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COMMENTARY

W. TAYLOR REVELEY, III *

My views have shifted notably as to the proper allocation of power between the President and Congress regarding the use of military force abroad. Upon leaving college, I was reasonably certain that the perils of the times in which we live, and the institutional advantages of the President over Congress as a decision-maker, necessitated that he make our basic foreign policy decisions, both the peaceful and the warlike. About all Congress could do was to accept this necessity gracefully. While in Law School, I had an opportunity to study the question in some detail, and came to the conclusion that though the President had a prerogative to initiate policy, and to implement it as he wished, Congress might legitimately call him short at any time, and force policies upon him. Further study has suggested that Congress is constitutionally entitled to an even greater role in the determination of American foreign policy, particularly when it involves the use of armed force.¹

Now obviously, as Mr. Belman pointed out, Congress cannot be involved in the day-to-day execution of our various external policies. But it can have a positive influence on the policies which the executive branch implements. The appropriate Congressional role includes—but goes beyond—a voice in the decisions which actually dispatch or withhold the troops. A say in these decisions alone would generally give the legislators little real influence on the course of events. When the President finally uses force as an ultimate instrument of diplomacy, he most often does so out of desperation, under pressures which would bear equally on Congressmen. Therefore, if the Congressmen are to have an effective role in determining when we will and when we will not use the military, they must have a prior voice in shaping the foreign policy which forms the context of later decisions.

Greater congressional influence would not necessarily reduce the number of wars. The President, on the whole, makes wiser foreign policy decisions than Congress; he is institutionally better able to do so. Further, there is no reason to think that Congress is fundamentally more pacific than the President. One recent notable instance in which the militancy of the legislators exceeded that of the Executive occurred during the Cuban Missile Crisis; some Congressional leaders would have preferred to bomb rather than blockade. On the other hand, it is probably true that greater congressional participation would not involve us in more wars. Whereas it is relatively easy for the President to use the military despite a reluctant Congress, it would be very difficult for Congress, in turn, to force a reluctant Executive to take military action of which he disapproves, as President Kennedy demonstrated during the Missile Crisis. Some restraint would be inherent in the

* A.B., Princeton University, 1965; LL.B., University of Virginia, 1968.

1. See generally Reveley, *Presidential Warmaking: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243 (1969).

process of consultation and deliberation that would emerge were Congress, as well as the President, to have a substantive voice in shaping American foreign policy.

Perhaps the greatest merit in the establishment of a larger role for Congress, however, is the constitutional legitimacy it would bestow upon the use of force. Most Americans (those, in any event, who have an opinion on the matter) think that the Constitution gives legislators a strong voice in decisions about American entry into war. Accordingly, when Congress has no meaningful say in the initiation of a conflict, two regrettable consequences result. First, the American involvement lacks much of the political backing essential to its continuance if the fighting proves to be longlasting. The way is open domestically to internecine struggle over the merits of American participation—a struggle likely to force withdrawal too soon to realize the goals of the hawks and too late to effect those of the doves.

Second, and perhaps more fundamentally, the rule of law within this country is measurably discredited when the President acts, or appears to act, in an unconstitutional manner. His willingness to initiate hostilities without the prior and express approval of Congress conflicts directly with popular notions that the Constitution necessitates such approval. The viability of our governmental system depends largely upon voluntary obedience to the law. The President and Congress—he through his willingness to act unilaterally and the legislators through their willingness to be bypassed—have set a very poor example; their relaxed approach to the pertinent dictates of the Constitution is particularly invidious in a time when voluntary obedience to the law is under serious challenge on a number of fronts.

Even the strongest supporters of presidential hegemony over American foreign policy would probably agree that greater congressional participation in the shaping of foreign policy would have certain advantages; but they argue that the potential costs of such participation would be greater. Today, the need for quick, flexible, expert, informed, and frequently secret decision-making is highly regarded; Congress as an institution is said to be at best inefficient and at worst dangerous as an active participant in the decision-making which shapes American foreign policy. But it seems that with a few changes in its procedures and with a major reformation in its will-power, Congress could adjust its decision-making processes to meet the demands of the times. Moreover, there is question as to what extent secrecy and expertise are crucial to the decisions in question. With the possible exception of Korea, Cold War crises have not required so hasty a commitment of American troops abroad as to preclude congressional participation in the decision to dispatch them. Similarly, with the possible exception of the Cuban Missile Crisis, the initial planning of the American response need not have taken place in such strict secrecy as to preclude congressional participation. And while expertise is helpful in identification of possible courses of action and the likely

possible courses of action and the likely consequences of each, it is not particularly helpful in making the inherently political value judgements as to whether or not the objective in question is worth the price of war.

Even should these institutional arguments against a greater Congressional role be overcome, supporters of presidential control may still question the legislators' competence on another score: Their judgment. There exists a fear, stemming in good part from ill-advised congressional policies during the years between the two World Wars, that the legislators would make decisions detrimental to national security. No doubt that danger exists, though it is important to remember that fallibility does not grace solely the legislative branch. Moreover, if any branch of government persists in making decisions unresponsive to the needs of the times, it will find its authority circumvented, as was the case with Congress at the hands of Franklin Roosevelt during the late 1930's. The likelihood of such legislative myopia today, however, is not great.

I have suggested the existence of widespread expectations that when the United States has a choice whether or not to go to war—that is, when hostilities are not thrust upon us by an attack directly threatening American territorial integrity—Congress must approve our involvement, or the Constitution will be violated. These expectations are well-founded. Admittedly when you look at the relevant constitutional provisions in Articles I and II, the language is ambiguous: Terms susceptible of many meanings are often used; conflicting grants of power are made to the President and Congress. Ambiguity admitted, however, the fact remains that in terms of express grants of power over the shaping of foreign policy, especially belligerent foreign policy Congress emerges well ahead of the President.

The intent of the Framers confirms the indication inherent in the Constitution's language that Congress is to have a meaningful voice in the determination of foreign policy. It seems clear that the Framers intended that both houses of Congress, with presidential advice, no doubt, and subject to executive approval or veto, to decide whether the goals sought are worth the likely consequences of resort to military force. By so involving Congress *and* the President, the Framers hoped to avoid both hasty, ill-conceived wars and wars devoid of the requisite national backing. Precedent during the early years of the Republic—a time when many of the Framers were still active in public affairs—suggests that their definition of war was extremely broad, including very limited conflicts which involved no formal declaration of war (such as the Naval War with France of 1798-1800), as well as more comprehensive, formally proclaimed struggles (for example, the War of 1812).

The meaning to be given the language in the Constitution is not confined to the intent of the Framers when they wrote the document or

when they gave content to its provisions by their own conduct in the new government. To remain functional the Constitution has, and must, evolve to meet the changing needs of the country. When, however, the Framers' language and intent seem clearly to compel a certain political process, when that process is not adverse to the needs of the times, and when strong popular belief exists that the process is constitutionally required, then it should be honored. Applying these criteria to Articles I and II, I find they grant Congress a larger role in decisions to commit American troops abroad than it has exercised during the last twenty-five years.

What of the argument that significant congressional involvement is no longer required, at least as a matter of Constitutional law, because the Constitution has been amended by usage to permit unilateral presidential war-making? Unquestionably presidential practice before the Second World War and during the Cold War provides precedent for a wide-ranging executive writ. And unquestionably, this practice has bred expectations that the President is constitutionally entitled to act broadly to defend the country.

But these expectations have not displaced in most people's thinking the more longstanding view that the President should seek Congressional counsel and approval before initiating hostilities abroad. There is ample precedent prior to the Cold War supporting this conclusion. With the exception of President Polk's *fait accompli* in the Mexican War (a bit of presidential warmaking which the House of Representatives censured as unconstitutional by a close vote in 1848),² there was in general collaboration during the nineteenth century between the President and Congress regarding the use of force abroad. Virtually all Executives of this period felt constitutionally bound to seek congressional approval before initiating hostilities. During the first forty years of the twentieth century, congressional influence over American foreign policy remained strong, as in the Neutrality Acts of the 1930's.³ Unfortunately the pernicious nature of much of that influence forced the more far-sighted Presidents of the era, Franklin Roosevelt in particular, to circumvent the legislators by fair means or foul.

As to the unilateral Presidential acts of the nineteenth and early twentieth centuries, most of them have little or no relevance to the present situation. The Presidents acting in those instances acted under circumstances wholly unlike those of today; accordingly, their conduct cannot be used to justify the activities of contemporary Executives. In any event the bulk of the incidents cited, especially those of the nineteenth century, were so minute in effort and impact as to pose no threat to congressional war powers. This, admittedly, was not the case with many instances of unilateral intervention by the

2. CONG. GLOBE, 30th Cong. 1st Sess. 95 (1848), cited in Reveley, *supra* 1, at 1260 n.48.

3. Ch. 837, 49 Stat. 1081 (1935); ch. 146, 50 Stat. 121 (1937); ch. 2, 54 Stat. 4 (1939).

President in Latin states during the first three decades of the twentieth century.

But even such presidential war-making took place under circumstances in which it was relatively easy to predict the consequences of the use of force, and in which the risk of escalation was largely non-existent. Moreover the incidents in question, particularly during the nineteenth century, occurred in an era when the United States had made no commitments to defend some states and to contain others. Thus it was virtually impossible for a President to present Congress with a situation in which it felt compelled to support his action, lest the credibility of our commitments be doubted and our defense posture weakened. In any event, had a nineteenth, and to some extent an early twentieth, century President wished to embark upon significant military efforts abroad without Congressional approval, he would have been hard-pressed to do so, as the standing military establishment was modest in the extreme. To raise the requisite troops, he would have had to seek congressional authorization. Finally, even when the incidents in question did not involve such minutia as the pursuit of pirates or small naval landings to protect American citizens or property from mob violence, they consisted principally of interferences with the affairs of backward, powerless states during an era which predated Article II of the U.N. Charter.

Against this background, let me speak briefly on what I think the President can do unilaterally. First, it seems clear that he is duty-bound to respond immediately when United States territory is physically attacked, or is in imminent danger of attack. In such a situation, the decision whether or not the United States will fight has been made by the attacking power. Conflict has been thrust upon us, and to this extent congressional authorization of hostilities becomes superfluous. The President's response, however, should be proportionate to the attack. Once he has utterly repelled it, he should not then himself, without congressional authorization, go on the offensive. For example, if enemy submarines were to shell with conventional ordinance a few coastal cities, the President would not have discretion to unleash SAC against the homeland of the attacking boats. But he would be free to sink or capture all hostile vessels caught within striking distance of American cities.

What of attacks on American security interests which do not involve physical assault on United States territory? In these situations the President is obligated to seek congressional authorization—if at all possible—before he acts. It is true that American security interests are worldwide now and that an attack need not be upon our territory to threaten directly our national security. On the other hand, reasonable men may disagree as to which foreign security interests are worth fighting for, and to what extent we should commit our forces.

Accordingly, as was the Framers' design, it is imperative that both houses of Congress be involved in the decision to fight, lest the war be hasty or ill-conceived or lest it lack adequate political support. The fact that a conflict is condoned by an international organization, as was the Korean War, does not obviate the necessity for Congressional approval. The Korean conflict is the premier instance of unconstitutional executive war-making.

Should the President be faced with a sudden attack on an ally which he feels must be repelled immediately, and should he believe that Congress would willingly support American intervention, he is constitutionally permitted to respond unilaterally, while at the same time placing the matter before Congress and asking for ratification of the action taken and for approval of further use of force. Or should the President believe that the American response to an attack upon one of our external security interests must be prepared in the greatest secrecy and sprung suddenly upon the enemy if it is to be effective, then he is entitled again to act first and seek congressional approval after the fact. Admittedly in both situations he would present Congress with a *fait accompli*, but his institutional advantages over Congress as a quick, flexible, informed, and if necessary secret decision-maker, and the nature of the times, necessitate that Congress gracefully accept this limitation on its powers. Presumably the legislators would not be reluctant to do so if they had a meaningful role in the shaping of American foreign policy and if they felt certain that the President would not act unilaterally unless he felt it essential, and unless he believed that Congress would willingly approve the measures taken.

What of attacks on American civilians or troops abroad? Obviously any Americans assaulted while outside the United States are permitted to defend themselves to the best of their ability. If they are in international air space or waters, it seems that the President can unilaterally do all in his power to defend them, just as he can repel assaults on American territory. But if the Americans are attacked within the territory of another state, the President should not send forces to their aid if the step risks significant hostilities. For example, the President could have done anything within his power to rescue the *Pueblo* before the North Koreans forced it into port. But once its capture had been consummated, any attempt by the President to recover the ship or its crew, or to retaliate against the attackers, would have risked sizable hostilities with the North Koreans, and therefore should not have been undertaken without congressional approval. On the other hand, the joint 1965 effort by American and Belgian forces to rescue whites under attack in the Congo by elements beyond the control of the central government could be undertaken unilaterally by the Executive without constitutional difficulty. Hostilities with another state were not involved, and there was no risk of large-scale fighting. Needless to say, the speed and secrecy exceptions to the necessity for prior congressional approval apply in this context as well.

As far as the peacetime deployment of American armed forces is concerned, the President has a broad prerogative to locate the troops as he sees fit, so long as he does not thereby immediately precipitate hostilities. Presumably, however, the deployment will be in accord with basic foreign policy objectives, which will have already been formulated with the assistance and approval of Congress.

Let me make one final remark, which was implicit in several of my earlier comments. To authorize the use of force abroad, I certainly do not believe it necessary that Congress formally declare war. Any type of affirmative indication by both houses that they approve the hostilities will suffice, though a joint resolution may be the best method as it avoids the dangers inherent in a formal declaration, and yet still speaks directly and singly to the question of the use of force. This resolution should be adopted only after Congress has adequately considered the situation and the proposed measure and its legislative history should clearly indicate, at the least, the steps authorized and their objectives.