an aid to referencing, the following sentences quoting the Constitution are preceded by the actual number given in the Constitution. Congress' constitutional powers in regards to foreign affairs continues in Section Eight with the power to:

11. To declare War, grant letters of marque and reprisal, and make rules concerning captures on land and water.

Letters of marque and reprisal concerned giving citizens the power to attack the shipping and property of enemy nations and not be considered pirates while doing so. In Britain these powers belonged to the King, and the purpose of this clause was to switch that ability to Congress. It has, however, not made any difference. Most of the wars we have been involved in have begun through actions of our presidents.

12. To raise and support armies but no appropriation of money to that use shall be for a longer term than two years ...

This clause, plus other inherent powers of the national government, give greater powers than anything else in the entire Constitution. With this power people can be drafted into military service, requisition, allocate and ration materials of all kinds, control the production, marketing, and consumption of all products, and do whatever is “necessary and proper” to bring a war to a successful end. The limitation of two years was to guarantee the army’s dependence on Congress. The idea represented a belief in civilian control of the military.

13. To provide and maintain a navy ...

A navy didn’t represent as much of a threat to Congress as a standing army. The limitation of two years didn’t apply as the building of naval ships often took much more than two years.

14. To make rules for the government and regulation of the land and naval forces ...

This power is one that is shared with the President and his powers as Commander-in-Chief during wartime. The Supreme Court has since narrowed the scope of who is subject to the rules for the regulation of the armed forces. This clause once meant that people subject to trial in front of military courts were not given the same procedural rights as civilians. The jurisdiction of the military courts is now more limited. Civilian employees of the armed forces and civilian dependents of military personnel with them overseas cannot be tried by court-martial. Ex-soldiers cannot be tried by the military for crimes committed while they were in service.

15. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof ...

Note here that Congress was not granted the power to make all laws necessary and proper for “any purpose whatsoever” but only those laws which will aid Congress in executing its enumerated powers (ones spelled out in the Constitution).

The doctrine of “implied” powers may be gleaned from the Necessary and Proper Clause. An example of an implied power is the power of Congress to pass laws to draft men into the armed forces. This power has been implied from the power to raise armies. Additional powers may be attached to an implied power such as the power to indict those evading or deliberately obstructing the draft. The acknowledgement of the constitutionality of such second order implications is known as “penumbra” or “shade” doctrine, the grafting of a power on to an implied power.

Section Nine continues with ...

7. No money shall be drawn from the Treasury, but in consequence of appropriations made by law ...

This clause, more than any other, gives Congress significant power or influence over the other branches of government. The executive and judicial branches depend totally on money appropriated by Congress to carry out their functions. Congress also determines how executive agencies are to account for their expenditures from appropriated funds.

This concludes the listing of essential legislative powers granted by the Constitution regarding foreign affairs. Any list would not be complete, however, without a discussion of the concept of “inherent powers.” These are powers used by the national government in foreign affairs that are not spelled out or even “implied” in the Constitution. The concept originates with the idea that the United States is one community in a greater world of many nations, some of which are hostile, and that it must be able to respond to situations as they arise - situations that were not and could

not have been anticipated by the Constitution (Peltason, 1982). Both the legislative and executive branches are perceived to have inherent powers.

One inherent power of Congress is its power to investigate. Congress needs to gather information so as to legislate, to propose constitutional amendments etc. Each chamber can subpoena witnesses and punish those who won't release documents or answer questions. This inherent power was used in the Iran-Contra affair when it held hearings, called witnesses etc. to determine what in fact happened. Are there limits on Congress' ability to compel individuals to produce material or answer questions? They aren't supposed to use their investigatory powers to negatively affect freedoms protected by the First Amendment. The Supreme Court has said "The power to investigate must not be confused with any of the powers of law enforcement" Congress "has no power to expose for the sake of exposure" (Watkins v. United States, 1957). Even with these statements, the Supreme Court hasn't placed any substantive restrictions on the scope of Congress's investigative powers.

Although there are numerous other provisions of the Constitution the ones just presented are the essential ones dealing with the power of Congress in the area of foreign affairs.

## Article Two

Article Two deals with the Executive branch which vests executive power in a "president" of the United States of America. What is interesting about this clause is the fact that the words "herein granted" do not appear as they do in the legislative clause. Does this give "executive power" to the President himself or does this clause just fix the title of a man who is given specified duties spelled out in the remainder of the article? There is what one could call a "majority" view which falls in line with past

presidential practices. It is that this section gives the President powers that have never been defined or enumerated and cannot be defined since it is dependent on circumstances of the time (Peltason, 1982).

The provisions of Section Two of the Constitution regarding the President and foreign affairs are as follows:

1. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices ...

As mentioned earlier, Congress shares power over the military with the President. Congress creates money and makes “regulations for their governance” while the President can give orders to the army, navy, and air force which might lead to hostile actions.

Congress has the power to refuse to grant money for military actions or can place stipulations on how the money might be spent. Past experiences, however, tell us that Congress has had difficulty in limiting the President in the way he exercises his powers as Commander-in-Chief. Future chapters will devote considerable attention to this matter.

2. He shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice of the Senate, shall appoint ambassadors, other public ministers and consuls ... and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by

law. But the Congress may by law vest the appointment of such inferior officers, as they think proper ...

Here, it is the President who can enter into agreements with other nations and gives the impression to other nations that it is he who speaks for the United States in foreign affairs. The Senate has actually done little advising over the years (Sofaer, 1976). The President negotiates the treaty and then presents it to the Senate. The final step in the treaty process is ratification which is also done by the President. The two-thirds vote by the Senate for approval makes it possible for a minority to stop the treaty from going into effect. A minority of the Senate has not exercised this power often in American history but the possibility exists and United States participation in some international treaties has been held up for years as a result. Since the House of Representatives must appropriate money to carry out the terms of a treaty, it also has considerable power in this area. The use of treaties, executive agreements and statutory agreements is treated extensively in Chapter IV.

3. He shall, from time to time, give to Congress information of the state of the union and recommend to their consideration, such measures as he shall judge necessary and expedient.

The President speaks to Congress and, since the advent of radio and television, the nation, in his "State of the Union Message" every year the timing of which coincides with the opening session of Congress. In this presentation it has become customary for the President to send messages to Congress, talk to them on specific subjects, and recommend certain legislation he would like to see passed. In this way the President can focus national attention on national problems or international affairs if he so desires.

3. (cont'd.) He shall receive Ambassadors and other public Ministers ...

After reading clause two it is apparent that the President is the only person who can officially speak for the United States when dealing with foreign countries. Conversely, foreign nations must speak directly through the President or his representative, the Secretary of State. This power also allows the President to recognize new nations or governments.

3. (cont'd.) He shall take care that the laws be faithfully executed, and shall commission all the officers of the United States ...

This clause gives the President the power to remove all executive officers. To execute the laws he must have control over those people through whom he operates. Congress, as we shall see in succeeding paragraphs and throughout this paper, has authorized the President to use the military forces to handle things which, for various reasons, are too difficult to be handled by the Congress or the courts in the enforcement of law. So, the President's duty to see that the laws are enforced is backed up by his power as Commander-in-Chief. There are numerous other duties and powers given to the president but these are the essential ones dealing with foreign affairs.

Almost every constitutional argument heard today was advanced in the Constitution's formative years in one form or another. The statements of the influential leaders of that time, including the framers of the Constitution, do not give us much guidance. They were often countered by opposing spokesmen. Some statements were politically motivated and the speaker is known to have acted in ways inconsistent with his speech. The actions of these early leaders were a more reliable gauge of their position than their rhetoric. However, even actions in the early years give us a little guidance because you can't look at executive or legislative actions as "precedents" like one would look at judicial decisions. Actions may speak louder than words but not necessarily as clearly.



If you are looking for “precedents” that establish some kind of executive or legislative dominance or exclusive responsibility for a particular branch you will have difficulty finding them. Since the conclusion of the Constitutional Convention of 1787 the legislative and executive branches functioned as separate entities but with power or influence over the same matters. These matters include the concluding of treaties, setting the legislative agenda, and especially the use of U.S. forces abroad.

The greatest area of potential executive power is where there is no direct confrontation with legislative powers. “Showdowns,” or direct confrontations, haven’t happened often. Many of today’s problems seem to happen in situations where Congress has delegated power to the President or where the President has acted in a legislative “vacuum.” An example might be the bold actions taken by Franklin Roosevelt at different periods throughout the 1930’s. The depression was hitting hard and Congress seemed at a loss as did almost everyone else. Congress, for the most part, backed up Roosevelt in his bold moves.

There is not much in the Constitution which suggests Congress is at all limited in its ability to delegate. If Congress, in advance and without limitation, delegated whole powers that are actually assigned to them in the Constitution such as declaring war or raising revenues, they would probably be violating their oath to uphold the Constitution. Short of that situation, it is clear that Congress’ power to delegate is very broad. On that matter Abraham Sofaer stated:

No provision, however, would seem to prevent the legislature from allowing the executive to plan and draft legislation, prepare the budget, control funds and information, conduct foreign relations, or even engage in military action upon findings largely within the President’s discretion to make (Sofaer, 1976, p. 4-5).

When Congress says or does nothing on a certain subject, even one over which it has direct authority over, does the President have the ability to act at least until

Congress moves to restrain or direct him? Again the Constitution is vague on this. The “vagueness,” however, seems to favor the President. He has the implicit authority to defend the nation from attack, to operate as Commander-in-Chief, to faithfully execute the laws and to be the spokesman to other nations. When combined these implied and actual powers form a considerable basis for legitimizing almost any executive action. It is possible for the President to say that, without legislative direction, he has a “sufficient embodiment of the national sovereignty to exercise its rights under the law of nations” (Sofaer, 1976, p. 4). There isn’t any written law that supports this but there is a large degree of trust placed in the office of President by the Constitution and when there is a need to respond to a situation where Congress has failed or been unable to act the President’s actions are likely to be supported. Historically, they essentially have been, as future chapters will show.

To briefly sum up one could say that the Constitution seems to give Congress more than adequate powers to effectively influence, possibly even control, foreign and military affairs. Yet it doesn’t stop them from delegating many of their functions to the President or from surrendering them to the President by allowing him to “assume the initiative”. Did the Constitution really intend to give power in this way? Or were there sharper lines of separation between the branches of government? Was the President supposed to be the agent of Congress?

The Constitution has often been called an “invitation to struggle.” Its meaning is often unclear. One has to look at all the available sources for any understanding, i.e., ratification debates, the minutes of the convention, the views of those who voted on the relevant provisions and the intellectual, social, economic and political background of the “participants.” A look at the British political system is necessary in order to see where certain concepts originated.

## Our British Connections

Many of our ancestors came to this continent from Europe, particularly Britain. They left Europe in fear of and opposition to what they considered an oppressive government especially in regards to religious freedom. They desired a freedom not to be found in England or in most parts of Europe at the time.

Our original thirteen colonies developed over a period of a century from outlying trading posts to fully developed communities. For this analysis differences between the colonies are unimportant. What is important is that they were all influenced and shaped by their English origins. Each colony contained the seeds of democracy which later formed the basis for the joining of the colonies with a national government. These “seeds” can be partially traced back to the Magna Carta of 1215. This document was the great charter of freedom granted by King John of England. Some of the resulting freedoms that can be found in American law are a trial by jury of one’s peers and the guarantee that no person shall lose his life, liberty or property except by due process of law. Further seeds can be found in the struggle between England’s royal aristocracy and Parliament which will be discussed in future paragraphs.

The first attempt at establishing a government, as opposed to a group of separate colonies, brought us the Articles of Confederation which was basically a “firm league of friendship” among the states. Each colony or state was sovereign within its own borders. Concerning foreign relations, each state was virtually a nation unto itself. No “national” government existed to speak for all states.

The Confederation appeared to have substantial powers, on paper. It could regulate weights and measures, create post offices, borrow and coin money, direct

foreign affairs, declare war and peace and provide recruits and money for an army. Each state, however, was jealous of its own rights and carefully guarded the use of these powers. The representatives who sat in the Congress were paid by the states and voted as their state legislatures directed them to vote. Within Congress only one vote per state was allowed regardless of size. Congress had no real power to lay and collect taxes and duties. There was no executive to enforce acts of Congress. No national court system existed. Amendments occurred only with the consent of all the states. A 9/13 majority of states was needed to pass laws. Although each state had its own democratic structure within its boundaries, there was no national government until the Constitutional Convention of 1787 which is discussed later in this chapter. Each of these sovereign states under the Articles of Confederation and later, when united under a written constitution, were influenced by their background. That background is English law.

English law could be said to be in the form of an “unwritten constitution.” It is basically a set of customs and traditions developed over the years. Just because a written document allocating the power and functions of government, procedures for making decisions and setting limits on government power isn’t neatly spelled out does not mean they don’t exist.

Much in the U.S. Constitution was taken from not only Parliament’s statutes but from common law. Common law is primarily a body of legal rules deriving from judicial decisions. English judges were often presented with cases which did not come under the statutes enacted by Parliament. Judges usually looked for a fair solution in the customs and values of the local community.

Although Parliament was powerful, much of British history is reflected in Parliament’s struggle with the Monarchy for control of the nation. There were periods

where one or the other dominated in ruling the country. These swings of power should tell us the British Constitutional practice isn't going to give us the neat concise answers we need to straighten out the vague portions of our U.S. Constitution. The fact is that both Parliament and the Monarchy took the initiative successfully at different times in regards to foreign and military affairs just as our Congress and President have done as later chapters will show.

Parliament has the "power of the purse" just as our Congress does and this constituted one of Parliaments primary powers in influencing foreign affairs. Despite this enormous power, the Monarchy (King) found ways to financially support his excursions. Charles I, for example, called upon local governments to provide ships for the nation's defense. Whatever Parliament's powers, and they were formidable, they couldn't be exercised during the frequent periods when they were not in session. At the time it was thought that the demands of a legislature were not such that Parliament needed to be in session full time. This left the door open for the King to initiate actions.

Although clearly our presidential system differs substantially from the parliamentary system we did inherit a number of items from the British system. They are: (a) a two-chamber legislature with sole authority to pass laws as well as other numerous privileges and limitations, (b) all money bills originate in the House of Representatives as they do in the British Commons, (c) impeachment by the lower house (House of Representatives) and prosecution by the upper house (Senate), (d) immunity of legislators during congressional session, and (e) a Chief Executive in charge of taking care of military and foreign affairs. The British counterpart to this Chief Executive was the King.

The American Constitution and the Bill of Rights rejected the idea that rights and privileges could be overridden by legislation and tried to put specific rights outside government's ability to change them without a constitutional convention. Even though it seems our President resembles the British King, the Constitution didn't give the President the full range of options available to the King, i.e., the power to make binding treaties without congressional consent or to raise armies and declare war. The trend in Britain during the 17th and 18th centuries was for Parliament to gain power at the expense of the King. The real question becomes to what extent was this trend incorporated into our American Constitution (for Congress to gain power at the expense of the President).

The most important and well known element in 18th century British constitutionalism was the doctrine of separation of powers. The British system seemed to grow along lines where government power was divided on functional lines (legislative, executive and judicial) with each type of power given to different persons. But this doesn't explain the overlapping authority that Parliament and the King experienced and that our Congress and President experience.

A second doctrine gained wide acceptance at that time which helps to explain some of the inconsistencies of the British political experience. As far back as 1642 British philosopher and politician Bernard Bailyn thought that British political thought rested on the idea that:

Liberty had been preserved and could be preserved ... by maintaining the balance in government of the basic socio-economic elements of society: King, Lords and Commons. ... Pure forms - monarchy, aristocracy, or democracy - would degenerate, whereas a 'mixing' of these forms within a single system could create 'counterpoised pressures' that might keep the system stable and healthy (Sofaer, 1976, p. 13).

This particular idea assumed the concept of separate branches but with an actual "mixing" in each branch of all forms of power - legislative, executive and judicial.

This concept was accepted as proper political doctrine by the early 18th century. So, it really made sense to think up a system where each important group would have powers that allowed it to check certain other powers that were given to other groups.

This concept can be understood further when discussed along with the idea of royal prerogative. Prerogative is the

Preeminence which the sovereign retains ... and which other heads of state retain elsewhere, consisting in certain rights of action allowed no one else in law ... it includes not only immunities from prosecution but also powers to initiate actions ... among these actions the conduct of foreign affairs is particularly important (Scruton, 1982, p. 370).

Philosopher John Locke backed this up well in his description of prerogative:

Where the legislative and executive power are in distinct hands, as they are in all moderated monarchies and well-framed governments, there the good of the society requires that several things should be left to the discretion of him that has the executive power. For legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having in the power in his hands, has by the common law of Nature a right to make use of it for the good of the society, in many cases where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it; nay, many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require; nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of Nature and government (Sofaer, 1976, p. 127).

It is possible that the constitutional experience of the British may yet give us some answers to the unanswered questions of the U.S. Constitution. The delegation of overlapping powers or mixing of powers in Britain was deliberate and it is entirely possible that certain "ambiguities" of our constitution were also deliberate. It now needs to be asked whether this British idea of "mixing" was applied to the U.S. Constitution. Were separate branches of government intentionally given powers exercisable over the same areas of concern?

## The Constitutional Convention

The weaknesses of the Articles of Confederation mentioned earlier became painfully obvious after several years. Congress, on paper, had all the essential powers within its hands. They had the exclusive right and power of determining issues of peace and war, sending and receiving ambassadors and granting letters of marque and reprisal in times of peace (a commission given to a ship by a government to make reprisals on a ship of another state). Congress, however, had no power to enforce its policies on the states. There was no independent executive.

In 1786 an armed revolt by farmers in Massachusetts who desired relief from foreclosures on mortgages tried to prevent judges from hearing the cases and attempted to capture an arsenal. Although this didn't seem too serious it did reveal the economic difficulties that confronted the states at that time. When the governor of Massachusetts asked for help, Congress lacked the authority to help. They could not invade the sovereignty of the state. Troops that were authorized to deal with the Indians were diverted to Massachusetts to deal with the situation which later became known as "Shay's Rebellion." Similar shortcomings of Congress were obvious in trying to maintain the war with Britain and maintaining order after the war ended. Many Americans felt a need for a stronger national government.

Americans who wished to see a more influential national government, often called 'nationalists,' wanted to present their ideas to the country. Their opportunity came when interstate conferences were held on navigation and commercial matters. Some nationalists from Virginia suggested that all states send delegates to Annapolis in September of 1786 to talk about establishing a uniform system of commerce for the entire country.



The turnout to this convention was poor (only five states sent delegates), however, James Madison and Alexander Hamilton persuaded those who did come to try and salvage something. They drew up a report suggesting all states send delegates to another convention which was to be held the following May (1787) in Philadelphia. The report also stated that delegates would be authorized to discuss not only trade matters but also to analyze the defects in the present system of government.

Even before Congress authorized a convention, many state legislatures, following Virginia's lead, selected delegates. Congress soon approved but also said that the delegates should meet

For the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government and the preservation of the Union (Sofaer, 1976, p. 67).

This convention was completed within four months without a complete or reliable record of its deliberations. The delegates met in secret and the journal kept only recorded formal motions and votes. Notes taken by members were scarce but invaluable. James Madison's notes were the most extensive along with James McHenry, William Pierce, William Patterson, Alexander Hamilton and George Mason. It is possible, however, to relate some general patterns of development. Concerning the Executive Department, the delegates started with the already existing almost powerless executive and moved to an independent, potentially powerful Presidency. After considering a number of different plans and propositions a "Committee on Detail" drew up a draft to present to the rest of the delegates. It was here where the power of the executive was vested in a "President." It was here where the President became "Commander-in-Chief" and to make sure that the laws be faithfully executed. What was missing in this clause was any debate that would have helped clear up the

confusion about this Commander-in-Chief clause as giving the President an undefined wealth of power to use in military situations that were unauthorized by Congress.

It was also recommended that the President be elected by a majority vote of an electoral college composed of electors selected by each state. This gave the President a political base that was independent of Congress and made the Presidential Office something much more than an arm of the legislature.

The Committee also recommended that he serve a four year term and be subject to impeachment if convicted of bribery or treason by a two-thirds vote of the Senate. This recommendation would appear to reflect an awareness of the President's independent powers and the need for a legislative "check."

It was during the drafting of these recommendations by the Committee on Detail that we come to an interesting concept. The actual drafting was entrusted to a Governor Morris of Pennsylvania who admitted later to making changes in the draft that he favored (without appearing to violate any of the Convention's agreements). He changed the "vesting" clause of Article One (Legislative powers) to indicate that the legislature's authority was limited to the powers enumerated in that article (all legislative powers herein granted). At the same time he left untouched the vesting clause in Article Two that simply granted the "executive power" to a President. It is here that Morris eliminated the possibility of any implied or unenumerated grants in Article One and hence gives much ammunition for the argument that the vesting clause of Article Two was in fact meant to vest all "executive" power not otherwise withheld.

Congress as it is today was the product of the convention. Under the Articles of Confederation Congress was unicameral (single house) with equal representation of the people from each state. Two major plans of representation were presented. The New Jersey Plan favored keeping the single house legislature where all states had equal

representation regardless of the population. The small states backed this plan because their vote would count as much as any other state (particularly a larger state). They didn't want the larger states to dominate the legislature just because they had larger populations. This plan also did not favor the appointment of a separate Judiciary. They preferred judges appointed by the President originally chosen by Congress.

The second plan, the Virginia Plan, called for three separate branches: legislative, executive, and judicial. Congress would consist of two houses (bi-cameral) with representation of the states based on population. Each plan had a good argument.

Why should a large state like Virginia allow its vote to be counted the same as New Jersey's when it contained more people and thus paid more taxes? At the same time why should a small state like New Jersey voluntarily hand over the equal status it enjoyed under the Articles and become dominated by larger states? (Smorston, 1980, p. 48).

Several delegates from Connecticut came up with what would become known as the Connecticut Compromise. They suggested a two house Congress giving equal representation in the Senate (two from each state) and representation by population in the House of Representatives. This would allow veto power to both small and large states because any legislation passed by Congress would have to have approval from both chambers. Since larger states have most of the taxation burden, all revenue bills would originate in the House. A Judiciary was also created in the form of a Supreme Court, appointed by the President with the approval of the Senate along with a lower court system to be created by Congress.

### Conclusions

To sum up, you could say that the framers were essentially concerned with building the national government's powers but on the road to doing so gave much attention to how those new powers would be spread among the separate branches. The

early plans they considered allowed for a weak executive but through the work of individuals like James Madison, Alexander Hamilton, Governor Morris and others, they gradually built a strong independent executive with considerable powers.

There was nothing done in the Convention that goes against the apparent grants to Congress of overwhelming authority to control all military decisions (other than tactical).

The Convention rejected an effort to enable the legislature to define the content of 'executive power' and to limit the legislature's authority to delegate 'legislative' or 'judicial' power to the executive. This left the President a strong basis for claiming in future controversies that Congress had overstepped its authority by interfering with his constitutional powers" (Sofaer, 1976, p. 38).

The Constitution was now void of any restraints on Congress' power to delegate broad authority to the President.

After intense argument between the states during ratification, the debates seem to confirm the idea that the President was to take care of diplomacy and negotiations and to handle all authorized military operations (Sofaer, 1976). The Commander-in-Chief section was interpreted as allowing the President to handle these affairs. George Washington set a good example during the Revolutionary War when it became obvious Congress could not effectively direct the war from their chambers. The "commander" was much more effective in the field. Conditions have obviously changed today and the President is being challenged on what some consider to be abuse of his own "prerogative."

Also developed during the Convention was the idea that Congress, and especially the Senate, would be able to approve or reject foreign policy in exercising their powers over treaties, appointments and appropriations. Just because Congress had the power to "declare" war it could not be seen as a limitation on Congress' ability for formal war-making.

Congress was seen by all who commented on the issue as possessing exclusive control of the means of war. No ratifier suggested that the President would be able unilaterally to utilize forces provided for one purpose in some unauthorized military venture. Undeclared wars were far too important a part of the international scene for one safely to assume that the Framers and ratifiers meant to leave that area of power to the President (Sofaer, 1976, p. 56).

After examining Convention and ratification debates further and with the quote mentioned in the previous paragraph in mind, it seems that no argument was given against legislative delegation of power to conduct foreign and military affairs. For example, the Constitution would not prevent Congress from authorizing the President to use military force under conditions which were largely within his discretion to determine. There also wasn't any indication that Congress was prevented from authorizing actions without declaring war. In fact, constitutional reading suggests that Congress can authorize aggressive acts short of war (Sofaer, 1976).

The ratification debates also failed to consider whether a treaty provision was deemed, in and of itself, enough to authorize the use of the military to accomplish an agreed objective, even though the House of Representatives didn't vote on it. Certain states, however, in the ratification process did give the impression that any military appropriation passed for a specific purpose could amount to legislative approval for the use of force.

The ratifiers also seemed to give no emphasis on the depth of authority the President had in defending the United States. In Article One the word "make" was changed to "declare" concerning Congress' influence on war. This was supposed to grant power to the Executive to defend the nation against sudden attack but no discussion took place on whether the President could act without legislative approval if an attack seemed imminent. There wasn't even any discussion on what an "attack" was. Once the troops were raised, the President was expected to command them.

There seemed to be limits on how far the President could go in completing these functions but not very clear limits.

In a debate on the 1973 War Powers Resolution, Senator Mark Hatfield quoted a 1789 letter written by Thomas Jefferson to James Madison which read

We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the executive to the legislative body, from those who are to spend to those who are to pay (Turner, 1991, p. 97).

Hatfield thought this statement supported his own view of broad congressional war powers with respect to debate on activities taking place in the Persian Gulf at the time.

Two versions of this letter exist in the archives of the Library of Congress. The one in Madison's files (quoted by Hatfield) mentions the power of "letting the Dog of War loose" while the copy Jefferson kept for his own records mentions the power to declare war. Both versions seem to represent the same meaning.

But the most remarkable thing about Jefferson's statement was his assertion that the power to declare war had been transferred by the new Constitution from the executive to the legislative branch. Under the Articles of Confederation, since there was no executive, all war powers were expressly vested in the Continental Congress (with consequences widely recognized to be disastrous). Yet clearly indicated that the new Constitution had transferred the power to declare war, a recognition that this power was by its nature executive (Turner, 1991, pg. 58).

Many of the people of the various states during ratification were afraid of the President using the troops improperly to the point of suppressing liberties and ruining the constitutional system. Obviously the President's command didn't extend this far. But could the President use his powers without legislative orders in a way that would cause war or make war more likely? Could he control foreign negotiations and represent the nation's position in such a way as to make aggressive action more likely? Could he just refuse to negotiate where such a refusal meant war? Could he, in commanding

troops for instance, move the troops to a disputed area where he was likely to meet armed resistance? Very little evidence is available on these matters.

It seemed as though people from most of the states expected there to be conflict between the legislative and executive branches and they didn't necessarily want Congress to dominate (as the Constitution might indicate). In the *Federalist*, Alexander Hamilton talked about a President who would risk both popular and legislative disapproval by opposing policies he thought contrary to the nation's interests. Opposition would have to be based on some type of argument or claim that there was an executive authority independent of legislative command (although not always beyond the legislature's power to control in the final analysis). James Madison gave the most convincing argument when he discussed how the Constitution "intentionally 'mixed' powers so as to create a separation of the branches designed primarily to insure their independence of will rather than a separation along functional lines" (Sofaer, 1976, p. 58). Evidence of this can be found by examining papers 37 and 38 of the *Federalist*.

This "mixing" theory needed an overlapping assignment of powers so each of the branches could establish an independent course of action and still maintain a constitutional balance or propriety. So, the open "holes" or unanswered questions in much of the Constitution "are only uncertainties in the sense that the outcome of struggles between the branches in such areas is not preordained; their existence should probably be regarded as intentional, an integral part of the constitutional plan" (Sofaer, 1976, p. 58).

## Summation

Alexander Hamilton (1961) defended the many powers given to Congress by saying that “every government ought to contain in itself the means of its own preservation” (p. 362). This is exactly what was done by the Framers in planting the seeds of American democracy. In defending the clause granting Congress all powers necessary and proper to exercise their responsibilities, Hamilton believed the clause was not all that essential because a necessary and proper clause is implied in every grant. So, both Madison and Hamilton not only combined the doctrines of separation and mixing in their writings but also included John Locke’s description of “prerogative” which saw an executive with the power to do what was necessary - though at the risk of being overruled or punished. Chapter VIII expands on Locke’s view of prerogative.

The Constitution incorporated a very basic aspect of the British system. Through the notes and writings of those involved in the Constitutional Convention and the ratification debates it can be seen that it was expected that the branches would battle each other in acquiring and defending their power. The powers were mixed so as to prevent any one branch from dominating; each branch was given important powers over the same area of activity. The experience our Framers had with the British and our own Confederation led them to

Avoid regarding controversy between the branches as a conflict between good and evil or right and wrong, requiring definitive, institutionally permanent resolution. Rather, they viewed such conflict as an expression of the aggressive and perverse part of human nature that demanded outlet but had to be kept from finding lasting resolution so that liberty could be preserved (Sofaer, 1976, p. 60).



## CHAPTER III

### EXECUTIVE GROWTH

With a few exceptions, the pre-revolutionary period up through and well into the 20th century was a period of dominance for Congress in their ability to influence foreign policy (Abshire, 1979). As certain world conditions developed and unique situations arose which had never been dealt with before, the executive grew in influence. This chapter will examine some of the actions key presidents took which were the seeds of what would eventually become known as the “imperial presidency.”

George Washington was already mentioned earlier in regards to sanctioning the powers of Commander-in-Chief with Congress being unable to operate in the battlefield effectively. Thomas Jefferson continued this emphasis in his administration. In 1807 the British ship *Leopard* attacked the U.S. ship *Chesapeake*. Jefferson authorized the purchase of arms and ammunition without congressional approval and actually made a point of doing so without calling Congress back into session.

Jefferson also had a problem in the Mediterranean with Barbary pirates looting American ships. Two large frigates were sent to cruise the Mediterranean. One ship ran aground and the crew was imprisoned in Tripoli. Jefferson then sanctioned the release of a much larger squadron which succeeded in bombarding the pirates into submission and securing the release of prisoners. So, Jefferson was the first president to send naval forces abroad without congressional consent. He was also the first president to interfere in the internal affairs of another nation when he attempted to overthrow one of the leaders of a Barbary nation by dispatching 1,000 marines and authorizing \$20,000 to subsidize other forces.

Jefferson was prone to withhold facts from Congress. In the more famous case of the Aaron Burr treason trial, Jefferson first espoused the principle of executive privilege by saying it was for the president to be the sole judge as to whether it was in the “public interest” for a sensitive document in the possession of the executive to be made public (even though he sent the documents that were requested).

In 1845 when Mexico refused an American envoy offering to purchase New Mexico and California, after Mexico claimed the Nueces River and not the Rio Grande as their boundary lines, President James Polk ordered U.S. forces to the Rio Grande area. The General in command of those forces said that Mexico considered their march as an act of war and would drive us out if they felt confident enough. Polk knew he could not gain a declaration of war from Congress simply because Mexico’s President refused an envoy. Fortunately for Polk, some small fighting broke out and so he drafted a new message asking Congress to give a war declaration against Mexico. At the time a freshman congressman by the name of Abraham Lincoln said that allowing the President to make war against a neighboring nation, whenever he wishes simply to repel an invasion allows him to make war at pleasure.

It seems strange after making such a statement that Lincoln would carry the war-making powers of the President far beyond what Polk had envisioned. The following could be said of Lincoln’s conduct during the Civil War:

The assumption by the Federal Government of powers of unprecedented breadth, even though nominally for the period of the war crisis only, established a precedent and conditioned the minds of the people for a similar exercise of broad powers in later years, whether in war crisis or otherwise. Within the government the assumption of unprecedented powers by the President and his strategy of putting Congress in a position where, instead of determining governmental policy, it could not do otherwise than sanction policies already initiated by the President, provided a handbook for those of his successors who in future years sought to escape the domination and avert the interference of Congress (Swisher, 1954, pg. 273).

In 1861, with a standing army of 16,000 men, Lincoln proclaimed a state of insurrection in response to the firing on Fort Sumter. He called for the states to come up with 75,000 militia volunteers. He told his Secretary of the Treasury to distribute \$2 million to private citizens to buy supplies and equipment. He ordered a blockade of southern ports. Later, he asked for 42,000 more militia and 40,000 volunteers for the regular army and navy, all without congressional authorization. By the time Congress was in session, Lincoln had 186,000 men under arms.

Lincoln also allowed military commanders to suspend the writ of habeas corpus (a court order directing an official who has a person in custody to bring the prisoner to court and to show cause for his being detained). The Constitution provided that this writ not be suspended “unless when in cases of rebellion or invasion the public safety may require it.” But it did not make clear whether the Congress or the president might authorize such suspension. It is possible to say that Lincoln assumed semi-dictatorial powers during the war. The real paradox is that most of Lincoln’s actions had popular support and strong backing from Congress (showing that Congress does, indeed, delegate powers).

Even though Congress had backed much of Lincoln’s actions there was a strong congressional backlash in the affairs of government with Congress taking the lead in many areas after the Civil War. After about three decades of this “congressional government” the Spanish-American War was to bring in a new era of Presidential government.

It was around this period that the concept of “manifest destiny” started coming to fruition. This was a doctrine, or more accurately a “notion,” which stated that it was the duty and fate of the United States to expand to the Pacific and beyond. “To a large extent, it was a pro-interventionist Congress and press that pushed President McKinley

into the very war that resulted in a so-called imperial role, a new manifest destiny on the world scene" (Abshire, 1979, p. 30). The war with Spain over Cuba extended to naval operations in the Philippines. America decided to keep control of the islands despite Filipino insurrection and even in face of the fact that the declaration of war made no mention of the Philippines. By the end of 1898 they were placed under the control of a military government. U.S. Senator Jacob Javits said that there was now a government of a foreign territory put in place "solely by a combination of the executive authority and the Commander-in-Chief power of the President of the United States" (Javits, 1973, p. 160-161).

McKinley found his strongest public support when he talked about maintaining U.S. hegemony in foreign lands. The feeling in the country at that time seemed to favor a strong president. McKinley's successor, Theodore Roosevelt, was just that. In 1902, when Germany's Kaiser Wilhelm the Second sent a fleet to Venezuela to capture ports as a repayment for bad debts, Roosevelt sent a U.S. fleet on maneuvers as a warning to the Germans. In 1903 he occupied Panama and later said "The Constitution did not explicitly give me the power to do what I did - it did not forbid me to do what I did. I therefore did my best to get the Senate to ratify what I had done" (Javits & Kellerman, 1973, p. 169). Roosevelt also completed secret agreements which offered the Japanese our assistance in case of European intervention and granted Japan "protectorate" over Korea.

Theodore Roosevelt was quoted as saying "I did not usurp power, but I did greatly broaden the use of Executive power. I did and cause to be done many things not previously done by presidents and the heads of departments" (Milton, 1944, p. 169).

The William Taft administration which followed Roosevelt continued the support of strong presidential powers. Taft said that the president could order the army and navy anywhere in the world "if the appropriations furnished the means of transportation." He also said that the president could bring the nation into war and leave Congress no option but to declare or recognize its existence.

Woodrow Wilson followed suit with his administration. When Mexican-American relations had decayed he had marines capture the port of Vera Cruz in 1914. He followed this up with a military excursion into Mexico led by General John J. Pershing.

Years earlier, in 1885, Wilson had already completed his doctoral thesis which was a stinging attack on congressional government. In it he argued that Congress was not predictable or accountable. It had no readily apparent leader including the Speaker of the House. Power was not concentrated. Wilson called it "government by standing committees of the Congress." It avoided strong debate on the floor and put the real action in the committee room. To Wilson, a widely spread division of power meant more irresponsible use of power. In other words, a confusion of authority existed.

Wilson failed in his attempt to enjoin the United States in the League of Nations. "Had there been the will and the means for consultation, compromise and partnership, the treaty (containing the league proposal) could have passed. As it was, Wilson's adamant stand opened the way for congressional government for the next 20 years" (Abshire, 1979, p. 20). The administrations of presidents following Wilson, that of Harding, Coolidge, and Hoover were basically isolationist in both branches of government.

Along with the congressional weaknesses mentioned by Wilson, upon which Chapter VI expands, it is possible to come up with five more reasons behind the rise of

presidential dominance. The first and most convincing reason is the increase of international commitments and crises. Someone once said of Theodore Roosevelt that if he didn't have a real crisis he would invent the atmosphere of one because he believed that crises maximize presidential power.

A second reason is what political scientist Clinton Rossiter calls "the positive economic state... a twentieth century phenomenon that the state activates, regulates, stimulates, and operates in all stages of economic life" (Abshire, 1979, p. 33). A third reason, once again referring to Rossiter, is the strange paradox of congressional expansion. The idea here is that Congress can't seem to expand its power without increasing the power of the executive at the same time. For instance, if Congress gave a greater role to the president in domestic emergencies then they had to give the president the power to enforce the laws, as it did in the Taft-Hartley Act (the Labor-Management Relations Act of 1947).

The fourth reason which grew out of this "expansion" is the institutionalization of the presidency which will be discussed in more detail in following paragraphs. The fifth reason is that strong presidents became leaders of Congress. After the turn of the century presidents were expected to have in-depth legislative programs and to get involved in trying to get them through Congress.

Congress had become so decentralized and cumbersome that it could not operate in 'grand style' without effective external leadership. The great twentieth century presidents readopted this dimension of Washington's first presidency, which demanded the skills that Alexander Hamilton had developed to dominate the legislative process of the first Congress. All of the dominant presidents thereafter used these skills, as witness Jefferson, Jackson, Polk, Lincoln, Wilson, and the two Roosevelts (Abshire, 1979, p. 34).

At the conclusion of Chapter II it can be seen that the Constitution was deliberately designed to be an "invitation to struggle." The Constitution by itself, though, is not really sufficient to explain the distribution of foreign affairs powers as it

has evolved to its present state. What has given the executive so much leeway in more recent years? The answer to this question and much of the remaining discussion in this and following chapters will use situations or specific events from post World War Two foreign affairs. It is at this point in history that America was thrust into the position of global leader with global responsibilities.

The decade prior to World War Two, however, sets the stage for true executive dominance. The emergence of the Franklin Roosevelt administration planted the seeds of presidential preeminence. It was the New Deal, a term now used to describe policies used to counteract the effects of a devastating depression, that brought large measures of government intervention primarily in the area of economics. It included positive encouragement of private industry along with state financed industries and the introduction of welfare legislation.

The New Deal involved a radical departure from the previous U.S. fiscal policy, of trying to secure a balanced budget, and had wide-ranging effects which have often been thought to be beneficial. It introduced the first substantial element of a mixed economy into the U.S., together with expectations associated with welfare legislation (Scruton, 1982, p. 321).

It was essentially Roosevelt's actions and proposals which Congress accepted, for the most part, that turned the focus of power around, or more accurately, created a focus of power where there was none. The success of his efforts and winning personality won him consistent reelection. He was seen as responsible for pulling the country out of much of the depression and this success was bound to increase the general power of the presidency. His success, however, was mostly on the domestic scene. Foreign policy during his first two terms was still basically in the hands of Congress and remained isolationist in nature. This stance began to change with the changing nature of the executive office and the advent of World War Two.

Nonetheless, his actions on the domestic scene help strengthen the overall presidency which extended to foreign affairs.

What has become known as the “institutional presidency” started in 1939 when certain recommendations made to Roosevelt by the Brownlow Committee (led by Louis Brownlow - Roosevelt’s Chairman of his Committee on Administrative Management) were enacted into law. The committee basically stated that the President needed help in accomplishing both foreign and domestic national goals. The committee stressed more intense use of staff as the primary solution. New staff and agencies within the executive office began to spring up and the seeds of the institutional presidency were born. The White House Office and the Executive Office of the President (EOP) were created. It moved the Bureau of the Budget which had been in the Treasury Department to the EOP thus making it a direct instrument of presidential authority. Six presidential assistants were assigned to the White House who were to serve as personal advisors to the President. This new “Executive Office of the President” which used to be mainly the Bureau of the Budget, now was to serve successive presidents and allow for some consistency within the “institution” and help to accomplish those national goals.

After World War Two the institutional presidency increased in size and scope through the creation of new advisory units; the Council of Economic Advisors (1946); the National Security Council (1947); the congressional liaison staff which was created informally in the White House office in the 1950’s; the president’s science advisor and professional staff (1958) and the newly created independent agencies that were placed under the presidential umbrella, including the CIA (1947), the Office of Economic Opportunity (1964), the Environmental Protection Agency (1970), and a host of



smaller EOP units such as the Council on Environmental Quality (Hargrove & Nelson, 1984, p.175-176).

It was mentioned earlier that many of Roosevelt's proposals were accepted by Congress. This is a key statement because many of the forces creating increased power for the presidency were not being challenged. The Vandenburg Resolution (1949) where Congress desired a permanent American alliance with other nations of Europe, which later became NATO, and a list of other resolutions such as Formosa Straits (1955), Middle East (1957), Cuban (1962), and the Gulf of Tonkin (1964) are all examples in which Congress gave the president broad, sweeping congressional support for handling foreign conflict situations.

This fostered presidential supremacy by demonstrating a unity of purpose between the President and Congress. The ascendancy of presidential power in foreign policy making came about not so much because recent presidents have seized power as because Congress itself encouraged executive leadership in the postwar atmosphere (Kegley & Wittkoph, 1982, p. 320).

## CHAPTER IV

### LEGISLATIVE-EXECUTIVE RELATIONS IN FOREIGN POLICY: CASE STUDIES, 1930'S TO THE 1960'S

The title of this chapter suggests a huge number of events when one thinks of a thirty year span of America's past relations with foreign nations especially in the post World War Two period. It would be virtually impossible and most likely inefficient to try and analyze such a large number of events.

The specific events given here in a miniature case study form are not totally representative of U.S. foreign policy. They are, however, representative of nearly all the published case studies of individual foreign policy acts and offer brief microcosms of post World War Two executive-legislative relations. At the close of almost every case it is indicated whether Congress took a dominant part, a minimal part, or no part at all in the event.

Virtually all statistical data can be found to have certain imperfections which would be misleading if not pointed out. It would be appropriate to note several defects in the data before being read. One negative aspect of these cases is that all but two were decided over fairly long periods of time. "Decision time" is often brought up as a key factor affecting the degree of congressional participation in foreign affairs. If more cases of importance involving short decision time were included, the chances of greater congressional participation would be slim. Chapter VI more closely examines congressional weaknesses which prevent Congress from reaching any consensus when short decision time is involved.

There are also few cases of congressional initiative. One should note the difference, though, between initiative and influence. The absence of attempts of

congressional initiative might be an indication of little previous success and a consequent decision to “leave it to the executive.” The case studies are nonetheless intriguing and do bring out some interesting points which will be addressed following their presentation.

### 1. Neutrality Legislation in the 1930's

Here, neutrality refers to the “legal status” of a nation which does not partake in any wars with other nations. Such a nation may defend its own territory but not take any action which would favor a particular side in a confrontation. After World War One many people in the United States felt there was no need to become heavily involved in the problems of other nations, particularly Europe.

Neutrality with other nations was an issue that was brought up several times during the first two administrations of Franklin Roosevelt. One background aspect that set the atmosphere for debate was the Nye Committee which investigated the arms trade and munitions making in the United States. Even though they were mostly concerned with making arms and selling them, they aroused much opposition to internationalism in general and especially to the idea of “collective security” (entering into pacts with other nations to come to one another's defense under certain circumstances).

In the early part of Roosevelt's administration, the executive prepared a resolution on neutrality which would have given the president the power to embargo arms to an aggressor. The House of Representatives passed the resolution as presented but the Senate amended it to apply to all aggressors. The issue of whether it should apply to all or only some aggressors (at the president's discretion) was one of the continuing arguments regarding neutrality. The bill died in the House. It was Roosevelt's first foreign policy defeat.

The neutrality issue came up again in 1935. Senators Gerald Nye and Bennett Clark offered a resolution which prohibited American citizens from travelling on the ships of aggressor nations and prohibiting any loans or credit to the government of any aggressor nation. Soon after that another resolution was introduced to stop arms shipments to all aggressor nations. Agreement could not be reached on a given resolution. Conversations followed between the President, Chairman of the Senate Foreign Relations Committee along with other State Department leaders and the resolutions were recalled and a subcommittee was appointed.

The House and Senate still could not come to an agreement. The Senate came up with a resolution which favored giving the President discretionary power in choosing what nation would be the recipient of an arms embargo. The House came up with a resolution which would allow for a mandatory arms embargo against all aggressor nations.

The complexity of the neutrality issue of the 1930's is woefully represented here in these brief paragraphs, however, it does point out some essential principles in the debate: the initiative for legislation originally came from the executive in 1933, but Congress did not give the President the discretionary authority he wanted in choosing which aggressor nation would be the target of an arms embargo. Hence, Congress took the initiative in requiring a mandatory arms embargo on shipments to all aggressor nations. Congress kept this stance from 1935 to 1939. After this point a concept that started in the House debates in 1935 called "cash and carry" was used. This concept "provided that American manufacturers could sell arms to foreign countries only if the legal transfer of ownership was made prior to the goods leaving the United States and if they were shipped in the vessels of other countries" (Robinson, 1967, p. 26).

## 2. Lend-Lease of 1941

Because of world situations in the early 1940's (Germany's rise to power, etc.) Congress authorized the President to manufacture or acquire any defense equipment for use by any government of any nation whose defense he considered essential to America's security. This included "any article, industrial or other commodity or article for defense." It allowed the President to "sell, transfer, exchange, lease, lend, or otherwise dispose of any item related to the support of the Allied cause, including weapons, food, raw materials, machine tools, and other strategic goods" (Plano & Olton, 1982, p. 178-179). The president would be the one to set the conditions in which any foreign nation would receive this aid.

The idea didn't start with Congress nor was the law drafted in Congress. It was prepared by the General Counsel to the Secretary of the Treasury (within the executive) and his assistant. After a beginning draft, discussions were held with congressional leaders. It was passed with little change. One of the changes did turn out to be quite significant and that was the "billion-three clause" in which the value of any defense articles that were to be transferred could not be more than three billion dollars.

This act cancelled the "cash and carry" concept accepted earlier in the late thirties. It turned out to be the turning point from an isolationist stance to one of active involvement in support of European allies engaged in the war with Germany. Congress's role in this decision was essentially that of a legitimator of the ideas presented to it by the executive branch (with small amendments added).

### 3. Aid to Russia - 1941

At the opening of World War Two, Russia was considered an ally of the United States in light of Germany's efforts to overtake most of Europe. After Germany's invasion of Russia the United States made available large amounts of aid to the Soviets (over 11 billion dollars). This was done under the Lend-Lease Act. There was some opposition. Congressmen feared Soviet Bolshevism. Although Congress would not stop the use of Lend-Lease funds for Russia, they were hesitant to publicly take notice of the fact that the President was on the verge of using such funds once the act was extended and the appropriations made. Many members were still hesitant to give explicit, open support.

Well before Congress actually settled the Lend-Lease questions, the President planned sooner or later to use Lend-Lease to aid the Soviet Union. In one sense, Congress was part of the framework for gaining public support for the President. So, Congress was not the initiator of this policy. Once again they were the legitimator of the President's eventual use of Lend-Lease to aid Russia.

### 4. Repeal of the Chinese Exclusion - 1943

If Congress has ever taken the initiative, at least in regards to the State Department, it is with immigration. Studies by Lawrence Chamberlain have shown that from 1880 to 1945 Congress has been dominant over the executive in being the initiator of immigration legislation, especially the content of that legislation (Robinson, 1967).

The repeal of Chinese exclusion laws shows the legislature's dominance over the executive in immigration policy. There was a series of acts by Congress stretching back 40 or 50 years where Chinese immigrants were systematically excluded from

entering the United States or even applying for citizenship. During the Second World War there existed an obvious inconsistency in immigration policy. For instance, the United States was an ally of China and at war with Japan yet its immigration policy was in favor of the Japanese and discriminated against Chinese.

A number of citizen groups outside of Congress pressured the legislature to join the cause of repealing the Chinese Exclusion. Members of the State Department also wanted the repeal of the discriminatory policy but were privately hesitant to see the issue come out into the open because unless the discriminations were repealed, it could be embarrassing to even think about the legislation. Several congressmen felt that “it was better to suffer the indignity of the inconsistency between the wartime alliances and immigration policy, than to bring to the floor a proposal which might fail” (Robinson, 1967, p. 30). So, certain members of the State Department warned members of Congress against handling the subject on the House floor unless they were sure of its passage.

It was suggested that leadership within Congress should try to determine the “attitude” of both the House and Senate before hearings got started. Although action was delayed for a time, the immigration acts were repealed and the Chinese were placed under a quota system and treated much like other nationals. In this instance Congress initiated action and the State Department played the role of “cautionary legitimator.” Here, the roles were reversed.

## 5. Fulbright Resolution - 1943

As was mentioned in Chapter III the United States expanded its role in world affairs during and after World War Two. Many new responsibilities were taken on. Even before the end of the war congressmen and citizen groups were concerned about

the role of Congress in postwar foreign affairs involvement. Congress did not want to be held responsible for any defeat in postwar collaboration with other countries as the Senate was held responsible for the defeat of the Treaty of Versailles after World War One. The executive branch was also thinking about how leading members of Congress could be involved in the structure of postwar policy.

One method of accomplishing this was a series of congressional resolutions brought out in 1943. These resolutions, in rather general language, stated that the United States should “anticipate postwar participation in international organization for the preservation of world peace.” It was never clear why this particular resolution was picked from other, similar resolutions to be passed.

It was Congressman J.W. Fulbright who worked for the resolution’s passage in 1943. Besides congressional support, he found he needed support from the executive branch. Most historians and various political analysts have thought this was an example of strong congressional initiative. This is true, however, the communications between Fulbright and the President, Secretary Hull and the President, plus Roosevelt and an unnamed historian, show the resolution may not have passed without the support of the executive. The executive actually participated actively with congressional leaders in setting the time when such a bill or resolution would be brought up on the House floor.

In the fall of 1943 more resolutions of a similar makeup were introduced. One of President Roosevelt’s friends, Irving Brant, a biographer, made his concern known that for such a resolution to pass the language would have to be compromised greatly. So much so as to negatively affect the administration later. Roosevelt didn’t feel the same and expressed this in a written reply to Brant.

I think that in many ways you are right, but I wonder how much weight should be attached at this time to any Senate or House Resolution. Remember the



water is going over the dam very fast these days and what language is used today may be wholly out of date in a week or two. Frankly, I am paying very little attention to the language of the debate. The affairs of "mice and men" are becoming less and less affected by verbiage (President's Personal File 7859, Oct. 27, 1943).

In other words, Roosevelt thought that all this activity was "marginal" and that he wouldn't be affected much by it later. Although Mr. Fulbright took the initiative for this resolution it depended much on the will of the executive and it was highly unlikely that it would have passed over any solid opposition from the executive.

## 6. The Atomic Bomb - 1944

One of the major arguments during World War Two was whether the dropping of the Atomic bomb actually shortened the war. Most policy makers agreed that it would. It was, at the time, considered one of the biggest gambles of the entire war. It follows that the decision to build the bomb was also a major gamble. The total cost of research and production of the bomb was approximately \$2 billion dollars. Congress, as keeper of the "purse" obviously had a role. What was that role in authorizing and appropriating funds?

Senator Harry Truman was a member of a committee whose purpose it was to investigate the national defense program. In 1944 several investigators went to Oak Ridge Tennessee to study the plant that was supposed to be producing the bomb. Nothing significant came of the visit and after a short time investigators were summoned home and no further inquiries were made.

Later in 1944 the War Department (now Department of Defense) found that they needed more funding to continue research and production as they had exhausted all other funding sources. Members of the executive branch visited with the Speaker of the House, then Sam Rayburn, and requested an unusually large amount of money without saying what it was intended for. Rayburn contacted the majority and minority

leaders of the House and these men in turn negotiated with the Appropriations Committee leaders and the request for money went through without any debate. The Democratic Floor Leader in the Senate, Alben Barkley, and the Republican Senate leader, Styles Bridges, were also informed. Finally in 1945 General Leslie Groves, head of the Manhattan Project, led some congressmen through the laboratories at Oak Ridge.

In this case Congress was represented by some of its more well known leaders. Besides these individuals and their close associates, information about the purpose of the funding request was not revealed. "The power of the purse, which ordinarily is used to investigate or instigate action was in this case used to legitimate the executive program to which the executive attached a very high value" (Robinson, 1967, p. 37).

## 7. The Truman Doctrine

As much as the Truman Doctrine and the Marshall Plan are thought of as one and the same, it is the Truman Doctrine that is specifically related to the supply of aid to Greece and Turkey. Early in 1947 the British Ambassador in Washington D.C. told the State Department that his government was going to withdraw any aid to Greece and Turkey. The United States saw this as a potentially dangerous move. It could alter the balance of power in the region thereby affecting the influence of the United States in that area. The civil war in Greece and the strategic importance of Turkey was central in America's decision to send aid. These two countries could soon be occupied by nations not friendly with the United States if aid was not sent.

The "vacuum" left by Britain was filled by the State Department who sought legislation from Congress authorizing the Export-Import Bank to allow credits to Greece and Turkey without any of the usual restrictions given on long term financial

aid. Also included would be the shipping of military supplies to both countries including any additional supplies and equipment needed. It would also include lending U.S. personnel to Greece to help in administrative, economic, and financial work of the Greek government.

The Under Secretary of State, Dean Acheson, made a dramatic appeal in Congress illustrating all the negative consequences that could affect America if Greece and Turkey lost their independence. The appeal impressed Arthur Vandenberg, the leading republican in Congress. At future meetings a program outline was agreed upon and the aid plan was set into motion.

From this point on, the part of Congress can be seen as, once again, a legitimator of the executive's proposals with their own amendments thrown in. It was interesting, though, that the party of the opposition, the Democratic Party, should join the Republican controlled executive in such a substantial aid program to these countries. It turned out to be one of the high points of bipartisanship in the postwar era. Here, congressional approval meant Republican approval and thus gave a clear stamp of approval with wide support throughout the United States.

Vandenberg also made some strong amendments to the program. One of them was that under certain conditions the President would have to withdraw any or all aid in the program. These conditions included "any decision by the United Nations General Assembly or Security Council that such action or assistance was no longer necessary or desirable." This amendment "had the effect of reducing the opposition of those people who felt that the United States was bypassing the United Nations in taking action in Greece and Turkey" (Robinson, 1967, p. 40-41). This amendment was never used but it did represent a new innovation for Congress, i.e. in addition to increasing the internal support for the President's program it also focused attention to America's

responsibilities under the United Nations. Congress who had, twenty or thirty years earlier, been thought of as obstructing international cooperation was now focusing in on the attention of American government in relation to the interests of international organization.

## 8. The Marshall Plan - 1947 to 1948

At Harvard University in 1947, Secretary of State George Marshall gave a commencement speech detailing reports of difficulty in meeting some of Europe's economic needs following postwar devastation (which was also partially related to Britain's withdrawal of aid to Greece and Turkey). He suggested that the European nations should participate with the United States in formulating aid projects which would help them the most. European nations responded. The initiative for policy suggestions rested with the U.S. representatives working in cooperation with European leaders.

Simultaneously, the House of Representatives appointed a select committee to look into Marshall's proposal. Christian Herter was the committee's vice-chairman who traveled throughout Europe and visited some of the countries who would be recipients of this aid. After returning, their report backed up the original executive request for interim aid "pending further development of the Marshall Plan."

It is obvious that the recognition of need demonstrated by these European nations came from the executive branch and from European governments (Robinson, 1967). Even though Herter's select committee helped to make several suggestions which eventually found their way into the Marshall Plan, the essential goal of the committee was to legitimate the primary ideas of the executive. In other words, the committee gave support to the idea that large-scale aid was necessary.

After the committee's report, President Truman submitted legislation for the European Recovery Program. The hearings conducted were long and intensive. There were more than one thousand pages in the Senate records and two thousand pages in the House records. Even though several amendments by Senator Arthur Vandenberg were accepted into the plan, the initiative for the plan began with the executive. The major responsibility for coming up with alternative proposals also rested with the executive. The role of Congress was, again, one of legitimator and slight modifier.

### 9. The Berlin Airlift - 1948

One of the more controversial situations during World War Two came at the end when Germany was divided among the United States, Soviet Union, Britain, and France. The Soviets had quickly occupied much of Eastern Europe. Fears arose of possible future confrontations with the Soviet Union. The "cold war" had begun. In the summer of 1948 the Soviet government put up a blockade dividing West Berlin from West Germany either by railroad or car. The Western governments responded by staging an airlift of various supplies to the needy city of Berlin. It defeated the purpose of the blockade without starting any violent action. Nonetheless, it was a risky decision to make not knowing how the Soviets would respond.

This was, essentially, an action taken by the executive branch. Historians accounts of this event record no consultation with Congress. This doesn't mean that absolutely no consultations happened but if they did they were minor and insignificant. There wasn't any legislation to deal with that Congress could legitimate and there didn't seem to be any effort of the executive to gather congressional support so as to give an indicator of public support to the airlift. This is an example of low or almost nonexistent congressional participation.

## 10. The Vandenberg Resolution - 1948

With the bold moves of the Soviet Union in Eastern Europe the Western governments were finding out that the original hopes they had for a peaceful, beneficial postwar period were fading. For an answer to the Soviet moves, British Foreign Secretary Ernest Bevin was one of the key figures in the formation and signing of a treaty in Brussels early in 1948 which, in effect, stated the determination of Western Europe to resist any external threat or aggression. America was not involved in the treaty but on the day it was signed President Truman promised the support of the United States.

At the same time in the U.S. Senate, several resolutions were being introduced showing the need to strengthen the United Nations by changing its Charter so as to reduce the veto power of the five principle nations. There wasn't as much interest in creating new military alliances in the Senate as there was trying to change the United Nations to make it more workable.

Secretary of State George Marshall and Under Secretary of State Robert Lovett contacted the Chairman of the Senate Committee on Foreign Relations, Arthur Vandenberg, to help the United States implement the Brussels treaty. Vandenberg, in turn, proposed that the executive's interest in a military treaty be merged with the various resolutions that asked for a change in the United Nation's Charter. The Department of State worked on the several different resolutions and finally came up with one version.

The Foreign Relations Committee backed up Vandenberg's version and soon the House Committee on Foreign Affairs, which had been working on its own version, set their version aside and adopted one similar to the Senate's. The resolution was

passed. The real significance to this resolution was that it gave legitimacy to the origins of America's participation in the future development of the North Atlantic Treaty.

To summarize, the agenda for thinking about this matter was set by the State Department. Yes, there was recognition by the Senate in how to prepare for and fight Soviet aggression but the initial presentation was by the executive. Also, Senator Vandenberg's first reply to the State Department was to legitimate the Department's position even though he tried to push through ideas which started in the Senate regarding the United Nation's Charter revision.

This example once again illustrates the executive's dominance in the identification and selection of problems which make up the foreign affairs agenda of both Congress and the executive.

### 11. North Atlantic Treaty - 1948 to 1949

We have seen through the adoption of Senator Vandenberg's resolution the participation of the United States in the development of the North Atlantic Treaty. This treaty was essentially to provide for peace and security in the North Atlantic area through the combined defense of several countries (Belgium, Britain, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, United States - three nations later joined, Greece, Turkey, and West Germany). The treaty basically said that an attack on one of these nations would be considered an attack on all and was an attempt to thwart more Soviet advances.

In the summer of 1948 the State Department started to work out a treaty with representatives of different European nations. This time period was known as a

“period of close cooperation between the State Department and the Senate Foreign Relations Committee.”

To some extent in the summer and to a very much greater extent in December, Undersecretary Robert Lovett and Senators Vandenberg and Connally worked as a team. There were daily phone calls between Lovett and the Senators, and between Francis Wilcox, Committee Chief of Staff, and Theodore Achilles, Lovett's assistant in the pact negotiations. ... As Lovett testified later, ‘when a line was agreed on, and when it had the imprimatur of the Senate Foreign Relations Committee, we could go back to work and know that we were going to be backed up, and that is of tremendous importance in negotiation’ (Bailey & Samuel, 1952, p. 383).

There was a brief setback in progress when Truman was elected in 1949. This meant that Senator Connally replaced Vandenberg as Chairman of the Foreign Relations Committee. Soon after, though, the Senate leaders and the State Department were working closely again. This whole time period seemed to be one where Senate leaders cooperated and met frequently with representatives from the State Department. Even with such close cooperation the congressmen seemed to eventually occupy the same position as with past experiences with the executive.

The communications during negotiation seemed to have been largely the opportunity for the Senate leaders to be co-opted by the Department, that is, to give legitimacy and support to the Departmental position. It would help, of course, if one knew precisely what contribution the Committee made to the substance of the treaty, but from the one detailed study of the case, it appears that the role of legitimation was predominant over that of initiation (Robinson, 1967, p. 48).

## 12. Korean Decision - 1950

The decision to enter the Korean conflict was one of the bigger gambles in the postwar era. It was a series of reactions to the invasion of South Korea by communist North Korea. It was never a “declared” war. American and United Nations forces fought for three years and ended with a divided nation cut off at the 38th parallel with American forces still maintaining their presence today.



What role did Congress play? On June 24th, 1950 President Truman decided to send out the Seventh Naval Fleet to protect Formosa from being attacked and keep Formosan forces from attacking mainland China. Simultaneously, Truman decided to strengthen U.S. forces in the Philippines and to speed up military assistance to the Philippines and aid the French in Indo-China (specifically Vietnam). After making these decisions the President met with a few members of Congress at the White House. This included Senate and House leaders and members of the Committees on Foreign Relations, Foreign Affairs, and Armed Services. The meeting lasted about thirty minutes and consisted of congressional members listening. It isn't clear if any objections were raised about Congress not being notified earlier. So, congressional leaders didn't play a part up to this point and didn't initiate any actions to participate to a greater extent either.

After three more days the situation in Korea did not improve. Truman decided to involve U.S. ground forces in Korea. On June 30th Truman and twenty-nine other executive officials had a meeting with fifteen congressional leaders. The republican floor leader, who was not at the first meeting with Truman, strongly objected to not being informed before his decision to commit troops. Other congressional members backed the President's decision.

Now, with historical hindsight, it is clear that Congress did not take part in the decision to commit American troops in Korea. They were not asked to approve or support the decision even though most of them did. They were not really told of the decision in enough time to raise questions in order to influence the decision. The congressional leaders who were called to the White House were the only ones who were told at the same time as the press. The rest of Congress found out about it by reading the newspapers.

### 13. Japanese Peace Treaty - 1952

Under this treaty the United States has the right to maintain land, sea, and air forces on Japanese soil and can use these forces without prior consultation with the Japanese in order to keep the peace in the Far East.

The Senate actually had a double role in the making of this treaty. A subcommittee on Far Eastern affairs (part of the Committee on Foreign Relations) took part in formulating it and the full Committee and the Senate consented to the treaty. This subcommittee was in contact with the U.S. ambassador to Japan frequently. The ambassador was the main negotiator of the treaty for the United States. The ambassador wanted to involve the subcommittee as a method of making it more likely that the kind of treaty the Senate would accept would be the kind of treaty the administration preferred and would accept with little public reaction.

The ambassador actually came to subcommittee meetings with ideas to discuss. So, the Senators had a chance to be kept informed of progress in the negotiations and to give their judgments about certain sections of the treaty. A point which stands out about this example of congressional involvement in foreign policy is that the number of people involved was increased substantially to include members of the Committee on Foreign Relations and others.

By the executive branch enlarging those participating and giving them the opportunity to advise as well as consent makes it possible to gain a treaty much more to their liking.

#### 14. Bohlen Nomination - 1953

Soon after Dwight Eisenhower took office he appointed Charles Bohlen to be the Ambassador to the Soviet Union. Mr. Bohlen was a Soviet specialist. He was Franklin Roosevelt's interpreter at the Yalta conference in 1944. Unfortunately the Yalta conference became a symbol among the Republicans for most all of the postwar foreign policy errors by the Roosevelt and Truman Democratic administrations. Some republicans objected to Eisenhower's choice of Bohlen as ambassador simply because of his role as interpreter at Yalta. At his confirmation hearings Bohlen had an opportunity to talk about Yalta. Instead of criticizing it he defended the conference. This caused the Foreign Relations Committee to delay action on his nomination.

Meanwhile, Soviet leader Joseph Stalin died and Secretary of State John Dulles tried to hurry the nomination along so Bohlen could be on hand to watch developments more closely in Russia. It was still two weeks before the Committee reported the nomination which allowed the Senate to consider the matter. Many believe an opportunity was lost by not approving the nomination in time for Bohlen to leave for the Soviet Union at the time of the Premier's death.

Even with Republican opposition, Bohlen's nomination passed with a vote of 74 to 13. The time taken to approve Bohlen was one month. An interesting thing to note is that the Republican attention to the issue of Yalta brought back the problem of party concerns to the President. Even though most republicans supported him, the reluctance of their support might have reminded him that there are limits to his range of discretion in foreign affairs.

## 15. Indo-China - 1954

In the early 1950's the French had occupied Indo-China for some time. By 1954 their position was decaying and their influence waning. Republican President Eisenhower wanted to support the French by using U.S. air power. He empowered his Secretary of State to try and gain the approval of congressional leaders for a joint resolution allowing the use of air and naval power in Indo-China.

Eight congressmen met with five executive officials at the State Department. They included; Senate Majority Leader William Knowland; Republican Conference Committee Chairman Eugene Milikan; Speaker Joseph Martin; Senate Minority Leader Lyndon B. Johnson and his Whip, Senator Earl Clements; Senator Richard B. Russell, the ranking Democrat on the Committee on Armed Services; and House Democratic Whip John McCormack and his assistant Percy Priest. The executive officials in attendance were the Secretary of State, Chairman of the Joint Chiefs of Staff, Under Secretary of Defense, Secretary of the Navy, and the Assistant Secretary of State for Congressional Relations.

The Secretary of State and the President's request for a joint resolution painted a rather dim picture of Southeast Asia. They feared the eventual collapse of the French forces in Indo-China unless American forces made an appearance. The Secretary felt that if Indo-China fell, other Southeast Asia nations would also fall like a row of dominoes. Senator Knowland at first approved the Secretary's request. At that time Senator Clements asked if the Chairman of the Joint Chiefs of Staff had the support of his colleagues. The answer was that none of the other Chiefs approved. Senator Johnson asked if American allies had been notified or consulted and was told that they hadn't been. These answers were not satisfactory to congressional leaders and they showed their hesitation to approve the executive's request.

The meeting between these executive and legislative leaders ended in a little over two hours. To sum up, the executive had asked for congressional approval to commit U.S. armed forces to the war in Indo-China by a joint resolution. Congress's questioning revealed holes in the executive's position and even Republican legislators were against the Republican President's proposal. The executive action was vetoed. In this instance Congress was fully consulted and was able to have more than a substantial impact on a proposal initiated by the Executive.

#### 16. Formosan Resolution - 1955

In the fall of 1954 the government of mainland China started bombing the city of Quemoy, Formosa, and a follow-up invasion seemed a sure thing. The mainland government stated their intention to "liberate" Formosa (Taiwan). Having already established strong relations with Taiwan the United States became involved to the point of being on the brink of war.

In 1955 the executive started a joint resolution which was passed by Congress and which allowed the President to use force to keep the peace and protect Taiwan and the surrounding islands. This resolution was proposed about the time Senator Walter F. George became the Chairman of the Senate Foreign Relations Committee. George was acknowledged as one of the most prominent Senators in his later years. It was his chairmanship that helped the resolution get through Congress. His view of the role of Congress in foreign policy was one of giving support and assistance for the State Department.

On this resolution, Congress was notified ahead of time but were not brought together as a group and asked if they would support this particular resolution. There was some reluctance on the part of some members even though the vote was 410-3 in

the House and 85-3 in the Senate. "In this case Congress' role was hardly to be consulted in advance but rather to be presented with a request for legitimation which it could hardly deny" (Robinson, 1967, p. 54-55).

### 17. International Finance Corporation - 1956

The International Finance Corporation (IFC) began as part of the International Bank for Reconstruction and Development in 1956. Its purpose is to help private investors in making loans for economic development. The IFC is different from the World Bank because it doesn't require a guarantee of repayment of the loan by whom it was given to. The IFC was supposed to be an organization with the ability to create private capital in international economic development (but in an easier fashion than the World Bank). The idea of the IFC started in the United Nations and the World Bank. For some time U.S. foreign policy makers opposed the creation of this type of affiliate. The opposition came from the business and investment communities in the United States.

The United States eventually came into agreement with the purposes of the IFC and joined the membership list. The importance of this case with regard to U.S. foreign policy is that Congress played a small role in the creation of American policy towards the IFC. The idea of the affiliation came from outside the government and met opposition from the business and investment communities. Any change in U.S. policy regarding the nation's stance on the IFC were made with no connection to congressional activity. Congress got involved only when they were pushed to authorize membership in and appropriations for IFC. So, again, Congress simply reacted to ideas and policies that started somewhere else and became a "legitiminator."

## 18. Foreign Aid - 1957

The focal point of Congress when it comes to foreign policy, at least in the postwar period, is foreign aid. Requests for large amounts of foreign aid have been thrown in the lap of Congress consistently since World War Two. The aid almost always takes the form of military or economic aid. Once Congress has authorized such aid they typically follow up with the appropriations process of actually coming up with the money. This entire process takes the attention of congressmen for as long a time as any other legislative issue.

Since this has been a recurring issue it may be advantageous to look at a single case in order to grasp the role of Congress. The foreign aid bill in 1957 is an interesting one to look at. It is not typical in relation to other foreign aid bills before or after 1957. It is one in which Congress had more than the usual amount of information to work with. Since Congress was prepared with more information than usual it is interesting to see how much initiative they took and how influential they were.

A special committee was established in 1956 to study foreign aid programs. It included all the members of the Committee on Foreign Relations and the chairmen and ranking minority members of the Senate Committees on Appropriations and Armed Services. The Committee contracted several nongovernmental agencies and groups which dispersed ten well chosen individuals to travel through forty-four different nations and report on the economic conditions and whether American aid might be appropriate.

After they published their reports, hearings were held which lasted over two months. The information contained in the reports had a large amount of solid facts, opinions and recommendations about foreign economic assistance. At the time the executive was simultaneously preparing their own research. Even though the Senate

had gone to considerable lengths to gather much needed information on their own and even though the Foreign Relations Committee finished a report that all of their members signed, the initiative for coming up with a foreign aid bill was still with the executive. It was still the President and his advisors who continued to “set the agenda” for any deliberation of foreign assistance.

Concerning this 1957 aid bill, the executive’s request included military aid, economic assistance, defense support, technical assistance, and the many “extra” programs that they threw together. It constituted more of an omnibus foreign aid program. The amount requested, however, was more than Congress was willing to grant. The executive wanted \$4.4 billion dollars. The Senate authorized \$4.2 billion. The House authorized \$3.7 billion. It went to a conference committee and the House and Senate differences were split somewhere in the middle.

To sum up, it can be seen that the initiative for making the draft of the bill came from the executive branch. It can also be seen that few original or meaningful amendments came about through Congress. Also, the research conducted by the special congressional committee ended up supporting or increasing the legitimacy of the foreign aid program. Once again, the role of Congress was to legitimate the policy put together by the executive. Congress was able only to “trim and reduce” that program.

#### 19. Renewal of Reciprocal Trade Agreements Act - 1958

The regulation of tariffs and trade was the most confrontational domestic and foreign issue facing Congress for over one hundred years (middle 1800’s and into the 20th century). By the 1930’s the issue was so intense that many people started looking for other alternatives for taking care of such issues. How intense was it? “In the debate on the Tariff Act of 1930, which consumed more than six weeks in the Senate,



several legislators were struck ill or died as a result of the long and arduous task of setting so many duties on so many items” (Robinson, 1967, p. 59).

The Reciprocal Trade Agreements Program was enacted by Congress in 1934. This gave the President the power to raise or lower tariffs up to 50% of the existing rates. It also included the category of “most favored nation” where countries with such specification would receive the best trade concessions.

The program was renewed at different times until 1953 when the party in power was the party which first opposed the Trade Agreements Program in 1934 (Eisenhower administration). Further extensions were managed until 1955 when, in the House, a motion from the Committee on Rules to consider the bill passed by only one vote. It passed on the final vote by a slim margin of seven. When it came time to renew again in 1958, an intense battle was expected.

Congressman Wilbur Mills of the House Ways and Means Committee put strategic moves into play. When the bill was sent to Congress from the executive, Mills saw it as very unfavorable and stated that only with time would the substance of the bill improve. He saw that a long series of hearings were held in its passage.

Around the time the hearings were done, House leaders were in close consultation with the executive leaders. The executive was helpful in coming up with particular amendments and concessions which they thought would be acceptable to other supporters of the bill. The legislative leaders tried to focus in on the individual concessions that the executive didn’t want to make.

The executive-legislative relations on bills like this are primarily those of close allies working in behalf of the same program. The house leaders in particular are the agents of the executive in getting through a program which the executive has designed. The legislative leaders can tell the executive what kind of support is available for the bill, but the making of alternatives to win over new votes is a joint effort with legislators sometimes initiating what may be regarded as minor concessions, and the executive, with its greater expertise, deciding whether these are acceptable in the light of the whole program (Robinson, 1967, p. 61).

## 20. Monroney Resolution - 1958

This was a Senate resolution that suggested the executive study the idea of approaching other governments with the idea of creating an international development association as an affiliate of the World Bank. Its purpose would be to give long-term loans at low rates of interest to underdeveloped nations. Another purpose would be to find a way to use huge amounts of foreign currencies owned by the United States because of a surplus of farm sales overseas.

The resolution was brought into the Senate by Mike Monroney. The State Department actively opposed it when first introduced. Monroney made certain modifications so the odds of passing might improve. It was modified further in future negotiations by the United States, the World Bank, and other governments. Monroney readily accepted these modifications as necessary for getting the organization established.

Later when the executive asked Congress to approve United States membership, Monroney was not on the Foreign Relations Committee any longer. He did, however, speak in behalf of the organization and continued his interest in seeing the organization prosper. This was clearly a case of strong Congressional initiative which might not have been successful if not for the persistence of Monroney.

## 21. Cuban Decision - 1961

In 1961 the United States supported an invasion of Cuba conducted by rebels. The idea was originally conceived under the Eisenhower administration but was altered and implemented under the Kennedy administration. In all the executive meetings that took place the only congressional representative that was present was Senator William

Fulbright, Chairman of the Foreign Relations Committee, who made his opposition to the invasion very obvious.

In April of 1961 the President met with the Secretaries of State, Defense, Treasury, Director and Deputy Director of the CIA, the Assistant Secretary of State for Inter-American Affairs, the President's Special Consultant on Latin America, and the President's Special Assistant for National Security Affairs. Fulbright was the only participant who opposed the invasion.

Fulbright's eloquent and emotional speech impressed even the President and many of those present thought the President might scrap the whole program. He didn't. Later, in another meeting with Secretaries of State and Defense and the CIA Director, the only change he made in his plans was not to involve U.S. troops.

So, only one congressional leader was consulted and even then at a late point in the meetings and was only able to critique one alternative. He was not able to help search for several alternatives. The invasion, as history has so well documented, was a total disaster.

Each of these "cases" provides a nice little vignette of American foreign policy. Where does it lead? The purpose is to demonstrate the involvement of the branches as it relates to violent (or potentially violent) and non-violent cases. This can best be illustrated in the tables which follow.

Table 1 demonstrates, in condensed form, which branch was involved, who initiated involvement, and who dominated involvement in the 21 case studies just presented. It also indicates if there was any legislation or resolution present or if violence played a part.

A few interesting points may be seen from examining Table 2. For

instance, notice the involvement of Congress in cases without the threat of violence against cases where potential or actual violence is present. One can see Congress is prone to be heavily involved in nonviolent cases. Table 2 summarizes this relationship.

Table 2 shows that in five of the six decisions in which Congress predominated were nonviolent. The case of the request for force in Indo-China was the only one where Congress was predominant in a potentially violent case.

By looking at Table 3 and the degree of influence, Congress is more likely to be influential in nonviolent cases as opposed to violent or potentially violent cases.

“The implication of this for Congress’ exclusive Constitutional authority to declare war is obvious. In spite of its legal advantage, the actual locus of influence ... (in the cases with potential violence) ... now resides with the executive” (Robinson, 1967, p. 68).

The definition of alternatives is the supreme instrument of power; the antagonists can rarely agree on what the issues are because power is involved in the definition. He who determines what politics is about runs the country because the definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power (Schattschneider, 1957, p. 937).

Table 1  
Congressional Involvement and Decision Characteristics

	Congress Involved?	Initiator	Dominant Influence	Legislation Resolution?	Violence at stake?	Decision Time
1	high	exec	cong	yes	no	long
2	high	exec	exec	yes	yes	long
3	low	exec	exec	no	no	long
4	high	cong	cong	yes	no	long
5	high	cong	cong	yes	no	long
6	low	exec	exec	yes	yes	long
7	high	exec	exec	yes	no	long
8	high	exec	exec	yes	no	long
9	none	exec	exec	no	yes	long
10	high	exec	cong	yes	no	long
11	high	exec	exec	yes	no	long
12	none	exec	exec	no	yes	short
13	high	exec	exec	yes	no	long
14	high	exec	exec	yes	no	long
15	high	exec	cong	no	yes	short
16	high	exec	exec	yes	yes	long
17	low	exec	exec	yes	no	long
18	high	exec	exec	yes	no	long
19	high	exec	exec	yes	no	long
20	high	cong	cong	yes	no	long
21	low	exec	exec	no	yes	long

Source: Robinson, J. (1967). Congress and foreign policy. Belmont, CA: Dorsey Press. Reprinted by permission.

Table 2

## Congressional Involvement and Violence

Involvement	Violence	
	No	Yes
None.....	2	2
Low.....	2	2
High.....	11	3

Source: Robinson, J. (1967). Congress and foreign policy. Belmont, CA: Dorsey Press. Reprinted by permission.

Table 3

## Preponderant Influence and Violence

Influence	Violence	
	No	Yes
Executive.....	6	10
Congress.....	1	5

Source: Robinson, J. (1967). Congress and foreign policy. Belmont, CA: Dorsey Press. Reprinted by permission.

## CHAPTER V

### INTERNATIONAL AGREEMENTS AND EXECUTIVE FUNDING

An often neglected way of looking at the executive-legislative balance in the foreign policy arena is to examine the “modus-operandi” of conducting foreign affairs. That is what this chapter will illustrate. Specifically, it will analyze the many international agreements the U.S. makes with other nations. By doing so we can see what form these agreements take, what their content has been, who has initiated them, who has dominated their use and who has initiated “secret” agreements.

The agreements discussed will be within the period 1946 to 1972 (cold war to detente). It is within this period that America began their expanded role as a world power with global influence and responsibilities. These responsibilities prompted more formal relations with a greater number of nations.

The only explicit reference in the Constitution regarding international agreement making is in Article Two, Section Two which states that the President “shall have power, by and with the advice of the Senate to make treaties, provided two-thirds of the Senators present concur.” So, it is on the President’s initiative that treaty making is undertaken. So also, the final ratification of a treaty lies within the power of the President and not, as commonly thought, the Senate. The President is the person who puts out the official statement showing that the U.S. has considered a treaty and will abide by it.

The President, however, doesn’t have unlimited power to enter into treaties all by himself. By a two-thirds concurrence the Senate was to intended to play a major role. The executive branch, though, has managed to engage this nation in agreements

without the concurrence the Senate, hence, the actual number of treaties ratified have been few.

Under a claim of constitutional prerogatives, frequently ill-defined, the executive branch has entered into many important international pacts merely with the stroke of a pen in hidden executive offices, far from the halls of Congress with its annoying habit of public debate (Johnson, 1984, p. 4).

The perfect example of this occurred during Franklin Roosevelt's administration when he signed an agreement with Britain in 1940 to hand over fifty over-age destroyers in return for a specific number of naval bases in the Caribbean. This was no small agreement. It opened the door for war with Germany. The treaty process was ignored. Many would say the end result was worth it, but it had the effect of chipping away at the agreement-making procedure brought by the Constitution. This trade with Britain established a precedent for future attempts at eliminating the Senate's influence. From there it spread to "executive agreements" in areas from the military to economics and communications.

Congressional criticism first directed itself to the form that these agreements were taking. The legislature felt that the President was using too many executive agreements, proclamations and other unilateral instruments to get around the Congress. The problem is made worse by even more vague forms of executive agreements such as verbal promises and "understandings" between nations.

In Table 4 a line of "Executive Discretion" is given to show the spectrum of international agreement making with the type of agreement in question.

As the next table (Table 5) shows, almost 87% of all United States agreements between 1946 and 1972 have been statutory (instruments involving both houses of Congress as well as the executive). Executive agreements which constitute an agreement reached by the President which doesn't require the approval of Congress, and treaties, represent only about seven or eight percent.



Table 4

**International Agreement Making:  
A Continuum of Executive Discretion**

MORE=====EXECUTIVE DISCRETION=====LESS						
A	B	C	D	E	F	G
region of executive authority			region of institutional sharing			
a. secret verbal executive agreements (understandings-promises)						
b. secret written executive agreements (kept from Congress)						
c. secret verbal or written agreements (shared with select congressional committees)						
d. unclassified executive agreements						
e. statutory agreements						
f. agreements pursuant to treaties						
g. treaties						

Source: Johnson, L. (1984). The making of international agreements - Congress confronts the executive. New York, NY: New York University Press, Reprinted by permission.

With 87% of agreements involving both houses of Congress versus the 7-8% represented by executive agreements and treaties, it is clear that Congress is a prominent player in the agreement making process.

The dominant pattern in this table shows that the statutory agreement has been used most often. The executive agreement is second while the treaty is third. This pattern held for fifteen years out of the twenty-seven represented by all the administrations represented. The remaining years had the pattern of statutory agreement, treaty and executive agreement. It is clearly evident that the statutory

Table 5  
Form of U.S. Agreements by Administration, 1946-1972

Form	Administration					
	Truman	Eisenhower	Kennedy	Johnson	Nixon	Ave.
Executive Agreements	10.6%	5.4%	3.8%	8.0%	9.1%	7.4%
Statutory Agreements	79.5%	89.2%	92.7%	86.7%	86.4%	86.7%
Treaties	9.8%	5.4%	3.4%	5.2%	4.5%	6.0%

Source: Johnson, L. (1984). The making of international agreements - Congress confronts the executive. New York, NY: New York University Press, Reprinted by permission.

agreement has been used most often as a way of committing the United States to other nations and so has effectively replaced the treaty as the official instrument of American foreign policy commitment in the post World War Two era.

There doesn't appear to be any drastic differences between presidents in the use of statutory agreements. Every president (except Truman) used the statutory agreement over 86% of the time. The key point to be seen here is that this table conflicts with the accepted argument that the executive agreement has replaced the treaty as the major tool in conducting foreign policy. Rather, it appears that the statutory agreement is the dominant tool. We should be able to discover the reason for this discrepancy by looking at the "content" of the agreements.

The period between World War Two and the Vietnam War represents more active U.S. global involvement with other nations. This would include the attempt to contain communism, rebuilding Europe and various other responsibilities as a world

power. It represented a period of increasing interdependence between nations. The dominant interest of the U.S. at the close of the war and for several years after was in the area of economic policy and trade. About 37% of all agreements were in this area. Later the Eisenhower era marked a turn toward more military defense pacts. The overall number of pacts, however, were greater in the economic area in every administration since World War Two with the exception of the Truman administration who had more agreements in the 'cultural-technical' area. Together, the economic and cultural-technical pacts made up almost 64% of America's international commitments from 1946 to 1973. The military pact was third in frequency, making up about 19% of the total. On the bottom of the frequency list were diplomatic issues such as international boundary disputes and the establishment of diplomatic relations with other nations along with transportation and communication issues.

To briefly summarize, it could be said the content of America's actions directed at the rest of the world have been primarily economic in nature, followed closely by cultural-technical and military agreements with a small stream of agreements having to do with transportation, communications and diplomatic matters in last place.

The way the three major forms of agreements (treaties, executive and statutory agreements) interact with the five "content" areas discussed in the above paragraphs is interesting. This is represented in Table 6.

Upon looking at this table it becomes obvious that statutory agreements are dominant here too. So, the argument that Congress has been consistently excluded from specific policy areas fails again. Variances do occur in certain content areas though. For example, executive agreements have been used most frequently for military and diplomatic policy and less for economic, transportation-communication, and cultural-technical policy.

Table 6

## Form of U.S. Foreign Agreements by Content Areas, 1946-1972

	Content				
	Military	Econ.	Trans. Comm.	Cultural Technical	Diplomatic
Executive Agreements	12.4%	4.6%	5.9%	3.7%	26.7%
Statutory Agreements	84.0%	88.6%	84.6%	93.2%	60.0%
Treaties	3.6%	6.8%	9.5%	3.2%	13.2%

Source: Johnson, L. (1984). The making of international agreements - Congress confronts the executive. New York, NY: New York University Press, Reprinted by permission.

An interesting way to contrast and compare legislative and executive patterns in international agreement making is to look at each administration and how they used the various forms and what their content was.

In each administration the statutory agreement was dominant in the process. It rarely fell below 80% in any policy area. The exception to this came in the diplomatic area where all presidents averaged just over 50%. Just two administrations, Truman's and Johnson's, had statutory agreement levels below 80% in any other content area.

In regards to treaties, four of the administrations used them most often for diplomatic commitments. In the other content areas the use of treaty varied with the administration but what is interesting is how little it was used for military agreements. Eisenhower, Kennedy, and Johnson had the lowest percentage of treaties and Truman and Nixon had the second lowest. Military agreements appear to hardly ever take treaty form.

In complete contrast to this is the frequency of the use of executive agreements in military and diplomatic policy by various administrations. All of the presidents, except for Kennedy, used executive agreements much more for military and diplomatic affairs than for any other policy areas.

Table 7 gives one an accurate conception of the balance between administrations on the use of the executive agreement. It is called the Executive Agreement Index.

The index is based upon the proportion of executive agreements (EA) among the total number of treaties (T) and executive agreements:  $EA/(T+EA)$ . This table provides an indication of the degree of activism in foreign affairs for each president. The use of treaties and executive agreements was compared, since they have been more controversial than statutory agreements (Johnson, 1984, p. 23-24).

While Nixon stands out as the one who made the most use of executive agreements over treaties, an overall rise in the use of executive agreements is evident. The resulting pattern is that presidents have relied more and more on the executive agreement at the expense of the treaty in the international agreement process.

### Summary

Two major themes can be seen upon reading the data presented. The first is that the statutory agreement is extremely important as the primary formal instrument of American commitments overseas along with the "accelerated" use of the executive agreement. This is true despite the heavy use of the statutory agreement as an important instrument for military and diplomatic commitments.

What the data suggest is that Congressmen have been asked by the Executive to give, and have given, the "green light" to a majority of foreign commitments (most of them begun by the executive branch). A different question is whether the Congress knew exactly what it was approving. There have been studies too numerous to cite here which argue that Congress is lacking in the "substantive" area (the meaningful

Table 7  
Executive Agreement Index (EAI), 1946-1972

Admin.	Policy Area					Ave.
	Military	Econ.	Trans.	Cultural	Diplomatic	
Truman	.67	.42	.25	.38	.72	.49
Eisenhower	.84	.12	.38	.55	.71	.52
Kennedy	.83	.27	.86	.67	.41	.52
Johnson	.83	.52	.26	.46	.71	.57
Nixon	.74	.77	.53	.66	.58	.66
Average	.79	.42	.46	.54	.63	

- a.) This table summarizes the use of military treaties and executive agreements only: statutory agreements, which are more numerous but less controversial are not analyzed here.
- b.) The numbers in each column represent for each administration the proportion of executive agreements compared to the total number of treaties and executive agreements. The Executive Agreements Index ranges from 0 to 1: the higher the index, the greater the reliance on executive agreements for the commitments abroad.

details of policy) in spite of its large procedural role in foreign commitments.

The second major theme to be seen in the data is that there has been a considerable amount of presidential discretion over specific, selected issues. Although this discretion has been confined to military and diplomatic areas, one must remember the commitment of American forces overseas are crucial facets of U.S. foreign policy.

One could easily surmise at this point that the Executive branch uses executive agreements primarily for military purposes. One could also surmise that this coincides with evidence given in Chapter IV in which the executive is dominant over Congress in those foreign affairs events involving the use of force or the potential for violence.

## The Secret Side of Agreement Making

This “secret side” refers to executive agreements. As we know, these are the agreements or commitments made by the executive branch with another nation with no approval, and often no acknowledgement to, Congress. The Senate Foreign Relations Committee, in a 1972 report, said “there have been numerous agreements contracted with foreign governments in recent years, particularly agreements of a military nature, which remain wholly unknown to Congress and to the people” (Senate Report No. 92-591). Add diplomatic and intelligence obligations to those of a military nature and you have a considerable number of secret agreements which can challenge the democratic principles which America thrives on.

The focus here is on those agreements of a military nature. Previous chapters have already discussed some of the bold actions Abraham Lincoln took during the Civil War. He stretched the powers of Commander-in-Chief to new heights. More recently, World War Two and the prolonged “cold war” have changed the shape of foreign policy. During this time our country looked to strong leadership to ward off an external threat and this resulted in a significant shift of power to the presidency. One need only look to the large number of international military commitments we’ve made since the end of World War Two that were based on executive authority to find this true.

For example, the executive branch has put military personnel in Guatemala, Mainland China and Ethiopia, pledged military support to Turkey and Pakistan, contracted for military bases in Spain, the Azores, the Philippines, Diego Garcia, and Bahrain. One might conclude such agreements allowed the U.S. to negotiate from a position of strength and, eventually, facilitate the downfall of the Soviet Union.

Earlier, in Table 1, it was shown that only 7.4% of all America's formal commitments from 1946 to 1972 were based on executive agreements. Agreed, this is a small percentage of the total, however, executive agreements have often been more significant than treaties. The real question is: How often has Congress has been left out of the decision-making process in crucial commitments overseas? This question was touched on in Chapter IV, however, addressed here, only the executive agreement and the treaty will be discussed (although used less than statutory agreements, they have been more argumentative and controversial).

The so-called "conventional wisdom," at least in the opinion of Congress, has taken the stance that the advice and consent of the Senate has been requested by the executive branch mostly for things with little substance or meaning. Senator Dick Clark of Iowa in 1972 complained on the Senate floor that "The treaty form has been used for a shrimp agreement with Brazil, an agreement on the conservation on polar bears, and an agreement regarding the uninhabited coral reefs in the Caribbean." Other treaties were concerned with such things as the recovery of lost archaeological objects in Mexico, and increase in membership of the International Atomic Energy Board from 25 to 34 and the international classification of industrial designs.

The findings in Table 8, however, show that treaties have been used for significant military agreements and not primarily for trivial matters.

Out of the 41 treaties signed from the Truman administration to the Nixon administration 32 of them (78%) dealt with large military commitments. Some of them included security arrangements with Japan, the Republic of Korea and certain countries in Western Europe; major arms control agreements including the nuclear test ban treaty of 1963 and post war peace treaties with former enemies (treaty of peace with Italy).



The evidence for defense commitments overseas doesn't back up the "conventional wisdom." Treaties have not actually disappeared from their usual traditional role.

Although 43 out of the 142 military executive agreements during this period had to do with smaller routine and minor aspects such as reciprocal air rights with Canada for rescue operations, many had involved large commitments abroad. Most of the significant military commitments took the form of executive agreements.

Decisions involving the use of force, especially with U.S. troops, are of major importance. Through analyzing the content of the main methods of conducting foreign policy (treaties, executive agreements, statutory agreements) one can see the executive branch attempting to circumvent congressional influence primarily through the use of executive agreements. Even though the statutory agreement is persuasive and Congress has participated extensively, it is not "seen" that way because many of the crucial decisions, at least those involving potential violence, have been handled by the executive. These crucial events are highly visible to the public and the world.

The basic conclusion here is that the executive branch has gradually increased the use of executive agreements mostly in military commitments overseas to "take the reins" in providing direction for overall American foreign policy.

### Avoiding the Senate

Can it be proven that Presidents deliberately circumvent the Senate by using executive agreements? Why would they want to? America's annexation of Texas and Hawaii are two examples. In both it was doubtful whether a treaty would have received the needed two-thirds vote for ratification by the Senate. Why? Often the political party opposing the President occupies the Senate or all of capital hill. The opposition to the President's policies then, theoretically, is strong.

Table 8

**The Dominance of Executive Agreements Over Treaties  
in the Making of Significant Military Commitments  
Abroad, 1946-1972**

	Significant Military Treaties	Significant Military Exec. Agree.	Executive Agreement Index=
	(T)	(EA)	EA/(T+EA)
<b>Administration</b>			
Truman	16	28	.64
Eisenhower	6	30	.83
Kennedy	1	4	.80
Johnson	5	24	.83
Nixon	4	13	.76
Total	32	99	

Source: Johnson, L. (1984). The making of international agreements - Congress confronts the executive. New York, NY: New York University Press, Reprinted by permission.

It has been proven that Presidents will have only a slightly higher ratio of executive agreements to treaties when the Senate is controlled by the opposition party than they will when their own party controls the Senate (Margolis, 1986). How much control (simple majority or a two-thirds vote) makes a difference. In a study by Lawrence Margolis, our Presidents negotiated an average of 20.4 executive agreements for each treaty when the majority of Senators were of his party. When Senators were among the majority of the opposition party the President negotiated an average of 24 executive agreements. Although higher, it is not a major difference.

Does it make any difference when the Senate is controlled by the opposition party? Does it influence what types of agreements are made? No, it does not. When the President's party made up a majority in the Senate (during the last eight administrations) the following percentages of agreements and treaties were made; 50.7% procedural, 35.7% material goods, 13.5% military. When the Senate was controlled by the opposition party the results are virtually the same; 50.3% procedural, 37.3% material goods, 12.3% military (Margolis, 1986).

A treaty, however, does not require a majority for passage. It needs a full two-thirds vote. If presidents really do use executive agreements more when they think that Senate ratification will be difficult or impossible then the ratio of executive agreements to treaties should be substantially lower when the President's party has a two-thirds or more majority in the Senate. This hypothesis proved to be true (Margolis, 1986). When the President's party had that two-thirds Senate majority he concluded an average of 13.7 executive agreements for each treaty. When the President didn't have that two-thirds majority he concluded an average of 24.4 executive agreements per treaty. It can be said with some assurance that Presidents really do use executive agreements to get around the Senate especially when the opposing party has a two-thirds majority.

### Funding

It has been demonstrated how the President uses executive agreements to circumvent the influence of the Senate in foreign affairs. Consistent use of the executive agreement has partially nullified congressional influence on the actions of the executive. The only other significant constitutional leverage Congress has in checking the behavior of the executive is the "power of the purse."

We should first recognize that there was early congressional deference to the executive represented by several acts of Congress. For example, when Congress first created the Department of Foreign Affairs the secretary's duties involved carrying out the directions of the president unlike the secretary of the Treasury who had to make periodic reports to Congress. The Secretary of War was also made accountable to the president.

When money was first appropriated for foreign affairs it was accepted that certain sensitive information needed to be kept from Congress. The president could have made his actions in sensitive foreign affairs and intelligence expenditures available to Congress under an injunction of secrecy. A statute, however, provided "the president shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable to specify" (Turner, 1991, p. 72).

The regular method of appropriating funds in the first fifteen years under the new Constitution was well described in a letter from Thomas Jefferson to Treasury Secretary Albert Gallatin in 1804:

The Constitution has made the Executive the organ for managing our intercourse with foreign nations ... the Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its duties ... It has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the president (The Writings of Thomas Jefferson, Vol. 6).

We could safely say that the "whole" is definitely not left to the president today. If, however, the executive has come to dominate specific key or crucial events, in ways sometimes contrary to the wishes of Congress, how have they obtained the money needed when Congress is supposed to control the purse strings? Is there something

about the funding methods which has allowed or even aided the executive in completing their foreign policy objectives?

The phenomenon of the executive attempting to spend funds in ways not earmarked for spending when the original appropriations went through Congress have become more commonplace with the beginning of the institutional presidency in which more executive agencies came into existence. The number of both domestic and foreign commitments rose dramatically. The number of appropriation bills Congress dealt with increased substantially. There seemed to be increasing instances of the President funding activities even when Congress never authorized or appropriated such funds. Also, many of these instances were cases where the completion of the objective was not at all vital to the national interest. How does the executive locate the funds?

One way is to make transfers between accounts. This happens when agency officials take money away from one appropriation account and put it in another. But is that legal? The current law states “sums appropriated for the various branches of expenditures in the public service shall be applied solely to the objects for which they are respectively made, and for no others” (Fisher, 1975, p. 104). Even so, in 1970, Richard Nixon said he was putting U.S. forces in Cambodia to destroy communist sanctuaries near the border of South Vietnam. This was financed initially by the transfer of funds from foreign assistance accounts. After invading Cambodia, Nixon requested \$255 million from Congress for military and economic assistance to South Vietnam. One hundred million of those dollars was used to restore funds that the president had already diverted to Cambodia from other programs (Fisher, 1975). Nixon was able to get the \$100 million because:

Section 610 of the Foreign Assistance Act allowed him to transfer up to 10 percent of the funds from one program to another. ... Furthermore, Section 614(a) of the Foreign Assistance Act gave the President additional authority to spend funds for mutual security whenever he found it ‘important to the security

of the United States'. Also, Section 506 gave the President a \$300 million emergency fund for military aid ... Nixon borrowed \$40 million from aid programs originally scheduled for Greece, Turkey, Taiwan, and the Philippines ... and diverted still other amounts until a total of \$108.9 million in military assistance had been given, or committed, to Cambodia (Fisher, 1975, p. 107).

Another method of getting the necessary funds is reprogramming. This consists of the shifting of funds within an appropriations account from one program to another. Reprogramming is done differently depending on the committee. The only thing usually required is an informal clearance by four men: subcommittee chairmen of the House and Senate Appropriations committees and authorizing committees. Sometimes it is handled at the staff level by subcommittee clerks (Ingram, 1972).

There is also "covert" financing or "confidential" funding. An authorized official signs a certificate which becomes a sufficient voucher. It then needs no further auditing (Fisher, 1977). One way of creating confidential funds is authorization in legislation followed by funding in an appropriation act. Authorization is a legislative action that establishes a program, specifies its purpose and the means for achieving it, and indicates the approximate amount of money needed to implement the program. An appropriation comes after the authorization and is the actual granting of money.

Another way of producing confidential funds is by creating authorization legislation without specific sums being appropriated for that purpose. The funds then taken from monies regularly appropriated each year, a portion of which may be spent for confidential purposes. Foreign assistance is occasionally done in this way.

Political scientist Louis Fisher cites an estimate that in the 1972 fiscal budget of \$249 billion, secret funds may amount to \$15 billion to \$20 billion ... the only item in the budget clearly marked as military aid totals around \$400 million. That is a gross understatement. At Joint Economic Committee hearings last January, Senator William Fulbright introduced a table showing more than \$6.9 billion in military assistance and sales for fiscal 1972. Two Defense Department officials broke pencils while disagreeing with each other over the total cost, finally putting the figure at \$4.9 billion and later revising it to \$6.3 billion (Ingram, 1972, p. 40).

There are other ways the executive can locate the necessary funds for their objectives. There is the use of military stocks. The Washington Monthly, 1972, estimated that the amount of obsolete weapons and supplies available to the Defense Department for military aid alone amounted to over \$9 billion. "Since there are no guidelines, a fairly new weapons system can be declared 'excess' and then shipped off to any nation that the Defense Department deems needy" (Margolis, 1986, p. 72-73).

Another method of getting funds is using unexpended funds. These are funds that haven't received authorization or appropriation from Congress. The amount available in this area is enormous and carries over each year. Here, the concept of "full funding" comes into play. The majority of appropriations are for one year only and the amounts not spent are supposed to be returned to the Treasury. Often on large projects such as building a navy vessel, Congress appropriates one large sum that carries over for a specific time until spent. This frees Congress from appropriating an amount each year and also allows them to know how much the project will cost. The drawback is that if the project is cancelled or comes in under budget, the remaining funds are not returned to the Treasury. So, having accumulated extra funds in the "pipeline," the military is careful to always have something in reserve.

The two most important things to remember are first, that Congress' control over the purse strings has been weakened by the funding methods just discussed and secondly, that for the most part, Congress has either created, or at least consented to, these methods. Congress could easily place a great deal of the blame on themselves for the problem, if it actually is a problem.

Congress actually creates secret and covert funding. It is no secret to them. Congress never at any time set strict guidelines to indicate when military equipment

becomes “obsolete.” The Pentagon can then simply declare an almost new system “obsolete.”

Congresspeople are not stupid ... they may have been either lax in their oversight duties or naive in their belief that the executive branch would not take advantage of the discretion that was granted to it. However, they may well have been guilty of neither of these charges. They may well have created this situation because they wanted it to work out the way it has (Margolis, 1986, p. 76).



## **CHAPTER VI**

### **STRUCTURAL WEAKNESSES WITHIN CONGRESS REGARDING FOREIGN POLICY AND THE ATTEMPT TO STRENGTHEN INFLUENCE DURING THE 1970'S**

Even though Congress has played an active role in foreign affairs (most often following a war) it does not mean Congress is adequately equipped to effectively handle serious foreign policy matters. There are several factors that can account for this inability. One factor is "parochialism."

#### **Parochialism**

This concept implies that members of Congress are drawn more to domestic matters rather than foreign affairs. Members are up for reelection every two years. This tends to pressure congressmen into focusing on domestic interests. Hence, members have a narrow constituency range unlike the President who has a national constituency.

Because most members need to satisfy local concerns within their constituency they tend to see the world in the same way. Former Senator and chairman of the Senate Foreign Relations Committee, William Fulbright, said

With their excessively parochial orientation, members are acutely sensitive to the influence of private pressure and to the excesses and inadequacies of a public opinion that is all too often ignorant of the needs, the dangers, and the opportunities in our foreign relations (Lehman, 1976, p. 43).

It is all too easy for a specific foreign policy problem to be looked at from the Irish, African or Israeli viewpoint. Recently there has been a push for mandated term limits which may or may not change the "parochial" view.

The President has a much broader outlook and can probably afford to alienate certain local or narrow interests. The President can and does think more in terms of the “long run”. A member of Congress cannot do this. This “local focus” usually means any attention given to foreign affairs will be short and the newsworthiness will determine just how short (Crabb & Holt, 1980).

Many members are anxious to serve on specific committees as a method of enhancing their chances of winning reelection. Most strive for a position on a committee which best serves his or her local constituency. Again, mandated term limits could have an affect here.

A difference in policy process should be noted here. Executive branch policy debates usually happen in private, with the President and one or two other individuals making any final choices. Congressional debates, however, are usually public with any final choices decided by votes of the various members of a committee or committees. The center of decision making is more fragmented and widespread.

### Organizational Weakness

At the opening of the 1970's Congress adopted numerous reforms that tended to decentralize power from the committee to the subcommittee level. Younger members challenged the seniority system. This, plus a number of other reforms reduced the importance of leadership positions such as committee chairman. The ultimate result was that it was now harder to find where, specifically, power and influence were in Congress. The “leadership” therefore, finds it harder to speak for Congress as a whole. Congressmen who are not usually associated with foreign policy issues are now able to take the initiative in defining issues and setting agendas. Many of the congressional attempts to restrict executive prerogative during the early 1970's were

started by members who were normally outside the congressional foreign policy “establishment” (Franck & Weisband, 1979).

Single issue politics has added to the problem of diffusion of power within Congress. Members typically are evaluated only on their performance (voting record) on specific issues and not on the basis of their overall record.

The diffusion of power and sharing of responsibility within Congress means that no one is capable of speaking for the whole institution, which complicates and frustrates efforts at legislative-executive consultation and coordination. It also leads to the charge that Congress is irresponsible” (Kegley & Wittkoph, 1982, p. 407).

Another method Congress uses which promotes individual unaccountability is the habit of dealing with issues in procedural terms instead of taking them head-on. For example, when the Senate was analyzing and deciding on two versions of a Panama Canal treaty, they offered 145 amendments, 26 reservations, 18 “understandings” and 3 declarations. It totaled up at 192 changes (Crabb & Holt, 1980).

It was common during the Panama Canal case to call most of the changes “improvements”. That made it easier to vote for a “politically unpopular document.” Put another way, “procedure” develops into an effective method for dealing with single-issue politics

Because congressmen are able to mask the real effects of their votes and thereby deflect potential electoral criticism. They can also avoid direct confrontation with the executive by couching their opposition in procedural arguments to which the executive branch has no retort (Kegley & Wittkoph, 1982, p. 407).

Procedure, it seems, is used to avoid direct responsibility.

Because Congress is more “open” to the public members are sometimes prone to “leak” information. Leaking is related to something senators and representatives hold dear; their independence. It follows that some will take advantage of opportunities that put them in the mass media’s spotlight.

Another area where Congress is weak, although through no fault of their own, is in the slow, meandering legislative process itself. Congress must find agreement among many disparate views and this often requires slow deliberative methods. The diffusion of power and responsibility between the two chambers, the intricate structure of the committee system along with the decay or even disappearance of “party discipline” only exacerbates the problem.

Rarely does anything happen quickly in Congress. On the way to reaching consensus, policies may be compromised to the point of ineffectiveness (Sundquist, 1976). Now, think of the President’s track record of being able to act quickly and decisively in a world of constantly changing events which often require secrecy and immediate responses. A President can delay or act indecisively too but Congress is forced to simply because of their institutional structure.

#### Inability to Control the Flow of Information

The President is known to have more extensive control of information and technical expertise available to him. Congress doesn’t have the huge capabilities for gathering information that numerous branches of the executive has. Congress still depends on the executive for much information. Because of this Congress tends to react to the executive taking the initiative as was illustrated in Chapter IV.

Congress has tried to improve their situation. They have enlarged the operation of the General Accounting Office in order to deal with the executive more effectively. They created the Office of Technology Assessment and the Congressional Budget Office. More importantly, Congress has increased the size of their staff - both committee and individual staff.

A larger staff provides Congress the means to assert its own independent position in relation to the executive branch with regard to major international questions. It also supplies national legislators with a new incentive to become active in a field where, during an earlier period, they often had neither the interest nor the expertise to become deeply involved (Crabb & Holt, 1980, p. 192).

Has a larger staff helped Congress to handle complex foreign policy issues? That is uncertain. More information is within their control but that doesn't mean that better policy is the result. Congress has often been leery of information it has received from the executive and now they must be wary of information it receives from its own staff which may be produced to further some special interest.

The director for the Carnegie Endowment's project on executive-legislative relations stated "Institutional decentralization, policy conviction, and ample staffing encourage legislators to become involved in the detail of policy. This not only takes away executive flexibility, but also adds new uncertainty because no one can predict what Congress will ultimately do" (Destler, 1981, p. 103).

Even though many individual members are experts in certain areas not all members can be experts on all matters of policy. The executive, however, can be and is. More importantly, members are poorly suited in acquiring specific types of information that would help them to better monitor and have an effect on decision making when crises occur.

Alexander Hamilton knew that the size and cumbersome ways of Congress would have a detrimental effect on foreign policy if congressional influence was too strong. Hamilton emphasized the wisdom of creating a "vigorous executive" who would act without the need to obtain approval of even an executive council. In the *Federalist Papers*, No. 70, he wrote:

Energy in the executive is a leading characteristic in the definition of good government. It is essential to the protection of the community against foreign attacks. ... That unity is conducive to energy will not be disputed. Decision, activity, secrecy and dispatch will generally characterize the proceedings of one man in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished. This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others, in the capacity of counsellors to him. ... In the legislature promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favourable circumstances palliate or atone for the disadvantages of dissension in the executive department. Here they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure, to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the executive which the most necessary ingredients in its composition, vigour and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the executive is the bulwark of the national security, every thing would be to be apprehended from its plurality (Federalist Papers, no. 70, pp. 471-73, 475-76, Alexander Hamilton).

Yes, structural weaknesses are present. This was not a condition, however, which prevented Congress from attempts to strengthen their influence on foreign affairs particularly during the 1970's.

#### Congressional Pressure on the Executive: Legislative Surges of the 1970's

This chapter will continue to examine the historical executive-legislative conflict which continues today; division over who controls the war powers.

During the 1970's Congress had begun to actively enact legislation designed to bring an end to U.S. involvement in Indo-China. Congress believed to be acting in accordance with the people since public opposition to the war had begun to rise or at least had become more visible.

In 1971 the Cooper-Church amendment attempted to end all funding for American troops, advisors or air support in Cambodia (after Nixon's journey into that country to attack North Vietnamese supply lines). The amendment failed. It did, however, set the stage for further legislative initiatives for Congress.

The picture of the Johnson and Nixon administrations carrying on military activities in Indo-China without congressional consent often has been overdrawn by critics of the war. They tended to overlook the frequent votes in Congress for appropriations to support the war. And while they often spoke of a constitutional crisis over war powers, they usually did not consider that throughout the war there was never a constitutional confrontation between a President determined to pursue the war and a Congress unwilling to appropriate the necessary funds (Kegley & Wittkoph, 1982, p. 426-427).

Another similar amendment, the McGovern-Hatfield amendment, attempted to set deadlines for U.S. withdrawal from Indo-China. Later, in 1973, the Eagleton amendment demanded a total withdrawal from Laos and Cambodia. Both amendments failed but the developing pattern of congressional assertion was obvious.

The Fulbright amendment, as an amendment to the Second Supplemental Appropriations Act of 1973, prohibited the use of funds that directly or indirectly supported combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam.

Regarding the sale of defense material to other nations, the 1974 Foreign Assistance Act required the President to give advance notice to Congress of any offer to sell defense equipment or services to foreign nations when such equipment or service had a price tag of \$25 million or more. It gave Congress the authority to disapprove these sales.

The Nelson-Bingham amendments to the Arms Export Act further affected the President's freedom of action in building bilateral relationships with foreign nations by adding more restrictions including advance notice to Congress of "major" defense equipment that totaled over \$7 million. The result of these laws is that for several years

high profile, national level debate has accompanied every major arms sale, which has been way out of proportion to the sale or transaction in question.

Congressional assertion went beyond the conflict in Indo-China. In July of 1974 the executive branch became involved in negotiating a settlement between two of our NATO allies, Greece and Turkey (over occupation of the island of Cyprus). After displays of violence, a cease-fire was reached with Turkey controlling 25% of the island of Cyprus. Congress, however, was following its own road. The House of Representatives brought out two measures demanding the withdrawal of Turkish troops from Cyprus. The Senate Foreign Relations Committee started a State Department inquiry into possible Turkish violations of U.S. arms restrictions. In trying to avert a Turkish arms embargo, the White House brought in several Senators to attend briefings on the possibility of negotiations. "Even after being shown evidence that a negotiation likely to improve Greece's position was in the making, these congressmen continued to call for an arms embargo; soon all hope for a negotiated settlement vanished" (Tower, 1981, p. 236).

Later, the Turkish government of Prime Minister Ecevit collapsed and a day later Congress began a Turkish arms embargo. By then Turkey controlled 40% of Cyprus. Turkey responded to the embargo by putting all American military bases on provisional status. After the White House rejected a motion to lift the embargo, Turkey stated it was shutting down all American bases on its territory.

Instead of reaching an agreement with a moderate Turkish government that controlled one-quarter of Cyprus, the United States had severely strained relations with an angry Turkish government that controlled two fifths of the island. Furthermore, the aid cut off weakened Turkey militarily, jeopardizing the southern flank of NATO and putting at risk our strategic listening posts in that country (Tower, 1981, p. 236).

Other areas in which Congress was developing influence was in aid to third world nations. The Tunney Amendment to the Defense Appropriations Act of 1976



stopped the use of any funds for any activities involving Angola other than intelligence gathering.

This was followed by the Clark Amendment to the Arms Export Act of 1976 which continued to restrict involvement in Angola by prohibiting any kind of aid. Many believed any U.S. involvement would bring about “another Vietnam”. The debate over involvement in Angola sent a straight forward message to the Soviets and their Cuban proxies - that America was unwilling to get involved in foreign entanglements. When the Tunney Amendment passed, the Soviets knew the risk of U.S. intervention was low. The number of Cuban troops doubled in preparation for what would become a full fledged offensive against pro-western forces.

This event marks a unique change. This was the first time the Soviet Union or any of its proxies attempted such large scale operations in Africa or any other third world nation. It gave them an improved image of being dependable allies and supporters of various political movements in Southern Africa. America, on the other hand, was seen as having lost some nerve for foreign involvement after Vietnam and as being divided domestically over a foreign policy strategy.

Congress continued to expand their influence in other areas. Two of the more aggressive congressional interventions into national security policy were the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, primarily the CIA, and the Hughs-Ryan Amendment to the Foreign Assistance Act. The former was also known as the “Church Committee.” Even the Vice-Chairman of the Church Committee, Senator John Tower, admitted that by operating a public inquiry concerning the CIA, we not only exposed alleged mistakes or blunders, we also exposed vital information on how the CIA is organized, what kinds of sources it makes use of and generally how it gathers intelligence.

In 1974 the Hughs-Ryan Amendment became law and prevented the CIA from engaging in any activities overseas that was not directly related to intelligence gathering “unless and until the President finds that each such operation is important to the national security of the United States and reports, in timely fashion, a description and scope of such operations to the appropriate committees of Congress” (Tower, 1981, p. 127).

Only several years later information on covert intelligence activities was accessible by eight congressional committees, totaling up to 200 members, or approximately 40% of Congress. In October of 1980 the President signed into law an amendment to the National Security Act which reduced the number of committees to two. This was one of the rare reversals of the legislative onslaught of Congress in the early 1970's.

This intrusion into intelligence activities, however, once again sent a message to other nations, particularly our adversaries, that secret operations would be significantly limited in the future. It upset the confidence of the friendly states who had helped us in gathering intelligence and made them reevaluate their relationship with the American intelligence community (Tower, 1981). They believed congressional investigations might reveal their own intelligence sources and methods.

Thus far numerous legislative acts have been discussed regarding Congress' attempt to increase its influence on foreign affairs. We will now examine the one act which is considered to be the most constitutionally questionable and the best example of executive-legislative conflict; the War Powers Resolution of 1973.

## CHAPTER VII

### CONSTITUTIONALITY OF THE WAR POWERS ACT OF 1973

The most far reaching of congressional attempts to curb the executive is the War Powers Act of 1973. This Act represents the epitome of the age-old problem of interpreting what branch holds what power regarding the use of U.S. forces abroad. As such, it serves as one of the best examples of current legislative-executive conflict. The Act contains ten different sections, however, only those sections that raise constitutional problems will be examined here.

Section 2(c) attempts to limit "the constitutional powers of the president as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" to three circumstances: (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces.

The language here would seem to try to have the effect of law. If so, it is a definite encroachment upon the independent constitutional power of the president. Senator Jacob Javits acknowledged this when he stated that the statute was improper because of its failure to recognize the president's power to rescue Americans in danger abroad or on the high seas.

Under the Constitution, as long as Congress provides the Commander-in-Chief with an army or navy it is his to deploy and utilize as he deems necessary with the single exception that if he concludes it is necessary to initiate offensive war against another state, he must first obtain the statutory approval of both houses of Congress" (Turner, 1991, p. 110).

Section 3 of the Act demands that the president consult with Congress whenever possible prior to committing armed forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” Certainly the president should keep Congress informed about major foreign policy decisions at least for political reasons. Remember, this is done with the idea of preserving operational security and maintaining safety of the main forces and other personnel.

This “consultation” should happen between co-equal branches of the government. It should be done out of mutual self interest. It is not something that one branch “compels” another branch to perform. It is well known that in constitutional law Congress cannot force the president to supply sensitive national security material that in his estimation should be held within the executive branch.

This section compels the president, a co-equal representative of the population, to consult Congress about sensitive issues specifically under his direction. Further, the section doesn’t specify with “whom” the president is supposed to consult. Does this mean individual consultations with 535 members of the legislature or maybe just a phone call or two to a few committee chairmen?

Most everyone would not deny the importance of the president keeping Congress informed. It could negatively affect his policy efforts over the long run if he did not. On grounds of policy not many people would oppose the consultation sections of the War Powers Resolution but as an exercise in the lawmaking authority of Congress it definitely raises problems. When a request to consult becomes a directive in the form of a statute forcing the president to reply, it gives the president great incentive not to cooperate. In the end it should be quite clear that Congress cannot change the constitutional separation of powers by statute alone.

Section 4 deals with the “reporting” requirements. If war hasn’t been declared, Congress demands detailed reports to be handed in within forty-eight hours of whenever U.S. forces are placed into “hostilities.” This congressional demand forces the president to supply details dealing with the scope and length of military operations. Congress then treats the information as a “legally binding commitment” which forces the executive “to accept precisely the sort of artificial constraints in advance of rapidly changing situations that (John) Locke and his contemporaries recognized were incompatible with the effective conduct of military operations” (Turner, 1991, p. 112).

If Congress accepted that these reports were good faith estimates that may need to be departed from by the president when conditions forced him to, then the only critical risks would be leakage of information that might jeopardize the safety of American lives or give advantage to adversaries. Congress, however, doesn’t see it that way. Most will view it strictly. When the president departs from any game plan given to Congress he will be quickly accused of lying or breaking the law.

Section 5(b) represents the most unconstitutional parts of the Resolution. It states the president must withdraw forces from any situation where “imminent involvement in hostilities is clearly indicated by the circumstances” (p. 4) if Congress has not acted to authorize the ongoing presence of military forces within 62 days of initial involvement. An additional 30 days may be approved by Congress if it is agreed that the safety of the forces involved requires it. This is required even if a single shot has not been fired and American forces are only in a defensive setting (being in harm’s way just by virtue of possible foreign aggression).

This section seems to be nothing less than a direct congressional effort to limit the powers of the Commander-in-Chief vested in him by the Constitution. The Constitution is clear on this point. We know the president must have approval of both

houses of Congress in advance of initiating a conflict (if the president believes starting a war with another state would serve national interests). Like all other exceptions to the president's powers, the power to declare war was intended to be viewed narrowly. It allows Congress to stop a presidential action to start an offensive action, however, it does not give Congress power to take control of the president's independent constitutional powers simply on the idea that any executive mistakes might bring another state to begin aggression against the United States.

It might be true that a president could utilize his powers as Commander-in-Chief in a way that would increase the chances of involvement in war, however, our experience with the Neutrality Acts of the 1930's (mentioned in Chapter IV) shows the prospects of war from aggressor nations may increase when the president's hands are tied. The Clark Amendment of 1975 prevented the president from helping the non-communist majority in Angola to fight Soviet and Cuban combat troops being brought to Angola and other areas of Africa. A later "enlightened" Congress repealed this.

One should also consider what kind of message this section of the Resolution sends to the world. Consider a country that wishes to align itself with America in deterring international aggression. They are informed that the president's powers as Commander-in-Chief are only good for two or three months. Beyond that, a huge unorganized legislature is in command.

To make the situation even more alarming, the War Powers Resolution tells America's friends (and its enemies) that Congress has determined in advance that, in the event it cannot make up its mind whether the president is right or wrong it will assume as a matter of law that the president is wrong. ... Through section 5(b) of the War Powers Resolution, Congress has effectively sent a message around the world that it has delegated broad legal authority to any anti-U.S. foreign radical who can aim a rifle or toss a grenade at a U.S. soldier to set the war powers clock in motion ... with luck, killing a few Americans might actually start the war powers clock and result in the withdrawal of all U.S. military forces from the region. The larger question is whether U.S. voters are going to tolerate such behavior once they realize that their elected

representatives have placed a bounty upon the lives of their sons and daughters serving in uniform abroad (Turner, 1991, p. 114-115).

This view was supported by Sam Nunn, chairman of the Senate Armed Services Committee during a statement on the floor of the Senate on May 18, 1988; “The 60 day clock, when it begins ticking, gives foreign governments and adversaries who perhaps are not governments, including terrorist groups, a real lever for influencing the U.S. policy debate ... in short it means the jerks can jerk us around, and they do” (Congressional Record, 100th Congress, 2nd session, p. 6175).

Excerpts from section 5(c) of the Resolution are presented below. It is followed by a direct quote from Article One, Section 7 of the U.S. Constitution. It is not complex language. See if you can discern any discrepancies.

**Section 5(c) War Powers Resolution of 1973:**

Notwithstanding subsection (b), at any time that the United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

**United States Constitution, Article One, Section 7:**

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the Same shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

A concurrent resolution needs the approval of both chambers of Congress (majority vote) but does not require the president’s signature. Its origins go as far back as Franklin Roosevelt’s administration in the 1930’s. Since 1932 when the first veto provision was enacted into law, 295 congressional veto-type procedures have been attached to 196 various statutes. Five statutes were affected from 1932 to 1939; nineteen statutes from 1940 to 1949; thirty-four statutes from 1950 to 1959; and one hundred and sixty-three statutes from 1970 to 1975.

The most important use of the resolution is as a “legislative veto” over the president’s exercise of powers delegated to him by Congress (not necessarily the Constitution). A legislative veto sometimes includes disapproval by Congress of specific “reorganization plans or congressional opinion regarding fixing the date for adjournment, creating joint committees and welcoming foreign visitors to the U.S.” (Plano & Greenberg, 1972, p. 157).

It is not, however, a constitutional method of controlling the direction of the executive branch. If you thought this “legislative veto” to be valid, you would have to also think Congress could amend the Constitution by concurrent resolution because decisions on the deployment of troops by the president is a power vested in him by the Constitution.

### Implementation of the Resolution

How many times since the resolution’s passage have there been situations where Congress might have invoked the Act? The following paragraphs contain incidents of U.S. foreign affairs, related to the War Powers Act, which show how presidential-congressional relations have evolved since the Act’s passage. Some examples will be elaborated on further following this initial listing.

1. President Nixon failed to submit a report after he ordered an evacuation of forces during hostilities on the island of Cyprus in July of 1974.
2. The first report since the Act’s passage was filed by Gerald Ford in 1975 after he ordered Marine forces, Navy vessels and helicopters to carry refugees in South Vietnam.
3. Ford, after ordering the same forces to aid the evacuation of Americans in Cambodia submitted a second report also in 1975.



4. Ford also filed a third report after using Navy helicopters, Marine and Air Force fighters to bring out U.S. citizens and foreign nationals trapped in South Vietnam (1975).

5. Ford again filed his fourth report following the introduction of U.S. forces to rescue the crew of the *Mayaguez* (U.S. boat seized by Cambodian communists). Notification of Congress came after actions had been ordered.

6. In June of 1976, the Navy evacuated 263 Americans and Europeans from Lebanon during that country's civil war. President Ford did not file a report regarding the landing craft used.

7. Additional military forces were brought into Korea after two U.S. Army servicemen were killed by North Korean soldiers in the demilitarized zone in August of 1976. Asked why he didn't file a report, President Ford answered by stating that Section Four A (3) the "substantial enlargement" provision did not apply to the addition of a "relative handful" of personnel. U.S. troops in Korea already numbered 41,000.

8. President Carter had U.S. military aircraft aid the Belgians and French rescue foreign nationals in jeopardy from the civil war in Zaire. No report was filed.

9. President Carter ordered U.S. Air Force helicopters and six other aircraft to rescue American hostages in Iran in April of 1980. Carter filed his first and only report regarding this action.

10. President Reagan in March of 1981, sent 20 military advisors to El Salvador to help other advisors already sent by President Carter. No report was submitted. Congressmen Richard Ottinger introduced a concurrent resolution stating that report was necessary. Reagan answered by saying that pertinent sections of the

Act did not apply because the personnel were not being introduced into hostilities and were not equipped for combat.

11. On August 19, 1981, two U.S. Navy fighters ordered into the Gulf of Sidra, were fired upon by two Libyan jets. The U.S. fighters returned fire and destroyed the Libyan aircraft. Reagan didn't file a report about placing the jets in the Gulf of Sidra on the grounds that "imminent involvement in hostilities [was not] clearly indicated by the circumstances".

12. Reagan's first report was filed in March of 1982 after he ordered U.S. military personnel into the Sinai to help expedite the peace treaty between Israel and Egypt.

13. Reagan's second report followed the placement of 800 marines to aid the withdrawal of Palestinian armed forces from Lebanon in August of 1982.

14. Reagan's third report came with the placement of 1,200 marines in Lebanon as part of a United Nations peace-keeping force designed to help the Lebanese government gain control within its own borders. A supplemental report followed after Marines were fired upon and two had been killed.

15. Reagan's fourth report came when he deployed several AWAC's (radar planes) and F-15 fighters to help the government of Chad with their fight against Libyan troops.

16. Reagan's fifth report happened when he deployed 5,000 marines, Army Rangers and paratroopers to seize the island of Grenada. The purpose was to protect 1,000 Americans endangered by an unstable situation.

17. As a response to numerous acts of terrorism sponsored by Libya, Libya's partial invasion of Chad and Mu'ammar Qaddafi laying claim to the entire Gulf of Sidra as Libya's territorial waters, the United States became involved. The U.S. Navy

requested to continue its “live-fire” exercises normally conducted within the Gulf. Reagan knew Libya was prepared to fight. The Navy knew conflict was likely. The plain terms of the War Powers Act should have been triggered. It was ignored. Several Libyan jets were downed. Qadaffi withdrew from terrorist actions temporarily and signaled his intent for a dialogue with the United States. Further sanctions against Libya were halted. The success of the shootdown stopped any congressional effort to invoke the War Powers Act.

18. Following the high-jacking of the cruise ship the Achille Lauro, the U.S. chose to intercept the plane carrying the terrorists responsible (after having been set free by the Egyptian government). The attempt was successful. No thought was given to Congress or the War Powers Act. The president and his advisors never doubted their authority to act under the president’s role as Commander-in-Chief.

19. Terrorist activities continued after the Achille Lauro incident. Qadaffi’s guilt in many of the acts was clearly indicated. Economic links with Libya were broken, fifteen hundred Americans were asked to leave Libya. Libyan assets were frozen and an executive order was now describing Libya as an “unusual and extraordinary threat to the national security and foreign policy of the United States.”

Soon after this, Reagan decided to target points within Libya for attack. The air strike was a huge success. Once again the War Powers Act was irrelevant. Consultation did happen but nothing resembling an official request for congressional authorization ever took place. Since the mission was a complete success most congressmen joined in the applause of the president and the armed forces.

Before we go to the last example of implementation, let’s go back and take more detailed look at some of the examples. For example, in number 5, President Ford believed military force would be needed for rescue operations. Ford contacted eleven

senators and ten House leaders about mentioning the need to prevent the moving of the crew of the *Mayaguez* to the Cambodian mainland. As mentioned before, notification of Congress came after the actions had been ordered.

Actions included a tactical air attack on a Cambodian air strip and selected other targets on the mainland. On the evening of the airstrikes (just minutes before) Ford was told the *Mayaguez* crew had been released and were back aboard the ship. Minutes later the air strikes concluded.

The War Powers Act was given only cursory consideration. Congress was informed after forces were in place and engaged in hostilities. There was no prior consultation. Also overlooked was the fact that this action also violated the Cooper-Church Amendment preventing U.S. forces from entering Cambodia.

Members of Congress were furious and started to criticize Ford. Right at that time polls came out showing overwhelming popular support for the president's actions. On a complete reversal, members of both houses began praising the president's decisive action. Sponsors of the War Powers Act were quoted as saying the action was "bold and successful" or a "job well done." "The trampled War Powers Act was not mentioned in the wave of political support. The president had acted under his authority as Commander-in-Chief and entirely outside the framework of the act and in actual violation of its provisions" (Lehman, 1992, p. 99).

In example number 9, (Carter's ill-fated hostage rescue), the result of the mission and its effect on popular opinion set the congressional attitude toward the president's violation of the War Powers Act. Congressional leadership was furious over lack of consultation. Lloyd Cutler, an advisor to Carter, later wrote a response stating; "The president's constitutional power to use the armed forces to rescue Americans illegally detained abroad is clearly established. The War Powers Act

should not be construed to require prior consultation under the precise circumstances of this case” (Lehman, 1992, p.101). The facts of this case were similar to the Mayaguez incident and in both cases the president ignored the War Powers Act. Ford was praised because it was successful and Carter was criticized because of failure.

On example number 13 (Marines in Lebanon) Reagan referred to his action as being consistent with the War Powers Resolution without citing any section under which he was reporting. With the assassination of Lebanese President Gemayel, requests for an increased multinational force were voiced. Many in Congress now believed “imminent hostilities” were now likely. The executive stated such hostilities were not “clearly indicated by the circumstances.”

Reagan introduced 1,200 marines (example no. 14) and filed a report that the troops were equipped for combat but would not “engage” in combat. Forcing the issue by Congress acting through a joint resolution was not considered an option. Any bill like that would be vetoed by the president and certainly upheld by at least one house. Congress decided on a compromise that would activate Section 4(a) (1) and the 60 day time limit but, contradictorily, granted the president statutory authorization for eighteen months after its passage (House Joint Resolution 364).

The president, in effect, traded invocation of the War Powers Act for at least eighteen months grace period from Congress. Even after signing the bill Reagan attacked the legitimacy of the Act saying it wouldn’t have any effect on his authority as president to deploy armed forces if necessary. If the president had been true to his speech he would have vetoed the bill. “The whole episode simply underlines the fact that whatever the theory or the legislation, the struggle between the president and Congress for control of national security always ends up fought on political rather than constitutional or legal terrain” (Lehman, 1992, p.108).

As a last comment on this event, a radio message was intercepted one week prior to the killing of the 241 marines which stated; "If we kill fifteen marines the rest will leave." This analysis was based on enemy awareness of the tenuous position of the Americans in Lebanon.

By tying the trigger on the War Powers Resolution to such events as a terrorist attack on American servicemen, Congress had inadvertently both surrendered the initiative to anti-american radicals around the world and virtually placed a 'bounty' on the lives of American servicemen abroad" (Turner, 1992, p. 138-144).

The attack on the marines had that exact effect. Before six months passed, the marines had left and Reagan's policy was seen as a failure.

The unstable situation described in number 16 involved a classic textbook marine and air assault of Grenada. Under pressure from the Senate Armed Services Committee all forces were to be "joint" or "multi-service." This fact overruled the local task force commander and forced him to add sections from the army and air force. We ended up with 15,000 U.S. troops plus 300 soldiers from nearby countries. The opposition consisted of 1,000 of Grenada's Revolutionary Army, several ill-trained militia and about 700 Cubans (636 of which were a military construction crew). So many different unrelated units were used that mistakes and unnecessary casualties were almost expected.

Two hours after Reagan issued invasion orders he met with several members of Congress. He stated the operation was justified on the basis of the president's powers as Commander-in-Chief. One day after the invasion House speaker Tip O'Neil condemned the president for "gunboat diplomacy." Many congressmen called for enforcement of the War Powers Act on the floor of Congress.

Leadership in the Democratic Party quickly passed Joint Resolution 402 which established that a 60 time limit on presidential action was initiated by the Grenada

action. Suddenly Speaker O’Niel quickly changed his mind and publicly stated the invasion was “justified”. The belligerent demands for an inquiry into the president’s breach of the War Powers Act was dropped like a hot potato. Why? The public polls showed a 90% approval rating for the president’s actions. “Debate over constitutional principles had once again been overwhelmed by political reality. Had the operation been a fiasco, it would have been otherwise” (Lehman, 1992, p. 112).

The last example or vignette will be given more attention as it is the most recent event as of this writing and provides an excellent example of the executive-legislative relations over how America goes to war.

20. Desert Storm was the United Nations led multinational force which confronted Iraq and its leader Saddam Hussein after their invasion of neighboring Kuwait. President Bush ordered deployment of forces in August of 1990 in order to, allegedly, protect American interests in Saudi Arabia and to aid Kuwait. The forces were set into motion.

- a. The Rapid Deployment force was in place and ready.
- b. Twenty-six “positioning ships” arrived on the island of Diego Garcia.
- c. Thirty-two modern airfields had finished construction in Saudi Arabia.
- d. Members of Army, Navy, Marine and Air Force had trained extensively in desert warfare.
- e. A force of 120,000 were to be the initial operating force with steady reinforcement from the United States and Europe as the need required.

Bush wrote Congress of these actions declaring the troops were not in “imminent danger of hostilities.” Was the president’s action really related to the situation? The U.S. Government had the most to fear from an attack by Iraq before they were ready. Just a month later Bush declared Iraq and the United States were “on

the brink of war.” Soon after this was an administrative action that allowed our forces to receive “imminent danger” pay. It seems apparent from these behaviors that Bush was putting U.S. forces “in harm’s way.”

Under these conditions the War Powers Act could have either been triggered by a more accurate presidential notification of Congress - obviously not forthcoming - or a congressional debate on the issue. That did not take place. Nor was there any effort in Congress to start the clock. Bush was therefore able to operate in the initial stage of the military buildup quite free of congressional restraint” (Lehman, 1992, p. 27).

As decisions to act aggressively drew near, military leaders said they needed a larger buildup of forces. Bush and Secretary of State Baker continued to try and gain unilateral support for the use of force. Meanwhile economic sanctions continued to try and force Saddam to move out of Kuwait - unsuccessfully. Congress was, justifiably, not ready to sanction the president’s position on the use of force before its adjournment. Most of them backed Senator Sam Nunn’s position on “letting the sanctions work.”

Key members of Congress were trying to motivate the Bush administration to continue with the Baker mission of diplomacy again even at the risk of pulling the rug on the president’s emphasis for using force. Baker did continue by setting a meeting with Iraqi foreign minister Tariq Aziz on January 9th, days away from the “deadline” given Saddam for leaving Kuwait.

Until Baker met with Aziz there had been no formal debate in Congress over Gulf policy. The newly elected 102nd Congress resolved to keep it in session but not to debate. In this way Congress continued to evade the issue. In theory the clock should have started running the minute “hostilities” became “imminent.” Many thought this situation existed at the beginning of deployment in August of 1990 - the Pentagon treated it that way. Congress, though, refused to wind the clock.



This state of “suspension” was Congress’ fault (Lehman, 1992, p. 45). Debate on the issue could have been scheduled at any time after deployment. The 101st Congress, preparing for adjournment, decided not to debate the authorization of war. Bush’s talks with congressional leaders on several occasions sprang from his belief of their political prudence and not their legal necessity.

Apparently most of Congress did not want war. They didn’t want to be in the way if war was necessary. Most members continued to support Sam Nunn’s position on letting the sanctions work.

The Democrats, therefore, took their ironic stand: not a decision to declare war itself, for none was asked, but a decision on whether the United States should ‘take the offensive’ - a tactical issue that reasonably belonged to the Commander-in-Chief even if the power to decide to go to war did not. It was a position that appeared increasingly to give all of the game to Saddam unless negotiations started - which even then might give much of the game to Saddam!” (Lehman, 1992, p. 45-46).

The Judicial branch became involved at one point when fifty-six congressional members led by Democrat Ron Dellums tried to bring a lawsuit. The idea was based on the president’s November 8th announcement of an “offensive option.” This, they thought, created a situation that insisted on a court injunction to prevent executive use of force without congressional consent.

The Court acknowledged the position of Congress, i.e., that the president’s actions were clear enough to constitute preparations for war-making. The court stated; “It is therefore clear that congressional approval is required if Congress desires to become involved.” The key point was when the court concluded. “It is only if a majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it” (Lehman, 1992, p. 48).

Obviously, if a majority of Congress could force an injunction from the court they could also take the easier path of just denying the president the money to act. In

reality almost every one of those fifty-six congressmen voted in favor of a bill for two million dollars specifically for Desert Shield.

The congressional debate which finally took place did not focus on presidential prerogatives (partly because the president had asked for support) but whether Congress would support a possible war which would probably start on the January 15th deadline - the timing and tactics of which would be left to the president. On January 12th Congress voted to support the president.

Desert Storm seemed to take the last breath away from the War Powers Resolution. The sixty day cut off period required by the Act came and went twice after the president put armed forces in harm's way. Neither branch seemed to pay any heed.

Early on, it was obvious Congress was against military action and the president was strongly for it.

In the end the president dominated the outcome when Congress backed down and passed a resolution approving the use of force. They did so because they felt the pressure of strong public support for military action. Had it been otherwise, they would have blocked military action by including in the 1991 appropriation the words 'no funds in this or any other act shall be used ... etc.' It was an almost perfect case study in how a government of divided and shared powers goes to war" (Lehman, 1991, p. 53-54).

### Summation and Conclusions

Several things can be seen by examining these incidents. To begin with, even though reports were filed with Congress, the Presidents involved had clearly said that each report did not substantiate their belief in the War Powers Act. They all avoided stating that their reports were "pursuant to the requirements of the Act." They considered these reports to be elective on their part and not mandatory (Holland, 1984). The placement of armed forces is always warranted by citing the President's powers

within the Constitution, either as Chief Executive, conductor of foreign relations or as Commander-in-Chief.

One of the few examples where prior consultation took place was with President Ford when he approached Congress on beginning a military operation. The results were enlightening and educational. On April 10, 1975, Ford asked both Houses of Congress to clarify their restrictions on using U.S. forces in Southeast Asia for the specific purpose of protecting American lives by completing their evacuation if that became necessary. Ford asked Congress to reply by April 19 because of what was an acute and pressing situation. Following much debate, the Senate did manage to pass a bill on April 25. On April 28, however, before the House took any initiative, Ford ordered an evacuation to begin. He based his decision on "the President's constitutional executive power and his authority as Commander-in-Chief of U.S. Armed Forces." The House finally responded on May 1, rejecting the bill. Here again, we see the structural inefficiencies within Congress demonstrating their inability to successfully reach consensus on a timetable that is often short.

Another point which was mentioned in earlier paragraphs is the predictability with which Congress reacts to the executive in the placement of armed forces in conducting foreign affairs. If the placement and execution is successful, Congress doesn't object; if it fails, Congress objects strenuously that the President did not comply with the War Powers Act. The recapture of the Mayaguez and the takeover of Grenada are recent examples of the former while the attempt to rescue hostages in Iran and the costly placement of marines in Lebanon are examples of the latter.

The concept to be grasped here is that almost no congressman is going to challenge a military operation that is speedy and successful. A drawn-out military operation that doesn't enjoy widespread support will entertain a consistent

congressional challenge. The reason for this criticism is not lack of consultation (it is not even clear that congressmen really want to be consulted, for consultation implies responsibility for the consequences) but lack of success. "Congress will not ignore the existence of public support for the President, regardless of what the law says" (Holland, 1984, p. 385).

The reality is that "public opinion tends to support the President in times of military crisis whatever its views beforehand about the merits of becoming involved in the crisis" (Wilson, 1983, p. 556-557). It seems that the War Powers Resolution has made no distinct change in the way Congress has reacted to the executive's use of armed forces in conducting foreign policy.

President Nixon believed several sections of the Act to be unconstitutional. He thought it:

Would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years ... it would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution - an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation (Holland, 1984, p. 386).

The Supreme Court sided with Nixon's viewpoint in June of 1983 when it reviewed the case of Immigration and Naturalization Service v. Chadha. In a vote of 7-2 the Supreme Court held that the "legislative veto" allows Congress to legislate by bypassing the procedures set out in Article One which stipulate that laws be passed by a majority of both Houses and be presented to the President for passage. The Court believed this to be an essential part of the Constitution's intentions regarding the separation of powers.

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers. Presentment to the President and the Presidential Veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final

debate on Article One, Section Seven, Clause Two, James Madison expressed concern that it might be easily evaded by the simple expedient of calling a proposed law a 'resolution' or 'vote' rather than a 'bill' ... the court's decision based on the Presentment Clauses (Article One, Section Seven, Clauses Two and Three) apparently invalidate every use of the legislative veto (Cushman, 1984, p. 118-120).

What effect has *Immigration and Naturalization Service v. Chadha* had on Congress' ability to force a withdrawal of U.S. forces by concurrent resolution? The case renders the legislative veto unenforceable. Congress can no longer legislate by concurrent resolution in such a fashion.

If Congress feels a report should be filed in a particular instance and the president does not do so, or if the president places armed forces into a hostile situation and Congress declines to authorize their presence within 60 days, there isn't any way, within the context of the resolution that Congress can force the president into accommodation. Congress' only other possibility would be to pass a joint resolution to end the funding for the operation. This would, of course, be presented to the president where he would sign or give Congress the opportunity to override his veto. This option, though, was available to Congress before the War Powers Act was passed.

Recently there have been some changes in belief and attitude of congressional members towards the War Powers Resolution. Thomas Eagleton, former Senator and one who did not vote for the Resolution because he felt it didn't go far enough in establishing legislative authority, stated;

Finally. ... I came to the conclusion that Congress really didn't want to be in on the decisionmaking process as to when, how and where we go to war I came to the conclusion that Congress really didn't want to have its fingerprints on sensitive matters pertaining to putting our Armed Forces into hostilities. I came to the conclusion that Congress preferred the right of retrospective criticism to the right of anticipatory, participatory judgment. ... I harbor the notion that most Senators and House members don't have the political stomach for decisionmaking involving war (Turner, 1991, p. 160).

Several congressmen (Majority Leader Robert Byrd, Armed Services Committee Chairman Sam Nunn, Congressman John Warner and Senator George

Mitchell) have prepared changes to the Act. In so proposing, George Mitchell made the following statements in Congress;

We have spent countless hours proposing, filibustering and debating the measures to invoke a law - rather than assessing the wisdom of the policy that prompted the deployment of forces. We have rarely reached a consensus, but we have often conveyed the appearance of a divided country. In doing so we have undermined the positive role that Congress can and should play in crucial national policy decisions. ... The [Byrd, Nunn, Warner, Mitchell proposal] joint resolution is based on the premise that the War Powers Resolution does not work because it oversteps the constitutional bounds of Congress' power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests. By enabling Congress to require - by its own inaction - the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the president as Commander-in-Chief ... the Constitution grants to Congress the exclusive authority to declare war, as well as the responsibility to provide for the common defense. But the constitution makes the president Commander-in-Chief of the Armed Forces. That authority gives him the power to direct the Armed Forces and repel attacks against the United States. Our Founding Fathers divided these war powers to enable the president to effectively lead while ensuring that Congress would concur in the weighty decision of war. But this deliberate division of powers was effectively ignored in the Korean and Vietnam wars, wars waged without a congressional declaration of war. ... Although portrayed as an effort 'to fulfill - not to alter, amend or adjust - the intent of the framers of the U.S. Constitution', the War Powers Resolution actually expands Congress' authority beyond the power to declare war to the power to limit troop deployment in situations short of war ... the president as Commander-in-Chief has authority to deploy troops in defense of American interests. His constitutional authority should not be subject to an automatic recall of American forces within 90 days ... furthermore, debate over the Resolution conveys the appearance of a divided America that lacks resolve and staying power. The Resolution severely undercuts the president by encouraging our enemies to simply wait for U.S. law to remove the threat of further American military action. Into the very situation that requires national steadiness and resolve, the War Powers Resolution introduces doubt and uncertainty. This does not serve our nation. The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution, it potentially undermines America's ability to effectively defend our national security (Turner, 1991, p. 162-163).

Even though many legislators are having second thoughts doesn't mean they won't use the Act when the president commits troops in a dangerous situation and mistakes happen. "Even a non-functioning (and unconstitutional) law can serve political purposes if the situation becomes sufficiently dangerous. That may be why,

despite the widespread acknowledgement of its infirmities by congressional leaders, the War Powers Resolution remains on the statute books” (Turner, 1991, p. 164).

The sections of the War Powers Resolution discussed in this chapter contain ample argument regarding their questionable constitutionality. The historical track record given in previous chapters gives weight to these arguments so that one may conclude that the War Powers Resolution of 1973 (ineffective as it may have been since its inception) should be repealed.

In conducting research one should retain a focus of objectivity. “Objective” research may still take the form of facts, logical relationships, correlations etc. and still support a single point of view. It is within this chapter I have departed from any objectivity and focused on such a blatant violation of the U.S. Constitution.

The last chapter goes back to where the truth may be found; the origins of our Constitution, our Founding Fathers and the individuals who influenced them. It is with this in mind that the closing argument is made and conclusions reached in this ongoing debate between the executive and legislative branches.

## CHAPTER VIII

### WAR POWERS REVISITED AND PRINCIPLES OF FREE GOVERNMENT

As discussed in Chapter II, the Constitution is often vague on the specific assignment of powers between the legislative and executive branches. Article One, Section One, states “All legislative powers herein granted shall be vested in a Congress of the United States. Article Two, establishing the executive branch states “The executive power shall be vested in a President of the United States.” This is a significant difference.

Article One, Section eight gives Congress the power to “regulate commerce with foreign nations,” to “raise and support armies” and to “provide and maintain a navy.” It does not, however, give broad blanket power to “power to provide for the common defense”. This same section states Congress shall “have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the general welfare of the United States.” The reference to the common defense is obviously a purpose for which revenues may be raised and not an independent grant of substantial power to create any legislation Congress wishes to provide for the common defense.

Yes, you could say these and other powers are shared but this would be inaccurate. For example, the president and the Senate both have a role in the treaty making process, however,

For the Senate to assume the negotiation function, to interpret the international effect of a treaty or to bring an approved treaty into international legal effect by transmitting it to the United Nations is simply wrong. It would be akin to saying that, since both the president and Senate have a role in the appointment process, the Senate may assume the function of nominating cabinet officials and then appointing them over the president’s objections. A far more useful



analysis, in both instances (appointment process and common defense), is to recognize that the president, Senate and the Congress each have certain, specific powers that influence U.S. foreign relations with the external world" (Turner, 1991, p. 50-51).

We know declaring war is an option for Congress while the President is given the leading role for conducting diplomacy and managing hostilities. It seems that with the power to conduct negotiations, so also, in practice, goes the power to engage in hostilities (Franck & Weisband, 1979). Historical events shown in Chapters III, IV, and V show a presidential dominance in managing hostilities (those situations involving use of force or where potential for violence exists).

The Commander-in-Chief clause seems to be the executive's "trump card" for taking such initiative. Alexander Hamilton, however, in number 69 of the *Federalist Papers*, thought the power "would amount to nothing more than the supreme command and direction of the military and naval forces." Hamilton contrasted this power to the British King and his unlimited power in declaring war and raising and regulating armies and navies.

Records of the constitutional convention are not enlightening as to what the authors meant by "Commander-in-Chief." This could be construed to have meant that the title wasn't intended to be of much consequence. But then James Madison and Governor Morris perhaps would not have moved to substitute the word "declare" for "make" in Article One. Their idea was to remove from Congress and assign to the presidency "the power to repel sudden attacks".

The authors in Article One, section 10, gave the power to the states to use their militia in self-defense or to repel an invasion without waiting for Congress to declare war. Could they have meant to give the President less power than a state governor? What this shows is that, in giving Congress the exclusive power to "declare" war, they were not unaware of the possibility that America might become involved in hostilities in

other ways. Most recent presidents and their lawyers claim unlimited presidential power to begin hostilities (Franck & Weisband, 1979). The support for this isn't from the Constitution but from practice. "Between 1700 and 1870, declarations of war prior to hostilities only occurred in one case out of ten, and such declarations were also very rare after operations of war had been commenced" (Turner, 1983, p.38).

Abraham Chayes, a former State Department legal advisor, claimed that as far back as 1789 the practice of declaring war was already a decaying formality. "Recent studies indicate that during the century preceding the Constitutional Convention 'wars were frequent but very seldom declared.' Thus it is argued, the power to declare war is no more than a role in an obsolete formalistic charade" (Franck & Weisband, 1979, p. 65). Undeclared wars are now commonplace.

In earlier chapters we have seen the growing dominance of the executive in the controlling of U.S. forces abroad. These numerous examples tend to make it futile to say that presidential war-making is unconstitutional regardless of what the Constitution says because of such a regular practice of it without any meaningful challenge from Congress.

If any challenge did come from Congress certainly it would have been in the form of withholding funds. Ever since the Mexican War, initiated by President Polk without prior congressional approval, it has been argued that funds voted by Congress to support a war make up a "retroactive congressional ratification" (Franck & Weisband, 1979).

The authors of the Constitution "did convey a strong impression that a military appropriation, passed for a specific purpose, could constitute legislative approval for the use of force authorized to accomplish the purpose contemplated" (Sofaer, 1976, p. 57). More recently, presidents seemed to have claimed that by merely approving the

general annual budget appropriation for the Department of Defense, that congressional approval for a presidential war already exists.

As described in Chapter VI, the 1970's "undeclared war" syndrome had started to change. The Vietnam War was reaching lengthy proportions unlike anything since the American Revolution. Much of Congress and the public at large became disillusioned with the war.

It is ironic that such a congressional surge of power should arise from a reaction to the Vietnam War. The war was not a bad or excessive example of the executive overstepping the "war powers". In 1955 the Senate consented to the ratification of a treaty that engaged America in assisting the non-communist nations of Indo-China to defend themselves against armed aggression. "The Senate report accompanying that treaty establishes beyond a reasonable doubt that this was recognized to be a major new military commitment for the United States" (Turner, 1991, p. xii).

In 1964 Congress passed the Gulf of Tonkin Resolution which gave President Johnson authorization to do anything necessary, including the use of armed force, to help South Vietnam. It was later overturned, but for years it allowed the president to operate virtually *carte blanche*. Congress then consistently voted funds for the next ten years.

### Presidential Prerogative

A belief which illustrates the American political system is that all uses of power by the government must be related to a specific clause in the Constitution. The 10th amendment provides that "Powers not delegated to the United States by the

Constitution, nor prohibited by it to the states, are reserved for the states, respectively, or to the people” (U.S. Constitution, 1776, p. 18).

The Supreme Court case of *Ex parte Merryman* stated that our government is one of delegated powers and limited powers. It exists through the Constitution. Also, no branch should use any of the powers of government except those powers specified and granted. If this is true, did President Truman have the authority to send U.S. troops into Korea without congressional authorization? Did President Kennedy have the power to run a blockade in the Cuban missile crisis, or for that matter, to invade Cuba? Some presidents have claims which cannot be directly related to specific legislation or constitutional provisions. Examples include the impoundment of funds, use of an executive order to alter legislation or spending funds for initiating hostilities without any congressional declaration of war.

Can you call these actions encroachments of power or does the president have “prerogative?” Prerogative according to Locke is the “power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it” (Turner, 1991, p. 53). What is prerogative power? John Locke discusses several types of prerogative in Chapter 14 of his *Second Treatise on Government*. The following four quotes are from that Treatise. The first deals with emergency situations.

For the Legislators not being able to foresee, and provide, by laws, for all, that may be useful to the Community, the Executor of the Laws, having the power in his hands, has by the Common Law of Nature, a right to make use of it, for the good of the Society, in many cases, where the municipal law has given no direction, till the Legislative can conveniently be assembled to provide for it (Turner, 1991, p. 59).

This quote above refers to domestic power. The idea expressed is that the executive should be allowed to act when Congress is not in session. But, prerogative isn’t restricted to “executive measures pending legislative action.”

Many things there are which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the executive power in his hands, to be ordered by him, as the public good and advantages shall require.

A second type of prerogative concerns the intrinsic imperfection of law; its generality. These are situations when individuals “on the scene” need to make decisions. The law can only set general parameters. The executive should be able to exercise discretion within these parameters.

A third type of prerogative is based on the idea that execution of the law could bring about “positive harm.”

Tis fit that the laws themselves should in some cases give way to the Executive Power, or rather to this Fundamental Law of Nature and Government. That as much as may be, all the Members of Society are to be preserved.

Below, John Locke refers to the example of pardoning power. This power is exclusively the President’s conferred upon him by the Constitution.

For since many accidents may happen, wherein a strict and rigid observation of the Laws may do harm; (as not to pull down an innocent man’s house to stop the fire, when the house next to it is burning) and a man come sometimes within the reach of the Law, which makes no distinctions of persons, by an action that may deserve reward and pardon; tis fit the Ruler should have a Power, in many cases, to mitigate the severity of the Law and pardon some offenders.

If the law is rigidly adhered to it could result in “positive harm.” Locke is saying that the executive must occasionally act outside or against the law. Locke obviously believed the legislature should have resources available for “checking” abuses by the executive. Congress can pass legislation for as many matters or contingencies as possible or supersede the executive when abuses do occur. The legislature cannot, however, according to Locke, displace prerogative on the whole, but it may override a particular case (Holland, 1984).

President Lincoln during the Civil War took actions which were questionable as to their statutory and constitutional authority. A Supreme Court justice called Lincoln’s

suspension of habeas corpus unconstitutional. Lincoln stated that the Constitution doesn't say which branch has the power to suspend. The Chief Justice replied by asking Lincoln how a duly elected official, who must take care that the laws be faithfully executed, could disobey the law. Lincoln stated he could violate one law so that the remaining laws are faithfully executed.

Richard Nixon used a similar argument when he impounded appropriated funds to control inflation. President Truman seized steel mills during the Korean War to avert a strike which would have hurt the war effort. Regarding this action, the Supreme Court case of *Youngstown Sheet and Tube Company v. Sawyer* held that because Congress had already rejected the idea of seized after serious consideration, Truman had to give back operation of the mills to the owners. Truman, though, thought that legislative action in the area of labor disputes was not as important as the duty to protect American personnel in battle.

In the Supreme Court case of United States v. Curtiss-Wright Export Corporation, involving the sanctioning of an arms embargo, Justice Sutherland spoke on governmental prerogative.

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs (p. 7).

What is being said here is that foreign policy powers are

Intrinsic to the nature of sovereignty. The government possesses them independently of a constitutional grant. Congress can delegate these powers to the President and the Constitution gives him power to preserve the sovereignty of the United States. Sutherland's opinion is not, however, a source for executive prerogative, because he says the President's foreign policy powers derive from the Constitution. The President per se has not extra-constitutional power to deal with foreign affairs. Only the federal government has such power outside the Constitution. The Constitution gives him a power that does not itself have a constitutional basis (Holland, 1984, p. 395).

Kenneth Holland, Assistant Professor of Political Science at the University of Vermont believes the Constitution needs to allow for substantial executive power to deal with war. To keep away from a monarchy one needs to stay away from war. As complexity of foreign affairs increases, defense and war increases. This, he believes, will allow for a natural rise in presidential power.

The President might sometimes have to roam outside the Constitution, to act on the basis of power unauthorized by it, even to disregard certain portions of it, in order to achieve that higher purpose of preserving it and the nation it establishes. The Constitution, moreover, like all law, is itself a means, an instrument to a superior object - security of those unalienable rights for the sake of which governments are instituted among men (Holland, 1984, p. 395).

### Conclusions

In stating conclusions I do not wish to continuously repeat data given in earlier chapters. The amount of data is significant enough i.e., constitutional discussions, natural growth of the executive, executive-congressional foreign affairs involvement regarding events containing the use of force or violence, use of statutory and executive agreements, funding sources and inherent structural weaknesses of the legislature in conducting foreign affairs.

What all this material documents is what has happened in the past. The actions of individual presidents has expanded executive power. It became clear to members of Congress and others that certain foreign policy situations demanded executive direction and oversight. Congress has repeatedly allowed and even encouraged these executive initiatives.

The tools used by government (treaties, statutory and executive agreements etc.) show evidence of the evolving congressional-executive relationship. Inherent structural weaknesses within Congress have also offered reasons as to their support or encouragement of executive initiatives and hence, executive growth.

Examples of congressional attempts to strengthen their influence in foreign policy (1970's) were primarily reactions to the Indo-China War. Here we come to an important point. Should Congress have recourse or "checks" to curb executive actions? Yes they should - in a given situation. Should Congress be able to have blanket authority to limit executive action in future events or situations? Absolutely not. This is exactly what the War Powers Resolution attempted to do. Beyond all this we come to specific reasons which clearly show the War Powers Resolution of 1973, to be unconstitutional. Indeed, it should be repealed.

Upon reading the Resolution, it appears to have the effect of law. If this is true it is an encroachment upon independent presidential powers. Quoting again from Chapter VIII,

Under the Constitution, as long as Congress provides the Commander-in-Chief with an army or navy it is his to deploy and utilize as he deems necessary with the single exception that if he concludes it is necessary to initiate offensive war against another state, he must first obtain the statutory approval of both houses of Congress (Turner, 1991, p. 110).

Does this seem to be on the same wave length as Section 3 of the Act which demands that the president consult with Congress whenever possible prior to committing armed forces? Keep Congress informed yes, but to compel the president to do so? It is well known that in constitutional law Congress cannot force the president to supply sensitive national security material that in his estimation should be held within the executive branch.

Section 4 demands detailed reports within forty-eight hours of whenever U.S. forces are placed into "hostilities." These "deails" deal with the scope and duration of military operations which Congress treats as a legally binding commitment. If the president departs from them (which conditions may force him to do) Congress would be quick to accuse him of lying or breaking the law.



Section 5 (b) again, demands the president withdraw forces from any situation where “imminent involvement in hostilities is clearly indicated by the circumstances” if Congress hasn’t acted to authorize their ongoing presence within 62 days. We know the president must have approval of both houses of Congress in advance of initiating a conflict. Like all other exceptions to the president’s powers, the power to declare war was intended to be viewed narrowly. Although it allows Congress to prevent a presidential action to start an offensive action, it does not allow Congress the power to take control of the president’s independent constitutional powers simply on the idea that any executive mistakes might bring another state to begin aggression against the United States.

Also, what message are we sending to other nations. Consider yourself an ally or enemy of the United States or even a country wishing to align itself with America. You discover that the president’s powers as Commander-in-Chief are good for only several months. After that a huge, unorganized legislature is in command. We discover that Congress has determined in advance, if it can’t make up its mind whether the president is right or wrong, it will assume as a matter of law that he is wrong.

The judicial branch has had its impact also. Consider the case of Immigration and Naturalization Service v. Chadha which determined the “legislative veto” effect of a concurrent resolution allows Congress to legislate by bypassing the procedures set out in Article One which stipulate that laws must be passed by a majority of both houses of Congress and be presented to the president for passage. This case renders the legislative veto unenforceable. These arguments coupled with foreign policy history which documents the growth and initiative allowed and sometimes given to the executive by Congress stands in total contrast to the actions of the 1970’s where Congress attempted to limit the president’s powers as Commander-in-Chief.

Ultimately I believe it is constitutional interpretation which shows the War Powers Resolution of 1973 to be unconstitutional. The discussion in Chapter VIII illustrates this. John Locke was a primary influence on many of our founding fathers. His ideas and beliefs permeate much of what is now contained in the Constitution. Presidential prerogative in its several contexts, i.e. emergency situations, law and its generality and the concept of “positive harm,” give the president the ability to, if needed, act outside the realm of the Constitution, even disregard it in order to achieve the higher aim of preserving it and the nation it represents.

We have examined and contemplated our constitutional foundations regarding foreign policy between the executive and legislative branches, the historical practice of presidential dominance in managing events involving violence or use of force, the natural growth of the executive branch, inherent structural weaknesses of Congress and constitutional interpretations on presidential prerogative. The question on the constitutionality of the War Powers Resolution of 1973 should be clear.

Although the Resolution’s constitutionality and its use have not been on the front burner of American politics for some time, its importance is not diminished. Even though many congressional members are having second thoughts about it doesn’t mean they won’t invoke its powers. “Even a non-functioning (and unconstitutional) law can serve political purposes if the situation becomes sufficiently dangerous. That may be why, despite the widespread acknowledgement of its infirmities by congressional leaders, the War Powers Resolution remains on the statute books” (Turner, 1991, p. 164).

Today, with the downfall of the Soviet Union bringing an end to the cold war, America is reevaluating its military role in world affairs. Gone may be the days of massive, overwhelming firepower. Ethnic and national tensions have broken out all

over Europe and the Middle East. Creating “safe havens,” “no-fly zones,” “humanitarian relief” and working with allies to intimidate but not actually engage aggressors is how America will be projecting much of its power in the future. As of this writing, the situation of ethnic cleansing taking place in Yugoslavia is an example of how the United Nations and other countries are determining policy which may or may not involve U.S. troops.

Many believe the true measure of America’s diplomatic clout will always be the military resources we are willing to commit. For the United States to speak with a unified voice, make decisions on what is often a short timetable and avoid legislative micro-management of foreign policy, presidential prerogative should not be binded by congressional restraint.

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