1975

Response to Henkin

Thomas Ehrlich

Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Constitutional Law Commons, Policy Design, Analysis, and Evaluation Commons, and the Policy History, Theory, and Methods Commons

Recommended Citation

http://www.repository.law.indiana.edu/facpub/1793

This Response or Comment is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
Professor Henkin's paper—like all his work—is splendid. It is thoughtful and thought provoking.

I do have doubts about some of his views concerning the intentions of the Framers of the Constitution regarding foreign affairs, but I have none about his basic characterization of the current situation. I agree completely that constitutional amendments are not in order. I agree further that the basic problem is one of attitude—the need for a more cooperative attitude on the part of both the Executive Branch and the Congress. Our Constitution mandates a separation of powers, but not an adversary approach by each of those powers vis-a-vis the other. Having worked in the State Department, I know that many in the Department too often view Congress as an adversary. Friends on the Hill tell me that the view from there is no different.

Attitudes cannot be changed by legislative or executive mandate. But some steps, I think, can and should be taken. I suggest them as a supplement to those proposed by Professor Henkin. As a lawyer and law teacher concerned with international affairs, I am particularly troubled by the frequent failure of those in foreign policy-making positions to bring issues of international and domestic law to bear on their decisions. Other fields may be equally neglected, but I will use law as the example since it has particular relevance to this discussion of the constitutional dimensions of foreign policy-making. Three approaches seem promising—one by the Executive Branch, one by the Congress, and one by the public.

I.

One of the most troublesome gaps within the foreign-policy bureaucracy is the lack of what has been called "multiple advocacy" before the President and the Secretary of State.¹ All of us have some tendency to adopt an anthropomorphic view of foreign-policy mak-

---

¹ See George, The Case for Multiple Advocacy in Making Foreign Policy, 66 AM. POL. SCI. REV. 751 (1972).
ing—that a single person decides key issues of foreign policy. In fact, of course, those issues are decided by many people in the State Department, the Defense Department, and elsewhere. All too often, unfortunately, different perspectives on a particular problem are blurred in the bureaucratic process of preparing the foundation for a particular decision. President Roosevelt developed a staff of advisers on whom he could rely to raise opposing positions and to maintain those positions until the issue reached his desk. The clashes between Harold Ickes and Harry Hopkins are a prime example. Similarly, former Secretary of State Dean Acheson stressed the extent to which President Truman encouraged officials to bring their differing views to him for resolution.

None of the existing structural arrangements in the Executive Branch promote such multiple advocacy concerning foreign policy. The Legal Adviser to the State Department, for example, is responsible for considering the legal implications of foreign-policy decisions. But he is also, and primarily, charged with being the lawyer for the Department—for defending, in legal terms, its ultimate political judgment, whatever that may be.

A variety of approaches might be suggested for meeting this problem. In my view, the most promising would be not a new office or other formal mechanism to promote debate from differing perspectives—a devil’s advocate or a new International Law Adviser—but rather a conscious policy to encourage that debate. If, for example, the State Department Legal Adviser, as a matter of publicly announced policy, were responsible for assuring that advocates within his office—or, if necessary, outside it—developed the strongest possible legal arguments for conflicting positions, I am certain that the Executive Branch would benefit from a fuller debate on difficult problems. In some situations, this adversary process might involve only two sides; more often, numerous options could be developed. I believe that such a practice would promote reasoned analysis of legal positions in a way that is unlikely without adversary pressures.²

² The advantages of multiple advocacy arrangements are not, of course, limited to lawyers or legal matters involving foreign policy. International trade issues, for example, can be sharpened and clarified by a clash of economists with different views. The same is true of experts in other fields.
II.

It is, I believe, even more important that new governmental arrangements be encouraged outside the Executive Branch. As a practical matter, these must be legislative arrangements, since there is little likelihood of substantial involvement by the judiciary.

What can Congress do to encourage the development of sound foreign policy? Perhaps most important, it can widen and sharpen the debate on what United States policy is and what it should be. Whatever arrangements are designed to encourage multiple advocacy within the Executive Branch, it is likely that most foreign policy decisions there will not be subject to a full adversary debate. If the Congress is given the facts of a situation—and spends the time to understand them—productive debate is much more likely. In my own view, the greatest single failure in Congress concerning foreign policy is lack of preparation—too many seem unwilling to spend the time to learn what is happening. Some steps can be taken to encourage that process. I use one as an example.

In 1973 Congress adopted—over the President's veto—the War Powers Resolution.\(^3\) President Nixon stated in his veto message that two key provisions in the Resolution were “clearly unconstitutional.”\(^4\) More than two-thirds of the Congress obviously disagreed, and the current status of those provisions is thus unclear. But another section in the Resolution has particular relevance here, although it received little attention in the public debates and no one questions its constitutionality. Within 48 hours after deploying armed forces in foreign hostilities, the President must now submit a report on the circumstances and justification of the intervention, including a legal analysis.\(^5\)

---

\(^4\) The President's Message to the House of Representatives Returning H.J. Res. 542 Without His Approval, Oct. 24, 1973, in 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1285-87 (Oct. 27, 1973) (provision automatically cutting off certain authorizations after sixty days, unless Congress extends them; provision allowing Congress to eliminate certain authorities by concurrent resolution).
\(^5\) Section 4 of the Resolution deals with “Reporting.” Subsection (a) reads:
- In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—
  - (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
  - (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
No one can expect preparation of a carefully reasoned, fully-developed brief within two days after a decision to use military force. But precisely for that reason, the requirement should have a useful impact. The need for justification to support a decision should be a strong incentive for a broader analysis of the impact of that decision than might otherwise be made. By requiring those in the Executive Branch to articulate the basis for an action, and to defend that basis, the Resolution will encourage them to think through their decisions more fully.

In my view, Congress allows the Executive Branch to escape with too little serious and sustained justification of its foreign-policy decisions. The Executive is seldom required to articulate the basis for its judgments in a way that involves reasoned elaborations from basic principles. That process can and should be encouraged by Congress, and the War Powers Resolution is an important step forward. I hope there will be others.

III.

Finally, it seems to me that there are ways to encourage more public involvement in matters of foreign policy than has been true over the last decade. In the first 15 years or so after World War II, a wide variety of influential organizations developed around the country to study international affairs and to promote bipartisan support for United States foreign policy. Sadly today, most of those organizations seem frayed around the edges—irrelevant to the real business of foreign affairs. Some are seen as guided by an aging establishment of a former era, others as worn-out remnants of that era.

A number of approaches are possible to encourage more concern about foreign affairs on the part of the public. The prime requisite, of course, is an Executive Branch that cares about the matter.

---

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

Those with whom I have talked in the State Department now say they care—and I hope that is true.

I hope it is also true of many in Congress. There are no concentrated political pressures brought to bear on most congressmen concerning most foreign-policy issues. Neither the Senate Foreign Relations Committee nor the House Foreign Affairs Committee feels any particular obligation or desire to promote public debate on most foreign-policy issues. The role of the former toward the end of the Vietnamese War is a prime and significant exception. That role shows how much can be done by those in Congress—when they choose to act. I close with the hope that the exception will soon become the rule.