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A Constitutional American Foreign Policy

By ARTHUR J. GOLDBERG*

So far this year, our bicentennial celebrations have been marked, for the most part, by testimonials to the growth of our domestic liberties—the Declaration of Independence, the Bill of Rights, the Civil War Amendments, the enfranchisement of women, and the like. While I join in the praise of our proud heritage of civil rights, I would remind you that they were not accomplished in a vacuum, but rather, in relation to world affairs. Indeed, the Declaration of Independence marks not only the birth of our nation but its entry into the arena of foreign policy.

In this article, I will examine the current thrust of American foreign policy and propose what Professor Arnold Wolfers has called the “optimistic” Anglo-American perspective of world politics.¹ It is the belief that nations can live peacefully together, if only statesmen will observe the precepts of law. In short, American foreign policy for the seventies and beyond must comport with our constitutional goals of liberty and the consent of the governed. The secret diplomacy of state necessity should be replaced by a form of statecraft which once again reflects the will of the majority.

Today, a lively and important debate is raging both in Congress and in scholarly journals about the future of American foreign policy. Through this dialogue thoughtful experts have expressed concern that as a reaction to Vietnam, America’s capacity to conduct a viable foreign policy has been seriously, if not irretrievably, impaired. They argue in support of this grim hypothesis that we have lost the will to exercise our proper role and influence in world affairs and are returning to the “splendid” isolationism which characterized past eras of American political thought.

It is my opinion that the governed, whose consent is imperative for a viable foreign policy, are not devoid of the desire to participate.

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1. A. WOLFERS, *ANGLO-AMERICAN TRADITION IN FOREIGN AFFAIRS*, at xx (Wolfers & Martin eds. 1956).

On the contrary, the public and Congress are insisting on a constitutional foreign policy and urging that it be right—both in assessing our genuine interests and in observing moral terms.

This public and congressional attitude, it seems to me, should be welcomed. A constitutional foreign policy will be more reassuring to worthy friends and allies than a foreign policy which flaunts the Constitution and lacks either legislative or popular support. What is the essence of a constitutional foreign policy? Simply put, it is the partnership between the executive and Congress in foreign affairs mandated by the Constitution. The Founding Fathers gave deliberate and thoughtful consideration to whom the foreign policy function should be delegated. Fearful of undue concentration of power in the executive, the framers were painstakingly cautious about reposing unchecked executive power in the president for conducting foreign affairs.

In this vein, Alexander Hamilton remarked in the *Federalist*: The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise . . . to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.²

The framers, however, were practical men. They knew that foreign affairs could not be conducted day-to-day by Congress or even by a congressional committee. On the other hand, they were determined that Congress should play the deciding role in setting policy in the foreign and military fields. The Constitution, therefore, represents a pragmatic approach to a shared responsibility in the area of foreign relations between the executive and Congress.

It is striking to see how many of the enumerated powers of Congress relate to the area of foreign relations. The powers over war and peace include the power to declare war, to raise and support armies, to provide and maintain a navy, to establish a militia, to grant letters of marque and reprisal, to make rules for the government and regulation of the armed forces, and to provide for the common defense.³ The foreign economic powers include the power to regulate

2. THE FEDERALIST No. 75, at 467-68 (H. Lodge ed. 1888) (A. Hamilton).

3. U.S. CONST. art. I, § 8. The framers of the Constitution were not alone in their recognition of war as the ultimate extension of foreign policy. The German geologist, von Clausewitz wrote: "We see therefore, that War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means." 1 K. VON CLAUSEWITZ, ON WAR 23 (rev. ed. J. Graham transl. 1968). Another realist, the late Chairman Mao, observed: "In a word, war

commerce with foreign nations, to set import and export duties, and to regulate the value of foreign coin, i.e., set exchange rates.⁴ Congress' diplomatic powers include the powers to advise and consent to the ratification of treaties and to the appointment of diplomatic representatives.⁵ Congress' international legal powers include the powers to define piracy, to punish crimes against the law of nations, and to make rules for captures in wartime.⁶ Congress' power of the purse enables it to pay the debts⁷ and to make appropriations by law.⁸ And Congress has the power to make all laws which are necessary and proper for carrying into execution all of the foregoing powers.⁹

By contrast, the express powers in foreign affairs given to the president by the Constitution are strikingly limited. The president has the power to receive ambassadors,¹⁰ to appoint ambassadors,¹¹ to make treaties¹² (subject to Senate consent), to serve as commander-in-chief,¹³ and to take care that the laws be faithfully executed.¹⁴ By implication, the Constitution does empower the executive to conduct foreign policy; accordingly, he is in charge of international negotiations. Yet, prior to the product of negotiations becoming effective, he is required to submit nonroutine agreements to the Senate for its advice and consent.¹⁵

The president is the sole representative of the nation in its foreign relations;¹⁶ Congress, on the other hand, possesses the power of the purse and the sword. As in domestic areas, powers are to be shared—and Congress is not the junior partner. As in the war powers area, the concept of inherent executive power in foreign affairs, as distinguished from implied, is without constitutional foundation. The Constitution is allergic to the doctrine of inherent powers. We are a nation of laws, not of men. At best, the executive's role in the foreign affairs

cannot for a single moment be separated from politics." *SELECTED WORKS OF MAO TSE-TUNG* 153 (Peking ed. 1965).

4. U.S. CONST. art. I, § 8.

5. *Id.* art. II, § 2.

6. *Id.* art. I, § 8.

7. *Id.*

8. *Id.* art. I, § 9.

9. *Id.* art. I, § 8.

10. *Id.* art. II, § 3.

11. *Id.* art. II, § 2.

12. *Id.*

13. *Id.*

14. *Id.* art. II, § 3.

15. *Id.* art. II, § 2.

16. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

of this nation is a shared role with Congress. The president leads our foreign relations, but it is Congress that ultimately determines foreign policy. This partnership between the president and Congress is not easy to come by, but its practical achievement is a sine qua non for a viable foreign policy.¹⁷

There is yet another important limitation on exclusively presidential foreign policy. The basic premise of our Constitution is that the consent of the governed is imperative. Results in public opinion polls establish that the people will support foreign policy goals and objectives which are constitutionally defined, reflect our vital interests, and are morally right, but will withhold their consent from those which are not so grounded.¹⁸

It is never easy to define what is moral, particularly in the diplomatic area. But, at the risk of being simplistic, it appears to me that a foreign policy is morally right if it is righteous rather than opportunistic, ethical rather than cynical, candid rather than secretive. With respect to defining our vital interests, the Constitution clearly requires that the executive propose and that the Congress dispose.¹⁹ The current public wariness over American foreign policy is caused in great measure by the departure from the Constitution, of the war-making by recent presidents, the lack of a constitutional definition of our vital interests, the practice of "real" rather than "moral politick," and the use of excessive secrecy and personalism in the conduct of foreign affairs.

The period of Richard Nixon's administration was one of extraordinary secrecy and personalism in foreign policy. It was a decade in which congressional, bureaucratic, and nongovernmental interests were excluded from world events by the sheer force of the involvement of the president and Dr. Kissinger's great—but now diminishing—popularity and diplomatic successes. Our future foreign policy must be more open, less personal, and less secretive. It is all to the good that Congress is reasserting its constitutional role in foreign affairs. This will result in a less covert and less personal foreign policy. But this is not to say that the executive branch can easily lay aside its propensity for super-secret negotiations; nor is it to say that every incoming diplomatic cable ought to be made public the next day. Democratic

17. See Goldberg, *The Constitutional Limitations on the President's Powers*, 22 AM. U.L. REV. 667 (1973).

18. See generally J. MUELLER, *WAR, PRESIDENTS AND PUBLIC OPINION* (1973).

19. See 6 J. MADISON, *THE WRITINGS OF JAMES MADISON* 138, 147-50 (G. Hunt ed. 1906).

diplomacy does not require "open covenants . . . openly arrived at"²⁰—a rather wistful Wilsonian concept never totally possible to realize. The diplomacy of a democracy does mandate, however, at the very least, open covenants secretly arrived at.

Part of the uneasiness about our recent and present foreign policy arises from misgivings about diplomatic understandings and commitments not made public. I can see good reason why secrecy is required when matters are in the negotiating stage. I can see little reason why, when negotiations are completed and agreements or commitments are made, that they should not be fully disclosed for congressional and public scrutiny. Every agreement, of course, may not reach the magnitude of a treaty, which constitutionally requires senatorial approval.²¹ But what the Constitution does not command, it may still inspire, and our Constitution inspires the open disclosure of agreements imperative to the functioning of the democratic process.²²

A pervasive aspect of recent foreign policy is reliance upon "big power politics." This "real politick" reflects the dream of an international utopia in which a few great states would use their power to settle the affairs of the world, much as the major powers of Europe did in the century after the Congress of Vienna. But we would do well to recall that when the rule of the "concert of Europe" finally collapsed, the balance of power fell to pieces. In its wake two world wars ensued which were to alter the old map of Europe beyond recognition.²³ This happened in great part because, in large areas of the world, the international order of the nineteenth century did not redress grievances, but merely submerged them, until in our century they erupted in revolution and world war.

Public distrust of the Helsinki Accord²⁴ reflects concern that the deep-seated grievances of the peoples of eastern Europe were papered-over by the accord. We must beware in practicing "real politick" of accepting a philosophy of international affairs in such a way that morality and power become antithetical. Power not ruled by morality is a menace; morality not served by power tends to be a delusion. We

20. Wilson, *The 14 Points*, in 2 DOCUMENTS OF AMERICAN HISTORY 317, 318 (H. Commager ed. 1934).

21. U.S. CONST. art. II, § 2.

22. In enacting 1 U.S.C. § 112b (Supp. V, 1975), Congress required the secretary of state to inform Congress of executive agreements entered into by or on behalf of the president.

23. See E.H. CARR, NATIONALISM AND AFTER 21-26 (1945).

24. U.S. DEP'T OF STATE, BULL. No. 1888, CONFERENCE ON SECURITY AND COOPERATION IN EUROPE 323-50 (1975).

must never forget that our nation derives its great influence in the world not from great physical power alone, but also from the fact that our basic law, however imperfectly realized, is premised on the moral principle of equality and dignity of all persons. No American president nor any Congress can assume any longer that Americans will, as they often have done in the past, adhere to the notion that: "Our country . . . may she always be in the right; but our country, right or wrong." This slogan is no longer on the masthead of the Chicago Tribune. It is no longer blithely accepted by the American people. They are patriotic but not jingoistic.

Our country will have to be constitutionally right in its foreign policy and commitments: right in acknowledging that both the president and Congress have complementary roles in the area of foreign policy, right in assessing where our real interests lie, and right in a moral as well as geopolitical sense.