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**STRATEGIC STUDIES INSTITUTE
US ARMY WAR COLLEGE
CARLISLE BARRACKS, PENNSYLVANIA 17013**

16 MARCH 1981

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**FOR A PRESIDENCY THAT IS STRONG
WITHOUT BEING IMPERIAL**

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SPECIAL REPORT

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US ARMY WAR COLLEGE
Carlisle Barracks, Pennsylvania

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Dr. Joseph L. /Nogee

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FOREWORD

This special report considers the issue of congressional versus presidential dominance in the area of foreign policy. In the years following the Vietnam War and Watergate, Congress limited the authority of the President most notably with passage of the War Powers Resolution. The author contends that current congressional predominance is a move in the wrong direction. He concludes that post-Vietnam congressional reforms have undermined the capability of the executive to do what is inherently beyond the capacity of the legislature: to develop and administer a coherent and rational foreign policy.

This report was written by Dr. Joseph L. Nogee. Much of the research was concluded during the period he was visiting research professor with the Strategic Studies Institute.

This special report was prepared as a contribution to the field of national security research and study. As such, it does not reflect the official view of the Army War College, the Department of the Army, or Department of Defense.

Andrew C. Remson, Jr.

ANDREW C. REMSON, JR.

Colonel, CE

Director, Strategic Studies Institute

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BIOGRAPHICAL SKETCH OF THE AUTHOR

DR. JOSEPH L. NOGEE is a Professor of Political Science and the Director of the Russian Studies Program at the University of Houston. From August 1979 until August 1980 he was the visiting research professor with the Strategic Studies Institute. He earned a bachelor's degree in foreign service from the Georgetown School of Foreign Service, a master's degree in history from the University of Chicago, and a doctorate in international relations from Yale University. Dr. Noguee is the author of Soviet Policy Toward International Control of Atomic Energy. He is a member of the editorial board of American Political Science Review.

FOR A PRESIDENCY THAT IS STRONG WITHOUT BEING IMPERIAL

Every generation of Americans to some degree has had to come to grips with the issue of congressional versus presidential dominance in the area of foreign policy. Thomas Franck and Edward Weisband, in a recent book, described four major periods in American history when the Congress became the predominant institution of American foreign policy. We are currently in that fourth period which began in the aftermath of Vietnam and Watergate. Franck and Weisband are convinced that this most recent change is more than just a swing of the pendulum, that it is "a revolution that will not be unmade."¹ But is congressional predominance a permanent state of affairs and is it a good thing? The contention of this essay is no to both questions. The thesis argued here is that American foreign policy will be better served with fewer rather than more congressional restraints.

In less than a decade Congress has cut the "imperial presidency" down to size and assumed for itself unprecedented powers over the conduct of foreign policy. Its most significant accomplishment has been the War Powers Resolution which curtails the presidential use of military force abroad and empowers the Congress to bring home US forces engaged abroad on rather short notice. Congress has given itself the right to veto military sales abroad. It has imposed detailed conditions for the sale of nuclear fuel and for the giving of military and economic assistance, even assuming the right to determine whether or not specific sales of weapons or nuclear fuel should be consummated. Congress has forbade the President to assist one party in an African civil war. It has set stringent limits on the conduct of covert operations by the Central Intelligence Agency (CIA) and forced the administration to keep the Congress informed of the agency's intelligence operations. Congressional authority has been extended into matters of detail as well as the broad general direction of American foreign policy. One Senator in the forefront of this congressional resolution noted

that ". . . those of us who prodded what seemed to be a hopelessly immobile herd of cattle a decade ago now stand back in awe in the face of a stampede."²

Even many of those who supported the growth of congressional power in foreign affairs are having second thoughts. J. William Fulbright, the senator quoted above, now admits that "I confess to increasingly serious misgivings about the ability of Congress to play a constructive role in our foreign relations."³ Although Fulbright does not favor a strong presidency, he is at least prepared to assess the consequences of his earlier position. For some the presidency is eternally tarnished with the guilt of Vietnam. They forget that Congress, too, supported the war until almost the end. Fundamentally the issue of what should be the proper distribution of powers between the President and Congress is not a function of a liberal or conservative ideology. Neither is it a question of whether one favors an isolationist or interventionist posture for the United States in world affairs. Historically Congress has been on all (or both) sides of these positions. At times--1812 and 1898 for example--Congress was the advocate of a war policy. In the period between the two world wars it demanded isolationism. If during the past decade it was the liberal position to restrict executive powers, one should remember that, in the 1950's, limiting the authority of the President to act in foreign affairs (as exemplified by the Bricker Amendment to the Constitution) was one of the tenets of conservative orthodoxy. The War Powers Resolution today is as undesirable as was the Bricker amendment a generation ago and for essentially the same reasons. Too often the position taken in the debate on congressional versus presidential power has been linked with one's view of the policies being pursued by the executive branch. The trouble with that approach is that the positions of both branches of government regarding the great issues of public policy are constantly changing. We sometimes look to structural remedies for the problems that are basically political in character.

Frequently the issue has been debated in terms of constitutional principles and constitutional law. What did the Founding Fathers intend? It is generally agreed that the framers of the Constitution acted wisely in not specifying in detail the powers of the two branches of the Federal government in the realm of foreign policy. The ambiguity of the constitutional mandate is well summed up on the oft-quoted observation of Edwin S. Corwin, the constitutional scholar, that the Constitution was "an invitation to struggle for the privilege of directing American foreign policy."⁴ Alton Frye rejects the idea of legislative-executive competition as understating the true purpose of the constitutional framework which was to guarantee that the views and concerns of as many citizens as possible be taken into consideration.⁵ Whether or not conflict was intended or anticipated, there seems to be little doubt that the constitutional framers did intend that both branches of government be directly involved in the realm of foreign policy.

The powers of the President are concisely described in the Constitution. Principally they consist of the following: the President (1) is empowered with the executive authority of the government; (2) is Commander-in-Chief of the Army and Navy; (3) can negotiate treaties; (4) appoints ambassadors, public ministers and consuls; and (5) receives ambassadors and other public ministers. Some of these prerogatives, such as the treaty-making and appointive powers are subject to senatorial concurrence. Presumably, the Founding Fathers saw these powers as the means by which the President would exercise the guiding hand in the conduct of the nation's foreign relations, for in part they called the Constitutional Convention into existence because of the mismanagement of foreign affairs by the Congress under the Articles of Confederation.⁶

That does not mean that Congress was to be only a minor partner in foreign affairs. Far from it. The powers of Congress are extensive and are spelled out in considerable detail. Chief among them are (1) the power to declare war; (2) the

power to authorize and appropriate funds; (3) the power to raise and support an army and a navy; (4) the legislative power; (5) the power of the Senate to advise and consent to treaties; and (6) the power of the Senate to confirm executive appointments. Thus the Constitution establishes a system of checks and balances with the potential for executive and legislative authority to develop in one of several different directions. What is true of foreign policy in this regard applies as well to the domestic sphere and to the relations between the Federal government and the states.

Notwithstanding the swings of the pendulum between presidential and congressional power in foreign affairs, the long-term trend has clearly been toward the former. The reasons for executive supremacy are complex and controversial. In part, the growth of executive power is related to the pragmatism of the American character: American security and prosperity required a strong president and so the political system in the United States adapted to meet that requirement. The contention here is that the post-Vietnam congressional reforms are moves in the wrong direction because they undermine the capability of the executive to do what is inherently beyond the capacity of the legislature: to develop and administer a coherent and rational foreign policy.

THE WEAKNESS OF CONGRESS

Central to the goal of a coherent policy is the requirement of leadership. Never in American history has the problem of leadership been so linked with the security and well-being of the nation; and rarely have the circumstances of domestic life made the creation of that leadership more difficult to obtain. The problem confronting American national political institutions is how to mobilize a fragmented public to support a coherent and sound foreign policy. In large part, the fragmentation of American political life is the product of a crisis of authority in American

society. The institutions and values that have united Americans in the past no longer have the influence they once did. Increasingly, American political activity is organized around an identification that stresses the separation of the individual from the larger society rather than his unity with it. These today include political groups based upon racial, ethnic, sexual, generational, ideological, religious, professional, economic, and other such identifications. We have "single issue," "special interest," and "political action" committees whose focus is on narrow issues rather than comprehensive programs. National political parties have steadily declined in appeal and importance. The number of voters who reject both major political parties has risen steadily in recent years to the point where independents now outnumber adherents to one of the two major political parties.

Inevitably, Congress, too, reflects the fragmentation of American political life. The decline in strength of the national political parties is reflected in the weakness of party authority in both houses of Congress. Not only party leaders but all the formal authorities of Congress--its officers and committee chairmen--are challenged today as never before. Seniority, which used to carry great weight is now sharply reduced in importance. The new breed of congressman insists upon maintaining his or her independence. Until fairly recently, the practice was for committee recommendations to be accepted almost automatically by the full membership. This is no longer true, particularly in the area of foreign and defense policy. Ironically, some of the individual member independence is the result of structural reforms intended to democratize the institution. For example, the availability of increased staff support now makes it possible for a congressman or senator to obtain his own supporting data and thereby to come to policy conclusions independently of the party or congressional leadership. Thus, Congress today is more decentralized than it ever has been. According to one recent study "The chief consequence of this structural disunity is to divide the congressional perspective, making the creation of an integrated and coherent legislation and policy almost impossible."⁷

The decentralized character of Congress is only part of its difficulty in formulating a coherent foreign policy program. There is, in addition, the problem of the lack of competence, interest or purpose of the individual legislator. The vast majority of the members of the House of Representatives and to a lesser degree of the Senate are motivated by a rather specialized set of concerns. Every congressman represents a specific constituency and is expected to support the interests of his or her district whether or not that coincides with the broader interests of the nation. A, perhaps extreme, illustration is the story about the chairman of the House Naval Affairs Committee who, when asked whether the navy yard in his district was too small to accommodate the latest battleships, replied, "That is true, and that is the reason I have always been in favor of small ships."⁸ As David Mayhew has noted in his study of Congress, the overriding goal of all members is to be reelected.⁹ Not unexpectedly, then, each congressman must promote the particular interest of his district. He must, of necessity, be responsive to pressures from ethnic, racial, or religious minorities whose concerns may well be narrower and more parochial than those of the nation as a whole.

Foreign policy issues rarely have the support "back home" to induce a congressman to make them a major part of his legislative repertory. Indeed, as James Sundquist notes ". . . being national minded can be a positive hazard to a legislative career."¹⁰ There are many congressmen ready to support defense appropriation because of sizable defense or defense-related industries in their districts. But who, for example, speaks for arms reduction or SALT? Apparently few. Alan Platt in a recent study found that:

Perhaps most importantly, virtually no member of Congress felt compelling constituent pressure to play a more active role in the SALT process. . . . During the 1969-1976 years, there was little electoral incentive for any senator to be actively involved in the SALT policy process. On the contrary, almost all senators felt pressure to focus their attention on matters of higher political salience and more immediate urgency to their constituents. . . .¹¹

Generally, foreign policy issues are further removed from experience and knowledge of most congressmen. On domestic issues, members of Congress have the benefit of information (selected, of course) made available by constituency lobbies and special interests. They are more at home with domestic than foreign issues. As Congressman Les Aspin puts it, "Almost every Congressman feels that he is an expert on education, or economics or any number of domestic issues. But when it comes to defense, most Congressmen lack confidence, and so they turn to 'experts.'"¹²

Further undermining the capacity of Congress in the foreign policy field is the process by which it does its business. An effective foreign policy must bring into balance a large number of diverse issues involving many different states. This is what is meant by coherence. The difficulty with the legislative process is that there is no one place in the institution where foreign policies are aggregated and synthesized. Every piece of legislation is examined independently in committee and acted upon in relative isolation from other related bills. Though principal responsibility falls upon the Foreign Relations Committee of the Senate and the Foreign Affairs Committee in the House, these are by no means the sole examining bodies of important foreign policy matters. According to one account, issues involving national security matters are dealt with by 16 Senate and 19 House committees and an even larger number of subcommittees.¹³ It is not uncommon for the same matter to be considered by two or more committees. Sometimes committees only peripherally connected with foreign policy must act upon important foreign policy issues, such as the post office and civil service and judiciary committees which considered the bill for the Panama Canal treaty implementation in the House of Representatives. The effect is to isolate issues that are very much connected in the real world. It is difficult, if not impossible, in most cases for Congress to make the necessary tradeoffs, bargains, and compromises which are called for in an effective foreign policy. Thus, George Kennan observed that:

Congress can act upon foreign policy only fitfully, in great ponderous lurches which establish its direction, and the limits within which it can vary, for often prolonged periods into the future. This may well have a certain negative value, as an insurance against Executive folly; but it greatly limits, of course, flexibility of reaction on the part of the Executive, where it does not rule it out entirely. It makes it impossible for the Executive branch to react sensitively and effectively to changes in the objective situation that were not foreseen and could not have been foreseen (and the course of international affairs is replete with such changes) at the time when the respective congressional norm was laid down.

Congressional participation in the policymaking process, in short, not only reduces privacy of decision but inflicts upon that process a high degree of cumbersomeness and inflexibility; and these conditions in combination, deprive the policymaker of the possibility of initiative, the advantages of surprise, and the capacity for sensitive response to the unexpected.¹⁴

THE PRESIDENTIAL IMPERATIVE

I noted above that some of the weakness of Congress in the foreign policy realm has its roots in the fragmentation of American politics and the diffusion of public authority which affects congressional behavior. I have also suggested that Congress is today too decentralized to provide the leadership which a strong foreign policy requires. I turn now to the reasons why, more than ever, the United States must have a strong and coherent foreign policy. That reason has to do with the nature of the international system and the character of international politics.

Since World War II, the international system has undergone considerable change. We are now in the midst of continuing change which makes it difficult to discern clearly all of the directions of global system change and thus to know, with any degree of certainty, what kind of a world we are confronting. However, certain basic features seem to be clearly evident. The nation state remains the dominant--though not the sole--political actor. The international system continues to be decentralized, that is, lacking a universal guiding mechanism or a world government. Nations are

compelled to look to their own means for security and, thus of necessity, to be engaged in a continuous struggle for power. War and the use or threat of force remain among the maximum instrumentalities for achieving national objectives. There is general agreement that a degree of interdependence exists among nations, particularly in the economic realm, but this interdependence does not limit political behavior in such a way as to keep nations from going to war against each other.

International politics today is characterized by a relatively high degree of tension and conflict. Currently, the major source of tension in the world is the East-West conflict. What keeps the leaders of the North Atlantic and Warsaw Pact alliances from going to war against each other is the nuclear arsenals possessed by the two superpowers. There are numerous other conflicts at the subnuclear level. Within the Third World, ethnic, racial, and nationalistic conflicts have frequently resulted in war. In addition there is the nonviolent but bitter struggle between the industrialized "Northern" countries and the underdeveloped "Southern" nations for economic leverage and benefit.

Though international politics has always been characterized by a high degree of anarchy, there have been periods in the past when a greater degree of political consensus prevailed among the leading actors than exists today. For example, in the aftermath of World War II, there was a more discernible commitment among the nations of the world against the use of force than there is today. Following the defeat of the Axis Powers the victorious allied nations were determined to prevent another world war and to that effect created the United Nations as an instrument of collective security. The very first purpose of that organization, as stated in its Charter, was "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. . . ." ¹⁵ Many people looked upon the United Nations as a step in the direction of a world government.

The system of collective security established in the United Nations never came into operation and is now recognized as defunct. But perhaps of greater significance has been the general decline in the commitment of nations to the reunification of the use of force as an instrument of national policy. There is little doubt that the United Nations today is far less united than it was in the 1940's or that the prospects for world government are more remote than any time since World War II. The idea of peace through collective security is a Western concept and, as Western power has declined, a decline in Western political theory has followed. Many UN General Assembly declarations attest to the readiness of most of its members to resort to the use of force to attain some political end.

What the disunity of world politics implies for the United States--and, indeed, all great powers--is the necessity of a strong, coherent, and rational foreign policy to guide the affairs of state in a world that regrettably must still be characterized as anarchical. The existence of nuclear weapons may make war among the major powers more dangerous than ever, but the only guarantee that any superpower has that these weapons will not be used is the maintenance of a credible deterrent. And it is unrealistic not to anticipate that force and the threat of force at the nonnuclear level will continue to be a feature of international politics. The argument for a strong President rests in part on the contention that the United States must speak with one voice to other states; the executive branch is better able than the other branches of government to provide national leadership and mobilize the nation when US interests are threatened; that the conduct of diplomacy often requires a government to act with speed and efficiency; and that the President still has access to vital sources of information which are unavailable to the Congress. The overall record of the Carter administration attests to the fact that not all presidents are competent in foreign policy. Institutional reform, in other words, does not guarantee leadership. There is no substitute for a capable, determined, and knowledgeable

President. Still every effort should be made to strengthen the institutional framework of the presidency, so that the occupant has the best chance possible to put his political skills to work for the country's interest.

SOME PROPOSED REFORMS

Toward that end two reforms are proposed to strengthen the weak link in the foreign policy process. The first is the repeal of the War Powers Resolution, probably the most important assertion of congressional power in a generation. The second is that the treaty-making process be revised so that an international treaty cannot be thwarted by so small a group as 34 senators. There are constitutional authorities who believe that the War Powers Resolution is unconstitutional,¹⁶ though, given the nature of the subject, the act is not likely to be challenged in the courts. Presidents Nixon, Ford, and Carter have each complained that the resolution has impeded their ability to achieve diplomatic objectives.¹⁷

The War Powers Resolution (a Joint Resolution which has the force of law) provides in substance: The power of the President as Commander in Chief to use military force abroad is limited to three circumstances: (1) where Congress has declared war; or (2) when the President has been given specific statutory authorization; or (3) as a result of "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." The President "in every possible instance" is required to consult with Congress before using military forces. In addition, if he uses military forces in the absence of a declaration of war, the President must report to the Congress within 48 hours and periodically thereafter if hostilities continue. Further, within 60 days--or in special circumstances 90 days--the President must terminate the use of armed force unless Congress specifically authorizes otherwise. However, the Congress can terminate the use of military forces in

less than 60 days simply by passing a concurrent resolution (which cannot be vetoed).¹⁸

There are three significant innovations in this legislation. First, is the limitation of the power of the President to use armed forces on his own. Under the War Powers Resolution, there must be a national emergency caused by an attack on the United States or its armed forces. This does not include a national emergency arising from other crises or an attack on American civilians. The requirement for the use of force is clearly too restrictive. There is ample precedent for the presidential use of armed forces to protect and evacuate American citizens from dangerous situations abroad, and yet, technically, the President cannot now do that without seeking congressional approval. The law makes no allowances for emergencies or unusual situations requiring rapid, clandestine movement of military forces to protect American lives abroad. Up to the time of the War Powers Resolution, there had been more than 150 instances when the President did resort to force to protect American property or lives without prior congressional authorization. Indeed, in the entire history of the republic, Congress has declared war only five times. Parenthetically, one might note, that since the end of World War II, the practice of declaring war has virtually ceased altogether. That does not mean, however, that war has ceased. According to one study of the War Powers Resolution the President's use of military force to evacuate American and allied personnel from Saigon and to rescue the S.S. Mayaguez from Cambodian seizure in April 1975 were illegal because in neither case was there a "national emergency" created by an attack on US military forces.¹⁹ The same argument would apply to the effort by President Carter to rescue the American hostages in Iran in April 1980. Technically, that, too, could be considered an illegal use of military force by the President. Presumably the Congress did not consider these actions to be illegal because no effort was made to impeach either President Ford or President Carter. Indeed, on the whole, Congress supported all of these actions, as

did the public. But it seems clear that the Congress acted hastily in trying to specify the conditions when the President can use military force abroad. For as now written the law is so restrictive that the President is encouraged to ignore it.

A second important innovation of the law is the consulting and reporting features. Here the law has been interpreted so loosely that one could argue that it has been selectively ignored. President Ford reported that Congress on four occasions, all within a period of 6 weeks, in connection with the use of American troops to assist in the evacuations from Danang, Phnom Penh, and Saigon and the rescue of the S.S. Mayaguez and its crew. President Carter has reported only in connection with the use of military forces to attempt the rescue of 52 American hostages in Teheran. Significantly, there was no reporting to Congress of the use of military personnel to rescue Americans from Cyprus during the disorders on the island in 1974; or of two evacuation operations in Lebanon in 1976; or of the 18 Air Force C-141's sent by President Carter to airlift Moroccan troops to Zaire in 1978. In all of these instances, there was some dissatisfaction within Congress about either the adequacy of the reporting or the lack of consultation. But, again, Congress as a body did not feel inclined to press the issue on technicalities when basically it supported what the President did. Thus, Jacob Javits, one of the principal architects of the War Powers Resolution simply closed his eyes to the Carter airlift of Moroccan troops in 1978. "I didn't see fit to challenge the President," he noted. "On pragmatic grounds I let it go."²⁰

However, both former Senators Frank Church and Jacob Javits expressed displeasure over the failure of President Carter to consult with Congress before he initiated the rescue effort for the American hostages in Iran in April 1980. This appears to have been a case where the risks of disclosure outweighed the benefits of consultation. Thus, the Resolution poses a continuing dilemma for the President: either to inform Congress of impending actions that must be secret to be successful and risk leaks

which might alert an adversary; or to maintain secrecy in order to enhance success but face the prospect of congressional censure.

Thirdly, there is the new restriction on the presidential use of military force to a maximum of 90 days or less if Congress so decrees. To date, this part of the law remains unused. But, in the long run, it could be the most damaging to the security of the United States. The law may very well inhibit the willingness of the United States to use force to protect its interest where there is no likelihood of a quick victory. The President may, in the future, be faced with a situation of having to weigh the risk of not using military forces in a crisis against the risk of using them only to have the operation terminated by Congress. Or, an approaching time limit might pressure the President prematurely to curtail US involvement or possibly to escalate the level of involvement to forestall congressional restrictions. There is also the possibility that adversaries could be encouraged to prolong conflict in the hope that Congress will refuse support for continued commitment. That is precisely what the North Vietnamese did during the latter phases of the Vietnam War.

In the words of one of its architects "The War Powers Act is a great restrainer."²¹ There is no doubt that it is. No other great power today operates under that kind of a restraint. Certainly, it raises serious questions about the capability of the United States to exercise leadership in a world where the use of force continues to be an instrument of foreign policy, particularly by those states likely to be adversaries of the United States. The problem was well described by President Nixon in his message vetoing the War Powers Resolution when he said that its passage:

Would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis. As a result, the confidence of our allies in our ability to assist them could be diminished and the respect of our adversaries for our deterrent posture could decline. A permanent and substantial element of unpredictability would be injected into the world's assessment of American behavior, further increasing the likelihood of miscalculation and war.²²

Against all of these objections is the argument that Congress is now in a better position to restrain a chief executive who might be tempted to abuse his warrmaking powers (as it is contended Presidents Johnson and Nixon did). But it is a questionable assumption that the Congress is any more of a safe repository of the power to make war than the President. When public opinion presses for intervention, the impact is as likely to be registered as quickly and as strongly on Congress as it is on the President. Even an ardent supporter of the War Powers Resolution former Senator Frank Church, the former Chairman of the Senate Foreign Relations Committee, had second thoughts about its value:

I voted for the bill because it came in the aftermath of the Vietnam experience and it seemed that Congress should at least endeavor to prevent another war initiated and pursued on the basis of executive decision.

Still, I have had my doubts that it is possible to accomplish such an objective by statute. . . . Uf the President . . . uses the Armed Forces in an action that is both swift and successful, then there is no reason to expect the Congress to do anything, other than applaud.

If the President employs forces in an action which is swift, but unsuccessful, then the Congress is faced with a fait accompli, and although it may rebuke the President, it can do little else.

If the President undertakes to introduce American forces in a foreign war that is large and sustained, then it seems to me that the argument that the War Powers Resolution forces the Congress to confront that decision is an argument that overlooks the fact that Congress in any case must confront the decision, because it is the Congress that must appropriate the money to make it possible for the sustained action to be sustained.

So, I wonder really whether we have done very much in furthering our purpose through the War Powers Resolution.²³

A second proposal for reform of the treaty making power concerns revisions of the treaty-making process. Perhaps responsibility for consent to ratification could be given to a simple majority of the Senate or even to a majority of both houses of Congress. The objections to the existing arrangement are of two kinds: the violation of principle and the negative political consequences of the two-thirds rule.

This rule is objectionable because it is undemocratic. By its very makeup the Senate is unrepresentative of the whole nation. Giving a determining voice to a third of the membership plus one only compounds the undemocratic aspect of the rule. It is possible for Senators representing no more than a fraction of the electorate to frustrate the will of the majority; and the record indicates that the two-thirds rule has in fact destroyed agreements which the overwhelming majority of Americans felt were in the best interest of the United States.²⁴

Nor can one defend the two-thirds rule simply because it was created by the framers of the Constitution, since the conditions under which the rule was devised no longer exist. John Jay, in the Federalist, supported the two-thirds rule because the Senate would be composed of a select appointed elite who would be uniquely equipped to advise the President on foreign policy, a condition that certainly does not apply to the now popularly-elected Senate.²⁵ Furthermore, the device of an extraordinary majority was chosen by the Founding Fathers because they distrusted Europe and wanted to limit as much as possible US involvement in international politics. Isolationism is no longer the basis of US foreign policy.

But the objection to the treaty rule extends beyond principle or history. The Senate operating under the two-thirds rule has not always served the nation well. The fate of the Panama Canal and SALT II treaties both illustrate this senatorial inadequacy, the former less so because ultimately the treaty did pass. However, the DeConcini reservation created enormous ill will for the United States in Panama, and efforts by some senators to attach reservations and amendments came perilously close to endangering over the fruits of a decade of careful negotiations. As for SALT II, it has yet to overcome the Senate hurdle. Even before the Soviet invasion of Afghanistan, the prospects for SALT II in the Senate looked bleak. Even if the Senate eventually gives its approval, there is always the possibility that it may extract as a quid pro quo a heavy price from the President. For example, it is

widely believed that former President Carter approved of the MX program in order to win over some conservative senators for SALT II. If true, this tradeoff can be criticized on the ground that it is a poor process for determining the proper strategic deterrent for this country.

In the last analysis, of course, the Senate would have to approve any change in the two-thirds rule and that is not likely, given its understandable determination to protect its own prerogatives. One consequence of a deadlock between the two branches of government would be for the President to resort to the use of treaties less and executive agreements more. This, in fact, appears to be the trend in compacts reached between the United States and other governments. Since World War II, approximately 95 percent of the understandings with foreign governments have taken the form of executive agreements.²⁶ According to Richard Haass, "The role of the treaty as the accepted form of international compact between the United States and foreign countries has been steadily declining."²⁷ He suggests as a possible compromise between the two-thirds rule and presidential efforts to evade it with executive agreements the combined use of the executive agreement with the congressional joint resolution, a process that involves the approval of a simple majority of each chamber and the signature of the President. Something like that may, in time, make the Senate's treaty power as obsolete as the electoral college.

CONCLUSION

To argue for more presidential control over foreign policy is not to deny the vital role that Congress must and does play in the making of foreign policy. Two general qualifications in the argument for presidential power need to be noted. First, neither the legislative nor the executive branch of government is monolithic. There are two houses of Congress which by no means always see eye to eye on questions

of foreign policy. It is not uncommon for one house to oppose the other in support of the President; indeed Congress has on occasion saved the President in spite of himself. This was the case when the House of Representatives in supporting Rhodesian sanctions in the late 1970's preserved the chief executive's flexibility against the rigidity of the Byrd Amendment. On the other hand in the case of the Panama Canal Treaty, the House, in resisting implementation legislation, came very close to undermining the treaty.

There is a parallel division in the executive branch between the National Security Adviser and the National Security Council staff, housed in the White House, and the Secretary of State and the State Department bureaucracy. As Leslie Gelb points out, each of these bureaucratic organizations tends to approach foreign policy issues from a different perspective and frequently comes to sharply differing foreign policy recommendations.²⁸ Thus admittedly the emphasis of this article on the dichotomy between the two branches of government is an oversimplification.

However, there is a more profound qualification to presidential power and that is the necessity of Congress to involve itself in foreign policy in order to preserve our democratic political system. The term "intermestic" reminds us that a large range of foreign policy decisions today are closely interwoven with domestic issues. Energy is a classic illustration. In theory one might agree with Henry Kissinger that:

The Congress can set broad guidelines and decide basic policies. But the Congress does not have the organization, the information, or the responsibility for deciding the tactical questions that arise daily in the conduct of our foreign relations or for executing a coherent, consistent, comprehensive policy. The President has this responsibility and must be permitted to exercise it on behalf of the entire Nation.²⁹

But in the real world these distinctions are not as easy to discern as they are to describe. American democracy has had to come to grips with a fundamental problem from its very inception, and that is the necessity of American institutions to

protect domestic liberty while at the same time operating effectively in the international system. Democracy requires a strong Congress; security requires a strong President. The thrust of this essay reflects the particular precariousness of nations in our time.

ENDNOTES

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18. Public Law 93-148, 93rd Congress, H.J. Res. 542, November 7, 1973.
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24. Daniel S. Cheever and H. Field Haviland, Jr., American Foreign and the Separation of Powers, Cambridge: Harvard University Press, 1952, p. 179.
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26. Crabb and Holt, p. 13. There are different types of executive agreements. Some require congressional approval, others do not. Where Congress does approve, it is by a simple majority of both houses.
27. Haass, p. 13.
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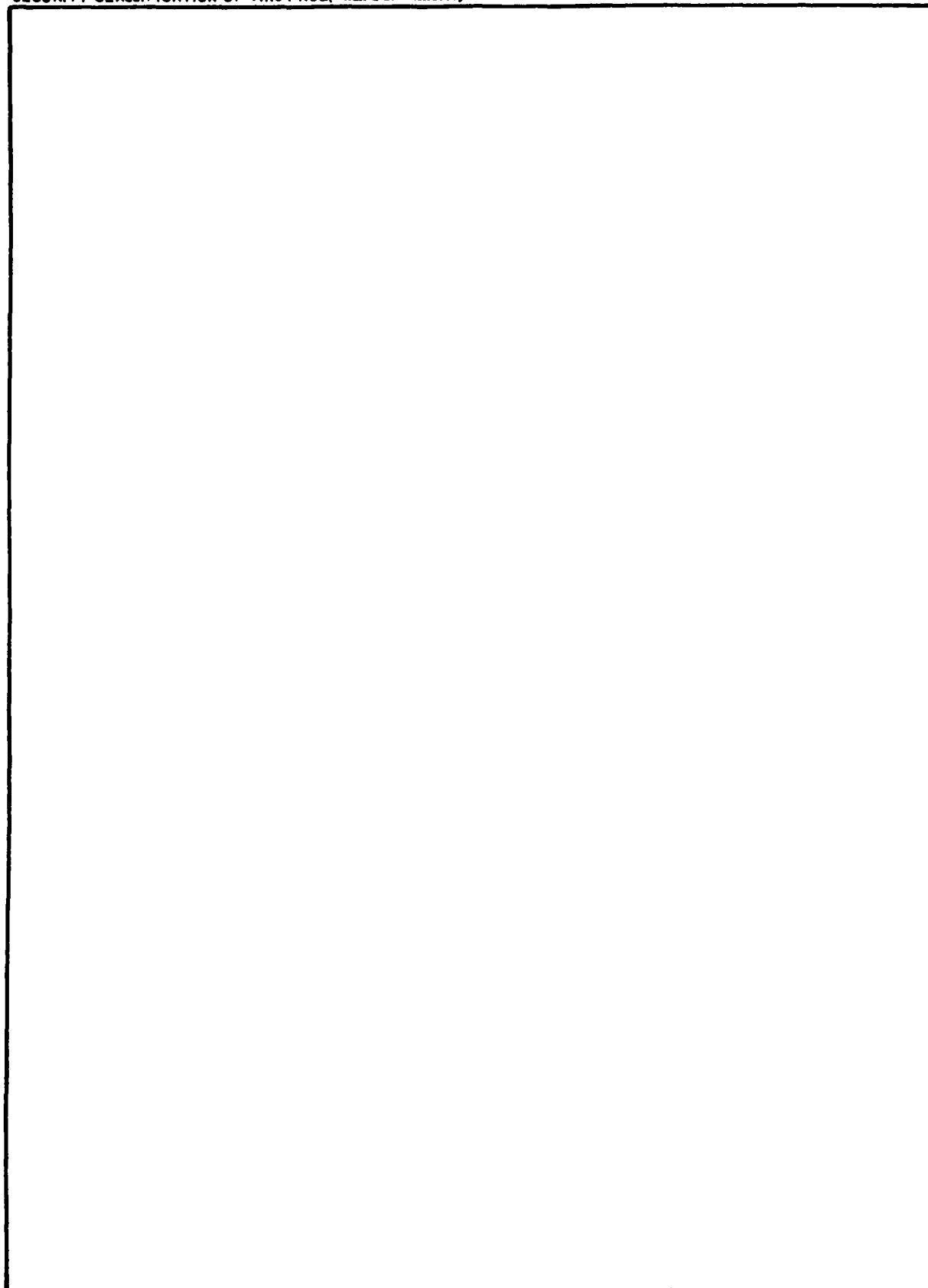
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