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Recommended Citation

Katzenbach, Nicholas deB. (1970) "Congress and Foreign Policy," *Cornell International Law Journal*: Vol. 3: Iss. 1, Article 3.
Available at: <http://scholarship.law.cornell.edu/cilj/vol3/iss1/3>

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Congress and Foreign Policy[†]

NICHOLAS deB. KATZENBACH*

Neither the President of the United States nor any of his principal officials charged with foreign policy responsibilities doubts the involvement or power of Congress in foreign affairs. Visible evidence of that power can be found throughout the statute books in laws authorizing and funding foreign diplomatic and military activities, regulating foreign commerce, providing economic and military assistance to foreign nations, and ratifying treaty obligations. Members of Congress devote considerable time and attention to these formal assertions of the Congressional role and far greater amount of time and energy is spent by them, and by the Executive Branch, in informal consultation. Top officials of State and Defense spend substantial amounts of their time, at least as much as their colleagues in other departments, on Congressional relations and securing legislation on foreign aid occupies most of the time of the AID Administrator. There is genuine respect for the power of Congress — though not always for the views of its members.

Congress does not see the problem in the same light. There is considerable concern currently being expressed over the loss of Congressional influence. In a recent report the Senate Foreign Relations Committee said:

Our country has come far toward the concentration in its national executive of unchecked power over foreign relations, particularly over the disposition and use of the armed forces. So far has this process advanced that, in the committee's view, it is no longer accurate to characterize our government, in matters of foreign relations, as one of separated powers checked and balanced against each other. The Executive has acquired virtual supremacy over the making as well as the conduct of the foreign relations of the United States.

[†]Irvine Lecture Delivered at The Cornell Law School on May 9, 1969.

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The principal cause of the constitutional imbalance has been the circumstance of American involvement and responsibility in a violent and unstable world. Since its entry into World War II the United States has been deeply, and to a great extent involuntarily, involved in a series of crises which have revolutionized and are continuing to revolutionize the world of the 20th century. There is no end in sight to these global commotions; there is no end in sight to deep American involvement in them.¹

This particular statement was, of course, touched off by dissatisfaction with Vietnam in particular and uneasiness about the extent of our foreign involvement generally. It was, therefore, a part of the crisis of confidence that affects the conduct of foreign affairs today. There is no consensus within the Congress or within the committee as to what changes should be made in our policy or even in its method of determination. Institutional loyalty is reflected in agreement by congressmen that Congress should play a greater role, but there is little real agreement on what that role should be.

The President needs the support of Congress for his foreign policy. He needs it because Congress, through its elected members, is probably his most important means of getting public support within the United States. He needs Congressional support because the United States cannot speak or act effectively with foreign countries if domestic division casts doubt upon what it says or does. He needs it because Congress can, and sometimes does, cripple and frustrate a particular foreign policy through legislative restrictions or refusal to appropriate funds.

This common wisdom is reflected by Presidential commitments to a "bi-partisan foreign policy" and by saying that "politics stops at the water's edge". It is reflected also by Congressional reluctance, at least in times of crisis, to criticize Presidential action. The President can and does play on feelings of patriotism and the need for unity. But unless the unity is genuinely there or the Presidential action quickly and demonstrably a success, he may pay a heavy political price for acting on his own. Vietnam and the dispatch of marines to the Dominican Republic in 1965 — in different degrees — serve to illustrate the point.

In general we have had an extremely successful bi-partisan foreign policy for the past quarter of a century and it has enjoyed, perhaps for that reason, a large measure of both Congressional and public support.

Today the agony of Vietnam has led the public and the Congress to question the relevance of that policy to the contemporary world and to raise questions which once seemed to have easy answers and which today are far more difficult to explain. In part these questions have been

1. S. Rep. No. 91-129, 91st Cong., 1st Sess. (1969).

raised as procedural and constitutional issues — by inquiry into the proper role of Congress.

One could argue that the role of Congress in its relationship with the Executive is not very important if there is general agreement on the policy which is being followed. Essentially procedural points can seldom be made effectively if they do not have a substantive objective. If students, for example, are wholly happy with the decisions of university administrators they are unlikely to spend time and energy trying to affect the decision-making process. And I believe the same is true with respect to foreign policy.

But a decision-making process should be examined for its capacity in times of crisis and difficulty as well as in times of relative agreement. And so I think this is a good time to examine and seek to understand the role of Congress in foreign policy.

The Constitution says relatively little about how foreign policy decisions should be made and foreign relations conducted. Even in the far calmer climate of this nation's infancy when — ironically — our foreign policy was "to steer clear of permanent alliances, with any portion of the foreign world" — the Founding Fathers appreciated the complexity of foreign affairs. They recognized that the voice of the United States in foreign matters was, of necessity, the voice of the Executive. Consistent with that basic necessity, they provided for the participation of Congress in a number of ways, direct and indirect. They did not seek a simple formula nor try to engrave the lines of authority comprehensively or clearly. Throughout our history the focus has always been upon the Presidency, and it is difficult to imagine how it could be otherwise. Jefferson put it succinctly: "The transaction of business with foreign nations is Executive altogether."

I think it is fair to say, as virtually every commentator has in fact said throughout our history, that under our Constitutional system the source of an effective foreign policy is Presidential power. His is the sole authority to communicate formally with foreign nations; to negotiate treaties; to command the armed forces of the United States. His is a responsibility born of the need for speed and decisiveness in an emergency. His is the responsibility for controlling and directing all the external aspects of the Nation's power. To him flow all of the vast intelligence and information connected with national security. The President, of necessity, has a pre-eminent responsibility in this field.

This was always the case. John Jay observed in *THE FEDERALIST* that the Presidency possesses great inherent strengths in the direction of foreign affairs: the unity of the office, its capacity for secrecy and speed, and its superior sources of information.

But, as Professor Corwin has said:

Despite all this, actual practice under the Constitution has shown

that while the President is usually in a position to propose, the Senate and Congress are often in a technical position at least to dispose. The verdict of history, in short, is that the power to determine the substantive content of American foreign policy is a divided power, with the lion's share falling usually to the President, though by no means always.²

The Constitution left to the judgment and wisdom of the Executive and the Congress the task of working out the details of their relationships. Disagreements susceptible of decision by the Supreme Court have been rare. As a result, controversies over the line of demarcation in foreign affairs have been settled, in the end, by the instinct of the nation and its leaders for political responsibility.

In leaving the job of working out the details of this relationship to the judgment and wisdom of the Executive and Congress, the framers of the Constitution acted wisely. Certainly they did not eliminate dispute as to power or role; we have had that from the outset of our history. Nor did they eliminate the possibility that the Executive, acting unwisely, could plunge this country into disastrous wars, although that was a concern. Nor did they insure that the Congress could not frustrate the wisest and most productive foreign policy imaginable.

They did not do and could not have done any of these things. They could and did insure that neither the President nor the Congress could long do without the other in the conduct of foreign affairs. They did recognize the need for Presidential initiative to an extent that they did not contemplate it in domestic matters. In the context of the times such initiative was not a particularly important one. If Presidential initiative is far more important today, as it undoubtedly is, it has also evolved in the domestic arena in ways not contemplated in our early history.

We have experienced, therefore, not only a dramatic growth in United States involvement in world affairs, but also a growth of Executive initiative and leadership in all fields. Clearly these developments have made more difficult an application of the flexible Constitutional formula. But we would do well to remember that it has never been an easy formula to apply, even early in our history.

Members of Congress have frequently criticized acts of the Executive as exceeding his power when acting without the support of a Congressional vote. Early examples are President John Adams' use of troops in the Mediterranean, President Jefferson's Louisiana Purchase agreement, and President Monroe's announcement of his famous Doctrine. In 1846 President Polk sent American forces into the disputed territory between Corpus Christi and the Rio Grande River, an action which began the

2. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS: 1787-1948; HISTORY AND ANALYSIS OF PRACTICE AND OPINION* (1948).

Mexican War. Presidents Roosevelt, Taft and Wilson frequently used American armed forces without authorization by Congress in protection of U.S. lives and property in Latin America and the Caribbean. While Congress was not consulted in any formal way in advance, during that period of our history the acts were generally popular, and in many instances both houses of Congress gave retroactive approval to Presidential action.

It can be maintained, as the Senate Foreign Relations Committee currently does, that Franklin Roosevelt expanded Executive power in foreign affairs to an unprecedented degree. Acting on Presidential authority alone, he exchanged overage American destroyers for British bases in the Western Hemisphere, committed American forces to the defense of Greenland and Iceland, and authorized American naval vessels to escort convoys to Iceland provided at least one ship in each convoy flew the American or Icelandic flag. All of these actions were justified as an emergency use of Presidential power. But there can be little question that, despite President Roosevelt's belief in the wisdom and necessity of these acts, he took them on Executive authority alone because he did not believe that the ensuing Congressional debate, should he have put the matters to Congress, would have been consistent with our national interest. The political problem, of course, disappeared with the Japanese attack upon Pearl Harbor, though the Constitutional problem and precedent remained.

Throughout our history, as currently, Congressional concern has most often been focused on two exercises of Presidential authority which are particularly troublesome from both a political and Constitutional view. The first of these is the Presidential power to use the Armed Forces of the United States. The second is the power of the Executive to engage the United States in various kinds of "commitments" to foreign governments. Congress sees the first as related to its Constitutional power "to declare war" and the second as related primarily to the treaty power, but also to more general authority delegated to the Executive by statute. There is a wealth of conflicting historical precedent and Constitutional argument on both issues.

I doubt it is fruitful to rehearse legal arguments with respect to the Constitutional provisions in any detail. Clearly they do reflect the view that both the President and the Congress have a voice — the power over foreign policy is divided. But we cannot find the answers to an effective foreign policy in a recitation of specific Constitutional provisions "all of which," as Professor Corwin noted, "amounts to saying that the Constitution, considered only for its affirmative grants of power which are capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy."³

3. *Id.*

If it is true, as I have said, that neither can succeed in this struggle and that what is essential is cooperation between the President and the Congress, the problem is less a Constitutional issue than a political one. How, within the quite broad confines of the Constitution, can the political system be made to produce a workable foreign policy? And to what extent is this possible if there is a genuine division of view in the country as there seems to be today?

The accepted fact that it is the President who must speak for the country and the modern tradition of bi-partisanship in foreign policy only complicate the matter. On domestic problems the Executive can operate successfully on quite narrow Congressional margins if need be, and employ partisan politics to the extent that it proves helpful to secure legislative authority. But often in foreign affairs he feels correctly that the effectiveness of the policy he espouses depends on his ability to convince other nations that it will not significantly or abruptly change with a new Congress or even with a new President. We have been operating in the post-World War II world on the assumption that long-term relationships, whether military alliances or economic programs, are important. And so, understandably, have many other nations whose leaders have made significant political commitments in their countries and to their peoples on the assumption that the United States will, for example, maintain certain trade policies or levels of capital flow. Our ability to influence others often depends on their assessment of the constancy of our policy. This is a function of our size, our wealth, and our power in today's world. What we do, or what we fail to do, influences other nations whether we want to influence their decisions or not. As Prime Minister Trudeau of Canada recently remarked, "Being a next-door neighbor to the United States is like being in bed with an elephant."

Let us examine the power to use the armed forces of the United States. To resort to armed force, for any purpose, is clearly a major, and conceivably the ultimate decision, in terms of the exercise of governmental authority. More than any other act it requires, or ought to require, the maximum in terms of consensus. It should be supported by the Congress of the United States and whatever is necessary to insure the broadest kind of public support should be done. Clearly it was this sort of consideration which led the authors of the Constitution to temper the President's power as Commander-in-Chief with the power of Congress to declare war and to raise armies. The President was not empowered to plunge the United States into war without Congressional sanction.

It has long been recognized that even this seemingly clear principle has difficulties in application. At the time the Constitution was written the declaration of war itself was an important international act. War itself was regarded as an appropriate means of effecting national objectives. The declaration of war, as a political act, had important international

significance. It affected, for example, the rights of neutrals vis-à-vis belligerents. Today all that has changed. War is no longer an accepted or acceptable act; the use of armed forces is, by international fiat, outlawed save in self-defense. The declaration of war, as such, no longer has international significance.

This interaction between accepted international doctrine, expressed in the U. N. Charter and sanctioned by the Congress of the United States, and the language of the Constitution, is troublesome. Viewed from the point-of-view of the separation of powers and the need for Congressional participation, the policies expressed by giving Congress the power to declare war remain valid. But viewed externally, as a national act, the declaration of war is itself no longer appropriate.

A further difficulty arises because even in terms of our own Constitutional doctrine, the Congressional power has always been subject to the exception that the President may employ the Armed Forces in self-defense against attack without the need for Congressional action. At least verbally this appears to have a relationship to Article 51 of the U. N. Charter which permits the use of Armed Forces in self-defense. And in an era in which U. S. forces are stationed in dozens of countries around the world — and which any use of force by anyone involves the possibility of large scale warfare — there is the danger that the power of Congress could be quickly emasculated.

The nature of both the world political system and the U. S. role in it, coupled with modern technology of warfare, has greatly complicated the problem of giving Congress a real voice in this most important of political acts, the engagement of U. S. forces. Any time the safety of U. S. troops stationed anywhere in the world is threatened there is a strong likelihood of a need for a quick response. Once engaged, it is often difficult, politically and militarily, to disengage.

Put differently, I doubt the President is likely to use force in a major way without the certainty of Congressional sanction, at least after the fact — when the prestige and emotions of the United States are already engaged and when the Congress, accordingly, is left little option. But in such an event the decision of Congress is not the same decision that the President made. He may have had choices as to the nature and magnitude of the response. The Congress may not, for it must make its decision in the context of a response already made. The facts have changed. Whatever one thinks of the Presidential decision involved, it is clear that the decision to use U. S. forces in Vietnam or the Dominican Republic was of a different type than the decision to withdraw them. In short, the President has a great capacity to put the Congress on the spot in circumstances in which it has little real choice but to back him. The Congress knows this, does not like it, and is floundering around in search of better solutions.

The problem of appropriate political process is further compounded by the system of alliances built up since World War II. If military alliances are to be effective, they must be credible; a certain amount of expectation as to prompt reaction needs to be built in. This is necessary to deter the enemy and necessary to keep ones allies. That is, after all, one important reason why so many U. S. troops are stationed abroad. While U. S. treaties formally reserve the right of the U. S. to determine for itself what is appropriate action, often with a reference to a decision made in accordance with its Constitutional processes, it is by no means clear that the time element will always be sufficient to permit Congressional action of a meaningful sort. That may or may not be the case. But to the extent either an ally or an enemy believes that the issue of U. S. involvement under appropriate circumstances could become a matter of prolonged political debate, the treaty is that much the less credible.

There is, in my judgment, no formal way of avoiding the kinds of problems that I have described. The President has great powers with respect to the use of the Armed Forces, and these powers have multiplied in the context of the U. S. position in the world today. But this does not mean that a President is likely to abuse those powers, or that he means to do so, or that he is not interested in the maximum of Congressional support and advice. While it is possible that he may do so, I believe that no President wishes to take action of such a serious nature without being confident that he has the support of Congress and the people for what he is doing. If there is an opportunity to seek such advice he will ordinarily, formally or informally, depending on circumstance, do so.

It may be a serious mistake for Congress to concentrate on the formalities of its role. In the world today the Congress is not well equipped to make many of the decisions which, however important, are pressed by time and circumstance. Presidential action with respect to the Cuban missile crisis presents a clear cut case where, despite the grave importance of the action contemplated, there was no adequate and secure mechanism for President Kennedy to consult with Congress. He did meet with Congressional leaders shortly before he announced his decision. This was a courtesy to the leadership, designed to secure their support in a time of crisis, but scarcely a suitable device for giving them a real role.

Let me turn to the other problem which bothers Congress, the problem of Executive commitments. From a legal and Constitutional viewpoint the Executive is scrupulously careful not to make binding commitments of the United States without either submitting these to the Senate for ratification as treaties, or acting within existing legislative authority. In this formal sense Congress has no legitimate complaint.

Yet it is true that diplomatic intercourse unavoidably creates expectations and thus affects decisions, even decisions not yet authorized or

made. Sometimes, though rarely, a representative of the United States goes further than, in hindsight, he should have gone. If, for example, one is seeking to encourage a foreign government to reduce its defense budget and increase its expenditures on economic development, it is difficult to avoid encouraging a belief as to future U. S. action on which the reform depends. There is no legal prohibition on the Executive from promising a level of U. S. support subject, of course, to Congressional action authorizing and appropriating the necessary funds. Yet Congress is understandably irritated if this "commitment," however properly qualified, is then invoked as an argument in favor of the necessary authorization and appropriations.

The underlying problem, of course, is that Congress persists in treating necessarily long term programs as though they were not. It insists upon an annual review and declines to make a formal commitment to the long term. If this formal review were taken seriously in more than the formal sense I have indicated, it would be impossible to conduct a sensible foreign assistance program. Long term economic objectives cannot be accomplished on a hand-to-mouth basis.

In addition, Congress has the habit of dealing legislatively with specific problems. The fact that a number of different Congressional committees deal with different aspects of foreign policy complicates the job of the Executive. It is hard enough for the President to pull together the Executive Branch of government in consistent ways. It is even more difficult to get the Congress of the United States to appreciate that what one committee does may, in the field of foreign affairs, undo the efforts of another. Difficult and controversial pieces of legislation, such as that authorizing the AID Program, are riddled with prohibitions and requirements which are specific, ill-thought out, damaging to our overall objectives, and occasionally of dubious Constitutionality. Legislation affecting sugar quotas could be an important tool of foreign policy within a limited area, but almost never does the Congress pay the slightest attention to the recommendations of the Secretary of State. Sometimes such specific provisions end up in a piece of legislation as the result of misinformation, misunderstanding as to their consequences, and a touch of demagoguery. Legislation affecting our trade or economic assistance to countries doing business with North Vietnam, or with Cuba, are clumsy diplomacy. There are many examples of this kind of prohibition — prohibitions which can seriously affect other goals of the United States which the Congress, in a calmer mood, might well endorse.

This sort of ad hoc action by the Congress serves to aggravate relations between the Congress and the Executive with respect to foreign affairs. Professionals in the Department of State tend to see Congress as a necessary evil, a view annually documented for them by the more frustrating and less informed amendments to our foreign relations law. When these

provisions, in their view, seriously handicap the conduct of foreign policy, there is an unavoidable tendency on their part to seek to minimize that impact. They tend to look for loopholes in or interpretations of the law which will permit them to avoid its most serious aspects. Congress, on the other hand, views this tendency as subverting its influence, and has no confidence that its voice will be heard and its views influential, unless it acts with the force of law — a force too rigid to deal with many subtleties in many situations.

In many respects I feel the problem of Congress and foreign policy is the product of misunderstanding. The Congress misunderstands its role — the points at which it could be effective and influential — and the Executive is little help. The result is too often a mutual distrust and disrespect. Perhaps the organization of Congress, its formal techniques of control, and the nature of foreign policy make this inevitable. But I hope that is not the case.

The role of Congress, the role which it can best play, is in helping to formulate and understand the broad outlines of our foreign policy. It cannot, and does not, deal well or effectively with details. If it feels that today the United States has too many commitments abroad, economic or military, and that our foreign policy is too comprehensive when it should be selective; if it believes that our military forces are overextended; then it should give some guidance to the President on where and how, in broad outline, our policy should be modified. Surely Congress can and should appreciate the fact that while stationing troops abroad may serve to deter military actions by others, it is also a source of potential involvement.

It should recognize and seek to assess potential gains against potential dangers at the time when that decision is appropriate, not after the die is effectively cast. Let me offer one concrete example. For the past eight years Secretaries McNamara and Clifford have testified at length as to the diplomatic and military assumptions which underlie our foreign policy. What they called a "posture statement" was and remains the bible of our involved foreign policy. It was the foundation of the Defense Department budget, and it laid out in broad terms our every diplomatic premise. It was also an annual invitation to the Congress to discuss and debate the fundamentals of our foreign policy. Yet it was virtually ignored by Congress.

These are difficult times in which to conduct our foreign policy, because there is much doubt and much debate. It will be the natural tendency of the Administration to seek to avoid such debate — a debate which in the present climate could seriously jeopardize legitimate goals. The Congress will, I suspect, use its specific powers to snipe away at some aspects of our foreign policy and seek a larger voice in its formulation. Such a situation could be dangerous. For it is clear that Congress

can greatly handicap the President in the conduct of foreign policy and it is clear that the President needs the support of Congress.

I think a new Administration needs time to think through its problems and its long range objectives. I think when it has done so, it would be healthy for the country as a whole if these could be discussed, as candidly and frankly as security permits, with the Congress. And I would hope that in such discussions it will be possible for the country to secure for itself the same basic agreement that, by and large, it has enjoyed in the postwar period.

What the country needs at this time is a review and reassessment of fundamentals. Without it we will continue to be faced with doubts, with inconsistent laws, and with the dangers of Congressional-Executive confrontation. In such a situation both the President and the Congress will lose control. Neither can gain and the shrill voices of the right or the left will lead us on a crooked path.

Whether the President and the Congress can find accommodation I do not know. We can hope that current controversies will again be settled, as they have been in the past, by the instinct of the nation and its leaders for political responsibility.

