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An Understanding of the Constitution's Foreign Affairs Power

By Thomas J. Campbell

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AN UNDERSTANDING OF THE CONSTITUTION'S FOREIGN AFFAIRS POWER

by Thomas J. Campbell

On April 14, 1986, elements of the United States Naval and Air Forces carried out military action against five targets within the sovereignty of Libya. The action was taken upon the order of President Ronald Reagan, having consulted with leaders of both parties and both Houses of Congress, pursuant to the requirements of the War Powers Resolution. Substantial damage was inflicted upon the Libyan targets, and two American servicemen lost their lives.

On October 22, 1983, 6,000 United States troops, joined by 300 troops of Barbados and Jamaica, invaded the sovereign nation of Grenada and engaged over 600 Cuban troops and armed airport workers. The fighting was completed in two days; all but 300 United States troops were withdrawn in one month after loss of American, Cuban, and Grenadian lives.

In the spring of 1980, President Carter ordered United States military forces into Iran in an unsuccessful attempt to rescue the American hostages. Substantial loss of life among the American servicemen resulted.

These three recent incidents raise a fundamental question for U.S. constitutional law in a modern world of terrorism and nuclear weapons. Terrorists operate with the support of individual nations, yet under a hypocritical cloak of denial. The acts of terrorists in form, if not in substance, are thus deprived of the character of acts of war. And the actions taken by the President in response thus do not easily fit within the constitutional category of declaration of war, yet they are certainly warlike. What justification is there for such use of force, and how does the explanation fit within our constitutional structure?

The concept of total war, imminently creatable and, through nuclear weapons, universally destructive, tugs at another premise of

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our constitutional allocation of powers. The formal involvement of Congress in a declaration of war seems oddly out of place in a world where the war, and the world, could be over in less time than it takes to convene a joint session.

My remarks today are directed to the constitutional dimensions of the foreign affairs power. I hope to offer some perspective into the proper allocation of functions between the executive and the legislative branches. It is my hope that, at the end, we will have a clearer understanding of why the actions of President Reagan in Grenada and Libya and of President Carter in Iran were each constitutional and in accordance with international law as that term has meaning in the U.S. Constitution. I hope that the resolution we reach will not be the despairing one reached by Senator Fulbright in 1961, with words that he lived greatly to regret, as he said: "I submit that the price of democratic survival in a world of aggressive totalitarianism is to give up some of the democratic luxuries of the past."

TWO SOURCES OF FOREIGN AFFAIRS AUTHORITY

The Constitution has certain explicit passages dealing with the foreign affairs power. Specifically, the President is given authority to make treaties, to which the Senate is given the authority to advise and consent (Article II, Section 2). The President is made Commander-in-Chief of the Army and Navy (Article II, Section 2); but the Congress is given the authority to raise and support armies, and to provide and maintain a Navy (Article I, Section 8, Clauses 12 and 13). The Congress alone is given the power to declare war, and--in a much overlooked provision--the Congress is given authority to define offenses against the law of nations and to set punishments for them (Article I, Section 8, Clause 10).

In addition to these explicit provisions, there are also certain powers that flow merely from the fact that the United States is a sovereign nation. Justice Sutherland, writing in United States v. Curtiss-Wright Export Corp., 29 U.S. 304, in 1937, observed that "The investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."

This claim actually has much more ancient roots, going back for its clearest exposition to a famous debate between Alexander Hamilton and James Madison in 1793. England and France had gone to war in that year, and President George Washington had announced the United States' neutrality. At once, the Proclamation was challenged, in that nowhere in the Constitution is the President given the explicit authority to proclaim neutrality.

As you might suspect, Alexander Hamilton was first to the rescue. In a series of articles, he developed the theory that the executive power, vested in the President under Article II, inherently included the full panoply of rights in foreign affairs on behalf of the American colonists by the British Crown. Contrast this view with Hamilton's earlier position, taken in Federalist 69, that the authority of Commander-in-Chief devolved upon the President substantially less power than was enjoyed by the British Monarch. One reconciliation might be that additional powers with regard to the Army and Navy are explicitly given to Congress; whereas the explicit grants of authority to Congress in foreign affairs deal only with treaties and the law of nations.

James Madison responded that the Congress more rightfully inherited these powers. Most important for our purposes, both men conceded that there were indeed powers inherent in the idea of sovereignty that were not spelled out in the Constitution. The only disagreement was which branch could exercise them, the President or Congress.

As to the allocation of these unspecified powers between the Congress and the Executive, the latter has won out over the subsequent years. Madison himself switched sides on the issue when it was presented in a different context several years later. In large part, this outcome was foretold by John Jay, in Federalist 64, that the executive branch had inherent advantages over the legislative in the conduct of foreign affairs, drawing from its ability to act quickly and, if need be, in secret. Much of this development, over the subsequent two hundred years, owes its force as well to Napoleon's maxim, quoted by Justice Jackson in the steel seizure case, that "the tools belong to the man who can use them" (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)). The President could use the inherent powers of sovereignty in foreign affairs, and so they became his.

A different result obtains in the domestic sphere. As the Supreme Court hastened to point out in the steel seizure case, as to domestic powers, there is no basis for the assumption of residual power by the President: indeed, there is very little basis for residual power at all. And the Tenth Amendment explicitly reserves to the states those powers not granted to the federal government. All that devolved from the nature of sovereignty was in the foreign area; the domestic powers were divided by the Constitution between the branches of federal government with the residuum to the states.

II. THE MODERN FOREIGN AFFAIRS POWERS

The distinction I have just outlined has direct application to the resolution of the problems initially posed: the allocation of

power to deal with the modern problems of terrorism and nuclear weapons. The key, I suggest, is to analyze the power being asserted and analogize it, either to an explicit constitutional grant of power, or to an inherent foreign affairs authority. Such a process of analogy allows both preserving the vital importance of the Framers' original intent and acceding to the modern realities they could only dimly have foreseen.

Let us begin with powers analogizable to the explicit grants of authority. I wish to discuss two areas: 1) the power to declare war, and 2) the power to make treaties. The power to declare war has a modern day equivalent in the War Powers Resolution. The power to conclude treaties has a modern day equivalent in the power to conclude executive agreements.

A. The Power to Declare War

The War Powers Resolution, adopted in 1973, requires the President to consult with the Congress "in every possible instance...before introducing United States armed forces into hostilities." No later than 48 hours following any such introduction, and regularly thereafter, consultation with the Congress is required. Sixty days from the initial involvement of U.S. troops, the President must withdraw them unless the Congress has explicitly authorized their continuance. This legislation is a modern day variety of the declaration of war. It has several advantages over the traditional declaration of war that are evident in consideration of the Grenada invasion and the Libyan action of last April.

Bear in mind that declarations of war have often been much contested in the U.S. Congress with substantial time elapsing after the President's request. Pearl Harbor and the immediately following declaration of war were exceptions rather than the rule. The Mexican War was debated for months, the First World War, for weeks. It can safely be assumed that, in the examples at hand, a request for a declaration of war against Libya or against the regime of General Austin in Grenada would have engendered substantial delay and debate. All promise of surprise, so essential to each incident, would have been lost.

Even more dangerously, such delay would have created the opportunity for U.S. adversaries to ally themselves with Grenada or Libya. It can scarcely be doubted that, long before Congress had finished debating the question, Cuba would have allied itself with Grenada, and the Soviet Union with Cuba, to stand by the General Austin regime in the event of an armed attack. And during the lengthy debate on a declaration of war against Libya, Syria and Iran, if not the Soviet Union, would have affirmed their solidarity with Colonel Qadhafi.

To forget the dangers of pyramiding alliances in a context of threatened use of force is to lose much of the lesson learned at so great cost in August of 1914. By contrast, both the Grenadian and Libyan incidents were commenced and virtually completed by the time the rest of the world knew of them. Of course, Cuba and the Soviet Union protested. But it is quite a different matter to protest a fair accompli than to add one's prestige to a game of mutual bluff with nuclear stakes.

But what of the Constitution? In the War Powers Resolution, we have a modernization of the declaration of war. It is an acceptable modification, in my view, because it is Congress that declares war, and it is Congress that established the consultation, notification, and duration requirements of the War Powers Act. Congress has recognized that, in the modern context, force must often be used without an overt declaration of war. Once hostilities commence, of course, there is no further need to exclude debate, and Congress has established a 60-day period as a rough cut for how long such debate might run.

American history has other examples of constitutional malleability: indeed, several of much more dubious legality. In 1845, for example, the Texas Republic was annexed to the United States by majority vote in both Houses, after a treaty between the two republics failed to achieve the required two-thirds vote in the Senate. Hawaii was acquired in 1898 in similar fashion after a treaty with Great Britain failed in the Senate. The substitution of legislation for a treaty substantially cut down the constitutional role of the Senate; whereas here Congress as a whole is not altering the powers of either House.

The proposition I advance is that the action taken in Grenada and against Libya was, in all meaningful respects, war. Indeed, I believe the United States is presently in a de facto state of war with Libya. In identical fashion, the United States was for ten years in a de facto state of war with North Vietnam. Even Senator Fulbright, who would have had it otherwise, admitted in 1967 to the first session of the 90th Congress that "Joint resolutions such as those pertaining to Formosa, the Middle East, and the Gulf of Tonkin are a proper method of granting authority, provided that they are precise as to what is to be done and for what period of time, and provided that they do in fact grant authority and not merely express approval of undefined action to be taken by the President."

The international law implications are profound. In that a state of war exists between Libya and the United States, as of the date agents of the Libyan government carried out armed attacks on United States military personnel in West Berlin, the strikes against the five Libyan targets became quite defensible within international law. The only objection might turn on the fact that there was no formal note

delivered to the Libyans in advance of the bombing; however, if, as we believe, the hostilities were actually begun by Libya's bombing in West Berlin, U.S. rights of belligerence commenced at that time.

Instead of taking this public position, however, the Administration has not sought to justify the April 14 actions as appropriate war measures. Yet that is just what they were. The U.S. was justified or not in taking the action, it was as a response to armed attack against Americans. Each state has now used military force against the other. Neither America nor Libya appeals to any third party arbitrator in this dispute. That is what is commonly known as war.

To try to fit within the U.N. Charter, furthermore, the United States has paid substantial costs in terms of world credibility. Article 51 guarantees "the inherent right of...self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

But no one expects the Security Council to take charge of this situation. Sadly, that body has failed of the promise so many had for it in October 1945. The United States made no pretense of bringing the matter before the Security Council. By trying to find justification within the confines of the U.N. Charter, the U.S. has given that document a higher status than present reality justifies and has also left itself open to the charge of hypocrisy.

Where the War Powers Resolution covers action that would otherwise be properly analyzed under the explicit authority to declare war, I find it an acceptable modernization of that power, but the War Powers Resolution also has been utilized in a category of cases not analogizable to declarations of war. There, I will have serious reservations with its use.

B. The Treaty Making Power

But to continue with the topic of modern day analogies to explicit constitutional powers, how are we to interpret the practice of executive agreements? Once again, our initial question is: Is the analogy closer to an explicit power, or to one of the reserved powers? The answer turns on what the substance of executive agreements has become. If these devices were limited to minor matters of courtesy between nations, for example dealing with the treatment of diplomats, one might advance the analogy to the courtesy between 18th century sovereigns, and thus to the implied powers that passed to the president rather than to the Congress upon nationhood. The strongest of these rights would be the right to recognize a foreign sovereign, upheld as exclusively the prerogative of the president in the Pink and Belmont cases in the United States Supreme Court. (United

States v. Belmont, 301 U.S. 324; United States v. Pink, 315 U.S. 203 (1942).)

But executive agreements have not been so limited. The fundamental charter dealing with commercial trade between eighty-one nations, including all the free economic powers, the so-called GATT (General Agreement on Tariffs and Trade) has force in American by dint of executive agreement. Does GATT have teeth as domestic law? It certainly does. GATT has been used to strike down the "Buy America" laws of several states. Yet GATT was never submitted to the Congress, never approved by anyone other than the President. The GATT, I submit, is a treaty, and its legitimacy thus turns on whether the executive agreement is an acceptable modernization of the treaty-making authority.

Consider the executive agreement at issue in the Pink and Belmont cases. The agreement dealt not only with the American recognition of the Soviet Union, but with the legitimization and assignment of claims asserted by that government against United States citizens. As a result of an agreement between President Roosevelt and the Soviet Minister Litvinov, Americans citizens who came to this country to escape the system that had confiscated their property in Russia found the property they had taken with them to American suddenly forfeited--to the United States, standing in the shoes of the Soviet Union.

In these examples, is it adequate to use an executive agreement rather than a treaty? The executive agreement cuts out a crucial constitutional step: ratification by the Senate. Thus, under the War Powers Resolution, the executive agreement is not a recasting of governmental authority in such a way that achieves substantial advantages while preserving the fundamental constitutional values. It is a modern device at fundamental odds with the allocation of constitutional authority.

Justice Robert Jackson, when he was was Attorney General to President Roosevelt, saw this danger quite clearly. In an Attorney General's opinion as profound in its analysis of foreign affairs power as his later opinion in the steel seizure case was for its analysis of domestic power, Jackson stated that no executive agreement could purport to bind for the future, commit the expenditure of money, or deal with an area other than the President's implied, not explicit, rights. (39 OP. 484 (1940).)

One final point concludes this discussion of explicit powers in foreign affairs. The Constitution gives the President the authority to make treaties, and the Senate the power to advise, and consent to them. How do we allocate the right to terminate treaties? Applying the method put forward here, terminating a treaty is more closely analogizable to adopting a treaty than it is to the implicit foreign affairs power. Of course, a treaty becomes void without more ado upon

renunciation by the other party. This accords with international law of treaties, as well as the common law of contract. But if the United States wishes to renounce such a commitment, the procedure should involve the President and the Senate concurring as it did when the United States took up an obligation.

This issue has not yet gone to the Supreme Court. However, the District of Columbia Circuit Court of Appeals has held that the President acting alone may terminate a treaty. (Goldwater v. Carter, F.2d 697 (1979).) The context was President Carter's unilateral abrogation of the Mutual Defense Treaty with the Republic of China. To those result-oriented observers who might rejoice at this outcome, I would offer the sobering inference that, by precisely the same logic, President Reagan was within his rights to terminate unilaterally U.S. adherence to the jurisdiction of the World Court. The Senate should have had a constitutional role in both, or in neither.

III. THE IMPLIED FOREIGN AFFAIRS POWER

We now consider a category of power that, however clear we are that it exists, is still dangerous: the implied foreign affairs power. I turn again to Justice Jackson:

> Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., Concurring).

To avoid this charge let me specify that I am here concerned with those powers that passed to the United States as a nation upon achieving independence, but that were not specified in the Constitution.

Nor am I speaking of the power over foreign commerce that the Constitution vests in the Congress, and which the Congress, with appropriate specificity, may delegate to the President. Such power is granted, for example, in the Trading with the Enemy Act, and the International Economic Emergency Powers Act, both of which convey exceptional power over interstate and foreign commerce to the President in order to achieve foreign policy objectives. Those powers are worthy of study, but in a different presentation, one dealing with delegation. Today, our subject is separation of powers.

What are the powers implicitly given to the President, so that no further word from Congress is necessary, and no restricting word from

Congress is effective? That latter qualification is critical: we are dealing with powers that, though implied, are as much into the President's authority as, say, the pardoning power: so that any congressional attempt to condition or restrict them would be unconstitutional. We are not here concerned with concurrent power, such as the President and Congress possess with regard to interstate or foreign commerce.

In answering the question, a natural starting point is the list of powers possessed by sovereign nations as of the time of America's founding. These would include at least these three: 1) the right to protect the safety of citizens abroad, 2) the right to respond with military force to aggression, whether from states or from international criminals, and 3) the right to carry on diplomacy with foreign states, including the rights to accredit their ministers and to grant or withhold recognition of foreign governments. Every nation exercising sovereignty as of 1789 displayed at least those characteristics in its external dealings.

Each of these implied rights has important modern applications. The right to protect the safety of citizens and their property was early recognized by Chief Justice John Marshall (see Schooner Exchange v. McFaddon, 7 Cranch 116, 136 (1812)); and as was eloquently restated in 1860 by Justice Nelson:

> As respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for...the great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home. (Durand v. Hollins, 4 Blatch 451, 454 (1860).)

When Leon Klinghoffer was isolated from the other passengers on the Achille Lauro, murdered, and thrown into the Mediterranean, he was killed because he was an American, as well as because he was a Jew. When Robert Stetham was marched to the front of TWA Flight 847, beaten, killed, and thrown to the pavement in Beirut, he was killed because he was an American and a member of the U.S. Armed Services. To our frustration and regret, the killers of Robert Stetham have blended back into the anarchy called Beirut. But the killers of Leon Klinghoffer were pursued and intercepted over the Mediterranean by United States Navy jets. The one reservation upon that proud episode was the cowardice of the Italian government when, in contravention of their treaty obligations, they allowed Abu Abbas out of custody within 24 hours. It is noteworthy that the Italian court hearing the case has since issued an arrest warrant for Mr. Abbas.

In the Achille Lauro action, was the President bound by the War Powers Resolution? The terms of the Resolution might fit the event, in that U.S. forces were introduced into a situation "where imminent involvement in hostilities is clearly indicated by the circumstances." Yet, I submit, any attempt to bind the President's action in such a situation, by an advance consultation or maximum duration requirement, directly interferes with a major category of implied foreign affairs power. Here, unlike the declaration of war power, Congress has not been given an explicit role; and any attempted extension of congressional authority is as unconstitutional as though Congress were to direct a federal judge which way to rule.

Likewise, President Carter's unsuccessful attempt to rescue the U.S. hostages in Tehran was squarely within this branch of implied power: to protect the lives of Americans invited into a foreign country and to seek their rescue. President Carter was right not to inform the Congress in advance because the extension of the War Powers Resolution to such a presidential action would have been an unconstitutional infringement on executive action. However, I must note that President Carter defended his failure to comply on the basis of what were termed "extraordinary operational needs."

Consider the second category: a nation's right to respond to aggression, whether from another state or from an international criminal. This right exists in the absence of any explicit constitutional provision; it would be hard to conceive nationhood without this right. President Wilson recognized the need to arm U.S. merchant ships against submarine attacks prior to America's entry into World War I. A bill to this precise effect had been introduced in Congress, but had failed. Woodrow Wilson went ahead under his own authority. Had this been a matter of domestic action, under the principles of the steel seizure case, the fact that the Congress had considered authorizing such activity and chosen not to do so would count strongly against the President's action. But, unlike domestic authority, we are here drawing upon implied authority in the international relations field; and not only is congressional authorization unnecessary, congressional prohibition is unconstitutional.

An even earlier example, and one with eerie modern day implications, is provided by President Jefferson's treatment of attacks upon American naval vessels by the Sultan of Tripoli. Pirates operating out of Tripoli were pursued and hanged, under President Jefferson's order. But Tripolitan naval vessels themselves were not pursued, unless they had attacked first. The power asserted by President Jefferson was the right to respond to attack from a foreign power, and the right to pursue international criminals such as pirates, even into foreign territory, if in hot pursuit. In

summarizing these precedents, the Senate Foreign Relations Committee in 1967 observed during the first session of the 90th Congress,

> During the 19th century American Armed Forces were used by the President on his own authority for such purposes as suppressing piracy, suppressing the slave trade by American ships, "hot pursuit" of criminals across frontiers, and protecting American lives and property in backward areas or areas where government had broken down. Such limited uses of force without authorization by Congress, not involving the initiation of hostilities against foreign governments, came to be accepted practice, sanctioned by usage though not explicitly by the Constitution."

In the modern context, the parallels are all too obvious. The power to deploy counterterrorist forces anywhere in the world is the modern day equivalent of commissioning naval vessels to seize and hang pirates. The President should exercise that authority without the hesitation imposed by the War Powers Resolution.

Lastly, the President has the implied right to carry on diplomacy, including the accreditation of foreign ministers and thus the recognition of foreign governments. President Washington took no consultation with the Congress in his handling of the Citizen Genet affair, and the power has been exercised unilaterally by the President ever since.

From the earliest times, Presidents have used the recognition power as a way of choosing sides in civil wars or wars to emerge from colonialism. Often, aid has gone beyond mere recognition and has included the provision of arms to one side. Here, the unilateral power ends.

Should the President choose to recognize the government of Arturo Cruz in Nicaragua, Jonas Savimbi in Angola, or the Mujahideen in Afghanistan, it would be entirely within his prerogative to do so. The provision of money and support, however, would require appropriation power; and there we run into an explicit constitutional grant of power to the Congress. Hence, it would be quite constitutional for the Congress to cut off funds to support these rival regimes, but quite unconstitutional for Congress to tie any executive branch appropriation to a condition that diplomatic support for any of these rival regimes be terminated.

The implied foreign affairs powers have important limits. First of all, one simply does not make them up. One starts the inquiry with the practice of sovereigns as of the time of the independence of the United States, for these are the powers that the United States as a nation obtained. What about attributes of sovereignty that have disappeared from the practice of nations since 1776? Can we make a

study of the law of nations, and derive newfound limits to the inherent foreign affairs power?

For the United States, the answer is clearly no, any more than a subsequent statute could abolish the Supreme Court. The inherent foreign affairs powers are no less constitutional for being implied and can only be given up by constitutional amendment.

Yet this concept has been roundly misunderstood by reason of an excessively broad Supreme Court statement in 1900. I refer to the statement by Justice Gray in the Paquete Habana, that

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction....For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. 175 U.S. 677 (1900).

Justice Gray cites no authority for this sweeping conclusion. As much as any law professor delights in learning that, by years of labor, research, and experience, his views might be made part of the law of the land, I fundamentally reject this conclusion. Indeed, any scholar who reads the Paquete Habana must concede that the statement is dicta.

But as a source of mischief, the Paquete Habana is unparalleled. Treaties to which the United States is not a party are cited, writings of distinguished international scholars with no background in U.S. constitutional law are proffered, and resolutions of the United Nations General Assembly are relied upon, all to prove some proposition of international law that supposedly binds the United States. From a constitutional point of view, it cannot be.

The first limitation, therefore, is a conscientious search for the claimed authority in the practices of nations as of the time of American independence. A second limitation is this: One must always yield to an explicit grant of constitutional authority.

The expenditure power is one example. Another example is the power to dispose of property, vested in the Congress by Article IV, Section 3, Clause 2. Hence, as right as that action was, it was unconstitutional for President Roosevelt to agree with Winston Churchill to swap fifty American destroyers for 99-year leases on military bases on British territory in North America and the Caribbean. The matter should have been submitted to Congress. It was

for Congress, not the President, to decide whether that was fair value or not.

There is another explicit source of power that might bind the executive agreement authority: The constitutional grant to Congress "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."

To the extent an implied foreign affairs power of the executive is defined in terms of an offense against the law of nations, Congress thus has the power to define, and thereby limit, that authority. This could be a check on some of the broader claims of implied foreign affairs power, though Congress has never used this authority. Of the three implied rights I have discussed, only the second would conceivably be affected by exercise of this power: the right to respond to aggression from other states or from international criminals. Though I cannot conceive of its happening, the Congress could define offenses against the law of nations so as to exclude piracy or hostage-taking. (Incidentally, I derive additional support for my castigation of Justice Gray's Paquete Habana dicta from this clause. Our constitution, I maintain, conceives of no other law binding on our government than the Constitution itself, treaties, and statutes. The law of nations can become part of our law, therefore, only by being explicitly legislated. My view is supported, I submit, by this clause in the Constitution, in which the Framers appear to say: "As to the law of nations, we shall leave that to the Congress to define, as and when it may wish to do so.")

IV. CONCLUSION--THE PROBLEM OF THE FAIT ACCOMPLI

To review, my thesis is that the recent strains in the exercise of United States foreign policy authority can be usefully analyzed by analogy. If the practice is fundamentally similar to the power explicitly granted by the Constitution, then the branches involved in that power must be involved. If the practice is fundamentally similar to an implied foreign affairs power, then it is for the executive alone to exercise. The April 14 action in Libya was analogizable to war. It was with good reason that we did not formally debate and then declare war; the War Powers Resolution was properly invoked as a surrogate for those procedures.

The Iranian hostage rescue was analogizable to an implied right to protect Americans from harm abroad and was exercisable by the President alone. That President Carter chose to comply even with part of the Resolution reflected a desirable, but not constitutionally compelled, degree of sharing with the Congress.

The interception of the Achille Lauro hijackers was the same. President Reagan was doing what presidents have done since the

founding of our nation and what sovereigns have the right to do: to pursue pirates in their attempt to escape.

The stationing of Marines in Beirut, with the approval of the Lebanese government, to protect our embassy and our citizens, was analogizable to an inherent foreign affairs authority of the executive. Congressional insistence on a 60-day duration for their presence, under the War Powers Resolution, was unconstitutional, and, as it turned out, a sign taken by our adversaries of a nonpermanent commitment on our part.

Executive agreements that deal only with the implied foreign affairs powers of the President may be concluded. Adherence to Robert Jackson's criteria guarantees that such executive agreements are just what would be analogizable to the attributes of a head of state as of the time of American independence. Executive agreements that go beyond those limits, to matters traditionally dealt with by treaties, are usurpations of the Senate's prerogative.

Yet I must admit that my analogies are not always easy. There are cases that fall dangerously in between. For example, what starts out as a proper exercise of implied power might very well lead to a state of war. The interception of the Achille Lauro hijackers interfered with Egypt's right to free passage over the seas. The U.S. went to war over just that principle in 1812. Had Egypt chosen to consider this a provocation, it could have declared war on the United States. Then, what had started out as a legitimate function purely by the President would have become a cause for war, in which the Congress was effectively given no role.

Exercises in the Gulf of Sidra pose the same problem. The President has the right, as Commander-in-Chief, to order U.S. naval vessels anywhere in international waters for exercises. No serious legal scholar denies that the Gulf of Sidra is international water. However, of all that can said against Colonel Qadhafi, being a serious legal scholar is not one. He has chosen to attack U.S. planes flying over these waters. Thus, from the legitimate, exclusively presidential decision to exercise our Navy in that Gulf, a state of war could result.

Hence, it might be argued, the War Powers Resolution should compel presidential consultation in advance of such maneuvers, and a limit to their duration.

This problem was foreseen by Hamilton, as early as 1793. In the same series of papers I alluded to before, he recognized that there was a "right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of power of the legislature to declare war....The executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision."

The solution, I feel sure, is not to restrict our country's legitimate rights in foreign affairs, but for the President to add a heavy measure of caution and good judgment when a fait accompli might arise. To take the contrary view is to surrender. To say that the President may not direct U.S. naval vessels without congressional authorization, because Colonel Qadhafi might take that as a pretext for war, is to reward Colonel Qadhafi with a veto power accorded to no branch of our government.

To compel the President to consult with the Congress when the opportunity presents itself to capture the murderers of Leon Klinghoffer is to renounce part of the sovereignty we have as a nation. Taking into account the remote chance that Egypt would treat that interception as an act of war, the President invoked a legitimate incident of American sovereignty, which it was his to assert under our Constitution.

The problem of the fait accompli is always present in foreign affairs; for a crisis, or a war, can be started by one actor alone. It is no criticism of the theory I have been expounding, or of the United States Constitution, that a head of state can precipitate the most serious international consequences.

A head of state who lacked the capacity would lack as well the will and the means to carry out a nation's principles and interests. This ancient doctrine has only grown more true as our world responds to the new crisis of nuclear threat and a revival of the old crisis of the international pirate. It is a strength of our Constitution that it allows us ways of accommodating both strains, while still preserving the separation of powers that is the genius of the American system of government and the guarantor of the American system of rights.*

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*The author refers the reader to the treatise, "The President: Office and Powers 1787-1948, History and Analysis of Practice and Opinion" by Professor Edward S. Corwin (1948), for corroboration of several of the historical events described in the text.