Do We Have an Imperial Congress?

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ADDRESS

The doctrine of separation of powers is one of the foundation principles of the great representative democracy that we have in the United States. The drafters of our Constitution recognized that power corrupts. They concluded that the powers of the federal government should be divided between the three branches so that one branch would not have absolute power, and each would serve as a check on the others. In our post-Watergate, post-Vietnam, post-Church Committee atmosphere, the principle of separation of powers has frequently been invoked as a check on the foreign policy actions of the President. Scholars have talked about an "imperial" Presidency and have urged Congress to undertake a more active involvement in foreign affairs. Congress has responded affirmatively to the urging and assumed a much more active role. Indeed, we have witnessed an extraordinary period of expansion of Congress' role in the formulation and conduct of United States foreign policy. In this setting of congressional activism, I would like to ask a reverse question: Do we have an "imperial" Congress?

This question raises the issue of congressional activism in foreign affairs in a fairly direct fashion. The more academic question is what checks does the separation of powers principle place on the Congress as it carries out its role in foreign affairs? No one doubts that Congress has an important role in foreign policy, but I think the more critical issue today—and I hope you will forgive me if I do not dwell on those areas where, in fact, there has been a significant and effective role played by Congress in foreign policy—is to seriously examine how the principle of separation of powers should operate to check congressional activism in foreign policy.

I will discuss four points. First, I will examine, once again from

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a post-Vietnam, post-Watergate, post-Church Committee perspective, the existing evidence of this increased congressional activism. Second, I will examine the broad—in my opinion overly broad—philosophical and theoretical underpinnings that form the basis for this enhanced congressional activism in foreign policy. Third, I will examine, very briefly, some of the ways in which this congressional activism may have been harmful to the foreign policy interests of the United States, particularly by undermining deterrence, or by failing to add elements of deterrence to American foreign policy. And finally, I will suggest a mechanism that I believe could be useful for establishing a proper balance between the executive and legislative branches on this fundamental issue of responsibility for the formulation and conduct of United States foreign policy.

First, let us turn to the evidence that reveals an explosion in congressional activism in foreign policy over the last fifteen years. Senator Tower, in a recent article in *Foreign Affairs*,[1] compiled a list of some 150 different measures by which Congress has sought to place checks on the executive branch's conduct of foreign affairs. Incidentally, this is one of the characteristics of this congressional activism in foreign affairs. It is not directed principally at deterring the foreign enemies, or potential enemies, of the United States, nor is it directed towards our relations with our allies. Rather, it is aimed primarily at checking the executive branch in its conduct of foreign policy.

The scope of this legislative activity has been quite diverse. Fifteen years ago, the Senate Foreign Relations Committee's compilation of the statutes concerning important foreign relations of the United States comprised a single volume.[2] Today, four volumes are required to list the same basic category of laws.[3] Examined from the standpoint of a national security lawyer, the impact of this congressional activism is even more striking. For example, most of the law relating to the intelligence area has been produced in the last fifteen years. This is a rapidly growing and complex area of the law, with courses on the topic now offered by law schools and bar organizations.

We have just completed an extraordinary public hearing by the

1. Tower, *Congress Versus the President: The Formulation and Implementation of American Foreign Policy*, 60 FOREIGN AFF. 229, 238-46 (1981).

2. SENATE COMM. ON FOREIGN RELATIONS, 93D CONG., 1ST SESS., LEGISLATION ON FOREIGN RELATIONS WITH EXPLANATORY NOTES (Comm. Print 1973) (compilation of public laws, executive orders, presidential documents, international treaties, and other materials related to foreign relations).

3. HOUSE COMM. ON FOREIGN AFFAIRS, 100TH CONG., 2D SESS., LEGISLATION ON FOREIGN RELATIONS THROUGH 1987 VOL. I-IV (Comm. Print 1987) (compilation of foreign relations material, including legislation, treaties, and related documents).

Congress in which, as a form of congressional oversight, a failed covert operation was examined and critiqued.[4] We have also had an enormous amount of congressional involvement in virtually every area of arms control. For example, the Congress has attempted to tell the executive branch what is the correct interpretation of an arms control treaty of the United States.[5] Furthermore, the State Department authorization bill,[6] which is making its way through Congress, was innundated by a blizzard of amendments from all sides of the political spectrum.

This congressional activism, however, has not been limited simply to legislative activity. Over 100 members of the Congress have joined in bringing a lawsuit that seeks to force the invocation of the War Powers Resolution.[7] In addition, we have an atmosphere in which the Speaker of the House of Representatives, prior to the recent Arias Peace Plan, sponsored a peace plan for Central America.[8] This necessarily brief and impressionistic look at some examples of this congressional activism indicates both the breadth of its reach and its clear target.

Let us turn to the second and more important point: To what extent are the philosophical and theoretical underpinnings of this

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4. H.R. REP. No. 433, S. REP. No. 216, 100th Cong., 1st Sess. (1987).

5. H.R. 1748, 100th Cong., 1st Sess. (1987). After delivery of these remarks, Congress enacted the bill with the treaty defining provisions as the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, §§ 225, 226, 233, 101 Stat. 1019, 1056-1057, 1061-1062 (1987).

6. H.R. 1777, 100th Cong., 1st Sess. (1987). After delivery of these remarks Congress enacted the bill as the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1331 (1987).

7. Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (Prudential considerations of equitable discretion and political question doctrine required dismissal of petition by 110 members of Congress that sought declaration that United States military activities in Persian Gulf required President to make 50 U.S.C. § 1543(a)(1) report.). *See* Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). In *Crockett*, 29 members of Congress brought suit against the President alleging that (1) aid to the government of El Salavador without an "exceptional circumstances" certification was in violation of Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151-2443, and (2) the presence of United States military officials in an area of imminent hostilities without a 50 U.S.C. § 1543(a)(1) report was in violation of the War Powers Resolution, 50 U.S.C. §§ 1541-1548, and the war powers clause of the Constitution, U.S. Const. art. I, § 8, cl. 11. *Id.* at 1356. The dismissal of the suit was upheld on the grounds that it presented a non-justiciable political question. *Id.* at 1356-57.

8. On August 5, 1987, Speaker of the House of Representatives Jim Wright drafted an 11-paragraph "peace plan." Greenhouse, *Latin Peace Plan is Put Forward by Administration*, N.Y. Times, August 5, 1987, at A1, col. 1. The central points of this proposal were as follows: (1) an immediate cease-fire to be supervised by the Organization of American States, (2) United States suspension of aid to the contras and suspension of Nicaraguan receipt of aid from Cuba and the Soviet Union, (3) regional security discussions, and (4) lifting of the United States trade embargo against Nicaragua. N.Y. Times, August 5, 1987, at A10, col. 5-6. The plan, however, fell apart.

approach overly broad and constitutionally suspect? It seems to me that there are a series of myths that influence our views. Two are affirmative myths, and the third myth is one that we simply do not think about, really a myth by omission from the overall discussion.

The first of these myths is the myth of superior congressional wisdom in regard to Vietnam, a myth that has had so much to do with this new congressional activism. We forget that prior to the 1968 Tet offensive, the Congress was a full party to the Vietnam engagement. It voted overwhelmingly in favor of the Tonkin Gulf Resolution, with only a total of two votes cast against the resolution by both Houses.[9] Ironically, that resolution met, in every way, the requirements of the later War Powers Resolution.[10] Within nineteen months of the passage of the Tonkin Gulf Resolution, and with 200,000 troops in Vietnam, Congress overwhelmingly rejected a motion by one of those dissenting members to repeal it.[11] Within another year, after a further increase in Vietnam troop strength, both Houses of Congress voted overwhelmingly for a $12 billion supplemental appropriation that was earmarked specifically for operations in Vietnam.[12]

The reality, therefore, is that Congress, as well as the media, strongly supported American involvement in Vietnam until the 1968 Tet offensive. At that point, however, Congress, the media, and the American people misperceived this televised battle as a military defeat when, in purely military terms, it was, in fact, the opposite. It was only after the Tet Offensive that Congress began decrying our involvement in the war and began saying that it was Mr. Johnson's and Mr. Nixon's war.

Just as Congress did not prevent us from getting into the Vietnam War, Congress did not take the United States out of the Vietnam

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9. Pub. L. No. 88-408, 78 Stat. 384 (1964) (codified at 50 U.S.C. App. § 1, title VI (1964 & Supp. V 1969)), *terminated by* Pub. L. No. 91-672, § 12, 84 Stat. 2055 (1971) (codified at 50 U.S.C. App. § 1, title VI (1982 & Supp. IV 1986)). The House vote was 416-0. H.R.J. Res. 1145, 88th Cong., 2d Sess., 110 CONG. REC. 18,555 (1964). The Senate then substituted H.R.J. Res. 1145 for its own S.J. Res. 189 and passed the bill on a vote of 88-2. H.R.J. Res. 1145, 110 CONG. REC. 18,470-71 (1964). Senators Gruening and Morse were the only legislators who opposed the resolution. 110 CONG. REC. 18,471 (1964).

10. *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1982 & Supp. IV 1986)).

11. Morse amendment to S. 2791, Supplemental Defense Appropriation Act of 1966, Pub. L. No. 89-374, 80 Stat. 79 (1966). On March 1, 1966, Senator Wayne Morse (D. Ore.) offered an amendment to repeal the Gulf of Tonkin Resolution. 112 CONG. REC. 4,370 (1966). The motion was tabled on a vote of 92-5, with the yeas representing support for the Johnson administration's Vietnam policy. 112 CONG. REC. 4,404 (1966).

12. Supplemental Defense Appropriation Act of 1966, Pub. L. No. 89-374, 80 Stat. 79 (1966).

War. It was ended not by way of congressional action, but by the Paris Peace Accords.[13] At that point, Congress passed extraordinarily broad measures, including a resolution that effectively said, in advance, to the North Vietnamese that under no circumstances would the United States ever reenter the war in Vietnam.[14] These substantially undercut the deterrence of future North Vietnamese aggression in South Vietnam.

The issue I am raising is not whether we should, or should not, have gone back into Vietnam. Rather, the issue is whether it was wise, in terms of deterrence, to signal so clearly to the North Vietnamese that under no circumstances would the United States react to violations of the Accords, at the same time that we were decreasing the levels of American military assistance to the RVN Government. As a consequence of this post-Paris Peace Accords congressional enactment, the North Vietnamese built up their mainline tank units, massively strengthened their other mainline forces, and crossed the Accord line with twenty-two of twenty-three of their mainline units,[15] confident that there would be no U.S. response. It seems to me that this is a record that does not show superior congressional wisdom in regard to Vietnam.

The second myth is the myth of plenary congressional authority. This myth has a series of sub-myths. One of these is that checks and balances are applicable only to the President. We tend to think of these principles only in terms of the necessity of checking executive action. Checks and balances are not something that we generally think about with respect to the activities of the Congress. As we know from the history of the drafting of the Constitution, however, that understanding is wrong. The drafters were at least as concerned with the concept of an "imperial" Congress, as they were with the concept of an "imperial" President, and they sought to devise a system of checks and balances that effectively operated to prevent both.[16]

A second sub-myth here, so to speak, is the "single barrel"—i.e.

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13. Agreement on Ending the War and Restoring Peace in Viet-Nam, January 27, 1973, 24 U.S.T. 1, T.I.A.S. No. 7542, 935 U.N.T.S. 2; Agreement on Ending the War and Restoring Peace in Viet-Nam, January 27, 1973, United States-North Vietnam, 24 U.S.T. 115, T.I.A.S. No. 7542, 935 U.N.T.S. 52. *See also* Act of the International Conference on Viet-Nam, March 2, 1973, 24 U.S.T. 485, T.I.A.S. No. 7568, 935 U.N.T.S. 405 (establishing international monitoring commission).

14. *See* Pub. L. No. 92-129, § 401, 85 Stat. 360 (1971) (sense of Congress that hostilities be terminated in Indochina).

15. The Vietnam Debate: A Fresh Look at the Arguments (J.N. Moore ed.) (to be published in 1989).

16. *See* remarks of Charles J. Cooper in Cooper, Hatch, Rostow & Koh, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 168-74 (1988).

single question—approach which is the prevailing legal framework for analysis in this area. This approach asks whether Congress has acted in an area that involves an exclusively presidential power. Only if the answer is yes, is it then concluded that Congress has exceeded its powers. The appropriate framework, however, should be a "double barrel" approach. Under this approach, the preliminary question should be whether the Congress has the legislative power to act in the particular area in which they seek to act. Then, the second question should be whether the action infringes upon an area of exclusively presidential authority, such as the commander-in-chief power. An answer of no to the first question, or yes to the second, should prohibit congressional action in the area.

Why this "double barrel" approach? It is appropriate because it is rooted in the language of the Constitution. Article I, section 1 of the Constitution gives Congress its legislative power and provides that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States."[17] Article 2, section 1, however, provides that "[t]he Executive power *shall be vested* in the President of the United States of America."[18] The drafters drew the distinction between limited legislative powers and broad executive powers very deliberately, intending that Congress would not have general plenary authority, especially in the area of foreign affairs.[19]

This intent is apparent from the opinions voiced by the Founding Fathers in interpreting the President's foreign affairs powers. Thomas Jefferson wrote in 1790 that "the transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department *except* to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly."[20] A few years later, Alexander Hamilton, as "Pacificus," wrote:

> "It deserves to be remarked that as the participation of the Senate in the making of treaties and the power of the legislature to declare war are exceptions out of the general Executive power vested in the President they are to be construed strictly and ought to be extended no further than is essential to their execution."[21]

In short, it seems to me that the starting point should be to first

17. U.S. CONST. art I, § 1 (emphasis added).

18. U.S. CONST. art II, § 1 (emphasis added).

19. *See infra* notes 20-23 and accompanying text.

20. Opinion on the Powers of the Senate Respecting Diplomatic Appointments (April 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 378-79 (J. Boyd ed. 1961) (emphasis original).

21. *Pacificus No. I*, in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 42 (H. Syrett ed. 1969) (originally published in *Gazette of the United States* (Philadelphia) June 29, 1793).

ask whether Congress, under an enumerated power, has the ability to legislate in the particular foreign affairs area that is under consideration, and if so, from where do they get the power. Further it must be determined whether the power or ability of Congress to legislate derives from a specific grant or from some reasonable penumbra of a specific grant. The second question that must be asked, even if the answer to the first question is yes, is whether Congress, in a particular case, has interfered with an area exclusively under presidential authority. An answer of no to the first question, or yes to the second, should prohibit congressional activism in the area.

Another sub-myth that forms a part of this overall presumption of congressional plenary power is the myth that all congressional action can be legitimated either under the necessary and proper clause, or under the appropriations power. A little thought on this proposition, however, shows the intellectual bankruptcy of this argument. If, in fact, any congressional action in foreign affairs can be legitimated by either the necessary and proper clause, or by the appropriations power, then, flatly, we have no principle of separation of powers, and Congress has absolute plenary authority. Such a result would be completely contrary to the framers intent and in direct contradiction of well-established Supreme Court precedent. For example, in *Myers v. United States*,[22] the Supreme Court made the same point that Jefferson and Hamilton had advanced, namely that article I grants limited legislative authority to the Congress, while article II confers a broad executive authority upon the President.[23]

A series of attorney general opinions,[24] and the concept of unconstitutional conditions,[25] refute the notion that the appropriations power can be a valid basis for broad congressional claims of

22. 272 U.S. 52 (1926) (holding unconstitutional a statute that restricted power of President to remove first class postmasters).

23. *Id.* at 128, 137-39.

24. *See, e.g.*, Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4 Op. Off. Legal Counsel 185 (1980); Legality of Certain Nonmilitary Actions Against Iran, 4 Op. Off. Legal Counsel 223 (1980); Congressional Authority to Modify an Executive Agreement Settling Claims Against Iran, 4 Op. Off. Legal Counsel 289 (1980); Presidential Implementation of Emergency Powers Under the International Emergency Economic Powers Act, 4 Op. Off. Legal Counsel 146 (1979); Request of the Senate for an Opinion as to the Powers of the President "in Emergency or State of War," 39 Op. Att'y Gen. 343 (1939); Questions Relating to the Administration of the Federal Register Act, 38 Op. Att'y Gen. 276 (1935).

25. The "unconstitutional conditions" doctrine holds that the receipt of benefits may not be conditioned upon the nonassertion of constitutional rights. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10-8, at 681-82 (1988). In the context of the Congress and the President, therefore, the Congress cannot condition funding or authority for the President to act in the foreign affairs arena upon the President's surrender of his own constitutionally grounded duties and privileges.

absolute plenary authority. For example, Congress cannot enact a law that provides benefits, or draws other distinctions based solely upon race, and then justify it as an exercise of the appropriation power. It is equally clear that the appropriations power cannot be invoked to legitimate a violation of a constitutional principle such as the doctrine of separation of powers. In sum, Congress cannot violate either the right to equal protection of the laws or the principle of separation of powers and then justify it by the concept of "we have an appropriations power," or "there is a necessary and proper clause."

Finally, we have the sub-myth that Congress, as the "democratic" branch, is the appropriate branch for dealing with foreign affairs issues. In recent years with a capital "D," Congress has frequently been "Democratic"—Democratic as opposed to Republican. But with respect to its small "d" meaning in this myth, it is not simply a question of whether Congress should have the preeminent role in dealing with foreign policy issues by virtue of its status as the "democratic" branch. Of course it is a democratic branch. But this argument ignores the fact that the executive branch is a democratic branch as well. Moreover, the President is the only official elected by all of the American people, and he is elected every four years. Certainly, this process with its built in accountability satisfies any, and all, requirements that "democratic" ideals demand. Therefore, the notion that the Congress is "democratic," and the President somehow is not, is a groundless philosophical argument upon which to base this increased congressional activism.

Mythology by omission is the third myth that underpins this congressional activism. It is a failure to ask how the framers perceived the functional differences between the branches. The answer to this question would tell us where each branch is likely to be most effective, and what constraints there ought to be on each branch's degree of activism. There are several very important reasons why, generally speaking, the executive branch is given responsibility for conducting the foreign affairs of the Nation. Principally, these include the greater speed and decisiveness necessary for the conduct of an effective and efficient foreign affairs policy, and which the executive alone can realistically exercise.[26]

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26. The necessity for speed and decisiveness in the conduct of foreign affairs, and consequently the need for the executive to exercise the predominant role in the foreign relations of the Nation, was well recognized by the founding fathers. *See* THE FEDERALIST No. 64, at 390-96 (J. Jay) (G. Carey & W. Kendall ed. 1966). Jay succinctly summarized the argument for conferring the preeminent foreign affairs role upon the President:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases

For example, after Congress passed the War Powers Resolution, and after North Vietnam invaded the Republic of Vietnam, there was a rapid collapse in South Vietnam. President Ford had to evacuate approximately 6,000 Americans who remained there. In the beginning of April, 1975, he took the extraordinary measure of inviting the entire Senate Foreign Relations Committee to the White House to discuss the situation.[27] Addressing a joint session of Congress, the President then asked for the authority to go in and rescue the Americans, so that he would not run afoul of the War Powers Resolution, or some of the other continuing Cooper-Church resolutions that restricted United States reinvolvement in Southeast Asia.[28]

> where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

Id. at 392-93. *See also* THE FEDERALIST NO. 75, at 449-54 (A. Hamilton) (G. Carey & W. Kendall ed. 1966). Hamilton argued that the House of Representatives should not be involved in the treatymaking process because "accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy* and dispatch, are incompatible with the genius of a body so variable and so numerous." *Id.* at 452.

27. R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 52-58 (1983).

28. Address Before a Joint Session of the Congress Reporting on United States Foreign Policy (April 10, 1975), in 1975 PUB. PAPERS 459 (1977). In the address, President Ford outlined South Vietnam and Cambodia's desperate situation, urged immediate aid for their governments, and asked the Congress to clarify the restrictions on the use of United States military forces to evacuate American citizens from areas of hostile activity. *Id.* at 462-65. The President urged the Congress to complete action on his requests by April 19. *Id.* at 464. On April 11, 1975, the President transmitted draft legislation to implement his requests, again requesting immediate action. Letter from President Gerald R. Ford to Speaker of the House Carl Albert and President Pro Tempore of the Senate James O. Eastland (April 11, 1975), in 1975 PUB. PAPERS 474-75 (1977). That day, the Khmer Communist Forces ruptured the defensive positions around the Cambodian capital, Phnom Penh, and the President ordered United States armed forces to enter Phnom Penh and evacuate American citizens. Letter from President Gerald R. Ford to Speaker of the House Carl Albert and President Pro Tempore of the Senate James O. Eastland (April 14, 1975), in 1975 PUB. PAPERS 476-77 (1977) (dated April 12, 1975, released April 14, 1975). The President noted the provisions of the War Powers Resolution, but explicitly declared that he had taken these actions pursuant to his executive and commander-in-chief powers. *Id.* During the third week of April, 1975, the situation in South Vietnam rapidly deteriorated and the President decided to begin withdrawing American personnel from that country. On April 29, 1975, the President announced that all remaining American personnel in South Vietnam had been evacuated. Statement Following Evacuation of United States Personnel From the Republic of Vietnam (April 29, 1975), in 1975 PUB. PAPERS 605 (1977).

Congress immediately responded to his request. Under the expedited procedures of the War Powers Resolution,[29] the House and Senate each passed a bill that authorized the President to take the necessary actions.[30] Because the bills were different, however, the House and Senate went to conference and, unfortunately, were unable to agree.[31] By that time, Saigon was being overrun, and the President sent in military forces in a hasty operation to rescue the remaining Americans and some of our allies. Ultimately, Congress was not able to pass any legislation in this area, even after the rescue. In early May, the House ended this debacle by decisively voting against the conference report, thereby refusing to give the President any authority to act at all under the War Powers Resolution.[32]

What about greater secrecy? This is something that from time to time is important in foreign policy. For example, does anyone seriously believe that President Carter could have consulted with every member of Congress with respect to the planning of the Iran hostage rescue effort? The War Powers Resolution, however, does not permit the President to consult with only two or three leaders of Congress. The way it is written, he must consult with the entire Congress in every possible instance.[33] It seems to me that this is patently absurd. The United States could not possibly mount a serious hostage rescue effort if we had to bring that number of individuals into the process.

There is also the question of whether Congress is equipped to effectively formulate a coordinated foreign policy, negotiating and balancing the intricate mix of "carrots and sticks" that are necessary for conducting our global foreign relations. I would argue that, for the most part, the strength of Congress in foreign policy is to serve as a mechanism to address broad policy, as an oversight mechanism and,

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29. War Powers Resolution, Pub. L. No. 93-148, §§ 6-7, 87 Stat. 555, 557-58 (1973) (codified as amended at 50 U.S.C. §§ 1545-1646 (1982 & Supp. IV 1986)). In 1983 an additional provision was added to govern the procedures of any bill introduced to force the withdrawal of United States Armed Forces from areas of hostilities. Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98-164, § 1013, 97 Stat. 1017, 1062-63 (1983) (codified at 50 U.S.C. § 1546a (Supp. I 1983 & Supp. IV 1986)).

30. The House and Senate each passed H.R. 6096, but with different amendments. H.R. 6096, 94th Cong., 1st Sess., 121 CONG. REC. 11,626 (1975).

31. The House disagreed with the Senate amendments, and the bill was sent to conference. 121 CONG. REC. 11,737-11,738 (1975). The conference report was subsequently accepted by the Senate, S. REP. NO. 97, 94th Cong., 1st Sess., 121 CONG. REC. 11,970, 11,977 (1975), but rejected by the House. H.R. REP. NO. 176, 94th Cong., 1st Sess., 121 CONG. REC. 12,752, 12,764 (1975).

32. The vote was 162-246. 121 CONG. REC. 12,763 (1975).

33. War Powers Resolution, Pub. L. No. 93-148, §§ 4-7 87 Stat. 555, 555-58 (1973) (codified as amended at 50 U.S.C. §§ 1543-1546 (1982 & Supp. IV 1986)) (presidential reporting and congressional action provisions).

to some extent, as a blunt instrument of deterrence. Basically, this is what Congress does best, legislatively, in foreign policy: It serves as a fairly effective blunt instrument in a variety of foreign policy linkage settings.

I would also argue that Congress can be overly responsive to public opinion. We deliberately created a representative democracy in the United States. President Kennedy, in his classic collection of stories entitled *Profiles in Courage*,[34] wrote of many situations where a member of Congress, a Senator, or a member of the executive branch opposed a proposal that was enthusiastically supported by his constituents. If you look at the performance of Congress as a whole, however, I would argue that these situations are far outweighed by the variety of instances in which Congress, especially in the foreign policy arena, has been overly responsive to popular pressures.

Interestingly, one of those was the 1975 *Mayaguez* incident. At the time, it was fairly clear that the Cooper-Church amendment was still in effect.[35] Nevertheless, the President acted decisively and his action was very popular. Congress immediately praised the President for his quick actions,[36] which was entirely proper under the circumstances. Now I think Cooper-Church was an unconstitutional limitation on the President's powers, especially as it applied to that situation. In any event, there was no suggestion of illegal presidential action, as was claimed after President Nixon's actions,[37] despite the language of the Cooper-Church amendment which flatly stated that American forces could not be sent into Cambodia.[38]

After the failure of the Iran hostage rescue effort, however, President Carter was beaten about the head and shoulders by the media and public opinion. Congress did not lose any time in joining in the

34. J. KENNEDY, PROFILES IN COURAGE (memorial ed. 1964).

35. Foreign Military Sales Act of 1971, Pub. L. No. 91-672, 84 Stat. 2053 (1971).

36. *See, e.g.*, 121 CONG. REC. 14,451-14,453 (1975) (remarks by Reps. Fuqua, Stratton, Flynt, Broomfield, Michel, Sikes, Edwards, Montgomery, Sisk in support of President Ford's action).

37. Among the proposed articles of impeachment brought against President Nixon in the 1974 impeachment inquiry was one article that alleged that military activities conducted in Cambodia from 1969-1973 were illegal. H.R. REP. NO. 1305, 93d Cong., 2d Sess., 120 CONG. REC. 29,279 (1974). The House Committee on the Judiciary ultimately decided to reject this proposed article. H.R. REP. NO. 1305, 93d Cong., 2d Sess., 120 CONG. REC. 29,280 (1974).

38. H.R. 15628, as amended, Foreign Military Sales Act of 1971, Pub. L. No. 91-672, § 7 84 Stat. 2053 (1971). The Senate Committee on Foreign Relations report indicated that one of the principle purposes of H.R. 15628 was to "prevent United States forces from becoming involved in a war in behalf of Cambodia and to insure that United States forces now in Cambodia are withdrawn." S. REP. NO. 865, 91st Cong., 2d Sess. 1, 3 (1971), *reprinted in* 1970 U.S. CODE CONG. & ADMIN NEWS 6054, 6054.

criticism of the President.[39] Similarly, during the Grenada rescue operation, many members of Congress were initially quite hostile.[40] When the American medical students got off the plane and kissed the ground on national television, however, and it became clear that the public supported the operation, there was an immediate shift in the mood of the Congress with respect to the Grenada operation. I know because I was invited to participate in a hearing that was to be convened in response to that action. The plan was to set up a hearing of international lawyers, who, I assume, would have been critical of the administration's action. I was invited, I suspect, as a token defender of the administration's actions in Grenada. In any event, I got a call almost immediately after the mood in the country had changed that informed me that the hearings had been cancelled. Congress did me a service in this case, however, because I took my planned remarks and put them in book form.

The third point I wish to raise is that there is a critical difference between the role that Congress played in the 1950's and 1960's, and the role that it has been playing in the 1970's and 1980's, with respect to deterrence. Deterrence is a fundamental component of American foreign policy, if we wish to avoid war in the world. To be successful, however, a policy of deterrence must be coherent and unified.

In the 1950's and 1960's, we had a series of congressional resolutions that said Congress was joined with the President in putting foreign nations on notice that they better not attack a particular country, or aggressively interfere with United States' defense commitments in a particular area of the world.[41] Since then, we have had a dramatic reversal, and most of the congressional activism has been directed at limiting the foreign policy actions of the President. I am not arguing the merits of this activism in each and every instance. I am simply saying that the difference in direction can have a profound effect on

39. *See, e.g.*, 126 CONG. REC. 9,274 (1980) (remarks by Rep. Dornan that President must "level with us" on reason for hasty withdrawal); 126 CONG. REC. 9,274 (1980) (remarks by Rep. Wylie that event "was one of the most bizarre and tragic in all of our history"). *But see* 126 CONG. REC. 9,275 (1980) (remarks by Rep. Biaggi commending President and arguing that action was within law as a "mass rescue mission, something within his powers under the War Powers Act").

40. *See, e.g.*, 129 CONG. REC. H.8706 (daily ed. October 27, 1983) (remarks by Rep. Dymally introducing resolution calling for immediate withdrawal of United States forces from Grenada); 129 CONG. REC. E.5187 (remarks by Rep. Weiss introducing resolution calling for immediate withdrawal of United States forces from Grenada).

41. *See, e.g.*, S.J. RES. 28, S. REP. NO. 13, H.J. RES. 159, H.R. REP. 4, 84th Cong., 1st Sess. (1955) (authorizing President to employ United States armed forces to protect security of Formosa and related areas).

deterrence, when we begin to signal to our adversaries in advance where, and how, the President is prohibited from acting.

For example, in Angola, just when President Ford was having some success in getting the Soviets to back down from pouring in Cuban forces and supplies to the Marxist insurgents in Angola, the Clark[42] and the Tunney[43] amendments were passed. Immediately, the airlift of military supplies from the Soviet Union to Angola was resumed, and a large Cuban expeditionary force was put in place. That force remains in place to this day.

Central America is another good example. The principal activity of Congress in regard to this region has been to focus on United States involvement and response. The Congress has been quick to place conditions on United States assistance to El Salvador, and to limit the kinds of support that Congress will provide for the Contras. Absent from these actions, however, is anything that says to either Cuba, or Nicaragua: "Stop your secret war against neighboring states. The Congress of the United States is joined with the President in saying that the continuation of that secret war, documented by our own congressional committees, is inappropriate, and the United States will not stand for it in the OAS [Organization of American States] region." This is not a coherent policy that will act to deter further aggression.

In conclusion, allow me to suggest a proposal for arriving at a better balance of the powers of the legislative and executive branches, in regard to foreign affairs. Hopefully, this will result in a true balance, instead of the recent unilateral congressional determinations of "balance" in the form of executive restrictive measures—measures which often passed on overrides of the veto of the President.

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42. International Security Assistance and Arms Export Act of 1976, Pub. L. No. 94-329, § 404, 90 Stat. 729, 757-58 (1976) (codified as amended at 22 U.S.C. § 2293 (1982 & Supp. II 1984) (prohibiting assistance to any group for the purpose of conducting military or paramilitary activity in Angola), *continued by* International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 118, 94 Stat. 3131, 3141 (1980), *repealed by* International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 811, 99 Stat. 190, 264 (1985). The original version of this act, S. 2662, was vetoed by President Ford on May 7, 1976 because of provisions that the President believed would "seriously inhibit my ability to implement a coherent and consistent foreign policy." 122 CONG. REC. 13,053 (1976). The President found the seven provisions providing for a congressional veto particularly objectionable. 122 CONG. REC. 13,054 (1976). H.R. 13680 was then submitted as a follow-up bill to S. 2662. 122 CONG. REC. 13,457 (1976). This bill had the veto provisions reduced to two and, after bouncing back and forth between the chambers, was finally passed in a form minimally acceptable to the President. 122 CONG. REC. 22,853 (1976). The legislative history of this bill is discussed in 1976 U.S. CODE CONG. & ADMIN. NEWS 1378-1454.

43. S. Amend. No. 75 to H.R. 9861, 94th Cong., 2d Sess. (1976), *as enacted* Department of Defense Appropriation Act, 1976, Pub. L. No. 94-212, Title IV, 90 Stat. 153, 165-66 (1976) (prohibiting expenditure of procurement funds in Angola for other than intelligence gathering purposes).

The mechanisms that exist now have not been terribly successful. Congress is simply writing into law its views on the separation of powers. It is the Constitution, not the Congress, however, that determines where the powers of the branches begin and end. Congress cannot, by its own enactment, change the lines drawn by the Constitution that separate congressional and executive powers. Consequently, if the War Powers Resolution changes the constitutional allocation of powers between the branches one iota, then the War Powers Resolution is unconstitutional, insofar as it seeks to alter our constitutional scheme.

Yet another paradox is that in an era in which we quickly invoke the rule of law to limit the commander-in-chief power of the President, Congress continues to invoke the War Powers Resolution as a brake on presidential foreign affairs and military actions, despite the fact that it is, at least in part, unconstitutional after *Chadha*.[44] I do not know of a serious argument that does not say Section 5(c)[45] of the Resolution is invalid after *Chadha*, and probably Section 5(b)[46] as well. This does not even directly address the separation of powers problems presented by the War Powers Resolution. The consideration as to whether Congress is seeking to apply an unconstitutional act is absent.

There is also a timing problem. When Congress simply enacts its own views on the limits of presidential authority in foreign affairs, it often does so in times of crisis, which is when the nation can least afford it. The Congress may submit that it is acting to protect our constitutional values or system. But the President, not just the Congress, is sworn under the Constitution to protect the Constitution of the United States. He also has the duty to protect the Nation against our enemies. Consequently, in a foreign crisis, the President may be forced into a Hobson's choice. He can choose to perform his constitutional duties, thereby opposing Congress and creating an enormous brouhaha with threats of impeachment, or he can accept these restrictions and witness an erosion of his own constitutional responsibilities and powers. With either result, the Nation is the ultimate loser.

We could seek to have these issues addressed more actively in the

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44. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) (holding one House of Congress legislative veto provision, § 244(c)(2) of Immigration and Naturalization Act, 8 U.S.C. § 1254(c)(2), unconstitutional as violative of the bicameralism requirement, U.S. Const. art. I, §§ 1, 7, and the presentment clauses, U.S. Const. art. I, § 7, cls. 2, 3).

45. War Powers Resolution, Pub. L. No. 93-148, § 5(c), 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. § 1544(c) (1982 & Supp. IV 1986)).

46. War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. § 1544(b) (1982 & Supp. IV 1986)).

courts. As a first step, I am in favor of encouraging the Supreme Court to consider appropriate cases that present these issues. I am hopeful that this will resolve the problem. Unfortunately, I do not believe that this will provide the ultimate solution because there are likely to be a series of case and controversy[47] and political question problems.[48] Additionally, the Court would likely focus solely on the legal issues, applying all of the restraint of the judicial system and not permitting a broader resolution of the issue. In any event, it will be a long, case-by-case process.

As an alternative proposal, I suggest that a bipartisan Presidential/Congressional Commission be established. This commission, with half the members appointed by the President and half the members appointed by the Congress—one quarter from each chamber—would have a broad mandate to examine the issue of separation of powers, in regard to foreign policy. It should make recommendations as to how the current executive/legislative process could be enhanced to formulate and conduct foreign policy more effectively. Such a commission can realistically deal with both the legal and policy issues. As an immediate counterargument, I realize that creating another commission is a classic way to avoid the issue. I think, however, that a commission approach is a practical and feasible approach.

The alternative is to leave it to Congress to draw these lines on its own. This alternative, I believe, is doomed to failure, inherently wrong in terms of the doctrine of separation of powers, and contrary to the principle that no branch can be the sole judge of its own powers. Furthermore, it invites an eventual collision between the branches that could result either in a constitutional crisis of serious proportions or severe damage to the foreign policy of the Nation in a crisis setting, at a time when we can least afford it.

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47. For a discussion of the case and controversy problem, see C. WRIGHT, FEDERAL COURTS § 12, at 53-59 (4th ed. 1983). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-7, at 67-69 (1988).

48. For a discussion of the political question doctrine problem, see C. WRIGHT, FEDERAL COURTS § 14, at 74-81 (4th ed. 1983). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-13, at 96-107 (1988). As *Lowry* and *Crockett* indicate, the judicial branch is very reluctant to become emmeshed in foreign policy squabbles between the legislative and executive branches. Lowry, 676 F. Supp. at 340-41; Crockett, 720 F.2d at 1356-57. The *Lowry* court stated, however, that

> had the constitutionality of the War Powers Resolution been squarely presented 'these prudential considerations would [not have been relevant.]'. . . The Court's task then would have been to analyze the constitutional division of powers rather than to evaluate the seriousness of military activity. The former is within the purview of the judiciary.

676 F. Supp. at 340-41 (quoting Goldwater v. Carter, 444 U.S. 996, 1000-01 (1979)).