1975

Responses to Louis Henkin's 'A More Effective System for Foreign Relations: The Constitutional Framework'

Gerhard Casper

RESPONSES

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While I generally agree with Professor Henkin's analysis of the allocation of the foreign affairs power, I should like to provide a somewhat different emphasis, voice a disagreement, and finally address myself to a practical suggestion for creating a more effective foreign policy system.

In his statement to the Commission, as in his excellent book, *Foreign Affairs and the Constitution*,[1] Professor Henkin demonstrates that the great abstraction of separation of powers is only valuable as a starting point in describing the respective roles of Congress and the President in formulating and implementing foreign policy. Many questions remain unanswered. Some have argued, for example, that the President is the "sole organ" of the federal government for foreign affairs.[2] This notion, however, is a fantasy: the actual constitutional arrangement is one of shared responsibilities. While the President does conduct our daily foreign relations, the Congress' war,[3] spending,[4] and foreign commerce[5] powers assure it a continuing involvement in foreign policy formulation and implementation as well.

On these points Professor Henkin is absolutely correct. However, what he refers to as the "lacunae" of the constitutional blueprint lead him to speculate that the Framers had a limited conception of foreign affairs. I submit that they did not. They fully understood the complexity of foreign affairs, and they fully intended to create a constitutional framework for the conduct of foreign relations.

One of the most frequently reiterated cliches about foreign affairs, not embraced by Professor Henkin, to be sure, is that our foreign relations are infinitely more complex now than they were at the time of the nation's founding. I wonder. At the time of the Constitutional

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[1] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 45-50 (1972).

[2] *See, e.g.*, Justice Sutherland's oft-cited opinion in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-21 (1936) (dictum), *citing out of context* 6 ANNALS OF CONG. 613 (1800) (statement by John Marshall). For two contrasting views on this question, *compare* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 YALE L.J. 181, 534 (1945), *with* *Berger, The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

[3] U.S. CONST. art. I, § 8.

[4] *Id.*

[5] *Id.*

Convention, Europe presented America with incredibly intricate foreign policy problems. The Europe of that period was a tangled skein of shifting alliances, dynastic ambitions, incipient revolution, and trade rivalries. In dealing with these problems under the Articles of Confederation, the Framers undoubtedly came to appreciate the complexity of foreign affairs in a troubled world.[6] Professor Henkin says that he was surprised to find little in the Constitution on the conduct of foreign relations. I would argue that, well aware of the complexities of foreign affairs, the Framers consciously designed the Constitution to deal primarily with matters of foreign relations, defense policy, and foreign commercial affairs.[7] Significantly, they chose to grant Congress the dominant role in foreign affairs. They gave it the decisive voice in providing for the national defense and regnlating foreign commerce.[8] They subjected treaties to the veto of one-third plus one of the Senators.[9] To guarantee that Presidents would not make secret deals with foreign powers, they even provided for impeachment, the ultimate deterrent.[10]

This clear purpose of the Framers to secure a controlled foreign policy offers a valuable perspective on the questions before the Commission. I would argue that we should take these original constitutional arrangements seriously. Professor Rostow would reply that the Constitution is better understood not as a document with an unchanging meaning but as an evolving body of law. However, I think there has been a rather large amount of epistemological onesidedness in the discussion of this question. While it would be unsound to ignore the historical fact that the Constitution has been adapted by Supreme Court interpretation and governmental practice to meet changing needs, unconstitutional practices cannot become legitimate simply by the mere lapse of time. There is no way around the question whether a certain practice is in accord with the basic scheme and purposes of the Framers. Chief Justice Marshall's

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[6] For a chronicle of the American diplomatic efforts from the Declaration of Independence to the ratification of the Constitution, see S. BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 15-84 (1936).

[7] *See* THE FEDERALIST No. 45, at 303 (Mod. Lib. ed. 1941) (J. Madison): "The powers delegated by the proposed Constitution are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce."

[8] U.S. CONST. art. I, § 8.

[9] *Id.* art. II, § 2.

[10] *Id.* art. I, § 3. *See* II M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 66 (1911) (comments of J. Madison).

dictum that it is a constitution we have to expound[11] does not offer even the beginnings of an answer.

In this regard, Professor Henkin notes that "the character and needs of foreign relations" have shaped the detail of our foreign affairs system, not the constitutional blueprint. I should be more comfortable had he referred to the *presumed* needs of foreign relations. There have been a great number of unexamined assertions about the modern character of foreign policy, some of which have a hollow ring today. One of the most common of these is the hypothesis that only the Executive Branch has the expertise to formulate and implement foreign policy. Senator Church once remarked that Presidents Truman, Eisenhower, Kennedy, and Johnson were all reared to this conviction.[12] Recent history has cast considerable doubts upon this hypothesis.[13] In any event, it has the character of a self-fulfilling prophecy. With the acquiescence of a Congress until recently shying away from its constitutional responsibilities, the President has concluded secret executive agreements, invoked executive privilege to deny access to foreign relations information, and then in turn argued that Congress lacks a proper understanding of foreign affairs. This circular pattern is as unbearable as the remedy is easy. Congress must resist the use of unauthorized executive agreements and the blanket invocation of executive privilege.

I agree with Professor Henkin that the President has the power under the Constitution to make executive agreements on purely "executive" matters. However, the circumvention of the Senate's treaty-making role by means of broadly-scoped executive agreements remains unconstitutional in spite of the volume and frequency of such agreements. Professor Henkin argues that the President has the constitutional power to declare policy, make informal commitments and understandings, and reflect general attitudes, all in the daily conduct of foreign relations. It would be foolhardy to quarrel with this assertion if by "informal" he means subject to congressional disallowance through the exercise of the appropriational and regnlatory powers. But Professor Henkin apparently believes, though he expresses the belief very cautiously, that Congress

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[11] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[12] *See* Frankel, *The Lessons of Vietnam*, in THE PENTAGON PAPERS AS PUBLISHED BY THE NEW YORK TIMES at 642 (Quadrangle Books ed. 1971).

[13] *See generally* R. DAHL, CONGRESS AND FOREIGN POLICY (1950); J. ROBINSON, CONGRESS AND FOREIGN POLICY MAKING: A STUDY IN LEGISLATIVE INFLUENCE AND INITIATIVE (1962).

would not be constitutionally justified "in refusing to support policies which are within the President's power to make." I respectfully disagree with this implication that the Congress, as a matter of constitutional, as distinguished from international, law, is bound to deliver on the President's undertakings. Given the Framers' grant to Congress of the power over war, commerce, and spending, the President has little authority unilaterally to bind the nation to anything. While this disability is perhaps inefficient in the narrow sense that it makes hard and fast international commitments by Presidents very difficult, it is written into the constitutional scheme. And it is actually efficient in the broader sense that freely given congressional consent will generally be more durable in the long run than consent coerced through some theory of constitutional obligation.

In order to carry out its historically important constitutional responsibilities in foreign affairs, Congress must also resist presidential attempts to invoke executive privilege at will. I would argue that such resistance to executive privilege has a textual constitutional sanction. Congress has the plenary power to make laws necessary and proper "for carrying into Execution" the powers vested by the Constitution in any officer of the government.[14] In doing so, Congress can even regulate, though not eliminate, presidential powers.[15] It follows that Congress has the power to regulate concerning confidentiality in government generally, including executive privilege.[16]

There may be a core of executive privilege which Congress cannot constitutionally impair. Although the concept is never mentioned in the Constitution, the Supreme Court has recently said in *United States v. Nixon*[17] that "the protection of the confidentiality of presidential communications has . . . constitutional underpinnings" in the nature of the executive power.[18] The Court took a balancing approach to the question whether a particular exercise of executive privilege is constitutionally protected, comparing the importance of the particular value that would be frustrated by such exercise.[19] It

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[14] U.S. CONST. art. I, § 8.

[15] *See generally* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS (4th ed. 1957).

[16] While Professor Henkin suggests that the case for executive privilege is strongest in the White House and weakest as one descends further into the bureaucracy, I do not consider this standard very helpful. The legitimacy of executive privilege lies not primarily in mere proximity to the President but rather with the nation's interest in confidentiality.

[17] 418 U.S. 683 (1974).

[18] *Id.* at 705-06.

[19] *See id.* at 707-14.

seems to me that a responsible Congress, too, must in the first instance balance the various interests at stake. In each case, it must weigh its own need for information to fulfill its constitutional obligations against the needs for secrecy in national security affairs[20] and confidentiality of presidential communications. Where the congressional and judicial balance will be struck will depend in part on the manner in which Congress safeguards the confidentiality of information it receives. But Congress should be able to prevent the more arbitrary assertions of executive privilege that characterize the present foreign affairs system.

Thus, simply by repudiating the use of broad executive agreements and demanding the information it needs, Congress can begin to perform its constitutional role in the conduct of foreign relations. I am, therefore, in complete agreement with Professor Henkin's reluctance to engage in constitutional surgery.[21] Constitutional amendments are simply unnecessary if Congress takes these and other initiatives.

In spite of Professor Rostow's criticism of what he refers to as constitutional fundamentalism, I would reaffirm the basic system established in 1787. In only one minor respect, I think, should we consider a system change. The need for this has been caused not so much by changing times as by our own constitutional amendment in another area. In giving the Senate a special role in confirming treaties without House approval, the Framers' view was that Senators would be elder statesmen performing an advisory service to the President. Since 1913, however, the Senators, like the members of the House, have been popularly elected. Given this constitutional

[20] There is dictum in *Nixon* that suggests greater weight to claims of executive privilege where its exercise would protect this need for secrecy in matters of national security. *Id.* at 706-07.

[21] I do, however, take issue with Professor Henkin's remarks that changing to a parliamentary system would not give the Congress more information and authority in the realm of foreign affairs. I would submit that the prime minister in a parliamentary government, despite his majority status, is subject to informal restraints requiring him to consult with parliamentary colleagues for their viewpoints. The foreign policy initiatives of the coalition government in Germany of Social Democrats and Free Democrats, for example, could not have succeeded without intensive prior consultations with the party leadership—which is for the most part identical with the parliamentary leadership. And in the case of such a major policy approach as *Ostpolitik*, the Brandt government sought support from the opposition as well. Thus the parliamentary system would certainly help to achieve informally what Professor Ehrlich has suggested the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), has done more formally—force the executive to consult with the Congress at early stages of the foreign policy formulation process.

change, and also the important legal consequences of treaties, Congress might consider a constitutional amendment allowing House participation in the treaty ratification process.[22] Nevertheless, with this one minor exception, Congress should not tamper constitutionally with the foreign affairs framework originally established by the Framers.

In conclusion, let me suggest what Professor Henkin would refer to as a sub-constitutional improvement in our present system for conducting foreign policy. As I have noted, part of Congress' constitutional responsibility to formulate foreign policy arises from its power to authorize programs and appropriate funds for the conduct of foreign relations. Today, however, the appropriations process is generally characterized by "incrementalism." Congress examines executive budget requests each fiscal year with a presumption that the appropriations for the preceding year are still justified; the Executive Branch need only justify requests for additional funds.[23] Unfortunately, Congress takes this annual, incremental approach not only when appropriating funds but also when originally authorizing programs.[24] Especially when employed at this authorization stage, the incremental approach deprives the Congress of any serious voice in the foreign policy process (as well as the domestic one). Switching from an annual to a long-term system of authorizations would remedy this congressional inadequacy. The substantive con-

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[22] Arguably Congress has authority to continue the present system of congressionally approved executive agreements with the scope and force of treaties.

[23] *See generally* A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1964); Lindblom, *The Science of "Muddling Through,"* 19 PUB. AD. REV. 79 (1959). For a standard criticism of incrementalism, see C. SCHULTZE, THE POLITICS AND ECONOMICS OF PUBLIC SPENDING (1968).

[24] *See Hearings on the Federal Fiscal Year as It Relates to the Congressional Budget Process Before the Joint Comm. on Congressional Operations*, 92nd Cong., 1st Sess. 129 (1971) (testimony of former Budget Director Charles L. Schultze):

> My first recommendation would be to eliminate the practice of annual authorizations. At the present time such major areas as defense procurement, construction, and R. & D., space, atomic energy, National Science Foundation, OEO, and the Coast Guard are subject to annual authorizations. . . . It seems to me that authorization committees should be engaged in basic evaluation and review of Federal programs. Each program literally cannot be carefully reviewed from the ground up each year. Rather, a cycle of evaluation and review could be undertaken with perhaps 3-year authorizations, and with a part of an agency or a major program area receiving attention each year. Thus in every 3-year cycle an authorizing committee would have completed a review of the programs under its jurisdiction . . . . Such a practice would achieve, I believe, the desirable goal of focusing attention on long-term trends and results.

But see U.S. CONST. art. I, § 8, cl. 12.

gressional committees could use such authorization hearings as an occasion for the comprehensive review of governmental policies.[25] Congress should conduct this comprehensive review without regard to the present artificial distinction between foreign and defense policy. It might even be advisable to combine the expertise of the foreign affairs and defense committees for reviewing long-term authorizations by establishing joint subcommittees along lines which make a multi-faceted policy review possible.[26]

I realize, of course, that even these modest proposals threaten powerful and established congressional and executive interests. But, to fulfill its mandate to create a more effective system for the conduct of foreign relations, the Commission must be willing to challenge these interests.

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[25] My approach here is in sharp contrast to that of Professors Henkin and Falk, who argue instead that Congress should review foreign policies through Senate confirmation hearings. The Senate, to be sure, does possess the constitutional ability to review foreign policy in such a setting, since it can withhold confirmation of an official for any reason whatsoever. Still, review in the context of nomination hearings would be exceedingly unwise. The confirmation question primarily involves issues of individual personality and qualifications totally unrelated to issues of long-term foreign policy. Linking policy considerations to an individual's fitness for a particular post could hamper Senate attempts to formulate foreign policy objectively.

[26] Many of these budgetary recommendations may be realized in the wake of the recently enacted Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, *codified at* 31 U.S.C.A. §§ 1301 *et seq.* (Supp. 1975). The Act announces it to be the duty of the new Budget Committees to study proposals for "establishing maximum and minimum time limitations for program authorization." 31 U.S.C.A. § 1301(a)(3). *See also id.* § 1322(d) (requiring multi-year planning considerations from the Budget Committee reports that will accompany the new first concurrent resolutions on the budget); *id.* § 1352(f) (requiring the Appropriations Committees to study all current laws "which provide spending authority or permanent budget authority"); *id.* § 1353 (requiring multi-year planning considerations from the Director of the new Congressional Budget Office for every public bill reported out of substantive committee).