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## The President, Congress, and Foreign Relations

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JUST four months ago,<sup>1</sup> the former United States Ambassador to the French Republic, appearing before the House Committee on Foreign Affairs in support of H. R. 1776, the Lend-Lease Bill, concluded his testimony with this fervent peroration:

"... I would like to just say that I do feel that this is terribly, terribly urgent. The skipper has set the course. You gentlemen are the officers. Those of us who are not in office are the crew. Our cargo is America."

Nautical allusions have come into increasing use in the discussion of public affairs during this period of broadening collaboration between a former Assistant Secretary of the Navy in Washington and "a certain naval person" in London, but there is an underlying significance in Mr. Bullitt's characterization of the executive-legislative relationship as that of skipper to ship's officers which calls for closer examination. The notion of a national course of historic implications being *set* by the President for the Congress seems, at first glance, difficult to reconcile with our basic conceptions concerning the proper distribution of governmental powers. In matters of domestic regulation, the present Administration, from the outset, has assumed an active role in the drafting and sponsorship of legislation,<sup>2</sup>

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<sup>1</sup> That is, on January 25, 1941. HEARINGS BEFORE COMMITTEE ON FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, ON H. R. 1776, 77th Cong. 1st Sess. (1941) 635.

<sup>2</sup> "In the first 'hundred days,' the emergency was so great that he [President Roosevelt] secured from Congress everything for which he asked . . . . It may be doubted whether, even during the World War, there had been so complete an acceptance of presidential leadership." LASKI, *THE AMERICAN PRESIDENCY, AN INTERPRETATION* (1940) 134.

but there has certainly been no suggestion that the determination of essential national policy is not, in the last analysis, within the province of Congress.

And yet, if we are to be at all realistic about it, we cannot escape the conclusion that there is much descriptive truth in Mr. Bullitt's metaphor, with respect to the role of the President in the formulation of American foreign policy. It is the observed fact that the course of our foreign relations, during these years of imperative decision, has been of essentially executive origin. The great international decisions of the past few years, Pan-Americanism, non-recognition of totalitarian conquests, and all-out aid to nations defending themselves against aggression, are decisions which friends and foes alike identify, and realistically so, with the executive department. There have been, as during the arms embargo repeal and lend-lease debates, sharp expressions of dissent from certain of the ship's officers, but the course set from the bridge has been adhered to without fundamental deviation.

In congressional hearings and debates, as elsewhere, consideration of executive authority in relation to the conduct of American foreign policy has tended to focus upon the power of the President, in his constitutional capacity as Commander in Chief, to exercise command over the armed forces of the United States. It is doubtless true, as pointed out again and again during debate on the lend-lease proposal, that this power could be made use of by the President, if he were so minded, in such a way as to commit the Congress, by presentation to it of the accomplished fact of commencement of hostilities, to a declaration of war against the Axis powers. If and when the President, as Commander in Chief, decides that it is necessary to order the convoy of supplies to England by the United States Navy we shall have, of course, a tremendously significant exercise of powers asserted as inherent in the presidential office and as independent of congressional policy-determining prerogatives. But, at least to date, there has been relatively little resort to inherent constitutional power over the armed forces in the President's technique of foreign policy direction. Authorization for most of the major steps taken thus far has been found in the construction, sometimes strained,<sup>3</sup> of existing legislation or sought by the urging of new legislation upon the Congress.

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<sup>3</sup> In the House hearings on the lend-lease proposal Representative Chipfield charged: "The logic of the Attorney General's opinion in the destroyer deal was somewhat like trying to change a chestnut horse into a horse chestnut . . . ." *HEARINGS BE-*

Accordingly, in an analysis of the relationship of the President and Congress in the conduct of foreign policy it must be kept in mind that executive action in the field may take either, or both, of two forms: *first*, the assumption of leadership in urging upon Congress measures deemed necessary to safeguard the interests of the United States; and *second*, the pursuit of an independent course of action, justified by claim of inherent executive prerogative. Since the intensification of the existing world crisis, particular measures illustrative of both types of action have been taken by the Administration. In this necessarily incomplete discussion certain significant aspects of each form of executive action will be submitted to analysis and comment.

#### THE LEGISLATIVE LEADERSHIP OF THE PRESIDENT

If the legislative activity of the executive department in the foreign policy field is to be fully understood, it must be viewed in relation to the increasing trend towards executive participation in the legislative process generally. In breadth of divergence between constitutional theory and political fact the evolution of the relationship between Congress and the President is perhaps exceeded only by the developments with respect to the electoral college. There has never been in political practice, at least since the administration of Jefferson,<sup>4</sup> anything at all comparable to the complete separation, or arms' length relationship of departments which seems to have been contemplated by the framers of the Constitution. The attainment of legislative leadership by American Presidents is one of the most significant, and most widely studied, developments in the growth of our political institutions. When the present Chief Executive, immediately after his inauguration in 1933, assumed the initiative in the proposal of emergency legislation to Congress he had the support of precedents as recent as the administrations of Theodore Roosevelt and Woodrow Wilson.<sup>5</sup> In fact, the energy with which President Wilson

FORE COMMITTEE ON FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, ON H. R. 1776, 77th Cong. 1st Sess. (Jan. 22, 1941) 340. The constitutional aspects of the destroyer-bases exchange are discussed in Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940) 35 ILL. L. REV. 365, 390.

<sup>4</sup> "Measures drafted by Jefferson in Cabinet council were transmitted by this subordinate [Gallatin] to the legislative committees, the membership of which was likewise arranged in accordance with the Executive's wishes, and received his constant supervision during all stages of the procedure required for their enactment." SMALL, *SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY* (1932) 166.

<sup>5</sup> On the legislative leadership of Theodore Roosevelt and Wilson, see *ibid.* c. V.

discharged the functions of parliamentary leader inspired a comment comparable to many more recently heard:

"The President of the United States occupies today a position of leadership and of command over the government of the country so different from that which was intended by the framers of the Constitution that, if it were not the outcome of a natural process of evolution working over a long period of years, it would bear the stigmata of revolution, and if it had been achieved in a single presidential term, it would have been denounced as a *coup d'état*."<sup>6</sup>

Students of American government have differed with respect to the propriety of executive assumption of legislative leadership.<sup>7</sup> None of them, whatever his position on the merits, has denied the scope or the significance of the development.

There is no need here to repeat the careful accounts which have been presented in explanation of the observed attainment of legislative leadership by American Presidents.<sup>8</sup> The unanticipated development of the party system, with the attendant probability that the President will also be the party leader of the congressional majority, was perhaps enough in itself to defeat the hope of the framers of the Constitution that an arms' length attitude might be maintained between the two departments. A catalogue of the factors which have contributed to the enhancement of the legislative position of the executive would have to include the adaptability of the veto power for use as a positive instrument in the hands of a strong-willed executive, the development of techniques for the judicious use of patronage, and the ability of the executive to support his legislative proposals by testimony as to practical necessities of enforcement drawn from the experience and expertness of his administrative aides. In legislation of nation-wide concern, the hand of the proposing executive has been further strengthened by the directness of the President's relationship to the electorate<sup>9</sup> although, as the failure of

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<sup>6</sup> BLACK, *THE RELATION OF THE EXECUTIVE POWER TO LEGISLATION* (1919) 1.

<sup>7</sup> Ex-President Hoover has expressed deep concern over the legislative activity of his successor: "If we examine the fate of wrecked republics over the world we shall find first a weakening of the legislative arm." *THE CHALLENGE TO LIBERTY* (1934) 126. But see the point of view advanced in HERRING, *PRESIDENTIAL LEADERSHIP* (1940).

<sup>8</sup> CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (1940) c. VII; LASKI, *op. cit. supra* note 2, c. III; HERRING, *op. cit. supra* note 7.

<sup>9</sup> "The mechanics of publicity alone give the President an enormous advantage over his political opponents. With few exceptions, no Senator can command more than a few inches of space in press association dispatches. The President has the front page at all times and under all circumstances for all that he may wish to say. A Senator cannot

the 1938 purge campaign suggests, an appeal to the people over the heads of the members of Congress is, in our practice, more wisely threatened than made.

The opportunity to assume legislative leadership, always open to a strong-minded executive, is even greater when the subject of the legislation is related to the foreign policy of the nation. The great strategic advantage which the President then possesses is the vast superiority of his sources of information, a superiority traceable to the status of the President as "sole organ of the federal government in the field of international relations".<sup>10</sup> American ambassadors and ministers are presidential appointees, responsible to the President for the discharge of their assignments and removable at his pleasure. When the President concludes that the information provided by regular diplomatic representatives is incomplete, he is authorized by long-standing political precedent to make use of special envoys for particular negotiation or for the acquisition of additional data on international conditions.<sup>11</sup> In short, the sources of international information, by reference to which the foreign policy of the United States must be determined, flow to the President and not to the Congress.

Moreover, any communication of foreign governments with the government of the United States must, by virtue of a constitutional convention of long standing, be carried on with the President as American representative.<sup>12</sup> There have been occasional errors of etiquette on the part of foreign states or their representatives, as when congratulatory messages have been sent directly to the Congress rather than through the correct executive channels.<sup>13</sup> More serious violations of the constitutional proprieties were committed in the Genet affair and, more recently, when Lord Grey, in the illness of President Wilson, ventured to communicate directly with members

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secure the greater advantage of the radio, but the President at his own will can talk to twenty millions of people whenever he chooses to do so." BECK & THORPE, *NEITHER PURSE NOR SWORD* (1936) 93.

<sup>10</sup> Sutherland, J., in *United States v. Curtiss-Wright Corp.* (1936) 299 U. S. 304, 320.

<sup>11</sup> President Roosevelt has made use of special envoys in many instances, e.g., Myron C. Taylor, Colonel Donovan, Under-Secretary Welles, and Harry L. Hopkins. The increasing tendency to employ special envoys has been criticized as leading to the appointment of men who "lack that independence and responsibility which are the hall-marks of the expert diplomatist." LASKI, *op. cit. supra* note 2, at 174.

<sup>12</sup> CORWIN, *op. cit. supra* note 8, at 208 *et seq.* And see BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* (1921) c. II.

<sup>13</sup> CORWIN, *op. cit. supra* note 8, at 405, n. 46.

of the Senate on the League of Nations issue.<sup>14</sup> But American Presidents, from the outset, have been jealous of their prerogative in this respect and, under any but the most extraordinary circumstances, the statements and proposals of foreign governments will be addressed to the President and to him only.

The accepted convention that communications from foreign governments, like dispatches from American diplomatic officers, must be addressed to the President would be of comparatively little significance if, as seems to have been argued for a time after the adoption of the Constitution, the President were to be regarded as a mere receiving agent, bound to transmit to the Congress all items of information within his possession.<sup>15</sup> On the duty of the President in this connection the most often cited precedent is Washington's refusal to accede to a request from the House of Representatives for the diplomatic correspondence relative to the Jay Treaty.<sup>16</sup> It is true, of course, that Washington's decision in this controversy could subsequently have been explained away as based upon the narrow ground that the House of Representatives, unlike the Senate, has no constitutional concern with treaty making.<sup>17</sup> But later Presidents have taken the broader position that the executive is justified in withholding information even from the Senate when, in the executive judgment, disclosure might be injurious to the international relationships of the United States.<sup>18</sup>

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<sup>14</sup> And see Secretary of State Bryan's reference, in the first Lusitania note (May 13, 1915) to "the surprising irregularity of a communication from the Imperial German Embassy at Washington addressed to the people of the United States through the newspapers". Quoted in CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 49.

<sup>15</sup> Prof. Corwin so construes Jefferson's reply to Genet in which reference was made to the President as "the only channel of communication between the United States and foreign nations". CORWIN, *op. cit. supra* note 8, at 209.

<sup>16</sup> See the discussion of the incident by Sutherland, J., in *United States v. Curtiss-Wright Corp.*, *supra* note 10, at 320.

<sup>17</sup> There is support for such narrow interpretation in the language of the executive reply: "The necessity of caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, *the principle on which that body was formed confining it to a small number of members.* To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." Quoted in SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* (1919) 126. (Italics added.)

<sup>18</sup> The Senate has never become fully reconciled to this executive position. See, for example, Senator McKellar's protest against President Hoover's refusal to furnish the Senate with the diplomatic correspondence preliminary to the London Naval Treaty. CORWIN, *op. cit. supra* note 8, at 405.

Accordingly, members of Congress, except to the degree that they enjoy private sources of information—one thinks of the late Senator Borah's "personal state department"—must accept the account of international conditions and necessities made to them by the President at the time he proposes foreign policy legislation. There are, from time to time, expressions of resentment from members of Congress desirous of more full information, but the situation can accurately be described as one in which the Congress, weighing the necessity and wisdom of executive proposals, must rely upon the relayed executive version of the justifying facts.<sup>19</sup> Under such circumstances a degree of executive dominance in the legislative process, far exceeding that generally found, is inevitable.

It must be understood, too, that members of Congress may be in doubt not only as to the attitudes and proposals of foreign governments but also as to the diplomatic maneuvers which may have been carried on by the executive department on behalf of this government. Constitutional recognition of the Senate as a participant in the treaty-making process, bound to grant its "advice and consent" before a treaty becomes binding upon the nation, has not been so construed in political practice as to entitle the Senate to participation in, or even to full disclosure concerning, the early stages of negotiation which may, or may not, result in the ultimate submission of a treaty to the Senate by the executive department.<sup>20</sup> "Advice and consent", as in the case of executive appointments, has in practice become mere senatorial veto power over agreements tentatively reached by purely executive negotiation.<sup>21</sup> This is not to say, of course, that it may not be wise executive policy to invite senatorial

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<sup>19</sup> The possibilities of investigating committee procedure as "an instrument for more effective congressional supervision over American foreign policy" are considered in Perkins, *Congressional Investigations of Matters of International Import* (1940) 39 AM. POL. SCI. REV. 284.

<sup>20</sup> "It will be observed that the advice and consent of the Senate qualifies the power of the President to *make*, not to *negotiate* treaties. When a treaty is contemplated, therefore, the President may, and more often does, enter upon negotiations with the foreign government, through diplomatic channels, and carries them to the point of reaching an understanding as to the terms and phraseology of the treaty, before the advice and consent of the Senate is sought at all . . ." SUTHERLAND, *op. cit. supra* note 17, at 122.

<sup>21</sup> And certain types of "executive agreements" can be made without compliance with the treaty-making procedure, *i.e.*, by the President without ratification by the Senate. Levitan, *op. cit. supra* note 3; Riesenfeld, *The Power of Congress and the President in International Relations: Three Supreme Court Decisions* (1937) 25 CALIF. L. REV. 643, 670 *et seq.*

participation in the early stages of negotiation. President Wilson's failure to include a member of the Senate in the American diplomatic delegation at Versailles will be remembered as a strategic error which certainly contributed to the ultimate frustration of the Wilson international policies.<sup>22</sup>

It is evident that in a field as difficult as that of international policy the great superiority of executive information and experience is virtually enough, in itself, to make certain congressional enactment of Administration-sponsored legislation urged as necessary to national security. A further circumstance of perhaps comparable significance in its contribution to the dominant executive position in the legislative aspects of foreign policy is the fact that the President represents, and so is able to express, the national point of view in an area of legislative activity in which the over-stressing of sectional viewpoints is likely to cause extreme national embarrassment. As ably stated by Turner Catledge:

"Congress is not a 'national body' in the generally accepted sense of the term. It is national largely in that it is the sum total of the country's sectionalisms—of representatives of various political, geographic and economic interests. It has no truly national leadership within its own organization, and every time it has to act affirmatively on some broad, national policy, it must depend upon some other source for guidance."<sup>23</sup>

There are practical reasons in a nation as large and varied as the United States which make necessary a regional basis for the election of representatives in Congress, but there is ample evidence, as in the recent activities of the congressional beef and wool bloc, that over-emphasis of regional needs and desires is fatal to the construction of sound foreign policy.<sup>24</sup> The intermittent rear-guard action carried

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<sup>22</sup> Wilson's writings reveal that he had always under-estimated the Senate's independence of mind in treaty ratification. "...to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He [the president] need disclose no step of negotiation until it is complete, and when in any critical matter it is complete the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also." *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (5th reprint 1921) 77.

<sup>23</sup> *New York Times*, May 25, 1941, at 6E.

<sup>24</sup> Reciprocal trade agreements legislation reflects general recognition of the problem. "While it is not impossible that log-rolling will occur in formulating the reciprocal trade agreements, it will at least be log-rolling on a national scale, as contrasted to the rough and tumble scramble for individual subsidies characteristic of tariff-making in Congress and in its Committees." Note (1937) 46 *YALE L. J.* 647, 667. And see Sayre, *The Constitutionality of the Trade Agreement Act* (1939) 39 *COL. L. REV.* 751.



on against the reciprocal trade agreements program<sup>25</sup> is suggestive of the necessity for executive leadership in the general field.

It is a corollary of executive leadership in the proposal of legislation related to foreign policy issues that the legislation will usually be so drafted as to confer broad discretion upon the executive. All of the factors which have contributed to the tendency towards congressional delegation of power to the executive department in matters of domestic regulation are present, in more compelling force, with respect to legislation affecting international relations. There are very real practical considerations which, from the earliest history of the United States, have led to the conferring of broad discretion upon the executive in the administration of legislation of international import. It is enough here to mention the need for expertness and flexibility in the application of broad policy to unforeseeable particular developments in the dynamic field of international relations, and the necessity of unity, timeliness, and secrecy of action. It is significant that the first important foreign policy legislation of the United States, the Embargo Act of 1794, authorized the President to lay the embargo "whenever, in his opinion, the public safety shall so require" and "to continue or revoke the same, whenever he shall think proper".

By the enactment of the lend-lease proposal the present congressional majority, in effect, exhibited a willingness to confer unconfined discretionary power upon the executive department. Presidential action under the legislation may be taken when the President "deems it in the interest of national defence", and the benefits of the statute may be extended to "the government of any country whose defence the President deems vital to the defence of the United States".<sup>26</sup> One controversy raised during the legislative history of the measure may be used to illustrate the prevailing congressional confidence in the executive judgment. In the House,<sup>27</sup> and again in the Senate,<sup>28</sup> a

<sup>25</sup> Kreider, *Democratic Processes in the Trade Agreement Program* (1940) 34 AM. POL. SCI. REV. 317.

<sup>26</sup> Pub. L. No. 11, 77th Cong. 1st Sess. (March 11, 1941) § 3.

<sup>27</sup> (Feb. 7, 1941) 87 CONG. REC. 794. Amendment offered by Representative Tinkham. The attitude of the majority was expressed by Representative Luther A. Johnson who disclaimed any intention to "favor the financing of the military establishment of Russia by the United States" but opposed "putting in here a gratuitous slap at Russia at this time, when Russia is making no menacing gestures against us. Russia has not aligned itself with the Axis Powers; why should we by this amendment encourage her to do so?" *Ibid.* at 797.

<sup>28</sup> Amendment offered by Senator Reynolds: "Nothing in this act shall be construed to authorize . . . the granting of any aid to the Union of Soviet Socialist Republics." (March 3, 1941) *ibid.* at 1684.

determined effort was made to forbid the grant of any assistance authorized by the legislation to the government of Soviet Russia. The basic issue of international policy presented by that proposed amendment was a serious one, in that the statute as introduced created at least the remote possibility of a measure of collaboration between two countries of deeply opposed political and social philosophy. In view of the known anti-Communist feeling throughout the nation it is significant evidence of congressional recognition of the need for flexibility in matters of foreign policy that the majority of both houses, by rejecting the amendment, left it to the executive department to determine whether, and under what circumstances, there might be possible justification, in American self-interest, for assistance even to a conspicuously anti-democratic government with a record of recent and unprovoked aggression.

The most sympathetic analyst of the lend-lease statute will concede that it confers upon the President a measure of discretionary power unequalled in the history of the United States. In fact, advocates of the legislation, the present writer included, urged its passage for the very reason that an authorization more narrowly drawn would make impossible a truly flexible and dynamic American foreign policy. A question arises, therefore, as to the constitutionality of the measure in its relation to the constitutional doctrine against undue delegation of legislative power. It would seem, if the same test of constitutionality were applied as in the case of statutes imposing domestic regulation, that a strong argument could be made that the broad grant of power contained in the lend-lease statute vests the President with just the sort of a "roving commission" struck down as unconstitutional by the unanimous decision of the Supreme Court in the *Schechter* case.<sup>29</sup> That there was not a more vigorous and sustained challenge of the constitutionality of the lend-lease measure during the course of its enactment can be explained only by reference to the scope of delegation of power in the field of foreign relations sanctioned by the landmark Supreme Court decision in *United States v. Curtiss-Wright Corp.*<sup>30</sup>

In the *Curtiss-Wright* case the Supreme Court, by a seven-to-one decision, sustained the constitutionality of a Joint Resolution of 1934 authorizing the President to forbid the sale of arms to the partici-

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<sup>29</sup> *Schechter Corp. v. United States* (1935) 295 U. S. 495.

<sup>30</sup> *Supra* note 10. And see the *Brig Aurora* (1813) 11 U. S. (7 Cr.) 382, sustaining the constitutionality of the Non-Intercourse Act of 1809.

pants in the Chaco dispute between Bolivia and Paraguay "if the President finds that the prohibition . . . may contribute to the reestablishment of peace between those countries." Obviously the discretion conferred by the Joint Resolution cannot realistically be compared to that effected by enactment of the lend-lease statute, but the language used by Justice Sutherland in his opinion for the Court would seem, in effect, to withdraw virtually all constitutional limitation upon the scope of congressional delegation of power to the President to act in the area of international relations. Particular attention may be called to that portion of the opinion which states:

"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 afford to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."<sup>31</sup>

It may be observed, further, that Justice Sutherland's opinion in the *Curtiss-Wright* case is much more than a statement of passive acceptance of the constitutionality of broad delegation of power to the executive in matters concerning foreign relations. Drawing upon his past experience and study in the field,<sup>32</sup> Justice Sutherland took full advantage of the opportunity afforded him by the issues of the case to make a forceful affirmative exposition of the practical necessities which make such delegation wise governmental policy.

#### EXERCISE OF INHERENT EXECUTIVE POWERS

To this point the discussion has been centered upon the possibilities of the technique of legislative leadership as a means of presidential direction of American foreign policy. Hereafter the emphasis will be on the types of action in the international field which can be taken by the President, independently of the Congress, by virtue of his position as diplomatic spokesman for the nation and as Commander in Chief of the nation's armed forces. Potentially, the powers incident to command of the armed forces are of the greatest weight insofar

<sup>31</sup> (1936) 299 U. S. at 320.

<sup>32</sup> Before becoming a member of the Supreme Court, Justice Sutherland had delivered the 1918 Blumenthal Lectures at Columbia University, published as *CONSTITUTIONAL POWER AND WORLD AFFAIRS* (1919), in which his essential point of view on issues like those of the *Curtiss-Wright* case was clearly stated.

as they confer upon the President the power, by his independent action, to affect the international relations of the United States. But in view of the fact that President Roosevelt, to date, has made no sweeping, all-deciding use of his powers as Commander in Chief, attention may be given first to the opportunities for independent executive action which exist by virtue of the constitutional position of the President as "sole organ of the federal government in the field of international relations".

Although the Constitution makes express provision for President-Senate collaboration in the conclusion of treaties,<sup>33</sup> there is no specific assignment of authority for the making of such other, more or less unilateral, expressions of national policy as are involved in the recognition of states, the severance of diplomatic relations, and the dismissal and recall of ambassadors. Naturally enough these acts have been regarded as attributes of the President's status as diplomatic representative of the nation,<sup>34</sup> and steps taken by the President in this capacity, wholly independent of congressional authorization, may have profound effects upon the position of the United States in world affairs.<sup>35</sup>

To illustrate, it is clear that there were significant implications for American foreign policy in such executive acts, in recent years, as recognition of the Russian soviet government and of the Franco regime in Spain, the recall for "consultation" of the United States ambassador to Germany, and the consistent refusal of the State Department to recognize the territorial conquests of Germany, Italy, and Russia. Within the past few weeks the use of such diplomatic measures has been exemplified by executive demand for recall of an Italian naval attache and continued recognition, for negotiation concerning the protection of Greenland, of a Danish diplomatic representative repudiated by the existing puppet government of that country. The potentialities of executive power in this respect can be made clear by considering the significance and seriousness of such a step, well within

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<sup>33</sup> "He [the President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ." Art. II, § 2.

<sup>34</sup> BERDAHL, *op. cit. supra* note 12, at 31 *et seq.*; CORWIN, *op. cit. supra* note 8, c. VI.

<sup>35</sup> "The breaking of diplomatic relations, while not in itself an act of war, and not necessarily resulting in war, is meant to be a marked protest and generally does lead to war. President Wilson thus understood very well, as did the whole country, that his action, on February 3, 1917, in dismissing the German ambassador to the United States and recalling Ambassador Gerard from Berlin, was very likely the first step towards actual war . . ." BERDAHL, *op. cit. supra* note 12, at 36.

the range of present possibility, as a future decision to deal with the de Gaulle Free French group as the lawful government of France.

Indeed, the international prestige of the office of President of the United States is such that the most informal representation of attitude made by the President will commonly be taken abroad as an expression of the sentiments of the nation as a whole. President Roosevelt has taken full advantage of his status as national spokesman by such actions as the sending of carefully-timed messages of encouragement to the President of Finland and to the King of Yugoslavia, the unprecedented personal reception of the British Ambassador, Lord Halifax, and the denunciation of totalitarianism in press conferences and on the air. Our international relations, realistically speaking, could not have been more vitally affected had these presidential expressions possessed, in addition, the supporting sanction of congressional joint resolutions. If, throughout the world, American foreign policy is identified with the Roosevelt personality there are adequate grounds for that association.

Any discussion of the ability of the President to pursue a forceful course in international affairs independently of congressional authorization must take full account of the great and largely undefined power of the Chief Executive in his constitutional capacity as Commander in Chief of the Army and Navy.<sup>36</sup> It is beyond question that the President, if he should order certain possible dispositions of the military or naval forces of the United States, might determine by his action whether or not this country is to become a belligerent in the present war. Within the limits of this discussion it will not be possible to do more than to suggest the principal constitutional issues related to presidential exercise of the power of command over the armed forces. It must be kept in mind that these constitutional issues, by their very nature, are normally non-justiciable<sup>37</sup> and that the precedents by which executive action is to be judged are chiefly historical or political, not judicial, precedents.

There are certainly precedents in our history for use of the armed

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<sup>36</sup> Art. II, § 2: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States . . ."

<sup>37</sup> Of the few cases in which the Supreme Court has passed upon the scope of the President's powers as Commander in Chief, a majority deal with the actions of Lincoln during the Civil War, a subject beyond the immediate focus of this discussion. See CORWIN, *op. cit. supra* note 8, c. V; and BERDAHL, *op. cit. supra* note 12. More directly in point is the decision in *Durand v. Hollins* (C. C. 1860) 4 Blatchf. 451.

forces upon executive responsibility, even outside the territory of the United States: the campaign against the Barbary pirates, the occupation of Vera Cruz in April 1914, and the Marine Corps expeditions to Nicaragua in pre-Good Neighbor times.<sup>38</sup> The distinction which has been advanced from time to time,<sup>39</sup> that such use of the armed forces is justified for the protection of American lives and property but not for the protection of other, more intangible national interests, seems unsound in principle and impossible to reconcile with historical facts.

The powers of the President as Commander in Chief must be considered, particularly, in relation to the specific provision of the Constitution which vests in Congress the power to declare war.<sup>40</sup> The choice of the framers of the Constitution to vest this power in the legislative department represented the deliberate judgment of the Convention that the governmental decision most drastic of all in its effects upon the life of the nation ought not be left to executive discretion.<sup>41</sup> Analysis of the reality of congressional war-declaring power must, however, give due weight to the fact that under existing world conditions a formal declaration of war is more often a mere regularization of an existing state of hostilities than an affirmative change in the situation between opposing countries. Congress would hardly be a free agent in the exercise of its constitutional war-declaring prerogative if actual hostilities had taken place between United States forces and those of the nation against which a formal declaration of war was sought.

Champions of the authority of Congress have long been aware of the fact that bold presidential exercise of the power of command over the armed forces may make somewhat unreal the constitutional power of Congress to declare war. Many times in the history of the United States it has been urged that it is a necessary implication from the grant of war-declaring power to Congress that the President cannot constitutionally make such use of the armed forces as would

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<sup>38</sup> 85 instances of the "use of land and naval forces of the United States for protection purposes" are enumerated in a memorandum inserted in the Congressional Record by Senator Barkley (March 6, 1941) 87 CONG. REC. 1955.

<sup>39</sup> See comment in CORWIN, *op. cit. supra* note 8, at 249.

<sup>40</sup> Art. I, § 8, cl. 11.

<sup>41</sup> "It seemed evident to the makers of the Constitution that a power involving such tremendous consequences must in a representative government rest with the body most directly representative of the people. To vest the power of declaring war in the Executive savored too much of monarchy and old-world institutions." BERDAHL, *op. cit. supra* note 12, at 79.

amount to an act of war. This supposed limitation upon executive power was reflected, for example, in the House Resolution of 1848 which, in its stigmatization of the War with Mexico as "a war unnecessarily and unconstitutionally begun by the President of the United States", amounted to a clear censure of the conduct of President Polk.<sup>42</sup> Again in the Senate debate of 1917 on the issue of arming American merchant ships Senator Stone challenged the power of President Wilson to take the step on his own responsibility and contended, in effect, that whatever the scope of executive prerogative it could not include the power to take such measures as would amount to acts of war.<sup>43</sup> More recently, during the prolonged debate on the lend-lease proposal, anti-Administration spokesmen made use of the same essential line of argument in denying the constitutional power of the President to order the convoy of shipping to Britain, their contention being that convoying would be an act of war and that executive use of the Navy for convoy purposes would amount to invasion of the war-declaring prerogative of Congress.<sup>44</sup>

Even if this implied constitutional prohibition against executive commission of acts of war be regarded as established by the political precedents of American history, difficulty remains in its application as a test of executive action. There would seem to be no realistic standard, under present conditions of international affairs, by which it can be stated, with any degree of assurance, just what does amount to an act of war. Nations observing the strictest neutral standards have been declared by the present German government guilty of theoretical breaches of neutrality sufficient to excuse aggression and invasion. The United States, on the other hand, has already committed acts in the implementation of its aid-to-Britain policy which pre-1939

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<sup>42</sup> Abraham Lincoln voted for the resolution of censure. As President, however, Lincoln was to assert a scope of executive power as Commander in Chief broader than that claimed by any other President. SMALL, *op. cit. supra* note 4. For the debate between Senators Calhoun and Cass on the constitutional issues of the War with Mexico, see CORWIN, *op. cit. supra* note 14, at 136.

<sup>43</sup> (1917) 54 CONG. REC. 4883 *et seq.*

<sup>44</sup> To this effect, Senator Wheeler: "I say that as a matter of law under our Constitution—and I submit that the best authorities on international law and on the Constitution are all in agreement on that subject—the President of the United States has no right under the Constitution to commit acts of war . . . . When such statements are made we come dangerously near to giving any President the right which the King of England once had. That is the very reason why Jefferson, Madison, and Monroe insisted that the provision to which reference had been made [giving Congress the power to declare war] was written into the Constitution." (March 6, 1941) 87 CONG. REC. 1959. And see remarks of Representative Day (Feb. 3, 1941) *ibid.* at 553-555.

international lawyers might well have characterized as acts of war. It is quite possible, in view of the degree to which the prospective adversaries of the United States are committed to international opportunism, that some minor incident, such as the recent tearing down of the swastika from the San Francisco German consulate, might be regarded by the Axis powers as an act of war, if they deemed existing conditions in their favor. Under other and less favorable circumstances even the dispatch of an American armed force to Dakar might not be considered by those powers a proper occasion for declaration of war or even for forcible retaliation. However sound in constitutional theory, a limitation of presidential action in the exercise of military command to measures short of acts of war would seem of little practical significance, in view of the great difficulty of determining even the approximate content of the limiting concept.

Power to exercise command over the military and naval forces of the United States, whether or not subject to a constitutional implication restricting executive action to measures which are not acts of war, is, of course, inherent executive power, in the sense that the authority is conferred directly upon the President by that constitutional provision which designates him as "Commander in Chief of the Army and Navy of the United States".<sup>45</sup> Does it then follow that presidential discretion in the exercise of the power of command cannot constitutionally be controlled or restricted by congressional direction? What would be the validity, for example, of a congressional enactment purporting to forbid the basing of the United States Navy at Singapore or the use of American armed forces to occupy Iceland or Martinique? Logically it seems a necessary conclusion that the power of the President as Commander in Chief, being inherent executive power, is not subject to congressional direction or interference. The essential nature of the constitutional issue, and the apparent attitude of a controlling majority of the present Congress with respect to it, can be illustrated by reference to the progress of debate on the convoy issue during the legislative history of the lend-lease statute.

As originally introduced, H. R. 1776 authorized the President "To sell, transfer, exchange, lease, lend, or otherwise dispose of . . . any defence article."<sup>46</sup> In the hearings of the House and Senate com-

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<sup>45</sup> Art. II, § 2.

<sup>46</sup> H. R. 1776, 77th Cong. 1st Sess. (Jan. 10, 1941) § 3(a)(2). Introduced the same day as S. 275.



mittees,<sup>47</sup> objection was immediately made that the word "transfer" was capable of interpretation as synonymous with "deliver" and that the President might construe the clause as directing him to assume responsibility for the safe conduct of lend-lease materials to Britain. Accordingly, in the bill as it emerged from the House Committee on Foreign Affairs a provision was inserted that:

"Nothing in this act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States."<sup>48</sup>

In the House, and later in the Senate, strenuous efforts were made to place the Congress more positively on record against the convoying of British shipping by the United States Navy. Flat and unequivocal statements were made on the floors of both houses that any congressional attempt to interfere with the President's discretion to direct the operations of the Navy would be unconstitutional, and disagreement with these statements was for the most part hardly more than perfunctory.<sup>49</sup> Even the bitterest opponents of convoys seem to have accepted the existence of this restriction on congressional power, for the non-interventionist group concentrated upon efforts to write into the statute such declarations of adverse congressional sentiment as that contained in the amendment offered by Representative Mundt, which would have added to the committee amendment, quoted above, the words:

"... and it is the sense of this Congress that the convoying of such vessels to belligerent ports or through belligerent waters should not be undertaken."<sup>50</sup>

The point that the offering of a restrictive amendment in this form amounted, in effect, to a concession that a direct prohibition against convoying would be unconstitutional was expressly made by Representative Kee:

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<sup>47</sup> See, for example, testimony of Alfred M. Landon. *HEARINGS BEFORE COMMITTEE ON FOREIGN RELATIONS, SENATE*, ON S. 275 (Feb. 10, 1941) 664.

<sup>48</sup> This committee amendment is section 3(d) of the statute as enacted. Pub. L. No. 11, 77th Cong. 1st Sess. (March 11, 1941). And note that the authorizing section in the statute as enacted [section 3(a)(2)] substitutes "transfer title to" for the word "transfer" in the original draft.

<sup>49</sup> It is, of course, dangerous to generalize concerning the essential tenor of a debate as prolonged as was the Senate debate on the lend-lease proposal. But the House debate of February 6, 1941 (87 CONG. REC. 776 *et seq.*) and the Senate debate of February 28, 1941 (*ibid.* at 1573 *et seq.*) seem fairly typical.

<sup>50</sup> (Feb. 6, 1941) *ibid.* at 776.

"You all agree that we cannot put in this bill a provision directly prohibiting the President from authorizing ships to be convoyed. If you thought otherwise you would have offered such an amendment. . . . What does 'sense of the Congress' mean? It means that you are aware of this fact that you cannot alter the constitutional provision under which the President has the power to convoy or to order convoys of these ships. This amendment we are now considering does not mean a thing . . . ." <sup>51</sup>

As is probably well known, even efforts to secure a congressional expression of policy opposing convoys were unsuccessful, and the most that the non-interventionist group were able to secure was a renewed declaration to the effect that the legislation was not intended to confer upon the President any greater power than he already possesses under the Constitution. This compromise provision, the substitute <sup>52</sup> Ellender amendment, merely states:

"Nothing in this act shall be construed to change existing law relating to the use of the land and naval forces of the United States, except insofar as such relates to the manufacture, procurement, and repair of defence articles, the communication of information and other noncombatant purposes enumerated in the Act." <sup>53</sup>

It seems a fair conclusion from the course of what was said and done in Congress throughout the legislative history of the lend-lease act that a great majority of the members of Congress acted upon the understanding that decision on the crucially significant convoy issue must, under the Constitution, be left to the discretion of the executive department. <sup>54</sup> What has been said of the power to convoy is

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<sup>51</sup> *Ibid.* at 781. And see 3 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 1567.

<sup>52</sup> The original amendment, offered by Senator Ellender and withdrawn after consultation with administration leaders, provided: "Nothing contained in this act shall be deemed to confer any additional powers to authorize the employment or use of persons in the land or naval forces of the United States at any place beyond the limits of the Western Hemisphere, except in the Territories and possessions of the United States, including the Philippine Islands." (March 5, 1941) 87 CONG. REC. 1844. For the sharp attacks made on the Senate floor against the "caucus substitute" finally adopted, see (March 6, 1941) *ibid.* at 1970 *et seq.*

<sup>53</sup> Pub. L. No. 11, 77th Cong. 1st Sess. (March 11, 1941) § 10.

<sup>54</sup> At least insofar as a flat congressional prohibition against convoys is concerned. But the Constitution vests in Congress sole power to appropriate money (Art. I, § 9), to raise and support armies (Art. I, § 8), and to provide and maintain a navy (Art. I, § 8). In pure and impossible theory, Congress could prevent executive adventuring by the simple expedient of refusing to create an army and navy or to appropriate money for their support. But *quære* as to the degree to which Congress could restrict the President's freedom of action by providing, in legislation making appropriations for military

doubtless true of the power of the President to exercise command over the United States Army, at least over soldiers other than those drafted under the Conscription Act of 1940. One may, in fact, speculate as to the constitutionality of the provision of the Conscription Act<sup>55</sup> restricting the service of men brought into the Army under its operation to the Western Hemisphere and the territorial possessions of the United States.

#### CONCLUSION

Crisis conditions call for resolute and consistent leadership, and initiative in the foreign policy field must come from the executive department. The only choice which the President has concerns the degree to which he will seek congressional endorsement, criticism, and revision of his international policies before translating those policies into governmental action. Whether the future emphasis in the President's strategy is upon his congressional leadership or upon his status as independent constitutional executive, support for his course can be found in the words of the Constitution and in the political precedents which have been set over the years by a succession of Presidents of widely varying temperaments and political philosophies. This is not, unfortunately, a parliamentary age, and the great impersonal pressures of the dynamic world situation may preclude executive consultation with the Congress prior to the taking of particular emer-

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and naval purposes, that no part of the money so appropriated should be used for specified purposes, e.g., conveying? The issue is neatly presented by an amendment offered by Senator Clark of Missouri, and rejected, during a late stage of the lend-lease debate: "No part of the money appropriated . . . in this or any other act . . . shall be, unless the Congress of the United States has declared a state of war exists, used for the employment or use of persons in the land or naval forces of the United States at any place beyond the limits of the Western Hemisphere, except in the Territories and possessions of the United States, including the Philippine Islands . . ." (March 6, 1941) 87 CONG. REC. 1983.

<sup>55</sup> Pub. L. No. 783, 76th Cong. 3d Sess. (Sept. 16, 1940). Can such a restriction be supported as incident to the power of Congress "to raise Armies", or as within the congressional power "To make Rules for the Government and Regulation of the land and naval Forces" (Art. I, § 8)? A like issue is presented by the *posse comitatus* act, section 15 of the Act of June 18, 1878 [20 STAT. 145, 152, 10 U. S. C. (1934) § 15], restricting the use of members of the regular army in domestic law enforcement. See Lorence, *The Constitutionality of the Posse Comitatus Act* (1940) 8 KAN. CITY L. REV. 164. Compare amendment offered by Representative Rankin, which would have added to the lend-lease statute a provision that: "Nothing in this act shall be construed to authorize or permit the President to order, transfer, exchange, lease, lend, or employ any soldier, sailor, marine, or aircraft pilot outside the territorial waters of the Western Hemisphere, without specific authorization by Congress . . ." (Feb. 8, 1941) 87 CONG. REC. 825.

gency measures. But sound constitutional principle urges that the President guarantee maximum possible participation of Congress in the successive decisions which will determine the role of the United States in the present war and, perhaps, the future of democratic institutions here and throughout the world.

But Congress, as well as the President, has a constitutional responsibility, that of seeing to it that its decisions represent the unobstructed judgment of a representative majority. If, for example, the free decision of the congressional majority is thwarted by the use of filibustering tactics by a self-willed minority any real executive-legislative collaboration will become impossible. The substance of democratic government is, after all, even more to be considered than its form. The capacity of Congress for prompt and forceful action, as well as the choice of the President, will determine the procedure to be followed henceforth in the formulation of essential foreign policy.

Americans generally, by tradition and sound sense, have a distrust for undue executive power, a distrust which has been sharpened by developments which have occurred in other countries. It is a proper matter for national concern that the President today, by virtue of his powers as legislative leader, congressional delegate, and constitutional executive, has within his hands the power to determine the issue of peace or war for the United States. In weighing the implications of this concentration of power for the future of democratic government, it is well to remember that many of the great constitutional decisions of American history, decisions which have conditioned the very course of our development as a nation, have been made by the executive, rather than the legislative or judicial, department.

A realistic historian would include as essentially executive decisions such fundamental steps as the Louisiana Purchase, the Monroe Doctrine, the War with Mexico, the definite resolution to resist secession, and the Emancipation Proclamation. No one would contend that the decisions of the executive department have been wise in every instance, any more than have those of the legislative and judicial departments. The point is that under our constitutional distribution of powers among three independent branches it is necessarily assumed that each department will be guided by an honest construction of the spirit of the Constitution. Against the risks of executive boldness

must be measured the dangers of inaction. It was only the bold exercise of inherent executive powers by Abraham Lincoln, action branded as dictatorial and tyrannical at the time, which insured the preservation of the Union.