

*John G. Tower*

## **CONGRESS VERSUS THE PRESIDENT: THE FORMULATION AND IMPLEMENTATION OF AMERICAN FOREIGN POLICY**

The President is the sole organ of the nation in its external relations,  
and its sole representative with foreign nations.

—John Marshall  
March 7, 1800  
6th Congress

**O**ne of the oldest conflicts in the American system of government is that between Congress and the President over the right to formulate and implement foreign policy. Is the President solely responsible for the conduct of external relations? Is the Congress an equal partner? Or does Congress have the right to shape U.S. policy by enacting legislation which proscribes a President's flexibility? These are not just debating points for historians and constitutional lawyers, but critical issues which need to be addressed if we are to see the successful exercise of American diplomacy in the 1980s. Our effectiveness in dealing with the problems ahead, especially U.S.-Soviet competition in the Third World, will depend to a significant degree on our ability to resolve the adversary relationship between the President and Congress.

The struggle for control of foreign policy came to the fore in the twentieth century, with America's reluctant entry into world affairs, two World Wars, and a smaller, but more complex, postwar bipolar world characterized by the increasing interdependence of nations. The first significant Congressional challenge to the Executive's foreign policy prerogative occurred during the interwar years. After the Senate rejected President Wilson's Versailles Treaty in 1920, Congress continued to assert itself in the formulation of foreign policy. By the 1930s, a strong Congress was able to prevent presidential initiative in the critical prewar years. The almost universal consensus today is that this Congressional intrusion had been a disaster and had inhibited the United States from playing a useful role in Europe that might have prevented World War II.

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Following the Japanese attack on Pearl Harbor and our entry into the Second World War, Congress and the President stood in agreement over the direction of American foreign and military policy. Congressional intervention all but ceased.

The post-World War II period was marked by a reasonable balance between Congress and the President in the foreign policy decision-making process. In fact, Presidential foreign policy initiatives were generally accepted and reinforced by bipartisan support on Capitol Hill. American foreign policy was fairly coherent and consistent through changing complexions of the body politic. The United States was perceived as a reliable ally and its leadership generally accepted with a high degree of confidence by the non-communist world. But the relative stability between Congress and the President began to erode in the early 1970s with Congressional disenchantment over the Vietnam War. By mid-decade the two branches were locked in a struggle for control of American foreign policy. To a certain extent Congress won, and the balance between Congress and the President has swung dangerously to the legislative side with unfavorable consequences for American foreign policy.

If the balance is not soon restored, American foreign policy will be unable to meet the critical challenges of the 1980s. We are entering an era of fast change and increasing volatility in world affairs. Political instability and regional conflict are on the rise, especially in the Third World. Developing nations in many parts of the world are being torn apart by civil wars between pro-West and Soviet-supported factions, subverted by externally supported insurrection, or subjected to radical or reactionary anti-Western pressures. The industrialized economies of the West are ever more dependent on a lifeline of resources from an increasingly vulnerable part of the world. The Soviet Union has pursued an aggressive interventionist policy on its periphery and abroad, supported by its emerging global force projection capability and its successful use of less direct means of projecting power.

We may well be in a situation today which is analogous to that of the late 1930s, when America's inability to play a more active role in world affairs helped permit the Axis to realize its objectives without serious challenge. During this period Congress tied the President's hands, with disastrous consequences. Now we are back in the same situation, and risk making the same mistakes. If the United States is prevented from playing an active role in counter-ing Soviet and Soviet proxy involvement in the Third World, the 1990s could well find a world in which the resource-rich and

strategically important developing nations are aligned with the Soviet Union.

## II

What is the proper balance between Congress and the President in the formulation and implementation of foreign policy? Although the bulk of opinion argues for strong Executive authority in the conduct of external relations, the Constitution itself offers no clear definition as to where legislative authority ends and Presidential prerogative begins. The Constitution would appear to have vested war powers in both the Executive and Legislative branches. Although it conferred the power to declare war and raise and support the armed forces on Congress (Article I, Section 8), the Constitution also made the President Commander-in-Chief of the armed forces (Article II, Section 2). Nowhere in the Constitution is there unambiguous guidance as to which branch of government has the final authority to conduct external relations. Nonetheless, there is the strong implication that the formulation and implementation of foreign policy is a function of the Executive Branch, both as a practical necessity and as an essential concomitant of nationality.

John Jay argues this point in the *Federalist Papers* (Number 64, March 5, 1788):

The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch, are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these the president will find no difficulty to provide, and should any circumstance occur which requires the advice and consent of the senate, he may at any time convene them.

The Supreme Court has forcefully upheld Executive authority in foreign relations. In 1935 Justice Sutherland, in the case of *U.S. v. Curtiss-Wright Export Corporation et al.* (299 U.S. 304), cited a series of previous Court decisions in arguing that the powers of "internal sovereignty" lay with the individual states, but those of "external sovereignty" were with the national government.

[There are fundamental differences] between the powers of the federal government in respect to foreign or external affairs and those in respect to domestic or internal affairs. . . . Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power 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. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, 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.

In addition to the constitutional, judicial and historical arguments against Congressional intervention in foreign policy, there is an even more clear-cut issue of the efficacy of Congressional involvement in foreign policy. To the extent that Congress often represents competing regional and parochial interests, it is almost impossible for it to forge a unified national foreign policy strategy and to speak with one voice in negotiating with foreign powers. Because of the nature of the legislative process a law may be passed in response to a certain set of events, yet remain in effect long after the circumstances have changed. The great danger of Congressional intervention in foreign affairs is that enacted legislation becomes an institutional rigid “solution” to a temporary problem.

The President, along with the Vice President, is the only officer of government who is elected by and responsible to the nation as a whole. As such, only he possesses a national mandate. As head of the Executive Branch, the President can formulate a unified foreign policy, taking into consideration how each aspect of it will fit into an overall strategy. He and his advisers can formulate their strategy with the necessary confidentiality not only among themselves, but between the United States and foreign powers. The President has the information, professional personnel, operational experience, and national mandate to conduct a consistent long-range policy.

The legislative body, on the other hand, is elected to represent separate constituencies. Congress must of necessity take a tactical approach when enacting legislation, since the passage of laws is achieved by constantly shifting coalitions. This serves us well in the formulation of domestic policy, where we proceed by voting

on one discrete piece of legislation at a time. Although many of us may have our own long-term strategies in mind as we vote on specific legislative matters, the overall effect is a body of legislation passed piece by piece by a changing majority of legislators. We build domestic policy one step at a time to the end that the final product of domestic legislation is reflected in a consensus of various coalitions. If we later find out we have made an error in a specific piece of domestic legislation, we can change it. For example, if we determine that we have underfunded housing subsidies we can increase them the next year. But the process by which generally accepted domestic policy is arrived at does not lend itself to the formulation of a long-term, coherent, foreign policy. Once we alienate a friendly government, perhaps through shortsighted legislation, it may take years for us to rebuild that relationship and recoup the loss.

A foreign policy should be an aggregate strategy, made up of separate bilateral and multilateral relationships that fit into a grander scheme designed to promote the long-term national interests. With a comprehensive design in mind, those who execute foreign policy can respond to changes in the international environment, substituting one tactic for another as it becomes necessary, but retaining the overall strategy.

In 1816, the Senate Foreign Relations Committee put the argument this way:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. . . . The Committee . . . think the interference of the Senate in the direction of foreign negotiations are calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

Five hundred and thirty-five Congressmen with different philosophies, regional interests and objectives in mind cannot forge a unified foreign policy that reflects the interests of the United States as a whole. Nor can they negotiate with foreign powers, or meet the requirement for diplomatic confidentiality. They are also ill equipped to respond quickly and decisively to changes in the international scene. The shifting coalitions of Congress, which serve us so well in the formulation and implementation of domestic policy, are not well suited to the day-to-day conduct of external relations. An observer has compared the conduct of foreign rela-

tions to a geopolitical chess game. Chess is not a team sport.

## III

The 1970s were marked by a rash of Congressionally initiated foreign policy legislation that limited the President's range of options on a number of foreign policy issues. The thrust of the legislation was to restrict the President's ability to dispatch troops abroad in a crisis, and to proscribe his authority in arms sales, trade, human rights, foreign assistance and intelligence operations. During this period, over 150 separate prohibitions and restrictions were enacted on Executive Branch authority to formulate and implement foreign policy. Not only was much of this legislation ill conceived, if not actually unconstitutional, it has served in a number of instances to be detrimental to the national security and foreign policy interests of the United States.

The President's freedom of action in building bilateral relationships was severely proscribed by the series of *Nelson-Bingham Amendments*, beginning with the 1974 Foreign Assistance Act (P.L. 93-559). This legislation required the President to give advance notice to Congress of any offer to sell to foreign countries defense articles and services valued at \$25 million or more and empowered the Congress to disapprove such sales within 20 calendar days by concurrent resolution. In 1976, the Nelson-Bingham Amendment to the Arms Export Control Act (P. L. 94-329) tightened these restrictions to include advance notification of any sale of "major" defense equipment totaling over \$7 million. Congress is now given 30 days in which to exercise its legislative veto.

The consequence of these laws is that for the past seven years every major arms sale agreement has been played out amidst an acrimonious national debate, blown out of all proportion to the intrinsic importance of the transaction in question. Often the merits of the sale and its long-term foreign policy consequences are ignored, since legislators are put into the position of posturing for domestic political considerations. The debate diverts the President, the Congress and the nation from focusing on vital internal matters. Finally, because arms sales debates command so much media attention, legislators are inclined to give impulsive reaction statements before they have an opportunity for informed deliberation. They thereby often commit themselves to positions that, on cool reflection, they find untenable but difficult to recant.

The recent debate over the sale of AWACS (Airborne Warning and Control System) surveillance aircraft to Saudi Arabia is a classic case in point. Under such circumstances, it becomes ex-

tremely difficult for elected legislators to ignore constituent pressures and decide an issue on its merits. For example, Congressman Dan Rostenkowski (D-Ill.) said following the House vote to reject the AWACS sale that he voted against selling AWACS to Saudi Arabia for political reasons, despite his view that the sale should go through on its merits.

Such a situation raises the possibility that should the Congressional decision do ultimate violence to our national interest, the nation whose perceived interests have been sustained by successful lobbying will pay a price later. My colleague, Senator William Cohen (R-Maine), who opposed the sale on its merits, felt compelled to vote for it because he feared its defeat would precipitate an American backlash against Israel:

If the sale is rejected, [Israel] . . . will be blamed for the dissolution of the peace process . . . when the crisis comes, . . . when everyone is pointing an accusatory finger looking for a scapegoat, I do not want to hear any voices in the United States say—if only they had not been so intransigent, if only they had agreed not to interfere, if only they had not brought this mess—this death—upon themselves.

In some cases Congress allows a sale to go through, but only after a series of trivial and humiliating restrictions are placed on the purchasing nation. This tends to negate whatever goodwill the sale was designed to achieve. For example, in 1975 the President agreed to sell HAWK surface-to-air mobile missiles to Jordan. After a national brouhaha filled with many insults to King Hussein and questions about the stability of his regime, the sale finally went through, but only in “compromise” form—we took the wheels off. Presumably, HAWK missiles without wheels would allow the Jordanians to use them in fixed positions to protect the capital and key military locations, but prevent them from moving the missiles to the front line to be used against Israel. King Hussein later asked then Secretary of State Henry Kissinger why Congress had insisted on such a trivial point. It was never a question of whether the HAWKS would be mobile or not—we knew the Jordanians would be able to buy the wheels on the international market if they decided to violate the terms of the sale. The end result was that rather than cement our friendly relations with Jordan, we succeeded in humiliating a longtime friend.

Such actions are not soon forgotten. In his recent visit to Washington, King Hussein indicated that Jordan is considering turning to the Soviet Union for its new air defense missiles. This attitude clearly stems in part from his unhappiness over Congress-

sional restrictions on U.S. arms sales to Jordan. According to a State Department spokesman, the 1975 HAWK missile sale "still rankles" in Jordan.

The *Turkish Arms Embargo* was a case where Congress tied the President's hands in negotiations. After the Turkish invasion of Cyprus on July 19–20, 1974, the Administration became involved in negotiations aimed at reconciling our two NATO allies, Greece and Turkey. After two days, a cease-fire was achieved, with Turkey controlling 25 percent of Cyprus.

Yet Congress was moving on a path of its own. On August 2, the House introduced two measures demanding the immediate and total removal of Turkish troops from Cyprus. After the second Turkish assault on August 14, the Senate Foreign Relations Committee prompted a State Department inquiry into possible Turkish violations of U.S. arms restrictions.

At one point, Prime Minister Ecevit of Turkey privately communicated his willingness to settle on terms representing a significant improvement over the status quo. The Administration was concerned that Congressional action would make it harder for Turkey to follow a conciliatory policy and thus destroy any hopes of a negotiated settlement. In an attempt to discourage a Turkish embargo, the White House invited several of my colleagues to attend briefings on the possibility of negotiations. Even after being shown evidence that a negotiation likely to improve Greece's position was in the making, these Congressmen continued to call for an arms embargo; soon, all hopes for a negotiated settlement vanished. On September 16, Ecevit's moderate government collapsed, and on October 17, the Congress imposed a Turkish arms embargo on a "very, very reluctant" President Ford. The embargo began on February 5, 1975; by that time, Turkey controlled 40 percent of the island. On June 17, 1975, Turkey responded to the embargo by placing all U.S. bases and listening posts on provisional status. On July 24, 1975, the House rejected a motion to partially lift the embargo; two days later, Turkey announced it was shutting down all U.S. bases and posts on its territory.

Thus, instead of reaching an agreement with a moderate Turkish government that controlled one-quarter of Cyprus, the United States had severely strained relations with an angry Turkish government that controlled two-fifths of the island. Furthermore, the aid cutoff weakened Turkey militarily, jeopardizing the southern flank of NATO and putting at risk our strategic listening posts in that country.



In a society such as ours, with its heterogeneous mix of various national and ethnic groups, strong lobbies are inevitable. But to submit American foreign policy to inordinate influence by these groups—often emotionally charged—is to impair a President's ability to carry out a strategy which reflects the interests of our nation as a whole. The Nelson-Bingham Amendments and the Turkish Arms Embargo were two pieces of legislation conducive to such a situation.

A second major area where Congressional intervention contributed to foreign policy disasters was the series of anti-war amendments. Throughout the early 1970s Congress proposed a series of acts aimed at forcing the United States into early withdrawal from Southeast Asia and cutting off American aid to Vietnam, Laos and Cambodia. The *Cooper-Church Amendment*, which became law in early 1971, cut off funds for U.S. troops, advisers and air support in and over Cambodia. The *Eagleton Amendment* (1973) called for American withdrawal from Laos and Cambodia. The *McGovern-Hatfield Amendment* (1970-71) set deadlines for American withdrawal from Indochina. Even though these two latter anti-Vietnam amendments did not become law, the pattern was clear by the early 1970s. My Senate colleagues would introduce one amendment after another, making it clear to the North Vietnamese that we would eventually legislate ourselves out of Vietnam. The Administration lost both credibility and flexibility in the peace negotiations. By making it clear to the North Vietnamese that Congress would prevent the President from further pursuing the war, or from enforcing the eventual peace, Congress sent a clear signal to our enemies that they could win in the end. The North Vietnamese were encouraged to stall in the Paris Peace Talks, waiting for American domestic dissent to provide them with the victory their military forces had been unable to achieve. After the Paris Agreements, aid to South Vietnam was throttled.

Finally, on July 1, 1973, we destroyed any hope of enforcing the Paris Peace Accords. The *Fulbright Amendment* to the Second Supplemental Appropriations Act for FY 1973 prohibited the use of funds "to support directly or indirectly combat activities in . . . or over Cambodia, Laos, North Vietnam and South Vietnam." As I said in Congressional debate over the Eagleton Amendment, the forerunner to the Fulbright Amendment:

It has tremendous significance because it marks the placing on the President of an . . . inhibition in the conduct of foreign relations, in the negotiating of

agreement and treaties, and in the implementation and enforcement of those agreements once arrived at. . . . What we have in effect done in the Eagleton Amendment is said to [the North Vietnamese]: 'You may do whatever you please. Having concluded this agreement, we intend to walk away from it, and we don't care whether you violate those provisions or not.'

I believed then and still believe that our failure to enforce the Paris Accords was a principal contributor to Communist victory in Indochina and the resulting horrors we have seen since in Laos, Cambodia and Vietnam. Reasonable men may argue whether or not we were right in being in Vietnam in the first place. I remain convinced that we made many mistakes that led us there, and that our direct involvement was ill conceived. But to deny a President the military means to enforce a negotiated agreement guaranteed that all the sacrifices that came before it would be in vain. Just because a peace agreement is signed or a cease-fire agreed to is no guarantee that both sides will live up to it. After World War II we enforced the peace with Germany and Japan by occupation forces. We guaranteed the Korean cease-fire by the continued presence of U.N. troops at the Demilitarized Zone. The Fulbright Amendment prohibited our enforcing the Paris Accords. We bought a settlement in Vietnam with 50,000 American lives that gave South Vietnam, Cambodia and Laos a chance to survive—a chance that was thrown away when we refused to be guarantors to that settlement.

The *War Powers Act* (P.L. 93-148) is probably the most potentially damaging of the 1970s legislation, although we have yet to experience a crisis where its effects are felt. The War Powers Act (1973) grew out of Congress' frustration with the war in Vietnam and its desire to prevent such a situation from ever happening again. Although President Nixon vetoed the Act on October 24, 1973, terming it "unconstitutional," his veto was overridden two weeks later by the House and Senate.

The act provides that before American troops are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" the President is to consult with Congress "in every possible instance." The President must notify Congress and submit a report within 48 hours after armed forces are sent abroad, "setting forth the circumstances necessitating the introduction of U.S. forces" and the "estimated scope and duration of the hostilities or involvement." After this initial two-day period, the President has 60 days to withdraw those forces or receive Congressional authorization for an extension, or a declaration of war.

This act jeopardizes the President's ability to respond quickly, forcefully and if necessary in secret, to protect American interests abroad. This may even invite crises. Although the act does not specify whether the report to Congress must be unclassified, there remains the possibility that a confidential report would become public knowledge. In many cases the more urgent the requirement that a decision remain confidential, the greater the pressures for disclosure. Thus, by notifying Congress of the size, disposition and objectives of U.S. forces dispatched in a crisis, we run the risk that the report may get into the public domain. If this information becomes available to the enemy, he then knows exactly what he can expect from American forces and thus what risks he runs in countering American actions. This removes any element of surprise the U.S. forces might have enjoyed and eliminates any uncertainties the adversary might have as to American plans.

It is interesting to speculate on just how damaging the legislation could prove to be at some future point. For that matter, what if the Iranian rescue attempt had gone somewhat differently? On April 26, 1980, President Carter reported to Congress the use of armed forces in the unsuccessful attempt to rescue American hostages in Iran on April 24, in full compliance with the 48-hour notification requirement of the War Powers Act. In this case, the rescue operation was over by the time the report was submitted, so there was no longer a need for secrecy nor a need for Congress to consider whether forces should be authorized or withdrawn. But what if the rescue attempt had bogged down or been planned as a longer effort? No doubt the details would have gotten out almost immediately, leaving little doubt in the minds of the Iranians just what the Americans were up to. While the framers of the War Powers Act intended it to prevent another Vietnam, their legislation has the effect of severely limiting the President's ability to respond quickly, forcefully and in secret to a foreign crisis.

In addition to the questionable wisdom of the reporting and consulting requirements of the War Powers Act, there are also doubts as to whether the legislative veto contained in the act is constitutional. Section 5 of the Act allows Congress the right to terminate any use of force, at any time, that has not been specifically authorized by either a declaration of war or similar legislation, by a concurrent resolution passed by a simple majority of both Houses. The legislative veto contained in the War Powers Act would appear to be in violation of Article 1, Section 7 of the Constitution. This so-called presentation clause clearly stipulates

that an act can become law only if it is passed by a majority of both Houses of Congress followed by the President's assent, or by a two-thirds vote in each Chamber to override the President's veto.

After the Indochina debacle, there was a raft of Vietnam-syndrome legislation that sought to prevent the President from getting us involved in "future Vietnams." The *Tunney Amendment* to the Defense Appropriations Act of 1976 (P.L. 94-212), which passed the Senate on December 19, 1975, prohibited the use of "funds appropriated in this Act for any activities involving Angola other than intelligence gathering."<sup>1</sup> My colleagues feared that President Ford's attempts to offer minimal assistance to the pro-West UNITA (National Union for the Total Independence of Angola) and FNLA (National Front for the Liberation of Angola) factions would somehow embroil us in "another Vietnam." The domestic debate over whether we should become involved in Angola sent a clear signal to the Soviets and their Cuban proxies. They knew that the risk of U.S. intervention was low, and the possibility of continued U.S. assistance to the pro-Western factions slim.

Although the Soviet-Cuban airlift halted temporarily in December with President Ford's stern warning to the Soviet Ambassador, the airlift resumed with a vengeance following passage of the Tunney Amendment on December 19, 1975. The number of Cubans in Angola doubled as they began flying in fresher troops for what was to become an all-out offensive against pro-Western forces. By January the Soviet Union had increased its military assistance to the MPLA (Popular Movement for the Liberation of Angola) and stationed Soviet warships in the vicinity of Angola. They began extensive ferrying operations for Cuban troops. It was clear that the United States had lost whatever leverage it might have had to persuade Soviet leaders to reduce Soviet and Cuban involvement in Angola.

With Angola the Soviet Union entered a new phase; never before had it or its surrogate Cuban army attempted such large-scale operations in Africa or anywhere else in the Third World. Their successful intervention in Angola bestowed on the Soviet Union and Cuba the image of dependable allies and supporters of radical movements in southern Africa. The United States by

<sup>1</sup> The Clark Amendment to the Arms Export Control Act of 1976 (Sec. 404, P.L. 94-329), which became law on June 30, 1976, further tightened the restriction by prohibiting "assistance of any kind . . . for the purpose, or which would have the effect, of promoting or augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola."

contrast was portrayed as having lost its taste for foreign involvement after Vietnam, and as being domestically divided over a foreign policy strategy. The moderate black African states lost confidence in America's willingness to stem the tide of Soviet involvement in the region.

After being reduced to sporadic guerrilla engagements for over a year, in July 1977 the pro-West UNITA faction declared its intention to renew the fight. Following this announcement, the Soviets and Cubans increased their efforts. As of late 1979, there were some 19,000 Cuban troops, 6,000 Cuban civilian technicians and 400 to 500 Soviet advisors in Angola. Although the guerrilla war continues, the Clark Amendment prohibits the United States from offering any aid to the pro-Western faction. The Clark Amendment prevents us from responding to Soviet and Cuban involvement in Angola, and leaves open to them the mineral-rich, strategically important region of southern Africa.

Finally, two of the most damaging Congressional intrusions into national security policy were the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the so-called *Church Committee*) and the *Hughes-Ryan Amendment* to the Foreign Assistance Act (P.L. 93-189). As vice-chairman of the Church Committee (1975-76) I sought to limit the damage to our intelligence community, although to little avail. By conducting a public inquiry into the CIA we exposed not only its supposed blunders and malfeasance but also important information as to how the CIA is organized, how it gathers intelligence and what kinds of sources and methods it uses.

The Hughes-Ryan Amendment, which became law on December 30, 1974, prohibited any CIA activities abroad that are not directly related to intelligence gathering, "unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operations to the appropriate committees of Congress." By 1977 information about covert intelligence activities was available to eight Congressional committees, for a total of 200 members or roughly 40 percent of Congress.<sup>2</sup>

This, plus the Church Committee hearings, confirmed to our adversaries that clandestine operations would be severely curtailed in the future. It sent a signal to our adversaries that they could

<sup>2</sup> In one of the few reversals of the 1970s legislation, in October 1980 the President signed into law an amendment to the National Security Act (P.L. 96-450), which stipulates that he must report covert operations to only two Congressional Committees, the House and Senate Select Committees on Intelligence.

proceed with impunity in the "back alleys of the world." These actions also shook the confidence of those friendly states which had cooperated with us in intelligence gathering, and caused many of them to reassess their relationship with the U.S. intelligence community. They feared Congressional investigations of the CIA would expose their own intelligence sources and methods. In private conversations with officials of friendly intelligence agencies, I have been told that the Church Committee raised doubts about the wisdom of their cooperating with the United States in the future. This has also adversely affected our cooperation with countries that for political reasons take a publicly hostile attitude toward the United States, but who privately cooperate with us on some matters of mutual interest. They fear the publicity generated by a Congressional investigation would expose what is essentially a private relationship, and lead to unfavorable domestic political consequences for them. Finally, either through leaks or publicly released data, the Church Committee titillated the press with daily helpings of some of our nation's most treasured secrets.

## IV

If we are to meet the foreign policy challenges facing us in the 1980s, we must restore the traditional balance between Congress and the President in the formulation and implementation of foreign policy. To do so, much of the legislation of the past decade should be repealed or amended.

Many in Congress are coming to this conclusion and are working toward a reversal of the imbalance. The 1980 modification of the Hughes-Ryan Amendment to require notification of covert actions to only the two Intelligence Committees is one such step, as is the Senate's October 22, 1981, vote to repeal the Clark Amendment. Further efforts in this direction are essential if we are to have the maximum flexibility required to respond to a fast-changing world.

In addition to reversing much of this legislation, we should also look at new legislation which may be appropriate. There are strong arguments in favor of creating an unspecified contingency fund for economic and military assistance. One of the consequences of the 1970s legislation was that such funds which had previously existed were either abolished or severely curtailed. Reestablishment of such funds would grant the President the flexibility he needs to be able to respond quickly to help new friends that emerge unexpectedly, or old friends who are suddenly endangered. While disbursement of these funds should be made with appropriate notification to Congress, the inevitable delays

involved in waiting for new Congressional authorization should be avoided.

For example, when Zimbabwe became independent on April 18, 1980, the new government was strongly anti-Soviet, pro-West and in need of economic assistance. On the day he took office, President Mugabe invited the United States to be the first nation to establish diplomatic relations with and open an embassy in Zimbabwe. We responded with a pledge of economic assistance, but due to the lack of funds for such contingencies, were able to grant only \$2 million. We had to wait almost ten months, until the next appropriations cycle could be completed, to grant Zimbabwe the amount of economic assistance it needed.

We face a similar situation in northern Africa today. In the confusion cast over the area in the wake of the Sadat assassination, Libyan President Qaddafi has heightened threats against the anti-Soviet government of Sudan. The Libyan army appears to be on an alerted posture. Were Libya to attack Sudan tomorrow, there is very little the United States could do right away to assist President Nimeiry.

As legislation now stands the President has certain limited flexibility to grant military assistance to respond quickly to unplanned situations. The Foreign Assistance Act of 1961, as amended, permits the President, in the interests of national security, to draw on U.S. military stocks, defense services, or military education and training, up to \$50 million in any fiscal year for foreign use. In 1981 the Reagan Administration requested that new contingency funds totalling \$350 million be established for emergency economic and military assistance. As of mid-November 1981 Congressional action on this request is still pending, although it appears that both Houses are moving to reduce significantly the size of these contingency funds.

In supporting such discretionary authority and appropriations, and urging the repeal of the excessively restrictive legislation of the 1970s, I am in effect proposing a return to the situation that prevailed in the 1950s and 1960s.

At that time the Congress did provide discretionary authority and substantial contingency funds for the use of Presidents Truman, Eisenhower, Kennedy and Johnson. Each of these Presidents employed his authority to act quickly and decisively in ways which, on balance, served the national interest—especially in new and unforeseen situations emerging in what we now call the Third World. The basic authority of the Congress to appropriate funds for the armed forces and foreign activities remained constant.

Indeed, the Congress from time to time expressed its views forcefully as to the desirability of support for nations that acted in ways prejudicial to American interests. (An early example of such legislation was the Hickenlooper Amendment, which for many years expressed Congress' general opposition to continue aid to countries that nationalized private American companies without adequate compensation.) The crucial difference is that such expressions of Congressional sentiment almost invariably contained a saving clause that permitted the President to go ahead if he certified to the Congress that the action was necessary for overriding national security reasons. This is a perfectly sound and reasonable practice, and one that avoids the immense complications and possible unconstitutionality of the legislative vetoes introduced by the various amendments of the 1970s.

In short, what I propose above is vastly more effective than the present situation, sounder from every constitutional standpoint, and fully in keeping with past precedents.

## v

Finally, in reconsidering the legislation of the 1970s, it is useful to reexamine it and its causes in a more dispassionate light than that of the period. At the time, much of this legislation was considered a necessary response to counter the excesses of the presidency. Since the Vietnam War had never been formally declared by Congress, it was seen as the President's war. Water-gate, along with the war, was considered to be the result of a Presidency grown too authoritarian. If the war were ever to end, and if future Vietnams were to be prevented, the President's foreign policy authority would have to be proscribed. As Arthur Schlesinger put it, the theory "that a foreign policy must be trusted to the executive went down in flames in Vietnam. . . . Vietnam discredited executive control of foreign relations as profoundly as Versailles and mandatory neutrality had discredited congressional control."<sup>3</sup>

If this legislation was motivated by an "Imperial Presidency," whose ultimate manifestation was an undeclared war, then the motivation is flawed. Blame for Vietnam can be laid at many doors: a series of American Presidents, and those in the civilian leadership who advocated gradual escalation and limited rules of

<sup>3</sup> Arthur M. Schlesinger, Jr., *The Imperial Presidency*, Boston: Houghton Mifflin, 1973, pp. 282-83.



engagement. But Congress was not blameless. The war in Vietnam, while undeclared by Congress in a formal sense, had de facto Congressional support. Beginning in the mid-1960s the Administration sent defense authorization and appropriations bills to Congress—legislation which clearly designated certain men and monies for the war effort. Year after year Congress acquiesced in the Vietnam War, by authorizing and appropriating resources for it. As former Senator J. William Fulbright remarked, "It was not a lack of power which prevented the Congress from ending the war in Indochina but a lack of will." With waning public support for a war which seemed to drag on forever, many in Congress and the media looked to a single explanation—for a scapegoat who could be held accountable for an unpopular war. Blame for the war in Vietnam was attributed to the usurpation of power by the President.

In the early 1970s Congress reversed itself and belatedly attempted to use its appropriation authority to end the war. While this was certainly within its prerogative, the timing was of questionable wisdom. Our efforts to disengage from Vietnam and to negotiate with the North Vietnamese were made more difficult by Congressional intervention. Congressional action made a settlement all the more difficult to achieve and, ultimately, impossible to enforce. The view that the Vietnam War discredited forever Executive control of foreign policy was an emotional reaction, driven by the passion of the moment. Because of it, Congress embarked on a course to limit not only President Nixon's flexibility, but also that of future Presidents. Congress prescribed a cure for a nonexistent disease. The lasting effect was that Congress institutionalized its foreign policy differences with the President by legislating permanent solutions for a temporary situation.

As Cyrus Vance said at the 1980 Harvard commencement, "Neither we nor the world can afford an American foreign policy which is hostage to the emotions of the moment." The authority to conduct external relations should not vacillate between Congress and the President as a result of failed or unpopular initiatives. The whole point of a written constitution and body of judicial opinion is to establish a consistent mechanism for apportioning authority. Whereas the Constitution confers on the Senate the duty of advice and consent in the making of treaties, on the Congress the power to appropriate monies for armed forces and to declare war, and special authority in the field of trade, it confers on Congress no other special rights in the field of external affairs.

The cumulative effect of this legislation is that, as the United States enters a period when the greatest flexibility is required of an American President to deal with fast-changing situations in the world, Congress has inhibited the President's freedom of action and denied him the tools necessary for the formulation and implementation of American foreign policy. We know that the Soviet Union maintains clandestine operations which are well organized, well disciplined, well financed, well trained and often well armed, in virtually every Third World country. They are in a position to exploit many restive political situations which they may or may not originate. To inhibit the United States in its ability to conduct covert operations, to provide military assistance to pro-West governments or groups, and to respond quickly to military crises is to concede an enormous advantage to the Soviet Union and its proxies.

It is my sincere hope that Congress will reexamine its role in the conduct of foreign policy and repeal or amend, as necessary, the legislation of the 1970s. The end towards which we should work is to do whatever is necessary to strengthen America's ability to formulate and implement a unified, coherent and cohesive foreign policy to face the challenges of the 1980s.

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