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Book Reviews

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BOOK REVIEWS

FOREIGN AFFAIRS AND THE CONSTITUTION. By Louis Henkin.[1] Mineola, New York: Foundation Press, 1972. Pp. 535. $11.50.

How does it happen, one may ask, that the Constitution seems to give Congress overwhelming primacy in foreign affairs yet the Presidency has come to have undoubted leadership in external relations?

Take the Vietnam War as an example of the confusion invited by our Constitution. A war it was, no one can doubt, but by constitutional standards never "declared." It was, clearly, a presidential war of a kind the Constitution does not seem to permit. And yet Congress gave many appearances of its consent to the war, what with the Tonkin Gulf resolution, appropriations of funds for the war year after year, and in fact by express declaration that Congress—while never declaring war—intended to support our armed forces in combat in Vietnam. Never mind that congressional consent was manipulated by Presidents; consent was implicitly given. So, who was violating the Constitution? The President; or Congress? The point is that the President usually gets the blame, while Congress may be equally at fault. Perhaps this is a clue to the constitutional ambiguity that confounds this issue.

On the other hand, the President directed the secret bombing of Cambodia in 1969 and 1970; the invasion of Cambodia in 1970; the use of air power to invade Laos in 1971; the mining and blockading (an act of war) of North Vietnamese harbors early in 1972; and subsequently the bombing of North Vietnam at Christmas time in 1972. All these warlike actions were taken in secret and with no apparent congressional consent. Was the President acting constitutionally? Has nuclear age military technology made obsolete the war powers of Congress? The answers to these questions cannot be as simple as they may seem. For Congress has more recently required the President to halt the bombing in Cambodia on a fixed date and has been trying to circumscribe presidential power in other ways. This interplay must be very confusing to the citizen who has read the Constitution and can find nothing that seems to give a clear and unambiguous solution.

Enter Professor Louis Henkin with his study *Foreign Affairs and*

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the Constitution. The author wrote this book to fill a void. An earlier study of this kind (Quincy Wright, *The Control of American Foreign Relations*, 1922) is outdated by more than 50 years. And while numerous volumes treat the United States Constitution or American foreign relations, none has addressed itself in recent times to foreign affairs and the Constitution. The book is, in Henkin's words, "a legal study" but it is designed to inform the general reader as well as the lawyer; it also has the structure of a carefully organized textbook.

A book of this scope and depth is not easily summarized. But it may be useful here to outline its general content and then move on to discuss what light it sheds on the great executive-legislative struggles that are usually, as is now the case, centered on foreign affairs and that seem to create periodic crisis in our constitutional system.

In other systems of government, the function of foreign affairs often is imbued with the attribute of "crown sovereignty." The result is that Chief Executives tend to have special (sometimes even absolute) powers in the conduct of foreign affairs. American constitutional government, however, is commonly regarded as a government of limited authority, the limits being defined by a written constitution. To implement its underlying theme—the democratic notion of popular sovereignty—the Constitution places limits on government authority to protect the individual and collective rights of the people. And, as Professor Henkin observes: "[C]onstitutional prohibitions and limitations inhibit foreign affairs as well as other governmental action."[2] The rub is, of course, that many persons claim that foreign affairs is particularly an *executive* function, a notion that has led Presidents to claim extraordinary powers concerning "national security" and "foreign affairs" as "inherent" in the office. And many thinkers have been uneasy about the conflicts between the democratic idea and the demands of diplomacy and strategy, particularly in the nuclear age. A major premise of Mr. Henkin is that while this problem has been a subject of major debate from time to time in the political arena, it has been neglected by constitutional lawyers. In essence, his purpose is to make up for this neglect. His analytical approach is generally that of the constitutional lawyer. I hasten to add that I approach the book not as lawyer but as political scientist. I argue that the question of presidential and congressional authority in

2. L. Henkin, Foreign Affairs and the Constitution 4 (1972).

foreign affairs is in part a constitutional question but perhaps in larger part ultimately a political question.

This book is divided into two main sections and eleven subsections. The principal sections analyze first, what the author calls the "constitutional blueprint," and secondly, the "limits of constitutional power."

In the first section he explains in great detail the ways in which the great principles of the Constitution, such as federalism, separation of powers and executive-congressional sharing of powers (cooperation and conflict) affect the functioning of our government in foreign affairs. There is no need here to summarize his points chapter by chapter, but I will suggest what they add up to.

With reference to the constitutional blueprint, two basic constitutional problems emerge.

The first is that in spite of some apparent mythology, as evidenced by public debate, most of the issues of separation of powers (President-Congress) are not capable of being solved by judicial review. One difficulty is that few such issues raise questions that are really litigable and even if so, the Supreme Court's historical stance is to shy away from intervention. In other words, Henkin demonstrates that judicial self-restraint has been the norm in President-Congress foreign affairs conflicts. In a sense, then, there is no referee—except the American people—when the charge of presidential "usurpation" or congressional "infringement" is raised. Thus the ship of state is left to toss about in stormy waters in this regard. So far, it has survived the storm.

The second constitutional difficulty suggested in Mr. Henkin's "blueprint" discussion is that the Founding Fathers, while giving undisputed sovereignty to the national government in the foreign affairs realm, did not, at the same time, allocate with precision presidential or congressional foreign policy roles. Let us not forget that the architects of the Constitution were writing in the 18th century. Undoubtedly they conceived foreign affairs in somewhat limited terms. Nor should we forget that a strong bias against executive concentration of authority informed the drafters of the charter for the Union. Mr. Henkin reminds us that in the eyes of the framers, "foreign relations seemed to consist wholly of making or not-making war and making or not-making treaties. Surely, though building magnificently, perhaps better than they knew, the Framers could not foresee what the United States would become,

what the world would become."[3] Relying solely on the Constitution as it was written in 1787, one could claim that Congress has undisputed primacy in foreign affairs. In two beautifully succinct and carefully documented chapters on "The President" (chapter II) and "Congress" (chapter III) Henkin demonstrates that the Founding Fathers, in every grant of power to the President, particularly those relating to foreign affairs, were derogating from congressional power, carefully parcelling it out with attention to safety devices and limitations. Namely, these were "checks and balances" involving such mandates as "advice and consent," treaty veto and the congressional power of the purse.

Yet every schoolboy knows that, as Henkin puts it, "American foreign relations are in the charge of the President."[4] This is clearly the result of nearly 200 years of experience with the Constitution and various Supreme Court decisions. But it was not until 1936 in the famous *Curtiss-Wright* case[5] that we have judicial sanction for the notion of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ."[6] Yet historically a combination of factors, Henkin reminds us, such as the structure of the federal government and the nature of diplomacy and strategy in international relations, inevitably has given Presidents the upper hand in foreign affairs, the constitutional primacy of Congress notwithstanding. In essence, the desire to balance power, to constrain executive authority and to limit government led the Founding Fathers deliberately to invite combat over role and function between the President and Congress. Their hope was to keep the system honest and to some degree democratic. The cost has been a system of ambiguous power, with deep crisis, and even stalemate, always in the wings.

Before offering his conclusions, Mr. Henkin systematically deals with somewhat more technical subjects in a chapter by chapter survey. These include: "Treaties and the Treaty Power," (chapter V); "Other International Agreements," (chapter VI); "International Organization," (chapter VII); "The Courts in Foreign Affairs," (chapter VIII); "The States in Foreign Affairs," (chapter IX); and "Individual Rights and Foreign Affairs," (chapter X).

3. *Id.* at 34.
4. *Id.* at 37.
5. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
6. 299 U.S. at 320.

The nature and utility of the book as a standard reference work on such topics is demonstrated by the fact that nearly half the book is made up of references and citations for the various chapters.[7]

The concluding chapter (XI) is entitled "Our Eighteenth Century Constitution," which suggests his concluding theme.

If one expects to find in this excellent and thorough work a clear demarcation between presidential and congressional authority in foreign affairs, he will be disappointed. Alas, there is no such clear cut line! In the words of Mr. Henkin: "The principal difficulty has been that, from the beginning, the compromises, irresolutions, oversights, and intentional silences of the Constitution left it unclear who had sail and who had rudder, and, most important, where is command."[8] Out of logical necessity, the President has come to be the "chief" of foreign policy. Nonetheless, as Henkin reminds us, "the Constitution clearly gave Congress the ultimate foreign relations power, the power to go or not to go to war, major legislative powers integral to foreign policy (*e.g.*, to regulate foreign commerce), and a spending power that has become a principal tool in foreign as in domestic affairs."[9]

Mr. Henkin's ultimate judgment on this issue is quite acceptable to a political scientist. He says, in effect, that the problem of presidential-congressional conflict cannot be settled by constitutional amendment, given the nature of the American system. The periodic conflict must be settled in the *political* arena. Henkin reminds us: "The President wields power with few limits when Congress does not resist or protest . . . ."[10] In foreign affairs, the congressional role cannot be equal to that of the President, he believes. But, and this is the crucial point, both constitutional principle and the democratic idea "suggest that the degree and kind of Congressional participation should increase as the means of foreign policy begin to include uses of force and to approach a national commitment to war, and as the cost of policy begins to loom large in the competition for national resources. But Congress will have to assert and demand a role."[11] Only recently has Congress begun to "assert and demand." The Constitution certainly does not will such congressional activity; it does encourage and underwrite it. To Gladstone, the United States Constitution was

7. *See* L. HENKIN, *supra* note 2, at 285-535.
8. *Id.* at 271.
9. *Id.* at 273.
10. *Id.* at 278.
11. *Id.* at 279-80.

"the most wonderful work ever struck off at a given time by the brain and purpose of man." With a little bit of luck, perhaps the ambiguities of the Constitution will permit it to live.

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THE CONCEPT OF STATE JURISDICTION IN INTERNATIONAL SPACE LAW. By Imre Anthony Csabafi. The Hague: Martinus Nijhoff, 1971. Pp. xix, 155. $9.10.

When, during the early years of this century, achievements in aeronautics made possible rapid development of a new mode of transport, jurists were quick to call for legal arrangements which would reflect the economic and social changes expected to result from the technological innovation. A series of international agreements and a body of international legal concepts regulating air navigation followed. Similarly, the development of space technology in the second half of the 20th century stimulated contemporary legal experts to search for principles and rules which would regulate and promote peaceful interactions of states in this new domain penetrated by man.

In his book, Dr. Csabafi discusses one of the most difficult problems confronting the emerging space law, that of state jurisdiction with respect to outer space activities. The basic problem dealt with by the author could be summarized as follows: should states transplant, with certain minor modifications, the existing earth-oriented principles of jurisdiction into the realm of space law, or should they break away from the traditional concepts and rules and replace them with new ones, better attuned to the needs of the space age.

The introductory chapter of Dr. Csabafi's book examines the basic principles of state jurisdiction in the terrestrial environment, especially the complete and exclusive sovereignty of each state over its national airspace and the principle of sovereign equality of states. The applicability of these principles to outer space activities in light of the United Nations' role as a "forum for the making of space law" is then subject to inquiry. The U. N. Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, of December 13, 1963, the Outer Space Treaty of January 27, 1967, and the Astronaut Agreement of April 22, 1968, are next explored by the author as the backbone of the new emerging law. Since the fundamental principles of space law are freedom of exploration and use, as well as the principle of nonappropriation, the author notes the difficulties of an automatic transfer to outer space of the terrestrial concepts of state jurisdiction. The difficulties are further compounded by the explicit language of the Outer Space Treaty providing that the U.N. Charter and the existing international law apply to outer space interactions and that states retain jurisdiction and control over objects

launched by them into outer space. Dr. Csabafi's preferred solution is a mix of the traditional principles of international law and the new principles of space law to be arrived at by way of a "functionalist" approach.

In Chapter XI, entitled "The Legal Basis of the Progressive Development in the United Nations of the Concept of State Jurisdiction in International Space Law," the author deals with the applicability of certain international rules and principles, including the rules of *jus cogens,* to space activities (the sovereign equality of states can be given as an example of *jus cogens,* provided by the author). An analysis of traditional bases of state jurisdiction in international law, together with the jurisdiction over the high seas and the Antarctic, can also be found in this chapter.

Chapters III and IV are concerned with the evolution of legal principles governing the exercise of state jurisdiction in outer space and on celestial bodies. Dr. Csabafi asserts, *inter alia,* that the U.N. General Assembly Declaration of 1963 represents a "formal source" of international space law and should be regarded as "evidence of customary international law." This Declaration in conjunction with the Outer Space Treaty and the Astronaut Agreement lead the author to advocate in Chapter V the adoption of what he calls a "functional" approach to the solution of the complex problem of jurisdiction in outer space. This would mean, in his own words, "the right of a state in international law to regulate rights of persons, to affect property, things, events and occurrences in designated zones in outer space or areas on celestial bodies, whether by legislative, executive or judicial measures to the extent and for the period of time that is necessary to safeguard and secure its right to explore and exploit outer space including celestial bodies."[1] In support of his proposal, Dr. Csabafi relies on analogies taken from the law of the sea, for example, the jurisdiction enjoyed by some states over pearl and sedentary fisheries and the "sovereign rights" accorded all states over the continental shelf. It appears that the application of such functional jurisdiction, according to the author, would legitimize the occupation of the optimal positions in geostationary orbit by telecommunication satellites of the technologically advanced states. Aware of the hazards inherent in the establishment of new prin-

1. I. CSABAFI, THE CONCEPT OF STATE JURISDICTION IN INTERNATIONAL SPACE LAW 131 (1971).

ciples of international law on the basis of "first-come, first-served," particularly in the present era of gross inequities among nations, Dr. Csabafi recommends greater reliance on regional arrangements to insure the development of an economical and safe system of space telecommunications.

There are a number of points in this book with which one could argue. For example, the author's evaluation of the legal nature of the U.N. General Assembly Resolution 1962 (XVIII). As various states and many commentators have observed, this resolution, like the other U.N. General Assembly resolutions, represents a declaration of intention and creates obligations (of rather dubious legal character) only for those member-nations that have expressly voiced their intent to be bound by it. Without underestimating the contribution and role of the United Nations to the development of space law, (and it has certainly played a major role in this endeavor, in the opinion of this reviewer) the U.N. outer space resolutions did not and cannot create legal obligations. Not only is there no provision in the Charter that makes this possible, but the very treaties and agreements which make the bedrock of existing space law were signed and ratified, and to an important extent negotiated, outside the United Nations. Moreover, the fact that several major states, *e.g.*, the People's Republic of China and the two Germany's were not members of the United Nations at the time the General Assembly adopted its space resolutions cannot be overlooked when an assessment is being made of the place of the United Nations in the law-making process relating to the regulation of outer space activities.

The concept of "sovereign equality" of states which has received in recent years considerable publicity, especially within the United Nations, figures prominently in Dr. Csabafi's work. Unfortunately, he has failed to incorporate this important concept into his theses in a critical and creative manner. On the one hand, he seems to accept the concept at its face value, ignoring the reality that not all the states are truly equal. As even such a champion of "equality" as the former Secretary-General of the United Nations, U Thant, had to admit, there is an important distinction between the right to independence and the participation in the United Nations as a full partner. On the other hand, the author's application of his functional jurisdiction to orbital positions for telecommunication satellites clearly departs from the principle of "equality" by favoring technologically advanced states, the only ones that can take immediate practical advantage of outer space activity.

The Concept of State Jurisdiction in International Space Law,

despite the above critical comments, which by no means exhaust all the potentially controversial appraisals and recommendations contained in this book, should nevertheless contribute to a better understanding of an important aspect of the developing space law and of the changing law on our planet. Dr. Csabafi's theory of functional jurisdiction might, with appropriate modifications and in regard to certain problems, serve the useful role of an aid to the decision makers.

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