Volume 61
Issue 4 *Dickinson Law Review - Volume 61, 1956-1957*

6-1-1957

Changing Concepts of Control of the Armed Forces

John Sparkman

CHANGING CONCEPTS OF CONTROL OF THE ARMED FORCES

BY THE HON. JOHN SPARKMAN

United States Senator from Alabama

MUCH of the constitutional history of the United States is concerned with a continuing dispute as to the precise lines which separate the powers of the three branches of government. This has especially been the case with regard to the powers of the President and of Congress and nowhere more so than in the field of foreign policy and the control of the armed forces.

The lines between these two branches of government have shifted back and forth, depending upon the times, the nature of the President, and the assertiveness of Congress. Strong Presidents, especially in times of stress and crisis, have shifted the balance of power toward the executive branch. Self-assertive, even aggressive, Congresses, especially during the administrations of weak Presidents, have shifted the balance back toward the legislative branch. In this continuing ebb and flow, both the President and the Congress have found able and learned advocates among the professional students of the subject.

Usually, the point in controversy has been whether a particular power in a particular set of circumstances properly belongs to the President or the Congress. Except for occasional advocates of the parliamentary system of government, there have been few serious suggestions that the problem be solved by merging the powers of those two branches of Government.

This is one of the more important aspects of the debate which occupied the Senate during the early months of 1957 in regard to the Middle East.

After having first come to Congressional and public notice unofficially but authoritatively in the press,[1] the President's doctrine for the Middle East was formally presented to a joint session of Congress on January 5, 1957.[2]

The action which the President requested of Congress consisted of three elements:

1. A restatement of the President's authority, under the Mutual Security Act of 1954, as amended,[3] to extend economic and military assistance to nations in the general area of the Middle East.

---

[1] *The New York Times,* Dec. 28, 1956, p. 1.

[2] United States Congress. House of Representatives. Middle East Situation. Address of the President of the United States. H. Doc. 46, 85th Cong., 1st sess., Jan. 5, 1957.

[3] Public Law 665, 83rd Cong., as amended by Public Law 138 and Public Law 726, 84th Cong.

2. Authority for the President, when he determined it to be important to the security of the United States, to use up to $200 million of available mutual security appropriations for these purposes without regard to the provisions of any other law.

3. A statement that the President "is authorized to employ the Armed Forces of the United States as he deems necessary to secure and protect the territorial integrity and political independence of any such [i.e., Middle East] nation or group of nations requesting such aid against overt armed aggression from any nation controlled by international communism . . . ." [4]

The first of these provisions was essentially no more than a restatement of existing law. The second did not involve additional appropriations, but only the manner of spending existing appropriations. The third was by far the most important and significant.

As a precedent for its request concerning authority to use the armed forces, the Administration cited the somewhat similar Congressional action relating to Formosa and the Pescadores in 1955.[5] Although the Formosa resolution passed the Senate with only three dissenting votes, some of those who voted for it raised the question of whether it was sound constitutional practice from the point of view of preserving intact the powers of the President.[6]

These doubts were renewed and strengthened by the President's request in regard to the Middle East. As consideration of the Middle East resolution proceeded, however, it became apparent that what was involved here was not merely the preservation of the powers of the President, but likewise the preservation of the powers of Congress. The great difficulty of the resolution, from a constitutional point of view held by many, was that it improperly commingled the powers of the two branches of government and blurred the line of separation.

On the one hand, the specific authorization requested by the President raised doubt that the President, acting alone, had the constitutional authority to do what he deemed necessary to protect the vital interests of the United States. This doubt was raised by the mere fact that the President had asked to be "authorized". The act of asking implied that the President himself felt that he did not have such authority. The doubt would have been compounded many times if Congress had concurred in the President's view.

---

[4] H.J. Res. 117, 85th Cong., print of Jan. 5, 1957.

[5] Public Law 4, 84th Cong.

[6] See Congressional Record, Senate Debates, Jan. 27 and 28, 1955.

The President's action also raised the question, under the principle of *inclusio unius est exclusio alterius,* as to whether American reaction to Soviet armed aggression would be limited to the areas and the circumstances for which there existed specific Congressional authority—namely, as to areas, Formosa and the Pescadores, under the resolution of 1955 and the Middle East under the proposed resolution of 1957.

Thus the Middle East resolution, particularly when considered alongside the Formosa resolution, called into question the power of the President and represented a diminution of that power. To the same extent, it represented an augmentation of the power of Congress.

On the other hand, the specific language requested by the President would have given him authority extending in some respects beyond what is properly his under the Constitution. It would have authorized his use of armed forces, not simply to meet a specific emergency endangering the United States, but to defend any nation in the general area of the Middle East which requested such aid against overt armed aggression by a country controlled by international communism. There were provisos referring to U. S. treaty obligations and particularly to the Charter of the United Nations, but in practical effect the authorization was unlimited in time or in the scale of action which could be undertaken, and was not explicitly tied to the security of the United States. It was, as the late Senator Barkley observed of the Formosa resolution, "a pre-dated declaration of war." It could just as well have been called a contingent declaration of war. It seemed to some degree to foreclose Congress from exercising any check upon the President if the time ever came when he used the authority conferred upon him. It could be argued that Congress was thus being asked to exercise its authority improperly—i.e., not on a case-by-case basis. In this way, therefore, the resolution represented an augmentation of the powers of the President and a diminution of the powers of Congress.

The resolution, as presented by the Administration, also tended to disturb the proper constitutional relationships between the Senate and the House of Representatives. Historically, when the United States has wanted to throw a mantle of protection over a given area of the world, it has proceeded in one of two ways.

The President, on his own authority, has proclaimed such to be the policy of the United States, as in the case of the Monroe Doctrine.

Or, the United States has made treaties, negotiated and ratified by the President with the advice and consent of the Senate. The North Atlantic Treaty is a good example.

In the situation which prevailed in the Middle East during late 1956 and early 1957, a treaty offered a clear alternative to the course of action which the President chose. For reasons which seemed to the President good and sufficient, and which are not questioned here, the treaty method was discarded. In lieu of a treaty, however, and in lieu, also, of a simple Presidential declaration of policy, the Congress as a whole was asked to pass a law. In this sense, and to this extent, therefore, the treaty-making power of the Senate was by-passed and the role of the House correspondingly increased. It should be noted in this respect that the Constitutional provision for a two-thirds vote on treaties in the Senate is also being by-passed in favor of a simple majority vote in each house.

The reasons for not proceeding through a treaty, however, did not rule out an approach through a policy declaration by the President. There was ample precedent for this approach, not only in regard to other policies, going back to the Monroe Doctrine, but also in regard to the current situation in the Middle East.

As early as April 3, 1956, Secretary of State John Foster Dulles had asserted that United States forces might be utilized in the Middle East without congressional authority in the event of an emergency—although he said at the same time that he was unaware of any situation which would require such emergency action.[7]

Six days later, on April 9, a statement released by Presidential Press Secretary James Hagerty pledged the United States to oppose aggression in the Middle East within constitutional means and to assist the victims of aggression.[8] On October 16, Secretary Dulles reaffirmed the determination of the United States "within constitutional means" to support and assist any victim of aggression in the Middle East.[9] On October 29, following the Israeli attack on Egypt, a Presidential statement in Washington declared that "we shall honor our pledge" to "assist the victim of any aggression in the Middle East." [10] Two days later, however, the President stated that the United States would not become involved in the Middle East hostilities,[11] and on November 1, it was indicated that United States action in the Middle East hostilities would be limited to an appeal to the United Nations General Assembly, with the aim of localizing the fighting.[12] On November 14, President Eisenhower stated that the United States would oppose through the United Nations any Soviet military

[7] Department of State Bulletin, April 16, 1956, Vol. 34, No. 877, pp. 641-643.
[8] *The New York Times*, April 10, 1956, p. 1.
[9] Department of State Press Release No. 542, Oct. 16, 1956.
[10] White House Press Release, Oct. 29, 1956. Statement by James C. Hagerty.
[11] *The New York Times*, Nov. 1, 1956, p. 14.
[12] See: United Nations, General Assembly, Document A/3256.

intervention in the Middle East,[13] and on November 16, the United States again warned the Soviet Union against sending Soviet "volunteers" to the area.[14] On November 29, the Department of State issued a statement reaffirming its support of the Baghdad Pact (Iran, Iraq, Pakistan, Turkey, United Kingdom) and warning that a threat to the territorial integrity or political independence of members of the pact would be viewed by the United States with the utmost gravity.[15] On December 4, the United States reportedly informed Syria that it would tolerate no more aggression in the Middle East.[16]

These several official statements are recited to show that the executive branch had made it abundantly clear that the United States would take all measures necessary, including the use of force, to repel Communist aggression in the Middle East. This position was, of course, weakened somewhat by the statements of October 31 and November 1 that the United States would not become involved in Middle East hostilities and that its action would be limited to an appeal to the United Nations General Assembly, with the aim of localizing the fighting. It could reasonably be argued, however, that these particular statements referred to the specific situation then existing, as among Egypt, Israel, France, and the United Kingdom, and that they had no bearing on what the reaction of the United States would be to Communist intervention. In this connection, it is important to note that these particular statements were made before the first offers of Soviet and Chinese Communist assistance to Egypt on November 3.

The President obviously felt, however, that, notwithstanding these repeated and authoritative statements of the grave view which the United States would take of Communist aggression in the Middle East, something more was needed. This something more could very well have been supplied by the insertion of a few appropriate paragraphs in the President's State of the Union message to Congress. If it was felt that even this would have been insufficient, then it could have been followed up and strengthened in the form either of a simple Senate resolution or of a concurrent Congressional resolution, neither of which requires the President's signature or has the force of law. Such a resolution would merely have expressed the "sense" of the Senate, or of Congress, as to what the policy of the United States in the Middle East should be. It would have been an indication of Congressional support of the President's policy, and it would have avoided all the troublesome constitutional questions raised by the joint resolution which the President proposed.

---

[13] *The New York Times*, Nov. 15, 1956, p. 26.
[14] Department of State Bulletin, Nov. 26, 1956, Vol. 35, No. 909, p. 836.
[15] *The New York Times*, Nov. 30, 1956, p. 1.
[16] *The New York Times*, Dec. 5, 1956.

Ample precedent for this procedure exists. To cite but three examples: During the war, the Fulbright resolution in the House [17] and the Connally resolution in the Senate[18] indicated Congressional willingness to support the United Nations after the war. In 1948, the Vandenburg[19] resolution indicated Senate willingness to ratify the North Atlantic Treaty. And in 1951, the Connally-Russell resolution[20] expressed Senate agreement with the President's action in sending American troops to Europe.

It seems entirely unreasonable to suppose that a procedure such as that suggested would have left any real doubt in the Kremlin or elsewhere as to what the United States would do if communism did commit armed aggression in the Middle East. On the contrary, such a procedure would have had the very great virtue of not creating doubt, both in the United States and abroad, as to what action the President could properly take in the case of some emergency direly threatening the United States in some other part of the world at some unknown future date.

The resolution as originally proposed by the President did create such doubt, and that was one of its disadvantages. It seems useful, therefore, to attempt some clarification of this question of the relative powers and the proper functions of the President and of Congress in connection with the use of the armed forces.

Whatever may be the relative powers of the executive and legislative branches in this field, it is certain that powers adequate to national defense reside in the two branches taken together. This is doubtless the consideration that moved the President to ask for the resolution in the form in which he did ask for it. This consideration, however, can be adequately met, as it has been many times in the past, through other means.

Situations so threatening to the security of the United States as to require the use of American armed forces in combat may conveniently be divided, for consideration of their constitutional aspects, into two categories: (1) those in which time permits joint action by the President and Congress; and (2) those which are of such extreme urgency that time does not permit congressional participation in the initial action.

In situations in the first category, the appropriate constitutional procedure is for the President to come to Congress and seek a declaration of war or other appropriate authority. The problem is frequently raised of the power of the

[17] House Concurrent Resolution 25, 78th Cong.
[18] Senate Resolution 192, 78th Cong.
[19] Senate Resolution 239, 80th Cong.
[20] Senate Resolution 99, 82d Cong.

President to take warlike actions, either through the disposition of troops, or other means, without prior Congressional approval, and thereby to precipitate a crisis in which Congress has no real freedom of action. This problem, I suggest, is more theoretical than practical. It goes more to the wisdom than the powers of a President. Many Presidents have used their powers to deploy the armed forces, for example, in a way which made the forces more subject to attack. The wisdom of these actions has sometimes been questioned, but so far as I am aware there has been no serious challenge of the constitutionality.

The line is admittedly a fine one, but I do not believe the President needs advance Congressional authority to take defensive measures of this character. President Wilson, for example, armed merchant ships after a Senate filibuster had killed a bill authorizing him to do so. President Franklin Roosevelt not only armed merchant ships without even asking Congress for authority but also issued a "shoot-on-sight" order and sent Army units to Iceland. But it was perhaps President Lincoln who went further than any of our other Presidents in stretching the powers of his office. All of this is not to say, however, that circumstances might not arise in which the President, without Congressional authority, could take steps which would result in a clear and present danger of involvement in war.

In situations in the second category listed above, the appropriate constitutional procedure is for the President to take whatever action he deems the circumstances require and then to come to Congress for a declaration of war or for whatever other legislative sanction may be indicated.

This writer supported President Truman's intervention in Korea in 1950, and is still of the opinion that this action was in the vital interests of the United States. But the writer is also of the opinion, with the benefit of hindsight, that immediately following the Korean intervention, President Truman should have come to Congress for approval of his action. There is no doubt that such approval would have been promptly forthcoming. Further, Congressional approval would have cut the ground from under much of the criticism which was subsequently voiced.

One of the major objections to the formula which was used in the Formosa resolution in 1955 and which was proposed in the Middle East resolution in 1957 is that it tends to create a precedent and when repeated tends to strengthen that precedent. Precedents of this character tend to weaken the power of the President to act in other situations while at the same time they tend to strengthen unduly his authority in the situation specifically dealt with.

This is a question of correct institutional relationships between Congress and the Office of the President. It is of the first importance that these correct relationships be preserved, because this particular field—the use of armed forces —is one which, except rarely, and long after the event, is not subject to judicial review. For practical purposes, the government of the United States, in regard to this question, is a bipartite, rather than a tripartite, government.

This fact makes it all the more important that both the President and Congress proceed with the greatest care; because the absence of a practical judicial check upon their actions means that the only real checks are those which they themselves exercise.

In the final form in which it was approved by Congress, the resolution on the Middle East was far superior to the original text requested by the President. This statement applies to all aspects of the resolution, but the discussion here will be limited to the constitutional aspects regarding the use of troops.

For purposes of comparison, the relevant texts are as follows:

As requested by the President:

"Sec. 2. The President is authorized to undertake, in the general area of the Middle East, military assistance programs with any nation or group of nations of that area desiring such assistance. Furthermore, he is authorized to employ the Armed Forces of the United States as he deems necessary to secure and protect the territorial integrity and political independence of any such nation or group of nations requesting such aid against overt armed aggression from any nation controlled by international communism: *Provided,* that such employment shall be consonant with the treaty obligations of the United States and with the Charter of the United Nations and actions and recommendations of the United Nations; and, as specified in article 51 of the United Nations Charter, measures pursuant thereto shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain or restore international peace and security." [21]

As passed by Congress:

"Sec. 2. The President is authorized to undertake, in the general area of the Middle East, military assistance programs with any nation or group of nations of that area desiring such assistance. Furthermore, the United States regards as vital to the national interest and world peace

[21] Senate Joint Resolution 19, 85th Cong.

the preservation of the independence and integrity of the nations of the Middle East. To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism: *Provided,* that such employment shall be consonant with the treaty obligations of the United States and with the Constitution of the United States." [22]

There are two key differences. First, the resolution as passed by Congress predicates the use of armed forces upon a finding that the independence and integrity of the nations of the Middle East are vital to the national interest. There was no such finding in the text proposed by the President, though it was, perhaps, implicit. Whatever the President's powers as Commander-in-Chief, they certainly do not extend to employment of the armed forces, without the express authorization of Congress, in situations in which the vital interest of the United States is not at stake.

Second, whereas the President had asked that he be "authorized" to employ the armed forces, the resolution as passed stated that "the United States is prepared to use armed forces." Thus, instead of muddying the constitutional waters, Congress in effect adopted the approach suggested above—i.e., a simple statement of the policy of the United States, concurred in by both the President and Congress. The advantages of this approach are aptly put in the report of the Senate Committees on Foreign Relations and Armed Services, which considered the resolution jointly:

> "This language has the virtue of remaining silent on the question of the relationship between the Congress and the President with respect to the use of the Armed Forces for the objectives stated in the resolution.
>
> "At the same time this formulation makes clear the importance which the United States attaches to the Middle East and the determination of the United States to use armed force to resist Communist aggression in the area should any nation request such assistance.
>
> "The joint committee rejects the idea that, because the agreed language does not deal with the question of the scope of the President's authority, the language therefore may indicate a weakening of United States determination." [23]

---

[22] Public Law 85-7.

[23] Senate Report 70, 85th Cong., p. 9.

It is, of course, necessary that there be the closest cooperation between the executive and legislative branches in these matters which may affect the very survival of the United States. But this kind of cooperation can be had without improper intermingling of their respective functions.

In the two months during which the Senate considered the President's Middle East resolution, the traditional relationships between the President and Congress were revived and reaffirmed. A useful, instead of a damaging, precedent was set. This result alone is enough to justify the statement that during the two months of January and February, 1957, the Senate performed a notable public service.