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REMARKS

*Robert A. Friedlander**

Foreign Policy and the Separation of Powers: Who Sets the Course for the Ship of State? **

At the beginning of the present decade, before the Iran-Contra affair had become a matter of national political controversy, Chairman Dante Fascell of the House Foreign Affairs Committee announced that Congress was an equal partner in foreign policy with the President of the United States.¹ Jeane Kirkpatrick, former U.S. Ambassador to the United Nations and current political science professor, has referred in her widely-syndicated newspaper column to a contest between the Legislative and Executive Branches "over control of U.S. foreign policy."² On June 30, 1987, the Senate Foreign Relations Committee passed out by a strict party vote of 10 to 9, a bill requiring the application of the War Powers Act to the Persian Gulf, which sought to restrict the intro-

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The views expressed in this Article are solely those of the author and do not necessarily represent the opinions of the Committee on Foreign Relations or the Committee on the Judiciary of the United States Senate.

** This Article was presented in somewhat different form at the Bicentennial Symposium of the Cornell University Federalist Society, Ithaca, New York, in September, 1987.

1. Fascell, *Congress and Foreign Policy*, 7 CONG. STUD. 5, 7 (Winter 1980). A later, toned-down view of the congressional role in foreign policy can be found in Fascell, *Congress and Arms Control*, 65 FOREIGN AFF. 730, 731-33 (1987). Liberal historian Arthur Schlesinger, Jr. goes so far as to claim: "In the field of foreign relations the Constitution commands a partnership between the Legislature and the Executive." Schlesinger, "The Legislative-Executive Balance in International Affairs: The Intentions of the Framers," speech delivered at Conference on "The Constitutional Legislative-Executive Relations in International Affairs," Center for Strategic and International Studies (Washington, D.C., Sept. 15, 1986).

2. Kirkpatrick, *Iran-Contra Affair: Policy Tug-of-War*, The Blade (Toledo), July 6, 1987, at 8, col. 3.

duction of United States Armed Forces into the Gulf when used as protection for both U.S. tankers and foreign ships reflagged as American ships.³ This bill would have subjected all U.S. naval and air operations in the Persian Gulf to the limitations of the War Powers Act, despite the United States naval presence in that area for more than four decades.

The concept of the War Powers Resolution of 1973, and its subsequent amendments,⁴ is at the very heart of the vigorous and continuing debate over the original intent of the Framers,⁵ or what some prefer to call the Constitution's original meaning.⁶ The War Powers of the President, and the Congress, and their differing interpretations of the Separation of Powers, were the primary focus of an especially acrimonious controversy between the two Branches over the American presence in the Persian Gulf and the reflagging of Kuwaiti ships. For example, Senator Sam Nunn (D.-Ga.), a highly respected spokesman on national defense and national security issues and a leading critic of the Reagan Administration in both areas, argued that reflagging represented "a military policy which lacks strategic purpose and which is unlikely . . . to receive sustained support from Congress and the people."⁷ Despite appearances, this is not a statement raising the question of Separation of Powers. It is, instead, an indication of the periodic congressional desire, usually manifested at a time of decline in presidential popularity, to control or micromanage foreign policy.

The question of who controls American foreign policy quickly became a major issue at the Iran-Contra hearings in the summer of 1987. "Who's running the Government?," asked Senator Paul Sarbanes (D.-Md.), during the testimony of Marine Lieutenant Colonel Oliver North.⁸ "Where," demanded Congressman Thomas Foley (D.-Wash.), House Majority Leader, "is the accountability?"⁹ To outside friends

3. See *Persian Gulf and the War Powers Resolution, Report Together with Additional Views, Comm. on Foreign Relations*, S. REP. NO. 106, 100TH CONG., 1ST SESS. 8 (JULY 10, 1987).

4. 50 U.S.C.A. §§ 1541-48 (1982).

5. See generally THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (The Federalist Society ed. 1986).

6. See Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 511-27 (1964).

7. Nunn, *It Looks like Lebanon All Over Again*, USA Today, July 15, 1987, at 8A, col. 2. The Persian Gulf was given much attention by the television news media from February, 1987, through April, 1988. Ironically, media coverage during most of the 1988 presidential primary campaign barely mentioned events in the Persian Gulf. S.R. LICHTER, D. AMUNDSON & E.R. NOYES, THE VIDEO CAMPAIGN: NETWORK COVERAGE OF THE 1988 PRIMARIES 21 (1988).

8. The Blade (Toledo), July 16, 1987, at 6, col. 3. Iran-Contra refers to an allegedly unlawful plan by members of the Reagan Administration to sell weapons to Iran and use the profits to finance the operations of the Nicaraguan Resistance group popularly known as the Contras.

9. *Id.* at col. 4. The Tower Commission, the independent presidential commission appointed by President Reagan to review the Iran-Contra Affair, clarified the issue without resolution when it declared: "The Constitution places the President and the Congress in dynamic tension." REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD II-1 (Feb. 26, 1987).

and allies, including the quixotic French, the continuing struggle over who should shape American foreign policy is as bewildering as it is fascinating. One correspondent of the prestigious French daily newspaper, *Le Monde*, viewed the special Iran-Contra hearings as an "unhealthy revival of the eternal battle between the legislative and the executive for the control of foreign policy."¹⁰ That battle, in fact, has been continually waged since the earliest days of the Constitutional Republic.¹¹

Dr. Jeane Kirkpatrick maintains that even before the Iran-Contra Select Committee Hearings, "[i]n foreign affairs particularly, Congress has stretched the powers of the purse and of oversight beyond recognition or reason. . . ."¹² Yet, she also suggests that the Framers would not have been surprised by the hearings themselves, because the authors of the *Federalist Papers* anticipated legislative encroachment. However, her disappointment is manifest with the failure of the Reagan Administration to assert the Separation of Powers Doctrine more vigorously.¹³

Senator William S. Cohen (R.-Me.), one of the most prominent Select Committee Republican critics of the President and his aides in the Iran-Contra affair, insists that the Founding Fathers intended governmental powers to be diffuse, thereby creating an institutional system of checks and balances. Cohen declares that "[t]he Founding Fathers decided that power necessarily had to be entrusted to someone, but that no one could be trusted with power."¹⁴ This is a felicitous phrase, even if devoid of real meaning. Contrast the remark of the distinguished historian of the Constitutional Convention, Clinton Rossiter, that the proposed president was "to be a strong, dignified, largely nonpolitical Chief of State and government."¹⁵ Concern over the use and potential abuse of power did not prevent the Framers from providing an enduring system of governance.

Former Congressman (R.-Ill.) and evanescent Presidential candidate, John B. Anderson, predicted at the beginning of August, 1987, that as a result of the Iran-Contra Hearings, "Congress will be emboldened to serve as a coadjutor with the President in the design and execution of foreign policy."¹⁶ Clarification of this comment can be found in Chairman Fascell's statement that Congress intends to co-manage American foreign policy.¹⁷ The House International Relations Committee (as it was called then) admitted this controversy's existence ten years

10. Kirkpatrick, *Congress Invades Reagan's Turf*, *The Miami Herald*, Aug. 2, 1987, at 3C, col. 3.

11. See the analysis of J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 189-93 (3d ed. 1983).

12. Kirkpatrick, *supra* note 10.

13. *Id.*

14. Cohen, *Iran-Contra Hearings: They Taught Us A Valuable Lesson About Proper, Improper Use of Power*, *The Miami Herald*, Aug. 9, 1987, at 8F, cols. 1-2.

15. C. ROSSITER, *1787: THE GRAND CONVENTION* 221 (1968).

16. Anderson, *A Chastening of Presidential Power*, *Los Angeles Times*, Aug. 12, 1987, Pt. II, at 5, col. 3.

17. See *supra* note 1.

ago in a Committee Print, when it referred to a "continuing controversy over the division of responsibility between Congress and the Executive Branch on questions of policy management."¹⁸

According to John Anderson, a successful president must communicate his ideas and defend his policies in order to "gain a consensus of support from both the people and their representatives."¹⁹ Here again, Anderson is clearly in error, for his high-sounding words are not at all indicative of how the system works. He is, in effect, proposing a parliamentary style of governance, not the American Constitution's Separation of Powers. Anderson is not the only one to propose changing the essence of our Constitution. An eminent legal scholar, Arthur S. Miller; a prominent Washington lawyer from the Democratic Party, Lloyd Cutler; and a distinguished journalist, Joseph C. Harsch, have advocated transforming our political process into a parliamentary-type democracy.²⁰

More appropriate to the functioning of our tripartite form of government is the observation of a UCLA sociology professor: "The effective president articulates his own goals first, then finds the mandate for carrying them out. If he doesn't get it immediately, he won't abandon his goals, for there is always a possibility that public opinion can be brought into line through persuasion, education, or even manipulation."²¹ In other words, presidents can rally public opinion to their special cause by using what Theodore Roosevelt termed "the Bully Pulpit."²²

I. Separation of Powers and Original Meaning

The operation of checks and balances between the three major branches of government is the concomitant result of the conscious creation by the Framers of a Separation of Powers. The parameters of that separation were left purposefully imprecise by the men of Philadelphia, though its general outlines have always been discernible. It is, nevertheless, too much to claim, as has one noted political scientist, that the constitutional elements of the presidential office are "extraordinarily loose in definition," due in part to the Framers' reliance on the inevitable first Presi-

18. HOUSE COMM. ON INTERNATIONAL RELATIONS, 95TH CONG., 1ST SESS., CONGRESS AND FOREIGN POLICY-1977 1 (Comm. Print 1978) (quoting HOUSE COMM. ON INTERNATIONAL RELATIONS, 94TH CONG., 2D SESS., CONGRESS AND FOREIGN POLICY-1976 1 (Comm. Print 1977)).

19. Anderson, *supra* note 16, at 5, col. 5.

20. Cf. Bonafede, *Reform of U.S. System of Government Is on the Minds and Agendas of Many*, NATIONAL JOURNAL, June 29, 1987, at 1521-22, 1524; Harsch, *Presidential Work*, The Christian Science Monitor, Aug. 25, 1987, at 11, col. 1; Miller, *Impeach? A Hollow Remedy*, The Miami Herald, Aug. 2, 1987, at 1C, col. 3; Lacayo, Holmes, & Ludtke, *Is It Broke? Should We Fix It? Changing the Constitution Is Not Easy, But Plenty of People Keep Trying*, TIME, July 6, 1987, at 54.

21. Alexander, *Personal Politics*, THE NEW REPUBLIC, Apr. 6, 1987, at 12.

22. See J.D. BARBER, THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE 5 (1972).

dent, George Washington, "to invent a tradition as he went along."²³

The impressive figure of George Washington undoubtedly loomed large in the delegates' minds as they fashioned Article II. Charles Mee, who has written a well-received popular history of the Constitutional Convention, gives cautious support to the notion that "the framers of the constitution shaped the office of chief executive around Washington . . . and would not have designed the office as they did had he not been there to fill it."²⁴ Nevertheless there is no basis for the claim of former White House Chief of Staff, and former Senate majority leader, Howard Baker, that Congress does not have the right to "limit the president's authority under the Constitution to administer the foreign policy of this country."²⁵

This, of course, forms the crux of the debate over who makes foreign policy, who implements foreign policy, and who can place limitations on foreign policy under the United States Constitution. Is foreign policy merely within the purview of the Executive Branch? If so, why does the Constitution vest the Legislative Branch with a role in the treaty process and the authority to declare war?²⁶ Why does the Judicial Branch have the Article III right to decide cases involving ambassadors, treaties, and disputes arising between the U.S. and another party?²⁷ Congress also controls the executive's ability to finance its foreign policy activities.

No matter whose notes to the Convention debates are consulted, there is not much debate beyond that on the war powers addressing foreign policy. The recently published Convention notes of John Lansing, Jr. reveal only five references to foreign policy issues between May 14 and July 10, 1787.²⁸ These references fall into two categories—war and treaties.²⁹ The treaty-making power was specifically raised by Alexander Hamilton on June 18th, given a priority status by Luther Martin's proposal that treaties should be the supreme law of the land on July 17th, and finally resolved, to all intents and purposes, on September 4th.³⁰ The question of making versus declaring war arose on August 17 and was debated during that day and the next. The war-declaring power was given to the Congress. The war-conducting power was left to the Execu-

23. *Id.* at 4.

24. C. MEE, *THE GENIUS OF THE PEOPLE* 118 (1987).

25. Quoted in Editorial, *The Contras after Iranamok*, *THE NEW REPUBLIC*, June 28, 1987, at 7. This also seems to be the current position of Henry Kissinger and Cyrus Vance. S. Graubard, *Presidents: The Power and the Mediocrity*, *The N.Y. Times Book Review* (Jan. 15, 1989), at 36-37.

26. U.S. CONST. art. I, § 8.

27. U.S. CONST. art. III § 2.

28. SUPPLEMENT TO MAX FARRAND'S *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 27, 50-51, 95, 120, 127 (J. Huston ed. 1987) [hereinafter *FARRAND SUPPLEMENT*].

29. *Id.* During the 18th Century, the two categories were inextricably intertwined. See, e.g., S.F. BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION* (1957).

30. See T. FRANCK & M. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* 232-36 (1987).

tive Branch; the President is the Commander-in-Chief of the armed forces. But the power of the purse in funding such activities also remained with the Congress.

The limited number of references cited above does not mean that foreign policy was not of significance as either an underlying cause for the calling of the Convention or as a motivating factor for the creation of the Constitution. Historian Frederick Marks, III makes a persuasive case for concerns about foreign commerce, national defense, and freedom from outside interference as being the major influences underlying the calling of the Philadelphia Convention.³¹ As Alexander Hamilton told his colleagues on June 29, 1787, domestic tranquility could not be preserved until the American Government was respected abroad.³² Thomas Fitzsimons of Pennsylvania wrote Noah Webster on September 15, 1787, that without the Constitution the Philadelphia delegates had developed "we shall become a prey to foreign influence and domestic violence."³³ Therefore, America had to be strong, and the real issue was not whether there was a need to establish a firm foreign policy, but rather who would set the course for the ship of state.

A close reading of the *Federalist Papers*, which remains the most authoritative interpretation of the U.S. Constitution, reveals the Founders' willingness to allow the Executive, rather than the Legislature, to make the major foreign policy decisions. The Legislature was a suspect institution given the historic role of the British Parliament in the events preceding the American Revolution. The British Monarch was both actually and symbolically the maker and mover of the national interest in foreign affairs.³⁴ The American Revolution was a dispute among Englishmen, and the King was denounced for his internal transgressions, not for his external relations.³⁵

From the earliest days of the Constitutional Republic, the battle has been joined between the Legislative and Executive Branches over the right of the latter to conduct an independent foreign policy.³⁶ The struggle sometimes abates, but never ceases.³⁷ The bare bones of the

31. See generally F. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (2d ed. 1986).

32. FARRAND SUPPLEMENT, *supra* note 28, at 127.

33. *Id.*, at 273. See also Hamilton's statement in *Federalist No. 24*, which in referring to Britain and Spain cautions that "we should not be willing to be exposed in a naked and defenseless condition to their insults and encroachments. . . ." THE FEDERALIST No. 24, at 162 (A. Hamilton) (C. Rossiter ed. 1961). He also makes reference to the dangers of foreign encirclement in FEDERALIST No. 25. *Id.* at 163 (A. Hamilton).

34. See THE FEDERALIST No. 69, *id.* at 419-20 (A. Hamilton).

35. Friedlander, *Autonomy and the Thirteen Colonies: Was the American Revolution Really Necessary?*, 18 DUQ. L. REV. 507 (1980).

36. See, e.g., R.W. LEOPOLD, *THE GROWTH OF AMERICAN FOREIGN POLICY* 69-92 (1962).

37. See generally R. BOLLING, *POWER IN THE HOUSE: A HISTORY OF THE LEADERSHIP OF THE HOUSE OF REPRESENTATIVES* (1974). Cf. Szamuely, *The Imperial Congress*, 77 COMMENTARY 27 (Sept. 1987). In a masterpiece of understatement, Senator Daniel Patrick Moynihan observes that "Presidents find the role of Congress in foreign

Constitution, as they pertain to foreign affairs, were fleshed out by the first Presidents—Washington, Adams, Jefferson, Madison, and Monroe—who by action and through precedent gave historic application to constitutional theory. Nowhere is this more apparent than with the Constitution's requirement that treaties shall be made by the President "with the advice and consent of the Senate. . . ."38

George Washington tried once, literally, to adhere to the explicit language of the Constitution. On the 22nd of August, 1789, Washington went to the Senate Chamber with the intent of discussing seven propositions contained in instructions he had given to a three-man Commission assigned to negotiate a treaty with the Creek Indians of Georgia.³⁹ When the President arrived in the Senate Chamber, there was a great deal of noise from the street and a good deal of confusion on the Senate floor.⁴⁰ The matter was therefore postponed until the following Monday.⁴¹ President Washington eventually secured Senate approval for all he requested after a lengthy debate.⁴² Neither Washington nor any incumbent president had gone back to the Senate to seek its assistance and approval as part of the treaty process. Since 1789, all presidential communications to the Upper House with respect to treaties have been made in writing.

Another experiment in advise and consent procedures took place one hundred and thirty years later. On August 14, 1919, President Woodrow Wilson invited the members of the Senate Foreign Relations Committee to have lunch with him in the East Room of the White House.⁴³ The subject of their luncheon discussion was the Treaty of Versailles, which the Senate ultimately rejected.⁴⁴ At the luncheon, Wilson in effect became a witness before the Committee, testifying on the nature and the origins of the Versailles Treaty, and especially commenting on Article 10, which dealt with the controversial concept of collective security.⁴⁵ The President submitted himself to three and one-half hours of intense interrogation by the Committee. The Committee, however, remained unsatisfied.⁴⁶

No sitting President before or since has met in person with the Senate Committee on Foreign Relations. Neither the visit of George Washington to the Senate Chamber, nor the meeting of the Foreign Relations Committee with Woodrow Wilson in the East Room, established prece-

affairs continually troublesome." Moynihan, *The Modern Role of Congress in Foreign Affairs*, 9 CARDOZO L. REV. 1489, 1492 (1988). Moynihan has served on both the Senate Intelligence and Foreign Relations Committees.

38. U.S. CONST. art. II, § 2, cl. 2.

39. 6 D.S. FREEMAN, *GEORGE WASHINGTON: PATRIOT AND PRESIDENT* 222-23 (1954).

40. *Id.*

41. *Id.*

42. *Id.*

43. T. BAILEY, *WOODROW WILSON AND THE GREAT BETRAYAL* 84-85 (1945).

44. *Id.* at 72-85.

45. *Id.* at 85.

46. *Id.*

dents or otherwise left an imprint on the treaty-making process. The doctrine of Separation of Powers was not disturbed by these solitary incidents.

The current and continuing Legislative-Executive wrangle over who is in charge has put the system of checks and balances in the realm of foreign policy at greater risk than they were during the two presidential concessions to senatorial prerogatives. Despite many claims to the contrary advanced over the past 200 years,⁴⁷ the treaty approval process under our Constitution is a simple one. It has always been relatively simple, and it should continue to be so.

In the treaty-making process envisioned by the Framers, the President proposes and the Senate disposes. As Alexander Hamilton wrote in *Federalist No. 75*, "[t]o have intrusted the power of making treaties to the Senate alone would have been to relinquish the benefit of the constitutional agency of the President in the conduct of foreign negotiations."⁴⁸ The Senate cannot remake a treaty after a treaty is made. It cannot revise a treaty after its approval.⁴⁹ The President submits a treaty to the Senate; the Senate then votes it up or down, or adds amendments, reservations, declarations, or understandings. The Senate can also direct the President to act, or refrain from acting, before he ratifies the treaty that it has approved, or modified, through a resolution of ratification.⁵⁰

Nevertheless, the Senate is not in the treaty-making business. According to the traditional view of the Separation of Powers, the Senate is not in the policy-making business. The Senate's function is one of oversight and approval. That is what the Separation of Powers is all about. To use Hamilton's insightful term from *Federalist No. 75*, the treaty-making process represents an "intermixture of powers."⁵¹

Two former National Security Advisers from the last decade (one of them a member of the Tower Commission) have complained that the Executive Branch is saddled with 535 putative secretaries of state and defense.⁵² When does the congressional oversight function give way to the actual management of foreign affairs? History has demonstrated that when the President is politically strong, the Congress becomes subservient in the foreign policy field. When a president is weak or when

47. The latest revisionist theories can be found in the recent Senate ABM Treaty Hearings. See *The ABM Treaty and the Constitution, Joint Hearings before the Comm. on Foreign Relations and the Comm. on the Judiciary*, S. REP. No. 164, 100th Cong., 1st Sess. (1987).

48. THE FEDERALIST NO. 75, *supra* note 33, at 451 (A. Hamilton).

49. *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

50. See *Treaties and Other International Agreements, A Study Prepared for the Comm. on Foreign Relations by the Congressional Research Service, Library of Congress*, 98th Cong., 2d Sess. 104-18 (June, 1984) (unpublished manuscript).

51. THE FEDERALIST NO. 75, *supra* note 33, at 449-50 (A. Hamilton).

52. Cf. Brock, *A Regal Battle to Reign*, *Insight*, Aug. 10, 1987, at 10, col. 1; Scrowcroft Comment, *How Can Democracy and Covert Action Be Reconciled?*, *N.Y. Times*, July 26, 1987, at E3 [hereinafter *Democracy and Covert Action*]. General Scrowcroft is once again National Security Adviser to the President.

there is a weakened presidency, the Congress becomes assertive and seeks to gain control of policy determination.⁵³ Samuel P. Huntington, distinguished Harvard political scientist and a former member of the National Security Council during the Carter Administration, claims that the present conduct of American foreign policy involves “a new role of Congress,” which is now “much more active and directive . . .”⁵⁴ The truth of the matter is that this has been going on for a generation, beginning with the unfolding opposition to the Vietnam War and continuing down through the wounded presidencies of Nixon, Ford, Carter, and Reagan. This active and aggressive congressional role makes the “intermixture of powers” a difficult and sometimes dangerous political brew.⁵⁵

II. Conclusion: The Necessity of Presidential Leadership in Foreign Affairs

The real issue in the 1980's is not the Separation of Powers so much as it is the allocation of powers. Madison's notes on the debates of the Philadelphia Constitutional Convention provide virtually no clues as to the original intent of the Framers with respect to the conduct of American foreign relations,⁵⁶ and as Hamilton implied in *Federalist No. 75*, the plain meaning of the Constitution in this area is not so plain.⁵⁷ Two authors of a well-received current study of the Constitutional Convention claim that there was really “no other question on which the Convention was so solidly in agreement as that the power to declare war be exercised by the Congress, and not the president.”⁵⁸ Nevertheless, this tells us nothing about the regular conduct of foreign affairs. These same authors then speculate that the Framers would have been heartily in favor of the War Powers Resolution, but they provide no evidence for their opinion.⁵⁹

53. See generally LEOPOLD, *supra* note 36. Cf. L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* (1985); and the famous analysis of Justice Robert Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

54. Huntington Comment, *Democracy and Covert Action*, *supra* note 52, at E3, cols. 2-3. Former Nixon speechwriter, Raymond Price, put it boldly and baldly: “Congress has introduced itself increasingly into the operational responsibilities of the executive in the conduct of foreign policy.” Price, *Preserving Liberty in a Hostile World*, *The Washington Times*, Aug. 27, 1987, at D2, col. 6. Cf. the exasperated lament of *Wall Street Journal* editorialist L. Gordon Crovitz that “[i]nstead of an imperial Presidency, we have an imperial Congress aided by an activist court.” *The Washington Times*, Jan. 23, 1989, at A7, col. 1.

55. See R. PIOUS, *THE AMERICAN PRESIDENCY* 416-22 (1979).

56. See NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, REPORTED BY JAMES MADISON (A. Koch ed., rev. 1985).

57. *THE FEDERALIST* No. 75, *supra* note 33, at 450 (A. Hamilton).

58. C. COLLIER & J.L. COLLIER, *DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787*, at 330-31 (1987).

59. *Id.* at 248. For an opposing view, see R. FRIEDLANDER, *WAR POWERS AND THE CONSTITUTION: WHAT DID THE FOUNDERS ACTUALLY INTEND?* (Legal Background, Washington Legal Foundation) (July 15, 1988).

Even so tenacious a critic of the role of the Chief Executive in the evolution of American foreign relations as Professor Raoul Berger of Harvard University stresses the congressional power of inquiry rather than the idea of management.⁶⁰ What the present congressional critics of the White House, and their journalistic allies, are now attempting to do is nothing less than to transform the Chief Executive into a Chairman of the Board with the Congress acting as 535 managing partners in the business of foreign affairs.⁶¹ There may be slight precedent for this in history, but there is no precedent for this in law,⁶² and there is, certainly, no precedent for this in the language of the U.S. Constitution.

The President of the United States is the architect of American foreign policy and manages the day-to-day conduct of American foreign relations. Consultation and collaboration with the Congress in the making of treaties, the appointment of ambassadors, and in dealing with foreign crises are what the Framers had in mind.⁶³ The overlapping of powers does not, and did not, mean the evisceration of powers. The President leads in the diplomatic arena with the cooperation of Congress, but he nevertheless leads. That is what the Framers meant, and that is the way the system was designed to work.⁶⁴

When the several branches of government are remodeled to a greater or lesser degree by a particular governmental branch, the Constitution is then reshaped at the nation's risk. That is assuredly something to think about during this Bicentennial anniversary year of the launching of the Constitutional Republic, as the current course is being set for the ship of state under a new presidential administration.

60. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 108-16 (1974).

61. See, e.g., the analysis contained in Low, *Clash Rooted in the Constitution*, *Insight*, Aug. 10, 1987, at 16-17. Arthur Schlessinger claims that "[t]he Framers envisaged a partnership in the conduct of foreign affairs with the Congress as senior partner." Schlessinger, *supra* note 1.

62. The most powerful statement to the contrary can be found in Justice Sutherland's majority opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

63. In reference to the treaty power, John Jay comments in *Federalist No. 64*: "All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature." THE FEDERALIST No. 64, *supra* note 33, at 394 (J. Jay).

64. The observation of New York Times Columnist Anthony Lewis that "[t]o a degree quite unforeseen by the Framers of the Constitution, the President has the initiative in our system. . . . [p]ower is centered in the White House," is somewhat overstated and not altogether accurate. Lewis, *Bork on the Presidency*, N.Y. Times, Aug. 27, 1987, at A27, col. 1. Cf. Editorial, *George Bush's First Crisis*, N.Y. Times, Jan. 19, 1989, at F2, col. 1, which asserts that the "constitutional executive power includes the right to act independently and prudently in foreign policy. . . . It requires that a president fend off congressional attempts to micromanage the operations of the White House and of executive agencies."