BOOK REVIEWS

FOREIGN AFFAIRS AND THE CONSTITUTION. By Louis Henkin*. Mineola, N.Y.: The Foundation Press, 1972. Pp. 553. $11.50.

In reviewing Professor Louis Henkin's book, *Foreign Affairs and the Constitution*, I am tempted in the manner of those who review books for the *New York Review of Books* to take off on my own. The title of the book, the timeliness of the subject, and the clear need for examining the "controlling relevance of the Constitution"[1] to the conduct of foreign affairs, invites thought and debate. How can one read the title without contemplating the Constitution and the war, for example?

The longest, most expensive, and most divisive war of American history has just been concluded. It was made without Congress exercising its constitutional right (or perhaps duty) "to declare war," and it ended without a peace treaty. In the meantime the Supreme Court has managed for ten years to avoid a decision as to what has happened to Article I, Section 8 (11) of the Constitution. Professor Henkin states that "[t]he President has power . . . to wage in full . . . war *imposed* upon the United States."[2] It tests one's imagination, however, to believe that the Vietnam war came about because the President was required to act as commander-in-chief to repel a North Vietnamese attack on the United States.

What has happened to the power of Congress to declare war? Surely the United Nations Charter with its principle that all members "shall settle their international disputes by peaceful means"[3] did not amend Congress's constitutional power to declare war. Yet administration spokesmen have suggested as much. Neither has Undersecretary of State Katzenbach's claim[4] before the Foreign Relations Committee that the Gulf of Tonkin Resolution, combined with the SEATO treaty, to become the "functional equivalent" of a declaration of war, displaced the constitutional law of the land.

Professor Henkin does not provide definitive answers to such propositions. But he does provide the historical and legal background necessary

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[1]L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION vii (1972).

[2]*Id.* at 52 (emphasis added).

[3]U.N. CHARTER art. 2, para.3.

[4]113 CONG. REC. 23390-92 (1967) (testimony of Undersecretary of State Nicholas Katzenbach), also in *Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess., 77-188 (1967).

for an examination of the separate powers of the Congress and the President in the area of foreign affairs.

Foreign relations powers appear "not so much 'separated' as fissured, along jagged lines," he observes.[5] Since these fissures have not developed along clear lines of division, the protagonists have engaged, in Professor Henkin's apt phraseology, in "tugging for more of the blanket under claim of constitutional right."[6]

Can a legal power once lost be retrieved? Can legal concepts such as precedents, laches, prescription, be woven into a legal doctrine which will negate specific and clear provisions of the Constitution? This is an interesting legal question. But when one discusses the relative powers of the President and the Congress in foreign affairs one is dealing as much with a political question as with a legal issue.

Whether the "tug of war" between the Congress and the President involves the war power, the treaty power, or other foreign policy powers, the point is the same. As long as the contest continues, as it has since 1789, we are on relatively solid constitutional ground. The danger is that if one of the contending parties were to pull the other into the chasm and thus achieve complete domination over foreign policy, the nation as the founding fathers conceived it, and as we know it, would not survive.

In 1926, the late Professor Lindsay Rogers of Columbia University in his magnificent book, *The American Senate*, wrote that control over foreign policy by one third of the Senate "is a control which . . . unfortunately, cannot be got rid of by any of the ordinary devices of popular government."[7] He was writing in the aftermath of the Senate's rejection of the League of Nations and the World Court. Fortunately, Mr. Rogers was either wrong, or *extra*ordinary events—such as World War II and the development of nuclear weapons—negated the power of one third of the Senate to control foreign policy.

Today the Senate finds itself forced to express its sense (by a vote of 50 to six) in terms such as these: "Whereas the Constitution states that the President of the United States must have the advice and consent of the Senate in order to make treaties. . . . Now therefore, be it *[r]esolved*, That any agreement with Portugal or Bahrain for military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent."[8] The President noted the resolution, but did not

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[5]L. HENKIN, *supra* note 1, at 32.

[6]*Id.*at 34.

[7]L. ROGERS, THE AMERICAN SENATE 55 (1931).

[8]S. Res. 214, 92d Cong., 2d Sess., 118 CONG. REC. S3290 (daily ed. Mar. 3, 1972).

submit those executive agreements to the Senate alone, or to the Congress.

The concern today is not that the Senate is too strong in the field of foreign affairs, but too weak. It is the President who dictates whether the nation is to be at war or peace. The Foreign Relations Committee of the Senate has been struggling to reassert some degree of congressional control over the President, but thus far with markedly little success. Two efforts by that Committee last year, were approved by the Senate, but failed in conferences with the House of Representatives because the House took positions in support of power for the President.

One effort was mounted by Senator Case, Republican senator from New Jersey. He sought to prohibit the expenditure of funds to carry out any agreement with a foreign government which provides for establishment of a military base in that country and assignment of American combat units to that base, unless the Senate first has given its advice and consent to such agreement. House conferees refused to accept this language even though Senator Case was willing to broaden it to abandon the implication that the language was applicable only to treaties. He offered to make it clear that the House could be a full party to approval of any such agreement.[9]

Another effort to assert legislative power was mounted by Senator Javits, of New York, also a Republican. Supported by Senators Stennis of Mississippi, Spong of Virginia, and Eagleton of Missouri, the Javits bill[10] sought to require congressional authorization before the commitment of United States armed forces in hostilities abroad. An exception was made for specific cases of emergency when the President might engage troops in combat for up to 30 days before obtaining congressional approval. Although the Senate approved the bill 68 to 16, House conferees were dedicated to a much weaker version of the same concept.[11] Meeting with Senate conferees for two frustrating sessions the conferees agreed to disagree, and so, no legislation was forthcoming for the President to veto.

I subscribe to the pendulum theory to help me understand the foreign policy tug of war between the President and the Congress. The pendu-

[9]For discussion see SENATE COMM. ON FOREIGN RELATIONS, in the FOREIGN ASSISTANCE ACT OF 1972, S. Rep. No. 823, 92d Cong., 2d Sess. (1972).

[10]S. 2956, 92d Cong., 2d Sess. (1972). For debate see 118 CONG. REC. S5255-84 (Daily ed. Mar. 30, 1972).

[11]*See* H.R.J. Res. 1, 92d Cong., 2d Sess. (1972), proposed by Congressman Zablocki, Democrat from Wisconsin.

lum swung far toward the Senate in the aftermath of World War I. During and after World War II, the pendulum swung far toward the President. That swing continued until the power of the President to make war in Vietnam encountered increasing public and congressional opposition. Now in the aftermath of the Vietnam war we may be witnessing the beginning of the swing of the pendulum back toward the Congress. To paraphrase—crises make poor constitutional law in the area of foreign affairs. But if crises have kept the pendulum swinging as between the foreign policy powers of the Congress and the President, then they have kept the nation from going over the brink to foreign policy dictatorship on the one hand or to the disorderly management of foreign policy by legislative bodies on the other.

So long as the pendulum swings, the nation will survive.

I fear the preceding paragraphs have too well illustrated the provocative nature of Professor Henkin's book inasmuch as the foregoing comments were stimulated by his first 65 pages which deal mainly with the powers of the President in foreign affairs.

Professor Henkin opens his discussion of the powers of Congress with these words:

> If in the competition for power in foreign relations the Presidential office has had inherent advantages, Congress has had other, enormous strengths, not the least the history, the conception, and the generous grants of the Constitution.

In concise and readable language, Professor Henkin describes those strengths.

His chapters on *Treaties and the Treaty Power, The Courts in Foreign Affairs, The Abiding Relevance of Federalism*, and *The Limits of Constitutional Power*, should be required reading for public servants in the Congressional, the Judicial, and the Executive branches of Government, as well as the press. I was about to add the phrase: "if those individuals are concerned with foreign relations," and thus by implication I would have implied that an individual concerned with, say, civil rights would not find much meat in the book. This is not the case. Henkin relates the powers of the President in the field of foreign affairs to individual rights in a chapter entitled *Individual Rights and Foreign Affairs*.

In that connection and in discussing the powers of the President, Professor Henkin describes them as being "indeed plenary," even to the

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[12]L. HENKIN, *supra* note 1, at 67.

extent of making some law in the United States.[13] But then he adds: "Of course, the President cannot do what is forbidden to him . . . by the Bill of Rights."[14]

Surely one hopes that to be the case and, I daresay, Professor Henkin was also only expressing a hope. "The President," says Professor Henkin, "*would* not make a treaty that forbids teaching or advocating racial superiority because it would probably violate the First Amendment."[15] It is a political judgment as to whether a President *would* make such a treaty. One need not be too radical to believe that some future President *would* make such a treaty, that the courts might find that he *could*—despite the Bill of Rights. In that instance the final protection would not have been abandoned if the Senate failed to give its consent to such a treaty. Hence the need to preserve the treaty veto power of the Senate.

Professor Henkin's book is unusually well-documented. Indeed, for the statistically minded, there are 281 pages of text and 252 pages of notes and citations—all placed in the back of the book—a benefit for the general reader, if not a boon to the indepth student. A well done and complete 16 page index makes the book a valuable reference instrument.

In short, Professor Henkin has given students, scholars, lawyers, public servants—indeed, all Americans who care about foreign affairs and the Constitution—a book which I believe comes close to being a classic, as defined by Webster, "of recognized value: serving as a standard of excellence."[16]

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INTERNATIONAL TAX PLANNING. By Barry Spitz.[1] London, England: Butterworth & Co. Ltd., 1972. Pp. xxiii, 159. $12.15 (U.S.).

In the challenging business world of today, management often must look beyond national boundaries in order to realize the fullest profit

[13] *Id.* at 64.

[14] *Id.*

[15] *Id.* at 254 (emphasis added).

[16] WEBSTER'S NEW COLLEGIATE DICTIONARY 153 (7th ed. 1970).

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