

THE CONSTITUTION, FOREIGN POLICY, AND DETERRENCE:
THE SEPARATION OF POWERS IN A DANGEROUS WORLD

by John Norton Moore

A central world order threat in the contemporary international system is the failure of deterrence against aggressive attack particularly, but not exclusively, secret warfare and subtle forms of mixed politico-military coercion. This threat is the synergistic product of, on the one hand, a growing network of radical regimes and movements that believe in the use of force to expand regime ideology and interests and, on the other hand, the democracies' historical difficulty in perceiving and deterring totalitarian aggression, as this difficulty is magnified in an era of sophisticated secret attack and accompanying political warfare.

A potential contributor (it will not necessarily always be so) to this difficulty is the principle of separation of powers--with its underlying rationale of checks on power. As with other potential contributors to the difficulty in democratic response, such as a vigorous and skeptical media and a population that strongly seeks peace and projects the same views to others, the separation of powers is a vital tenet of democracy itself. As important, in light of the contemporary threat to world order, those responsible for implementing the separation of powers must do so with an awareness of the effect on deterrence--and the challenge it poses for the democracies. In this connection, sadly, the post-Vietnam congressional record is poor.

The precise parameters of congressional and presidential power have been debated throughout U.S. history, beginning with the famous debate between Alexander Hamilton writing as "Pacificus" and James Madison writing as "Helvidius." As Edward S. Corwin has written, the Constitution "is an invitation to struggle for the privilege of directing American foreign policy." Sometimes the ambiguity can be overstated. I believe that the scholars supporting a strong presidency, such as the late Quincy Wright or currently Robert F. Turner, are correct both on legal and policy grounds. Nevertheless,

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the degree of constitutional ambiguity has permitted periods of enhanced congressional activism in foreign policy, particularly when supported by popular myth. This would include the post-Vietnam period, one of the most active such periods in American history. Former Senator John Tower has pointed out that there have been more than 150 congressionally induced constraints placed on the exercise of presidential power within the last decade alone. The War Powers Act may be the most visible generic example.

It is important and appropriate that Members of Congress and the Executive Branch, as well as scholars and the public, appraise the effects of this congressional micromanagement of foreign policy, particularly its effect on deterrence. Analysis in this area should not focus solely on constitutional line drawing, it should also appraise the effects of particular forms of congressional action. In doing so today, I will focus on two sets of issues. First, an appraisal of the popular myths supporting heightened congressional activism in a post-Vietnam setting, and second, questions concerning the record of congressional micromanagement in enhancing or reducing deterrence.

No one questions that Congress has an important role to play in U.S. foreign policy. Congress appropriates funds for foreign as well as domestic matters, declares war and can terminate major hostilities, confirms senior foreign policy makers, and participates in approving the great bulk of international agreements. Yet we should also never forget that there is a vitally important, enduring rationale for why the Executive is better suited to leadership in foreign affairs. I can identify at least seven time-proved advantages of presidential foreign policy control.

First, the Executive can act with greater speed and decisiveness. Does anyone for a moment believe that Congress could have managed the Cuban missile crisis comparably with the speed it so urgently demanded?

Second, the Executive can act with greater secrecy when it is genuinely needed. Can anyone for a moment seriously believe that Congress could have handled a Grenadian rescue mission effectively?

Third, the Executive still has superior information flow. I say this with full awareness of the growth of a very large and able staff in Congress. Of course, there has been a massive increase in information flow on the Hill, but in my judgment it simply does not match having an embassy in every single country around the world sending in reporting cables, daily briefings from the Central Intelligence Agency, daily contact with the desk officers in the Department of State, and the many other sources of Executive Branch information flow. In short, I believe that the Executive is now and is always likely to be far ahead of Congress in terms of processing and acting on the overall information flow so critical to foreign policy decisions.

Fourth, congressional action is generally less flexible and tends to take a blanket approach. When you intervene by act of Congress, what do you do? Take, for example, the aid cutoff to Turkey. Legislation is basically a blunt instrument in dealing with foreign policy; it is quite difficult to fine tune legislation to meet all of the more complex realities.

Fifth, congressional action sometimes may be too responsive to popular opinion. It is true that we take living in a democracy very seriously. But we live in a representative democracy, in which the framers deliberately did not take opinion polls to resolve issues but rather sought to rely on the leadership of individual representatives. My own feeling is that, prior to conflict or during protracted conflict, the correct American actions to achieve deterrence are frequently quite unpopular. If the decision makers are more sensitive to the popularity of an action than to its correctness, they will ultimately undermine their policy objectives. And it should be remembered that they can err through popularly forced escalation as well as popularly forced withdrawal.

Sixth, it seems to me that the Executive can integrate negotiations and other options in ways that Congress cannot. And this, I suppose, leads to a related point: that Congress has difficulty in formulating an overall policy. In fact, a coherent policy is something that would be quite difficult for Congress to construct since by its nature it is more likely to react to the interests of its domestic political constituencies.

Finally--and I say this with some reluctance--there is a tendency toward greater partisanship in Congress. Moreover, Congress provides a forum for the multiplication of special interests, in terms of their ability to focus on particular issues.

Since those policies favoring Executive leadership in foreign policy are reasonably evident, why is the U.S. currently in this period of congressional micromanagement? I believe the answer largely rests in two popular myths, broadly accepted even if infrequently fully articulated following the national trauma over Vietnam. These are, first, the myth of superior congressional wisdom and its corollary, that of a flawed presidency; and second, a simplistic belief that it is American foreign policy entanglement that is the threat rather than the radical regime attack against which every American presidency has sought to respond. Both flow inexorably from the national trauma and widely believed myths of the Vietnam War.

The myth of superior congressional wisdom is just that--a myth. Many scholars have shown that Congress was a full partner in the Vietnam War up until the Tet Offensive. Congress then misperceived Tet as a military defeat, exactly as had the American public, and

thereafter was single-mindedly bent on American disengagement. Its actions in passing the 1971 Cooper-Church Amendment and the 1973 Fulbright Amendments, as well as its reduction of military assistance to the South Vietnamese, resulted in reducing the potential of American deterrence in these areas to a virtual zero.

North Vietnam was so confident of American nonintervention as it tore up the just concluded 1973 Paris Accords that it committed 22 divisions to the attack against the South, leaving only its anti-coup division in the North. Predictably, South Vietnam was overwhelmed, even though a commitment of greater U.S. financial resources and airpower alone might well have stopped the regular Army invasion, as it did in the Easter offensive after Tet. Most important, whether or not further American resources should have been committed to Vietnam, could the North Vietnamese attack have been deterred or militarily reduced if there had been some uncertainty as to the American response? For the historical record, it should also be remembered that Congress did not embody great wisdom in rejecting the Versailles Treaty or in ritualistic neutralism before World War II, just to name several of the the more glaring examples.

As to the second myth, that American entanglement is the real threat and that Congress thus plays a vital role in checking such entanglements, this is a form of contemporary isolationism, again largely traceable to Vietnam. But America did not create the threat in Vietnam; that came unequivocally from Hanoi. And it was not the fact of American engagement abroad that was at fault, but the form of that engagement. Vietnam is no more a reason for American disengagement from the world than choking is for withdrawal from eating. While it must be handled cautiously and realistically, to fail to engage in foreign affairs in the effort to deter the radical regime attack is to risk a subsequent and far worse global explosion and to accept destruction of the most important underpinning of modern world order. Moreover, and most important to the point of this discussion, congressional action contributed virtually nothing to remedying the defects in American engagement in Vietnam and, if anything, may have exacerbated them.

During the 1950s and 1960s, Congress played an affirmative role in deterrence. It passed the important Cuban, Middle Eastern, and Formosa Resolutions, contributing significantly to deterrence in those areas and demonstrating a joint executive-congressional resolve in deterring aggressive attack.

But in the post-Vietnam setting, Congress has pursued an opposite policy of focus on constraining, publicly and in advance, American foreign policy options. Obviously, such a policy whether or not embodying wise choices as to American engagements, severely undercuts deterrence. Let us look at a few examples in addition to those from the pre-World War II setting and the Vietnam settings already discussed.

In 1976, the Clark Amendment was passed, terminating United States involvement in Angola. The Clark Amendment and its parallel--the Tunney Amendment--were basically intended to cut off any United States covert assistance to any faction in the complex Angolan hostilities, in particular assistance to the anticommunist UNITA and FALN. Prior to the vote in Congress, President Ford had issued a stern warning to the Soviets, who had an airlift underway pouring in tons of supplies to the Marxist insurgents in Angola. Based on that warning, the airlift had at least been temporarily halted. As soon the Clark and Tunney Amendments were passed, however, the Soviet airlift to Angola was resumed with increased tonnage and ultimately large numbers of Cuban expeditionary forces moved in as well.

If we look to Lebanon in 1983, we see a variety of problems, such as whether one particular type of military deployment was more useful than another. It seems to me that the basic motivation for the Lebanon deployment was quite sound and that it was a reasonable policy option under the circumstances. In other words, it is in U.S. national interest to prevent Lebanon from being either dismembered or controlled by radical regimes. It also should be remembered that the U.S. went into Lebanon originally as part of a multinational effort with the important and laudable objective of protecting civilian populations from warlike massacres, as had recently occurred in Palestinian refugee camps. My judgment is that the effort to invoke the War Powers Resolution vis-a-vis the Lebanon situation, the debate on the Hill that attended the effort, and a second debate that took place after the attack on the American Marine barracks reduced deterrence in Lebanon and contributed to making the United States position there untenable. Again, whether or not we should have been engaged in Lebanon under the constraints imposed, congressional actions did little to alter that engagement under the accompanying constraints and may have contributed to the mix of engagement and constraints that ultimately proved untenable.

Finally, if we look to Central American today, we find a mixed, but not as monolithic, record of American disengagement, as in Vietnam. True, Congress has most recently provided, by a narrow margin, \$100 million in contra assistance. But many of its early actions have certainly sent signals to Managua, Havana, and Moscow that a policy of secret warfare against Nicaragua's neighbor may be continued at acceptable risk. This includes the protracted twice yearly debates on human rights conditionality in military assistance to El Salvador without requiring an equivalent discussion of the level of Sandinista armed aggression against El Salvador, a rush to repudiate the low casualty strategy of mining Nicaraguan harbors against delivery of military supplies for the Sandinista armed attack, and the Boland Amendment (intended it is true to avoid more radical proposals). Such actions at least partially assured the Sandinistas that the U.S. would pull back from any ultimate sanction of seeking the overthrow of the Sandinista regime as in Nazi Germany following

German aggression. Most important, while Congress has been preoccupied with constraints on U.S. action, it has passed nothing comparable to the Cuban or Middle Eastern Resolutions to add congressional voice to deterrence of Sandinista attacks against their neighbors.

The War Powers Act itself, clearly at least partly unconstitutional, may, as a generic measure, contribute to reduction in deterrence. As an Act of Congress, the War Powers Act has no authority to alter the constitutional structure of the separation of powers. Thus, the President may feel that he has a constitutional duty to oppose application of the War Powers Act in a time of national crisis when the nation can least afford the serious legal controversy that would ensue. That is, such a generically legislative, definitional approach to separation of powers initiated by Congress and passed over the veto of the President, would force him in a time of national crisis either to acquiesce in an assertion of congressional authority he may believe to be unconstitutional or to challenge the Act at a time when the nation can least afford confusion over the legal authority of the President. As in Lebanon, it also shifts national attention from the real issues of deterrence and limits of American effective action to a sterile legal confrontation between Congress and the President.

Now in addition to these examples, we should be aware that there are many proposals being seriously urged for additional constraints on the presidential authority in national security settings. For example, Dr. Jeremy Stone, a supporter of a nuclear "no-first-use" policy for NATO, has suggested one in a much publicized article in the Fall 1984 issue of Foreign Policy and held at least one substantial conference sponsored by the Federation of American Scientists (of which he is director) in November 1985 to discuss it. Stone proposes that, with certain possible exceptions, no nuclear weapons could be employed by the President in a NATO defense emergency absent prior approval by Congress or a specially created congressional committee. Dr. Stone has also suggested in a nonlawyer statement of bad constitutional law that his proposal is constitutionally required. Needless to say, this proposal is not constitutionally required and could, if adopted, severely undercut deterrence--already strained in the NATO area.

The separation of powers is an important principle of the American democratic system. It is important, however, that, whatever the precise constitutional parameters of the foreign affairs powers, Congress should exercise its power with a realistic understanding of the rationale strongly favoring executive control of foreign policy. Too often we approach these issues solely as a matter of constitutional line drawing with the usual indeterminate answers at the edges. We also must begin to appraise congressional action--even if clearly within congressional competence--by a broad standard of contribution to an effective American foreign policy. In this

connection, it is particularly important that we appraise the effect of congressional actions on deterrence. That, after all, is the key issue if we truly wish to avoid war.

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