

CONGRESS AND THE MAKING OF AMERICAN FOREIGN POLICY

By Arthur Schlesinger, Jr.

The problem of the control of foreign policy has been a perennial source of anguish for democracies. The idea of popular government hardly seems complete if it fails to embrace questions of war and peace. Yet the effective conduct of foreign affairs appears to demand, as Tocqueville argued long ago, not the qualities peculiar to a democracy but "on the contrary, the perfect use of almost all those in which it is deficient." Steadfastness in a course, efficiency in the execution of policy, patience, secrecy—are not these more likely to proceed from executives than from legislatures? But, if foreign policy becomes the property of the executive, what happens to democratic control? In our own times this issue has acquired special urgency, partly because of the Indochina War, with its aimless persistence and savagery, but more fundamentally, I think, because the invention of nuclear weapons has transformed the power to make war into the power to blow up the world. And for the United States the question of the control of foreign policy is, at least in its constitutional aspect, the question of the distribution of powers between the presidency and the Congress.

II

On December 21, 1936, in the days when the Nine Old Men of the Supreme Court were, it was supposed, hellbent on confining the power of Presidents, the Court, speaking through one of its most conservative justices, conferred rather greater power on Franklin D. Roosevelt than it had denied him when in the previous 18 months it had vetoed such New Deal experiments as the NRA and the AAA. The decision in the case of *U.S. v. Curtiss-Wright Export Corp. et al* came as a ringing affirmation of inherent and independent presidential authority in foreign affairs.

The case arose because Congress in 1934 had passed a joint resolution authorizing the President to stop the sale of arms to Bolivia and Paraguay, then fighting each other in the Chaco jungles, if, in the presidential judgment, such an embargo would help restore peace. President Roosevelt immediately imposed an

embargo by executive proclamation. Subsequently the Curtiss-Wright Corporation was discovered in a conspiracy to violate the embargo. Brought into court, Curtiss-Wright contended that Congress, when it gave discretionary power to the President through the joint resolution, had made an unlawful delegation of its authority. The Federal District Court accepted this argument, pronounced the resolution an "attempted abdication of legislative responsibility" and dismissed the charges. The government then took the case to the Supreme Court.

Chief Justice Charles Evans Hughes, himself a former Secretary of State, assigned the opinion to George Sutherland, a former member of the Senate Foreign Relations Committee. With only the intractable McReynolds dissenting, the Court saw a "fundamental" distinction between the President's power in domestic affairs and his power in foreign affairs. Sutherland found the two classes of power different both in their origin—"the powers of external sovereignty did not depend upon the affirmative grants of the Constitution"—and in their nature. In particular,

participation in the exercise of the power [over foreign policy] is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

In reversing the lower court and affirming the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," the Court concluded that "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

Several points must be made about this decision. It involved the power over foreign commerce, not the power over war; it did not free the executive from the necessity of acting on congressional authorization; its actual holding was restricted; and its more expansive contentions were in the nature of *obiter dicta*. Still the Court claimed "overwhelming support . . . in the unbroken legislative practice which had prevailed from the inception of the national government to the present day" for delegation to the President in the field of foreign relations; and the

decision was the judicial culmination of the long drift of control over foreign policy into the hands of the executive. Certainly for another generation the mood here registered even by an anti-presidential Supreme Court and thereafter strengthened by 30 years of world crisis encouraged a succession of Presidents in the conviction that there were few limits to executive initiative in the making of foreign policy. Now the tide has turned; and, nearly 40 years after the Curtiss-Wright case, the Senate Committee on Foreign Relations is striving to recover for Congress the role in foreign policy that a one-time member of that committee appeared to take away in 1936.

The Constitution itself is cryptic and ambiguous in its allocation of powers affecting foreign policy. Its authors were great men because they knew what they did not know as well as what they knew. "*It is impossible to foresee or define the extent and variety of national exigencies,*" Hamilton wrote with due emphasis in the 23rd Federalist. ". . . The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." But the rejection of shackles did not mean the rejection of processes and standards; it meant rather the establishment of a system which did not try to solve all problems in advance and would be capable of responding to unforeseen contingencies.

The intentions of the Founding Fathers may be better understood against the background of their own experience. That experience led them to seek more centralization of authority than they had known under the Continental Congress or the Articles of Confederation. So the Constitution in Article II bestowed general executive authority on the President; and, as the Federalist Papers emphasized, the characteristics of such an executive—unity, secrecy, decision, dispatch, superior sources of information—were especially vital to the conduct of foreign affairs. The President was expressly empowered to receive foreign envoys and, with the advice and consent of the Senate, to appoint ambassadors and make treaties. In addition, he was designated Commander in Chief of the armed forces. "Of all the cares or concerns of government," said the Federalist, "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."

But experience also led the Founding Fathers to seek less cen-

tralization of authority than they had known under the British crown. The presidential prerogative was to fall significantly short of the royal prerogative. Hence the qualification of the treaty power: where the British King could conclude treaties on his own motion, the American President had to win the support of two-thirds of the senators present before a treaty could go into effect. "The one can do alone," said Hamilton, "what the other can do only with the concurrence of a branch of the legislature."

Above all, the Founders were determined to deny the American President what Blackstone had freely conceded to the British King—"the sole prerogative of making war and peace." As Hamilton carefully explained in the 69th Federalist, the President's power as Commander in Chief

would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces . . . while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.

An early draft of the Constitution had even given Congress the power to "make war;" but Madison and Elbridge Gerry persuaded the convention to change this to "declare" in order to leave the executive "the power to repel sudden attacks." While this amendment allowed the President to respond when war was imposed on the nation, it was certainly not understood as giving him the power to initiate hostilities. Hamilton's dry comment on the treaty power would apply all the more forcibly to the war power: "The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States." As Madison put it in a letter to Jefferson in 1798: "The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care vested the question of war in the Legisl."

The Constitution conferred other relevant powers on the Congress: the power to make appropriations, to regulate commerce with foreign nations, to raise and maintain the armed forces and make rules for their government and regulation, to control nat-

uralization and immigration, to debate, oversee and investigate. But the allocation of powers could hardly be, in its nature, clear-cut; and particularly in the case of the war power and of the treaty power it was a matter, in Hamilton's phrase, of "joint possession." In these areas the two branches had interwoven responsibilities and competing opportunities. Moreover, each had an undefined residuum of inherent authority on which to draw—the President through the executive power and the constitutional injunction that "he shall take Care that the Laws be faithfully executed," Congress through the constitutional authorization "to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States." In addition, the Constitution itself was silent on certain issues of import to the conduct of foreign affairs: among them, the recognition of foreign states, the authority to proclaim neutrality, the role of executive agreements, the control of information essential to intelligent decision. The result, as Edward S. Corwin remarked 40 years ago, was to make of the Constitution "an invitation to struggle for the privilege of directing American foreign policy."

The struggle began in the silences of the Constitution. Thus President Washington turned his constitutional power to receive foreign envoys into the assertion of diplomatic recognition as a prerogative of the executive; by receiving Citizen Genêt, he thereby recognized the revolutionary republic of France. Congress did not, however, abandon interest in recognition policy. In later years members of Congress tried various ways to force on reluctant Presidents the recognition of newly independent Latin American states—Argentina, for example, in 1818 and Cuba in 1898. In still later years Congress sought by concurrent resolution to dissuade Presidents from recognizing the People's Republic of China.

On the control of neutrality, Washington asserted the presidential prerogative by proclaiming American neutrality in the war between France and Britain in 1793. Congress recovered ground by passing a neutrality act of its own next year; and a century and a half later, in the nineteen-thirties, it triumphantly succeeded in imposing mandatory neutrality policies on the resistant Roosevelt administration.

On the control of information, Washington rejected a request

from the House of Representatives that he turn over copies of instructions and other papers relating to the Jay Treaty. Though he based his refusal on the narrow ground that the House was not involved in the treaty-making process and that "all the papers affecting the negotiation with Great Britain" had already been laid before the Senate, he established a larger precedent that future Presidents used to deny information to the Senate as well. By 1936 Justice Sutherland could write in the *Curtiss-Wright* case that the wisdom of Washington's original refusal "has never since been doubted," adding that the success of presidential action in international relations may well depend "upon the nature of the confidential information which he has or may thereafter receive;" this, Sutherland said for the Court, was another proof of "the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed."

But the main battlegrounds lay in the critical areas of "joint possession"—the war power and the treaty power—and the changing contours of the struggle for control are best displayed in relation to these complex and contentious questions.

III

The war power has historically involved a competition between the power of the Congress to authorize war and the power of the President as Commander in Chief. It is important to state the issue with precision. The issue is not the declaration of war in a strict sense. Long before Under Secretary Katzenbach startled the Senate Foreign Relations Committee in 1967 by pronouncing the declaration of war "outmoded," Hamilton had written in the 25th *Federalist*, "The ceremony of a formal denunciation of war has of late fallen into disuse." One study of European and American wars shows that between 1700 and 1870 hostilities began in 107 cases without declaration of war; in only ten cases was there a declaration of war in advance of hostilities. Though the United States has engaged in a number of armed conflicts in the last two centuries, it has only made five formal declarations of war (of which four—all but the War of 1812—recognized the prior existence of states of war).

The real issue is congressional authorization—whether or not by declaration of war—of the commitment of American forces in circumstances that involve or invite hostilities against foreign

states. One aspect of this issue emerged clearly during the undeclared naval war with France in 1798–1801. Mr. Katzenbach injudiciously testified that “President John Adams’ use of troops in the Mediterranean” (by which he presumably meant Adams’ use of the fleet in the Atlantic) was “criticized at the time as exceeding the power of the Executive acting without the support of a congressional vote.” Others, before and since, have cited this conflict as an early precedent in the cause of presidential war-making. In fact, when trouble with France began, Adams called Congress to meet in special session “to consult and determine on such measure as in their wisdom shall be deemed meet for the safety and welfare of the said United States.” In due course, Congress turned more belligerent than the President and in the spring of 1798 passed some 20 laws to encourage Adams to wage the war. Adams’ Attorney General described the conflict as “a maritime war *authorized* by both nations,” and in 1800 the Supreme Court, called upon to define the conflict, drew a distinction between “perfect” and “imperfect” wars. As it concluded in a unanimous decision, if war

be declared in form, it is called solemn, and is of the perfect kind. . . . But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war. . . . Still . . . it is a war between two nations, though all the members are not authorized to commit hostilities such as in a solemn war.

Both sorts of war, whether solemn or non-solemn, complete or limited, were deemed to require some mode of congressional authorization. When John Marshall assumed leadership of the Court in 1801, he reinforced the point in a second case arising out of the trouble with France. “The Congress,” he ruled, “may authorize general hostilities . . . or partial war.”

Jefferson similarly acknowledged the congressional right to license hostilities by means short of a declaration of war, while at the same time he affirmed the right of the executive to repel sudden attack. When an American naval schooner was fired on by a Tripolitanian cruiser in the Mediterranean, it repulsed the attack with signal success; but, Jefferson instructed Congress, its commander was “unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense,” so the enemy vessel, having been “disabled from committing further hostilities, was liberated with its crew.” Jefferson went on

to ask Congress to consider "whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries." Again, fearing incursions into Louisiana by the Spanish in Florida in 1805, he declined to broaden defense against sudden attack into defense against the threat of sudden attack and said in a special message: "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force. . . . The course to be pursued will require the command of means which it belongs to Congress exclusively to yield or to deny."

In this case, Congress chose to deny. But half a dozen years later a more belligerent Congress led a more reluctant President into war. In 1812 Madison, now that he was the executive and the War Hawks of the legislature were demanding hostilities with Britain, may well have reflected ruefully on his argument of 1798 about the supposed greater interest of the executive in war.

When the Seminole Indians were conducting raids into American territory in 1818, President Monroe chose not to consult Congress before ordering General Andrew Jackson to chase the raiding parties back into Spanish Florida, where Jackson was soon fighting Spaniards and hanging Englishmen. But tangling with foreigners was incidental to Jackson's ostensible objective, which was punishing Indians. We would now call the principle on which he and Monroe acted "hot pursuit." Where direct conflict with a foreign state was the issue, Monroe was more cautious. When he promulgated his famous Doctrine, he neither consulted with Congress nor sought its subsequent approval; but, when Colombia requested U.S. protection under the Monroe Doctrine, John Quincy Adams, Monroe's Secretary of State, carefully replied that the Constitution confided "the ultimate decision . . . to the Legislative Department."

Jackson himself as President meticulously respected this point. Though he enlarged the executive power with relish in other areas, on the question of the war-making power he followed not his own example of 1817 but Jefferson's of 1801. Thus in 1831, after ordering an armed vessel to South America to protect American shipping against Argentine raiders, he said, "I submit the case to the consideration of Congress, to the end that they may clothe the Executive with such authority and means as they deem

necessary for providing a force adequate to the complete protection of our fellow citizens fishing and trading in these seas." When France persisted in her refusal to pay long-outstanding claims for damage to American shipping during the Napoleonic wars, Jackson, instead of moving on his own, took care to ask Congress for a law "authorizing reprisals upon French property, in case provision shall not be made for the payment of the debt." (Albert Gallatin observed that this "proposed transfer by Congress of its constitutional powers to the Executive, in a case which necessarily embraces the question of war or no war" was "entirely inconsistent with the letter and spirit of our Constitution," and Congress turned Jackson down.) When Texas rebelled against Mexico and sought U.S. recognition as an independent republic, Jackson referred the matter to Congress as a question "probably leading to war" and therefore a proper subject for "previous understanding with that body by whom war can alone be declared and by whom all the provisions for sustaining its perils must be furnished."

Still the executive retained the ability, if he so desired, to contrive a situation that left Congress little choice but to give him a declaration of war. James K. Polk demonstrated this in 1846 when, without congressional authorization, he sent American forces into disputed land where they were attacked by Mexican units who, not unreasonably, considered it Mexican territory. Polk quickly obtained a congressional declaration of war, but many members of Congress had the uneasy feeling that the President had put something over on them. Two years later, with the war still on, the House resolved by a narrow margin that it had been "unnecessarily and unconstitutionally begun by the President of the United States." Perhaps so; but, unlike some later Presidents, Polk did have behind him not just a congressional or U.N. resolution, but a formal declaration of war by the Congress. In any case, this was the situation that provoked Congressman Lincoln of Illinois into his celebrated attack on presidential warmaking:

Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion. . . . and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect. . . . If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, "I see no probability of the British invading us," but he will say to you, "Be silent; I see it, if you don't."

IV

The prevailing view in the early republic, it has been suggested, was that congressional authorization was clearly required for the commitment of American forces overseas in circumstances that involved or invited hostilities against foreign states. But what if the hostilities contemplated were not against foreign governments but were in protection of American honor, law, lives or property against Indians, slave traders, pirates, smugglers, frontier ruffians or foreign disorder? Early Presidents evidently decided as a practical matter that forms of police action not directed against a sovereign nation did not rise to the dignity of formal congressional concern. These were mostly trivial episodes; and, when Senator Goldwater, with such fugitive engagements in mind, said, "We have only been in five declared wars out of over 150 that we fought," he was stretching the definition of war in a way that could comfort only those who rejoice in portraying the United States as incurably aggressive throughout its history.

Jackson in Florida was an early example; but the commitment of armed force without congressional authorization was by no means confined to North America or to the Western Hemisphere. American naval ships in these years took military action against pirates or refractory natives in places as remote as Sumatra (1832, 1838, 1839), the Fiji Islands (1840, 1855, 1858) and Africa (1820, 1843, 1845, 1850, 1854, 1858, 1859). As early as 1836, John Quincy Adams could write, "However startled we may be at the idea that the Executive Chief Magistrate has the power of involving the nation in war, even without consulting Congress, an experience of fifty years has proved that in numberless cases he has and must have exercised the power."

Adams, who in any case (at least till the Mexican War came along) regarded the power of declaring war as "an Executive act," mistakenly turned over by the Founding Fathers to the Congress, somewhat exaggerated. Still the spreading employment of force overseas by unilateral presidential decision, even if not yet against sovereign governments, was a threat to the congressional monopoly of the war power. In the meantime, the demonstration by Monroe of the unilateral presidential power to propound basic objectives in foreign policy, the demonstration by Polk of the unilateral presidential capacity to confront Congress with

faits accomplis, the demonstration by Pierce of the unilateral presidential power to threaten sovereign states (as when he sent Commodore Perry and a naval squadron to open up Japan in 1854)—all these further diminished the congressional voice in the conduct of foreign affairs. Congress continued to fight back, particularly on the question of the war power. It took, for example, special pleasure in rejecting half-a-dozen requests for the authorization of force from the punctilious Buchanan, who believed that “without the authority of Congress the President cannot fire a hostile gun in any case except to repel the attacks of an enemy.”

Perhaps it was Buchanan's strict constructionism that led to the drastic expansion of presidential initiative under his successor; for Lincoln may well have delayed the convocation of Congress till ten weeks after Fort Sumter lest rigid constitutionalists on the Hill try to stop him from doing what he deemed necessary to save the life of the nation. In this period of executive grace, he reinforced Sumter, assembled the militia, enlarged the army and navy beyond their authorized strength, called out volunteers for three years' service, disbursed unappropriated moneys, censored the mail, suspended habeas corpus and blockaded the Confederacy—measures which, as he said, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity; trusting then as now that Congress would readily ratify them.” He added that it was with deepest regret he thus employed what he vaguely called “the war power;” however, “he could but perform this duty, or surrender the existence of the Government.”

No President had ever undertaken such sweeping actions in the absence of congressional authorization. No President had ever confronted Congress with such a massive collection of faits accomplis. Benjamin R. Curtis, who had been one of the two dissenting justices in the Dred Scott case, wrote that Lincoln had established “a military despotism.” But Congress gave retroactive consent to Lincoln's program, and two years later the Court in the Prize cases found constitutional substance (narrowly; the vote was 5-4) for his idea of “the war power” by attaching it to his authority as Commander in Chief and to his right to defend the nation against attack. Throughout the war Lincoln continued to exercise wide powers independently of Congress. The Emancipation Proclamation, for example, was a

unilateral executive act, pronounced under the war power without reference to Congress. But Lincoln's assertion of the war power took place, it should not be forgotten, in the context of a domestic rebellion and under the color of a most desperate national emergency. There is no suggestion that Lincoln supposed he could use this power in foreign wars without congressional consent.

V

The presidential prerogative has not grown by steady accretion. Nearly every President who has extended the reach of the White House has provoked a reaction toward a more restricted theory of the presidency, even if the reaction never quite cuts presidential power back to its earlier level. When Lincoln expanded presidential initiative, Congress took out its frustrations by harassing him through the Committee on the Conduct of the War, impeaching his successor and eventually establishing a generation of congressional government. In this period of relative military quiescence (there were only 17 instances of American military action abroad in the 20 years after the Civil War as compared to 38 in the 20 years before the war), the locus of conflict shifted from the war power to the treaty power. The Senate's constitutional right to consent to treaties—even though it had long since lost to George Washington its claim for a voice in negotiations and to his successors its power to confirm the appointment of negotiators—turned out to be more solidly embedded in the structure of government than the constitutional right of the Congress to declare war.

In the years after the Civil War the Senate freely exercised its power to rewrite, amend and reject treaties negotiated by the President. Indeed, it ratified no important treaty between 1871 and 1898. Writing in 1885, Woodrow Wilson observed that the President was made to approach the Senate "as a servant conferring with a master. . . . It is almost as distinctly dealing with a foreign power as were the negotiations preceding the proposed treaty. It must predispose the Senate to the temper of an overseer." Wilson grimly noted that the treaty-making power had become "the treaty-marring power," and a dozen years later John Hay told Henry Adams that he did not believe "another important treaty would ever pass the Senate."

Secretaries of State regarded the assertion of senatorial pre-

rogative as the mindless expression of institutional jealousy. As Secretary of State Richard Olney observed in one case, "The Treaty, in getting itself made by the sole act of the executive, without leave of the Senate first had and obtained, had committed the unpardonable sin. It must be either altogether defeated or so altered as to bear an unmistakable Senate stamp . . . and thus be the means both of humiliating the executive and of showing to the world the greatness of the Senate." Hay regarded the one-third veto as the "original," the "irreparable" mistake of the Constitution, now grown to "monstrous shape," and wrote, "The attitude of the Senate toward public affairs makes all serious negotiations impossible."

Ways had to be found to evade the veto. One was the use of the joint resolution, which required only a majority of the Congress as against two-thirds of the Senate; by such means Texas was annexed in 1845 and Hawaii in 1898. Another was the use of agreements entered into directly by the President with foreign states. The "executive agreement" had the legal force of a treaty; and, though largely confined in the nineteenth century to technical matters, it could be the vehicle of large purposes. It was, for example, the means by which Britain and the United States agreed in the Rush-Bagot accord of 1817 to disarm the Great Lakes and by which the United States in 1898-99 developed the policy of the Open Door in China.

Still, Congress remained in the saddle. As Henry Adams put it in a famous complaint:

The Secretary of State exists only to recognize the existence of a world which Congress would rather ignore; of obligations which Congress repudiates whenever it can; of bargains which Congress distrusts and tries to turn to its advantage or to reject. Since the first day the Senate existed, it has always intrigued against the Secretary of State whenever the Secretary has been obliged to extend his functions beyond the appointment of Consuls in Senators' service.

But, just as executive domination had produced a shift in power over foreign policy toward Congress after the Civil War, so congressional domination was beginning to produce a shift back to the presidency. And, in clamoring for war with Spain, Congress became its own executioner. Writing in 1900, Wilson eloquently portrayed the impact of that war upon the lodgment and exercise of power within the federal system. When foreign affairs dominate the policy of a nation, he said, "its Executive

must of necessity be its guide: must utter every initial judgment, take every first step of action, supply the information upon which it is to act, suggest and in large measure control its conduct. The President of the United States is now . . . at the front of affairs, as no president, except Lincoln, has been since the first quarter of the nineteenth century."

VI

Oddly Congress, in its salad years, had not asserted itself on the question of the war power, perhaps because it so generally agreed with the use the executive made on his own motion of American forces abroad. Victory over Spain now made the United States a world power; and in 1900 President McKinley set the tone for the new century by sending 5,000 American troops to China. The pretext was the protection of American lives and property; in fact, the Americans joined an international force, besieged Peking and helped put down the Boxer Rebellion. This was done without reference to Congress and without serious objection from it. The intervention in China, resulting among other things in the exaction of an indemnity from the Chinese government, marked the start of a crucial shift in the use of the armed forces overseas. Where, in the nineteenth century, military force committed without congressional authorization had been typically used in police actions against private groups, now it was beginning to be used against sovereign states. In the next years Theodore Roosevelt and Taft sent American forces into Caribbean countries and, in some cases, even installed provisional governments—all without prior congressional sanction.

In 1912, in an effort to meet the constitutional problem, J. Reuben Clark, the Solicitor of the State Department, offered a distinction between "interposition" and "intervention." Interposition meant simply the insertion of troops to protect lives and property; it implied neutrality toward the government or toward contesting forces within the country; and, since it was a normal exercise of international law, it did not, Clark argued, require congressional approval. Intervention, on the other hand, meant interference in sovereign affairs; it implied an act of war and required congressional authorization.

Whatever merit this distinction might have had in the nineteenth century when the United States was a small power, by the

twentieth century a great power could hardly interpose anywhere without intervening in sovereign affairs. On the other hand, it could be argued that the superior force of the United States was now so great relative to the Caribbean states that intrusion, whether interposition or intervention, did not invite the risk of war and therefore did not require congressional consent. Still, whatever the nuances of arguments, limitations were evaporating. The executive was becoming habituated to the unconstrained deployment of American forces around the world, and Congress chose not to say him nay. Though Wilson received retroactive congressional approval for an incursion into Mexico in 1914 and the approval of the Senate for another in 1916, he did not seek congressional authorization when he sent troops to Siberia after the First World War. Congressional resolutions of protest perished in committee.

The revival of presidential initiative under Theodore Roosevelt and Wilson provoked the predictable reaction. The Senate, reasserting its prerogative, rejected the Versailles Treaty (though when the elder Henry Cabot Lodge claimed in his second reservation that Congress had the "sole power" to "authorize the employment of the military or naval forces," his fellow isolationist William E. Borah called it "a recital which is not true"). By the thirties the Congress, regarding the First World War as the malign consequence of presidential discretion in foreign affairs, imposed a rigid neutrality program on the executive and remained generally indifferent when Germany and Japan set out on courses of aggression. The reassertion of the presidential prerogative in the years since must be understood in part as a criticism of what happened when Congress tried to seize the reins of foreign policy in the years 1919-1939.

The outbreak of war in 1939 found the President restrained both by the neutrality laws and by the balance of power in Congress from doing what he deemed necessary to save the life of the nation. Roosevelt responded, as Lincoln had 80 years before, by pressing to the utmost limits of presidential power. But, though doubtless encouraged by Justice Sutherland and the Curtiss-Wright decision, he did this without grandiose claims of executive authority. When he exchanged American destroyers for British bases in an executive agreement of 1940—Senators Fulbright and Church have both said that Roosevelt "usurped the treaty power of the Senate"—he did not found his action on

novel authority claimed as Commander in Chief nor on inherent powers of the presidency but on the construction of laws passed by Congress in 1917 and 1935. Nor did the transaction involve promises of future performance, and Roosevelt's circle of prior consultation included even the Republican candidate for President.

When in 1941 he sent American troops to Greenland and later to Iceland, this was done in agreement with the Danish government in the first case and the government of Iceland in the second; moreover, the defense of Greenland and, less plausibly, Iceland, could be considered as part of hemisphere security. Senator Robert A. Taft declared that Roosevelt had "no legal or constitutional right to send American troops to Iceland" without authority from Congress. Few of his colleagues echoed this protest. The Selective Service Act of 1940 had contained a provision that draftees could not be used outside the Western Hemisphere (except in American possessions); but the younger Lodge, who sponsored this provision, evidently doubted its force and called it "a pious hope."

In instituting a convoy system and issuing the "shoot-at-sight" order to the navy in the North Atlantic, Roosevelt was bringing the nation without congressional authorization into undeclared naval war with Germany. Senator Fulbright has latterly charged that he "circumvented the war powers of the Congress." But the poignant character of Roosevelt's dilemma was made clear when in August 1941 the House of Representatives renewed the Selective Service Act by a single vote. If Congress came that close to disbanding the army at home, how could Roosevelt have reasonably expected congressional support for his forward policy in the North Atlantic? His choice was to go to Congress and risk the fall of Britain to Hitler or to proceed on his own with measures which, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity; trusting then as now that Congress would readily ratify them."

Roosevelt did not, like later Presidents, seek to strip Congress of powers in the name of the inherent authority of the Commander in Chief. The most extraordinary prewar decision—Lend-Lease—was authorized by Congress following intensive and exacting debate. After America entered the war, Roosevelt asked Congress for authority to send military missions to friendly

nations. Both Roosevelt and Hull, remembering the fate of Wilson, made elaborate efforts to bring members of Congress from both parties into the discussion of postwar policy through the Advisory Committee on Postwar Foreign Policy and through congressional representation at Bretton Woods, San Francisco and in the delegations to the United Nations. The United Nations Participation Act of 1945 took express care to protect the war powers of Congress.

VII

The towering figure of Franklin Roosevelt, the generally accepted wisdom of his measures of 1940-1941, his undisputed powers as Commander in Chief after Pearl Harbor, the thundering international agreements pronounced at wartime summits of the Big Two or the Big Three—all these factors, combined with the memory of the deplorable congressional performance in foreign affairs during the years between the wars, gave Americans in the postwar years an exalted conception of presidential power. Moreover, Roosevelt's successor, a man much read in American history and of doughty temperament, regarded his office, in the words of his last Secretary of State, as "a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige." Dean Acheson himself, though an eminent lawyer, was impatient with what he saw as constitutional hair-splitting and encouraged the President in his stout defense of high prerogative. Nor were they alone. As early as 1945 Senator Vandenberg was asserting that "the President must not be limited in the use of force" in the execution of treaties; and, when Vandenberg asked the retired Chief Justice, Charles Evans Hughes, whether the President could commit troops without congressional approval, Hughes replied, "Our Presidents have used our armed forces repeatedly without authorization by Congress, when they thought the interests of the country required it." It must be added that American historians and political scientists, this writer among them, labored to give the expansive theory of the presidency due historical sanction.

Above all, the uncertainty and danger of the early cold war, with the chronic threat of unanticipated emergency always held to require immediate response, with, above all, the overhanging possibility of nuclear catastrophe, seemed to argue all the more

strongly for the centralization of the control over foreign policy, including the use of armed forces, in the presidency. And the availability of great standing armies and navies notably enlarged presidential power; before the Second World War, Presidents (Lincoln excepted) could call on only such limited force as was already in existence. Where Truman required congressional consent either because of the need for appropriations (the Marshall Plan) or for treaty ratification (NATO), he rallied that support effectively. But he decided not to seek formal congressional approval for the commitment of American forces to hostilities in Korea (though he consulted congressional leaders informally before American troops went into action) lest he diminish the presidential prerogative. This was followed by his decision, also proposed without reference to Congress, to send four divisions to reinforce the American Army in Europe. These initiatives greatly alarmed conservative members of Congress. On January 3, 1951, Congressman Frederic Coudert of New York introduced a resolution declaring it the sense of the Congress that no "additional military forces" could be sent abroad "without the prior authorization of the Congress in each instance." Two days later, in a full-dress speech before the Senate, Taft returned to the argument he had made against Roosevelt ten years earlier. "The President," he said,

simply usurped authority, in violation of the laws and the Constitution, when he sent troops to Korea to carry out the resolution of the United Nations in an undeclared war. . . . I do not believe the President has the power without congressional approval to send troops to one country to defend it against a possible or probable attack by another country.

Tom Connally, the Chairman of the Senate Foreign Relations Committee, responded with a stirring assertion of high prerogative. "The authority of the President as Commander in Chief to send the Armed Forces to any place required by the security interests of the United States," he said, "has often been questioned, but never denied by authoritative opinion." Secretary of State Acheson went even further:

Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.

Acheson added irritably: "We are in a position in the world

today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour."

The debate also divided scholars. Henry Steele Commager wrote, "Whatever may be said of the expediency of the Taft-Coudert program, this at least can be said of the principles involved—that they have no support in law or in history." The present writer, with a flourish of historical documentation and, alas, hyperbole, called Taft's statements "demonstrably irresponsible." In reply Professor Corwin, who had studied the constitutional position of the presidency for many years with sardonic concern, pronounced Commager and Schlesinger (with some justice) "high-flying prerogative men" who ascribed to the President "a truly royal prerogative in the field of foreign relations . . . without indicating any correlative legal or constitutional control to which he is answerable."

The Great Debate of 1951 ended inconclusively in the passage of a "sense-of-the-Senate" resolution in which the Senate approved the sending of Truman's four divisions but asserted that no additional ground troops should be sent to Western Europe "without further congressional approval." The administration opposed this ceiling; Senator Nixon of California was among those who voted for it. Where Acheson noted that the resolution was "without force of law" and "had in it a present for everybody," Taft applauded it as "a clear statement by the Senate that it has the right to pass on any question of sending troops to Europe to implement the Atlantic Pact." Both were right; and since no subsequent President has tried to increase the American Army in Europe, the resolution has never been tested.

In areas more clearly dependent on the appropriations power, notably in foreign aid, Congress neither then nor later hesitated to tie up executive programs with all manner of hortatory prescriptions, rigid stipulations and detailed specifications, often against executive desire. In 1948 it forced an additional \$400 million in aid to China; in 1950, over strong executive objection, it imposed a mandatory loan to Spain. Nor did it hesitate in 1951-52 to go beyond the administration in using economic aid to encourage not only economic coöperation but political integration in Western Europe. This congressional effort to shape foreign policy through appropriations did not relent in subsequent years; and the greater dependence of foreign policy on

appropriations has meant that, in this sector at least, the presidency has lost power to Congress. When Monroe issued the Monroe Doctrine, he did not seek congressional assent, but when Kennedy called for the Alliance for Progress, he was at the mercy of Congress every step along the way.

The postwar argument between the Congress and the presidency spilled over to the treaty power as well. Members of Congress feared that the executive agreement, which had started out (with notable exceptions like Rush-Bagot) as a vehicle on minor matters, was now threatening to supersede the treaty as the means of major commitment. In December 1950, when Prime Minister Attlee came to Washington, a resolution sponsored by, among others, Senator Nixon, declared it the sense of the Senate that the President not only report in full to the Senate on his discussions but refrain from entering into any understandings or agreements. The Secretary of State dismissed this (as President Nixon would today) as "plainly . . . an infringement of the constitutional prerogative of the President to conduct negotiations." Still the resolution received 30 votes. Concern over the abuses of the executive agreement, already set off by hysteria among conservatives about the Yalta records, soon flowed into the movement for the Bricker Amendment.

This Amendment went through a succession of orchestrations; but the pervading theme was that treaties and executive agreements should become effective as internal law only through legislation valid in the absence of a treaty. This would mean not only that a treaty could not authorize what the Constitution forbids but that action by the House of Representatives and, in some cases, by state legislatures might be necessary to give it full effect. One version specifically empowered Congress "to regulate all executive and other agreements with any foreign power or international organization." When moderate conservatives joined with liberals to resist the Amendment, Senator Knowland plucked out the section on executive agreements and offered a bill requiring that all such agreements be transmitted to the Senate within 60 days of their execution. Though the Senate passed this bill in July 1956, the House failed to act. In 1972, when Senator Case of New Jersey, a liberal Republican, revived the Knowland idea, the Senate, with liberals in the lead, passed it almost unanimously, and a liberal Democrat, Senator Pell of Rhode Island, recently remarked that the Bricker

Amendment, "if put up today, I think, would be voted overwhelmingly by all of us."

VIII

The congressional protest soon subsided, in part because the election of a Republican President in 1952 seemed to promise a period of executive restraint and congressional influence and in part because Congress, no less than the executive, accepted the presuppositions of the cold war. Moreover, as so often, the acquisition of power altered perspectives. Secretary of State Dulles opposed the Bricker Amendment as strongly as any Democrat; and, while the Eisenhower administration was active in seeking joint resolutions at times of supposed vital decision in foreign affairs, it did so not because it thought Congress had any authority in the premises but because the resolution process, by involving Congress in the takeoff, would incriminate it in a crash-landing (this valuable aerial metaphor had been invented by Harold Stassen in 1946). The resolution process now became a curious ceremony of propitiation in which Presidents yielded no claims and Congress asserted few but which provided an amiable illusion of partnership; it was in domestic terms what someone had said of the Briand-Kellogg Pact—"an international kiss."

Sometimes even members of Congress considered such resolutions superfluous. When President Eisenhower, recalling Truman's omission in 1950, asked in 1955 for a resolution to cover possible American military activity around Formosa, Sam Rayburn, Speaker of the House and presumably an incarnation of the congressional prerogative, said, "If the President had done what is proposed here without consulting the Congress, he would have had no criticism from me." The Formosa Resolution at least contained language by which the President was "authorized to employ the Armed Forces," however lightly the executive regarded that language, but Congress loosened even that pretense of control by adding that he could use these forces "as he deems necessary" in the defense of Formosa and the Pescadores. When Eisenhower sought a Middle East Resolution in 1957, the Senate Foreign Relations Committee this time deleted the idea of congressional authorization. Senator Fulbright even expressed the fear that any resolution might limit the President's power as Commander in Chief to defend the "vital interests" of the nation. And when Eisenhower, in what in retrospect seems

a mysterious and, indeed, hazardous mission, sent 14,000 troops to Lebanon the next year, he cited as authority for this action, not at all his own resolution but the now capacious presidential prerogative.

On the other hand, Eisenhower had acknowledged the practical importance of congressional support when in 1954 he yielded to congressional (as well as British) opposition and declined to commit American force to the relief of Dien Bien Phu. At the same time, however, he reduced the significance of the troop-commitment issue by confiding an increasing share of American foreign operations to an agency presumed beyond the reach of Congress, the Central Intelligence Agency. In the Eisenhower years the CIA became the primary instrument of American intervention overseas, helping to overthrow governments in Iran (1953) and Guatemala (1954), failing to do so in Indonesia (1958), helping to install governments in Egypt (1954) and Laos (1959), organizing an expedition of Cuban refugees against the Castro régime (1960). Congress had no oversight over the CIA. It even lacked regular means of finding out what it was up to. There was a joint congressional committee on atomic energy but none (none to this day) on secret intelligence operations.

The cold war created both a critical environment and an uncritical consensus; and these enabled even a relatively passive President, a "Whig" like Eisenhower, to enlarge the unilateral authority of the executive. Nor did either the President or the Congress see this as a question of usurpation. During the fifties and much of the sixties most of Congress, mesmerized by the supposed need for instant response to constant crisis, overawed by what the Senate Foreign Relations Committee later called "the cult of executive expertise," accepted the "high-flying" theories of the presidential prerogative. In early 1960 Senator John F. Kennedy observed that, however large the congressional role in the formulation of domestic programs, "it is the President alone who must make the major decisions of our foreign policy." As late as 1961, Senator Fulbright contended that "for the existing requirements of American foreign policy we have hobbled the President by too niggardly a grant of power." While he found it "distasteful and dangerous to vest the executive with powers unchecked and unbalanced," the question, he concluded, was "whether we have any choice but to do so." Republicans were no less devoted to the thesis of executive supremacy. "It is a rather

interesting thing," Senator Dirksen, then Republican leader, told the Senate in 1967, "—I have run down many legal cases before the Supreme Court—that I have found as yet no delimitation on the power of the Commander in Chief under the Constitution." "I am convinced," said Senator Goldwater, "there is no question that the President can take military action at any time he feels danger for the country or, stretching a point, for its position in the world."

In this state of political and intellectual intimidation, Congress forgot even the claim for consultation and was grateful when the executive bothered to say what it planned to do. ("The distinction between solicitation of advice in advance of a decision and the provision of information in the wake of a decision would seem to be a significant one," the Senate Foreign Relations Committee finally commented in 1969. Pointing out that in the cases of the Cuban missile crisis and the Dominican intervention congressional leaders were informed what was to be done only a few hours before the decisions were carried out, the Committee added dryly, "Such acts of courtesy are always to be welcomed; the Constitution, however, envisages something more.") In this mood, too, Congress acquiesced in national commitment through executive agreement—as, for example, in the case of Spain where the original bases agreement of 1953 was steadily escalated by official pronouncement through the years until the Foreign Relations Committee could conclude in 1969 that the sum of executive declarations was a virtual commitment on the part of the United States to come to the aid of Spain. Senator Fulbright recently remarked a little bitterly, "We get many treaties dealing with postal affairs and so on. Recently, we had an extraordinary treaty dealing with the protection of stolen art objects. These are treaties. But when we put troops and take on commitments in Spain, it is an executive agreement."

The case of Thailand is equally astonishing. In 1962 Secretary of State Rusk and the Thai Foreign Minister expressed in a joint declaration "the firm intention of the United States to aid Thailand . . . in resisting Communist aggression and subversion." While this statement may have been no more than a specification of SEATO obligations, the executive branch thereafter secretly built and used bases and consolidated the Thai commitment in ways that would still be unknown to Congress and the electorate had it not been for the indomitable curiosity of Senator Syming-

ton and his Subcommittee on Security Arrangements and Commitments Abroad. The Subcommittee also uncovered interesting transactions involving the executive branch with Ethiopia (1960), Laos (1963) and South Korea (1966). The case of Israel is even more singular. Here a succession of executive declarations through five administrations have produced a virtual commitment without the pretense of a treaty or even an executive agreement.

In this mood also Congress accepted the Americanization of the Vietnam War in 1965. "If this decision was not for Congress under the Constitution," Professor Bickel has well said, "then no decision of any consequence in matters of war and peace is left to Congress." As for the Tonkin Gulf Resolution, though President Johnson liked to flourish it as proof that Congress had indeed made a decision, he himself really did not think, as he later put it, that "the resolution was necessary to do what we did and what we're doing." As he unfolded his view of presidential power in 1966: "There are many, many, who can recommend, advise and sometimes a few of them consent. But there is only one that has been chosen by the American people to decide."

Listing 24 statutes facilitating the fighting in Vietnam, Senator Goldwater said in 1971, "Congress is and has been involved up to its ears with the war in Southeast Asia." The argument that Congress thereby "authorized" the war, especially by voting appropriations, has a certain practical strength up to the point (as Judge Frank Coffin put it in a 1971 decision of the First Circuit Court) where Congress asserts a conflicting claim of authority, which it has not done. But, also as a practical matter, it is rare indeed for parliaments to deny supplies to fighting men, and too much cannot be inferred from the refusal to punish the troops for the sins of those who sent them into the line. It is true that members of the British Parliament voted against supply bills during the American Revolution, but this was before the Reform Acts had created constituencies broad enough to include large numbers of relatives of men in combat. At the height of his opposition to the Mexican War, Congressman Lincoln said, "I have always intended, and still intend, to vote supplies." Still, though Congress has placed restrictions on troop deployment, it had not by the middle of 1972 interposed a decisive obstacle to presidential escalation of the war.

IX

If President Johnson construed the high prerogative more in the eighteenth-century style of the British King than of the executive envisaged by the Constitution, his successor carried the inflation of presidential authority even further. In asserting that his power as the Commander in Chief authorized him to use American ground troops to invade Cambodia, and to do so without reference to or even the knowledge of Congress, President Nixon indulged in presidential warmaking beyond a point that even his boldest predecessors could have dreamed of. Those who had stretched the executive war power in the past had done so in the face of visible and dire threat to national survival: Lincoln confronted by rebellion, Roosevelt by the Third Reich. Each, moreover, had done what he felt he had to do without claiming constitutional sanction for every item of presidential action.

But, in justifying the commitment of American troops to war in a remote and neutral country, Nixon cited no emergency that denied time for congressional action, expressed no doubt about the total legality of his own initiative and showed no desire even for retroactive congressional ratification. All he was doing, he told the Senate Republican leader in June 1970, was fulfilling "the Constitutional duty of the Commander-in-Chief to take actions necessary to protect the lives of United States forces." This was no more, he implied, than the routine employment of presidential power; it required no special congressional assent, not even the fig-leaf, shortly repealed and abandoned, of the Tonkin Gulf Resolution. William Rehnquist of the Department of Justice, himself soon escalated by the President to the Supreme Court, called it "a valid exercise of his constitutional authority as Commander-in-Chief to secure the safety of American forces"—a proposition that might not have deeply moved the Nixon administration had it been advanced by the Presidium to explain why the Red Army was justified in invading a neutral country to secure the safety of Russian forces. "The President's authority to do what he did, in my view," Rehnquist concluded, "must be conceded by even those who read Executive authority narrowly." It was, in fact, challenged by even those who read executive authority broadly.

The government thus committed armed forces to hostilities first in Cambodia, then in Laos and North Vietnam (for the air force remains a part of the armed forces) on the basis of a theory

of defensive war so elastic that a President could freely and on his own initiative order armed intervention in any country housing any troops that might in any conceivable circumstance be used in an attack on American troops. If this seemed an extraordinary invasion of the congressional war power, there seemed a comparable invasion of the appropriations power when Henry Kissinger informed Hanoi in secret negotiation that the United States "could give and undertake, a voluntary contribution by the President, that there would be a massive reconstruction program for all of Indochina, in which North Vietnam could share to the extent of several billion dollars."

Congress appeared increasingly impotent in the face of the size and momentum of the postwar institutions of American foreign policy—an institutional array spearheaded by an aggressive presidency and supported by a military and intelligence establishment virtually beyond congressional reach. Indeed, large sections of the electorate were coming to feel that foreign policy had escaped from democratic control and that the institutions would have their way however the voters might vote.

Excess, as usual, invites reaction; and the Senate, with due timidity, reacted. What Versailles had done to the congressional prerogative, Vietnam now did to the presidential prerogative. But Congress did not react by frontal attack on the means by which the President continued the war, though various members of Congress urged this course on their colleagues. The Senate reacted rather by passing in June 1969 by 70-16 the National Commitments Resolution, described by the Senate Foreign Relations Committee as "an invitation to the executive to reconsider its excesses, and to the legislature to reconsider its omissions in the making of foreign policy." Neither invitation was accepted.

The Senate also reacted in April 1972 by passing a War Powers bill, from the workings of which Vietnam was specifically exempted. This bill, conceived and bravely promoted by Senator Javits, has, from some views, substantial defects. Had it been on the statute books in past years, it would surely have prevented Roosevelt from responding to Hitler in the North Atlantic in 1941 and would surely not have prevented Johnson from escalating the war in Vietnam (for Johnson would have received—indeed, did receive—overwhelming congressional support for escalation at every point till the middle of 1968). If passed by the Congress, the bill might be more likely to become

a means of inducing formal congressional approval of warlike presidential acts than of preventing such acts. Moreover, the principle on which the bill is based—that the President must carry out the policy directives of Congress in the initiation and prosecution of military hostilities—might itself have bellicose consequences the next time War Hawks dominate the legislative branch. Still the Senate's passage of the bill—especially by the impressive margin of 68–16—might have been expected to have some cautionary influence in reminding the President that Congress in its pathetic way thought it had some voice in the determination of peace and war. It had no such effect. A fortnight after its passage, President Nixon, again without reference to Congress, threw the American Air Force into devastating attacks on North Vietnam.

If there is an imbalance of powers, if Congress has lost authority clearly conferred on it by the Constitution, it can only be said that Congress has done little to correct the situation. Its complaints have been eloquent; its practical action has been slight. Its problem has been less lack of power than lack of will to use the powers it has—the power of appropriation, the power to regulate the size of the armed forces, the power through joint resolutions to shape foreign policy, the power to inform, investigate and censure. As late as the summer of 1972, the Senate, in declining Senator Cooper's amendment to the aid bill, which proposed to cut off funds for American troops and bombing in four months, relinquished, in the words of *The Washington Post*, "the only opportunity it has ever dared afford itself to make an independent and conclusive judgment on the war."

In the present as in the past, Congress has preferred to renounce responsibility—which is why the presidency has retained power. "We may say that power to legislate for emergencies belongs in the hands of Congress," said Justice Jackson in the Steel Seizure case, "but only Congress itself can prevent power from slipping through its fingers." The situation today, for all the wails of congressional self-pity, is much the one that Lincoln feared in 1848: "Allow the President to invade a neighboring nation [or, today, a nation on the other side of the world], whenever *he* shall deem it necessary to repel an invasion . . . and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect."

X

The Abraham Lincoln who had thus challenged the presidential prerogative of Polk was the same Abraham Lincoln who a dozen years later gave the presidency greater powers over war and peace than ever before, as the Andrew Jackson who showed such deference to Congress in the eighteen-thirties was the same Andrew Jackson who a dozen years earlier had charged without congressional authority into Spanish Florida. This is a critical point in understanding the nature of the issue. For nothing has been more characteristic of the perennial debate than the way in which the same people, in different circumstances and at different points in their lives, have argued both sides of the issue.

Richard M. Nixon had one set of views in 1951 on the question of whether Congress could control troop commitments and executive agreements. By 1971 he had an opposite set of views. Senator Fulbright, moving in the reverse direction, has long since repented his belief that the President needs more control over foreign policy. Professor Corwin's "high-flying prerogative men" of 20 years ago have zoomed downward on this question in recent times. Professor Commager has, in effect, accepted the Taft-Coudert case in his testimony in favor of the War Powers bill; and this writer, while remaining skeptical about the War Powers bill, would freely concede that Senator Taft had a much more substantial point than he supposed 20 years ago. But to make that point Senator Taft had to explain away the views of *his* father, the Chief Justice, who had written in 1916 that the President as Commander in Chief "can order the Army and Navy anywhere he will, if the appropriations furnish the means of transportation." And, while the younger Senator Taft has followed his father rather than his grandfather, such heirs of Taft as Goldwater and Rehnquist are today very high-flying prerogative men. For that matter Professor Corwin's own record was not all that immaculate. While he defended the congressional prerogative in 1951, in 1940 he had raised the question "whether the President may, without authorization by Congress, take measures which are technically acts of war in protection of American rights and interests abroad," and replied: "The answer returned both by practice and by judicial doctrine is yes." Even as late as 1949, Corwin described the power "to employ without congressional authorization the armed forces in protection of American rights and interests abroad wherever necessary" as "almost

unchallenged from the first and occasionally sanctified judicially."

There are several reasons for this chronicle of vacillation. For one thing, the issues involved are ones of genuine intellectual difficulty, about which reasonable men may well find themselves changing their minds. For another, power usually looks more responsible from inside than from outside. For another, general questions often assume different shapes in different lights. It is agreeable to claim constitutionality for policies one supports and agreeable too to stigmatize policies one opposes as unconstitutional. All these reasons tend toward a single conclusion: that the problem we face is not primarily constitutional. It is primarily political. History offers the lawyer or scholar almost any precedent he needs to sustain what he may consider, in a concrete setting, to be wise policy. There is simply no absolute solution to the constitutional issue. This is no doubt why the Supreme Court has been so skittish about pronouncing on the problem. In our long and voluble judicial history, the decisions bearing even marginally on the question can be numbered on the fingers of one hand, and the illumination they provide is, at best, flickering if not dim.

If this is so, we must restrain our national propensity to cast political questions in constitutional terms. Just as in other years we went too far in devising theories of spacious presidential power because we agreed with the way one set of Presidents wanted to use this power, now we are likely to go too far in limiting presidential power because we disagree with the projects of another set of Presidents. We must take care not to convert a passing historical phase into ultimate constitutional truth. Professor Bickel has even suggested that "Congress should prescribe the mission of our troops in the field, in accordance with a foreign and war policy of the United States which it is for Congress to set when it chooses to do so. And Congress should equally review and settle upon an appropriate foreign policy elsewhere than in Vietnam, and reorder the deployment of our forces accordingly." There is no great gain in replacing high-flying presidential men by high-flying congressional men, nor is James Buchanan necessarily the model President.

As the guerrilla war between the presidency and the Congress for control over foreign policy has dragged along through our history, the issue is sometimes put as if one or the other were the

safer depository of authority. Congressional judgment, Adolf Berle once argued, "tends to lag behind the facts in an international case to which the President must address himself . . . Defense means seeing trouble in advance and moving to prevent it. The President's estimates of what will happen have usually been better than those of men who do not live with the problems." Senator Goldwater opposed the War Powers bill because, as he said, "I would put more faith in the judgment of the Office of President in the matter of warmaking at this time than I would of Congress." But Senator Fulbright, who in 1961 feared the "localism and parochialism" of Congress, now believes "the collective judgment of the Congress, with all its faults, could be superior to that of one man who makes the final decision, in the executive."

History does not support any general assignment of superior virtue to either branch. In spite of Madison, the Congress is not always a force for restraint (as he himself discovered in 1812) nor the executive always a force for bellicosity. One need go back no further than the Cuban missile crisis to recall, as Robert Kennedy has told us, that the congressional leaders, including Senators Russell and Fulbright, "felt that the President should take more forceful action, a military attack or invasion, and that the blockade was far too weak a response." Those of us who hate the Indochina War may see more hope today in the Congress than in the presidency; just as those who grew up in the days when Congress rejected Versailles and promulgated the neutrality acts saw more hope in the executive. But it would be folly to regard either presidential or congressional wisdom as a permanent condition. Neither branch is infallible, and each needs the other—which is, I guess, the point the Founding Fathers were trying to make.

There is no worse fallacy than to build final answers on transient situations. The questions of the war power and the treaty power are, and must remain, political questions. This is not a zone of clear-cut constitutional prescription. It is rather what Justice Jackson in his brilliant opinion in the Steel Seizure case described as

a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential re-

sponsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

While the Constitution sets outer limits on both presidential and congressional action, it leaves a wide area of "joint possession." Common sense therefore argues for congressional participation as well as for presidential responsibility in the great decisions of peace and war.

To restore the constitutional balance, it is necessary in this period to rebuke presidential pretensions, as it has been necessary in other periods to rebuke congressional pretensions. Perhaps Tocqueville was not so profound after all (for once) in his theory of the antagonism between democracy and foreign policy. Perhaps Bryce (for once) was more to the point when he argued that the broad masses are capable of assessing national interests and of sustaining consistent policies. So far as judging the ends of policy is concerned, Bryce said, "History shows that [the people] do this at least as wisely as monarchs or oligarchies, or the small groups to whom, in democratic countries, the conduct of foreign relations has been left, and that they have evinced more respect for moral principles."

We are still told about the supposed structural advantages of the executive as portrayed in the *Federalist*—unity, secrecy, superior sources of information, decision, dispatch. These advantages seem less impressive today than they must have been 180 years ago. Our sprawling executive branch is often disunited and is chronically incapable of secrecy. Its information is no longer manifestly superior and is often manifestly defective. The need for decision and dispatch has been greatly exaggerated; apart from Korea and the Cuban missile crisis, no postwar emergency has demanded instant response. Moreover, there was far more reason for unilateral executive action in times when difficulties of transport and communication could delay the convening of Congress for weeks than there is in our age of the telephone and the jet aircraft. What remains to the President is his command of the institutions of war and his undeniable ability to create situations which will make it hard for Congress to reject his request. Here it might be well to recall the warning of the *Federalist*: "How easy would it be to fabricate pretences of approaching danger."

But in demythologizing the presidency we must take care not to remythologize the Congress. If it is extreme to say that the President can send troops anywhere he pleases without congressional authorization, it is equally extreme to say he cannot do so short of war without congressional authorization (even Senator Taft proposed no limitations on presidential deployment of the navy and air force). In this area, John Norton Moore and Quincy Wright have proposed a test worth careful consideration: that the President must obtain prior congressional authorization in all cases where regular combat units are committed to what may be sustained hostilities or where military intervention will require congressional action, as by appropriations, before it is completed. This would leave the President with independent authority to deploy forces short of war (and, of course, to repel attack), while it would assure congressional authority to limit or prohibit presidential commitment when war impends. But this provision, however attractive, would not have stopped escalation in Vietnam where President Johnson would have had no difficulty in getting the necessary authorization. The War Powers bill, though excessively rigid in its definition of situations where the President is authorized to act and unconvincing in its reliance on a 30-day deadline, contains valuable provisions for presidential reporting to the Congress once hostilities begin. Congressman Jonathan Bingham has proposed a simpler approach, which would avoid the rigidities of the War Powers bill but retain its affirmation of congressional control of undeclared hostilities. Citing the Executive Reorganization Act as a precedent, he would give either house of Congress power to terminate such hostilities by resolution. Some declaration of congressional power in this area would serve as a useful check on Presidents.

As for the treaty power, Senator Case's efforts to bring executive agreements within congressional purview and to induce the executive to submit major agreements in the form of treaties are long overdue. But the notion that executive agreements must be rigorously confined to minor matters and that all important international undertakings must be subject to senatorial veto would bring us back to the frustrations of Olney and Hay. Does anyone seriously suggest that every time a President meets another chief of state their understandings can be extinguished by one-third of the Senate? Would even high-flying congressional men contend that the Monroe Doctrine, the Emancipation Proclamation, the

Fourteen Points and the Atlantic Charter were cases of presidential usurpation? And in the period ahead, with the bipolar simplicities of the cold war giving way to the shifting complexities of a multipolar world, the executive simply cannot operate just on the leading strings of Congress. There has to be a middle ground between making the American President a czar and making him a puppet.

Senator Fulbright once distinguished between two kinds of power involved in the shaping of foreign policy—that pertaining to its direction, purpose and philosophy; and that pertaining to the day-to-day conduct of foreign affairs. The former, he suggested, belonged peculiarly to Congress, the latter to the executive. The trouble was that Congress was reversing the order of responsibility. “We have tended to snoop and pry in matters of detail, interfering in the handling of specific problems in specific places which we happen to chance upon. . . . At the same time we have resigned from our responsibility in the shaping of policy and the defining of its purposes, giving away things that are not ours to give: the war power of the Congress, the treaty power of the Senate and the broader advice and consent power.” Perhaps it would be well to recall the hope expressed by Senator Vandenberg in 1948 that the habit of senatorial intervention in foreign affairs would not become “too contagious because . . . only in those instances in which the Senate can be sure of a complete command of all the essential information prerequisite to an intelligent decision should it take the terrific chance of muddying the international waters by some sort of premature and ill-advised expression of its advice to the Executive.”

XI

Vandenberg was everlastingly right in his emphasis on information; for a flow of information to Congress is indispensable to a wise use of both the war and the treaty powers. And in no regard has Congress, until very recently, been more negligent than in acquiescing in executive denial of information. As Woodrow Wilson said long ago,

Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.

In Wilson's judgment, "The informing function of Congress should be preferred even to its legislative function." The executive has devised no more effective obstacle to the democratic control of foreign policy than the secrecy system which has grown to such appalling proportions since the Second World War.

It is time for Congress to reject the "if-you-only-knew-what-we-knew" pose by which the executive deepens the congressional inferiority complex. Members of Congress, at least those who read *The New York Times*, know more than they think and, in general, would not receive blinding illumination if they read Top Secret documents too. While the executive, through its diplomatic, military and intelligence operatives, has an abundance of short-run information not easily available to Congress, experience shows that this information is seldom essential to long-run judgments. Nor is executive information all that infallible; one has only to recall the theory prevailing in the executive bureaucracy a few years back that Hanoi and the Vietcong were the spearhead of a system of Chinese expansion in Southeast Asia. If the executive "had been subjected more quickly and more closely to the scrutiny of informed public and congressional opinion," Senator McGovern has said. "... it may not have fallen prey to its own delusions and fantasies."

And, as former government officials readily concede, there is no reason in most cases why Congress should be denied classified information. Thus George Ball: "I think there is very little information that Congress should ever be denied;" McGeorge Bundy: "I do not believe most of what is highly classified . . . should be kept from responsible members of the Congress at all. Indeed I believe the opposite." Nor should members of Congress be denied the opportunity to interrogate public officials presently shielded from them by the promiscuous invocation of executive privilege. Ball, calling executive privilege "a myth, for I find no constitutional basis for it," contends it should be invoked only when the President makes the decision himself and communicates that decision to Congress. George Reedy would even take the position "that the President has no executive privilege whatever in any public question." This is going a little far. The executive branch must retain the capacity to protect its internal processes of decision, and the President must on occasion assert a power to resist the disclosure of information against what he seriously believes to be the public interest. But Senator Ful-

bright's bill to restrain the flagrant abuse of executive privilege surely deserves enactment.

If Congress really wants to reclaim lost authority, it can do little more effective than to assure itself a steady and disinterested flow of information about foreign affairs. More than ever, information is the key to power. That is why the MacArthur hearings were so valuable in 1951; why the hearings conducted in recent years by the Senate Foreign Relations Committee under Senator Fulbright's leadership have done more to turn opinion against the Vietnam War than other more tangible weapons in the congressional arsenal. Perhaps the flow of information could be usefully institutionalized—as in Benjamin V. Cohen's proposal for the establishment by Congress of a commission of eight: two from the House, two from the Senate, four from the executive branch, empowered to exchange information and views on critical questions of foreign affairs.

XII

Structural change can effect only limited improvements. The greater hope perhaps lies in increasing sensitivity to the problem of "joint possession" of constitutional powers. Greater awareness of the problem, to which so many for so long were oblivious, has recently led serious men into serious consideration of the issues of constitutional balance. In the future such awareness may both restrain conscientious Presidents and reinvigorate responsible Congresses.

Nor can structural change save us from the exasperations of choice. We must recognize both that our government must operate within constitutional bounds and that, within this spacious area, questions involved in the control of foreign policy are political rather than constitutional. If we do this, we will perhaps stop turning passing necessities, or supposed necessities, into constitutional absolutes. For a self-styled strict constructionist, President Nixon has gone very far indeed in anointing manifest excesses with the lotion of constitutional sanctity.

In this regard he compares unfavorably with such Presidents as Jefferson, Lincoln and Franklin Roosevelt. Faced with infinitely more genuine emergencies, they had considerably more excuse for expansion of the presidential prerogative. But they did not claim that they were doing nothing more than applying routine presidential authority. Lincoln, particularly, in his trou-

bled justification for the suspension of habeas corpus, said, "Would not the official oath be broken if the government should be overthrown, when it was believed that disregarding the single law would tend to preserve it?" Jefferson put the case more generally:

To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. . . . The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.

A conscientious President must distinguish between the exception and the rule. Emergency may compel him to abandon the rule in favor of the exception; but he must not pretend—as Jefferson, Lincoln and Roosevelt declined to pretend and as Johnson and Nixon have pretended—that the exception *is* the rule. Rather, like Lincoln in 1860, the executive may at his own peril undertake measures about whose strict legality he may be in doubt, and do so, not under an illusion of constitutional righteousness, but in terms of a popular demand and a public necessity. In the end, he must rest such acts on the assent of Congress, the justice of his country and the rectitude of his motives. Only Presidents who distinguish emergency from normality can both meet emergency and preserve the constitutional order. As Justice Jackson said in the *Korematsu* case: "The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."