

Book Reviews

War, Foreign Affairs and Constitutional Power—The Origins

Abraham D. Sofaer; Ballinger Publishing Company, Cambridge, Mass. 1976; xxxvi + 533 pages. Introduction by Arthur Schlesinger, Jr.

Reviewed by MAX CHOPNICK

This volume is the initial publication, with two additional volumes to follow, of a research project sponsored by the American Bar Association concerning the “respective powers under the Constitution of the President and of Congress to enter into and conduct war.” The background of the project which produced this volume should perhaps be noted. It will be remembered that the first United States combat operations in Indo-China were authorized by the Executive in 1965. As the Viet Nam War continued unsatisfactorily and additional forces and materiel were sent abroad, public disfavor and disillusionment mounted, with questions arising as to the power of the Executive to commit our armed forces to the fighting in Indo-China without a declaration of war by the Congress. This problem received serious consideration in the Section of International Law and in other ABA committees and sections.

In February 1966, the House of Delegates of the ABA adopted a resolution offered by the Section of International Law and the Standing Committee on Peace and Law Through the United Nations, stating that the position of the United States in Viet Nam was legal under international law, and was in accordance with the Charter of the United Nations and the South-East Asia Treaty. The report on this resolution mentioned that professors of international law at 31 of the nation’s leading law schools had expressed the opinion that the United States position in Viet Nam was legal. The action of the ABA was prompted by allegations made before the Senate Foreign Relations Committee to the effect that international lawyers were “agreed” that the United States

position in Viet Nam was illegal and in violation of the Charter of the United Nations.

In March, 1966, a legal memorandum of law prepared by the Legal Adviser of the Department of State, was submitted to the Senate Committee on Foreign Relations in support of the legality of United States participation in the defense of Viet Nam. In the following month the Section sponsored a well-attended seminar held in Washington on the topic: "Is the United States presence in Viet Nam legal under international law?"

As the war intensified, with many anti-war demonstrations, controversy grew over the powers of the President. Prompted by this concern, the House of Delegates and the Assembly of the ABA adopted a resolution in July 1971 requesting the Section of International Law and the ABA's Standing Committee on World Order Under Law to study and report on the subject of the respective powers of the President and Congress to enter into and conduct war. The Section thereupon appointed a committee called "Ad Hoc—On War Powers Study," and now called the "War Powers Steering Committee." Lyman M. Tondel, a past Section Chairman, has served as Chairman of the Committee throughout the years since the project began, acting both as spearhead and shepherd on this undertaking. Although the Section provided some small financial support for the study, the principal financing has come from the ABA's Fund for Public Education. The present volume resulted from this study. Its author, Professor of Law Abraham D. Sofaer of Columbia University, and his staff of researchers, who have been intensely involved on the project since 1972 discovered from primary sources much significant material on the subject of war powers hitherto not generally known.

The structure and arrangement of this volume is unusual. After a short and modest preface by the author and a commendatory introduction by Arthur Schlesinger, Jr., the book presents a table, preceding the full text of the Constitution, listing the executive officers of each administration during the period covered and the party representation in each house of Congress. This table, developed from reliable sources, shows that, except for a two-year period (1793-1795), the party of the President had control of both houses. From the beginning it is evident that there were many disagreements between the President and Congress on issues pertaining to presidential powers.

Despite the elaborate fact and reference materials, the author writes clearly and interestingly with objectivity, impartiality and perspective. Although Sofaer describes his product as "more a history of certain events than an analysis of the constitutional problems to which these events relate," throughout the presentation, and especially in the conclusions which follow each chapter, we find a sound legal treatment and critical analysis of the developments of each of the periods covered. Thus, the author concludes that legislative or executive action and inaction seldom can be treated as "precedents" in the way we are accus-

tomed to treating judicial decisions. He points out that while leaders asserted that no branch of government must intrude on the area assigned to another branch, each branch was jealous of its authority and sought to increase its power; and that neither branch prevailed consistently to subordinate the other branch.

The first chapter of the book is devoted to the background of the Constitution with a review of British influence, colonial and state governments prior to 1789 and the experience under state constitutions, the Constitutional Convention and the ratification process. The author concludes that legislative and executive powers under the federal Constitution were mixed to prevent the supremacy of one branch over the other, with each branch holding important powers over the same area of activity.

The second chapter covers the administration of George Washington, during whose administration the broad outlines of the presidency as we know it today were drawn. The author points out that a close look at executive-congressional relations during this period indicates that many practices and doctrines commonly assumed to be of relatively recent origin are rooted in the early precedents.

The third chapter deals with John Adams and undeclared war as national policy, and impels the author to conclude that John Adams and his party consciously adopted the policy of fighting an undeclared war in large part to avoid the political complications of securing a formal declaration of war from Congress. Adams authorized many naval and other military actions, such as seizure of belligerent ships, search of neutral vessels and other potentially war-causing actions against other nations. But he secured congressional sanction without serious challenge as to the legality of his actions. In that period, the Supreme Court [*Talbot v. Seeman*, 5 U.S. (Cranch) 1 (1801)] unambiguously confirmed the power of Congress to authorize hostilities in any degree without declaring war.

The fourth chapter deals with Jefferson and the Revolution of 1800. In this period, the powers of the Executive were increased at the expense of Congress. Jefferson broadly construed his authority to conduct foreign and military affairs. He indulged in secret diplomacy. He authorized seizure of armed vessels beyond our territorial jurisdiction in circumstances that might have led to war. He cleverly sought and obtained congressional approvals. He ordered purchases of arms not authorized by Congress though Republican doctrine (which he abandoned for Federalist principles) called for the Executive to spend only appropriated funds for authorized purposes. He assumed emergency powers and indulged in a system of secrecy which was largely immune to legislative check. He secured congressional approval for most of his objectives: annexation of territory, suppression of piracy, protection of neutral commerce. He affected control of foreign relations by designating communications and actions as

private or confidential so to keep from Congress information he wished to withhold.

The fifth chapter, the longest in the book, relates to the post-Jeffersonian Republicans (Madison, Monroe and John Quincy Adams), national expansion and executive power. During this period many military actions were initiated by the Executive; and at times these actions were questioned by the Congress but not sufficiently limited. President Adams was forced by Congress to submit one of his programs for full legislative approval. In this period occurred the War of 1812 by declaration of Congress, and war with Algiers in 1815 recognized by Congress to exist. Military commitments assumed by the Executive were claimed to be justified on varying grounds, the principal one being that the action was authorized by delegation under some congressional legislation. Madison and Monroe claimed justification for military actions in Florida and the West Indies on the basis of treaties, contending that the presidential power to execute all laws included authority to interpret treaties and to enforce our nation's rights thereunder. However, the author concludes that at no time did any of the three presidents of this period claim inherent power to initiate military actions.

With expansion of diplomatic and naval activities, subordinate executive officers became important factors in foreign relations. Madison, and especially Monroe, appear to have exploited unilateral actions by subordinates. Questionable actions were condoned though they exceeded the powers of either the subordinates or the Executive. An illustration of such an action was Andrew Jackson's seizure of Florida territory without previous authorization of Congress. Some defended the action on the alleged failure by Spain to keep its treaty obligations and by the law of nations. It was argued that the President could authorize military actions short of war relying upon past military actions where war had not been formally declared.

These altogether too-brief capsules of the five chapters make a sketchy overview, but one must read the work for the full and often fascinating events, positions and actions of the period. Some episodes are dramatically described; so well indeed, that several might provide scenarios for plays, motion pictures or television features.

The question may be raised as to whether this research project has not become academic because of recent congressional acts which have shifted control on war and related powers away from the Executive and into the legislative branch. Three statutes are particularly material—the War Powers Resolution (50 U.S.C.A. §§ 1541-1548, eff. Nov. 7, 1973); the National Emergencies Act (Pub. L. 94-12, eff. Sept. 14, 1976); and the "Presidential Recordings and Materials Act" (Title I, 44 U.S.C.A. § 2107, eff. Dec. 19, 1974). We do not think so. On the contrary, this book is a classic, which alone, or with the two forthcoming volumes, should serve as invaluable guides for an understanding

of the relative powers, in practice, of the executive and legislative branches, particularly as to the war and emergency powers of the Executive.

In adopting the War Powers Resolution, Congress openly proclaimed that it was doing so to reassert its own prerogatives and responsibilities in order to restore the balance of power between the two branches. Despite a disclaimer by Congress of any intention to alter the constitutional grants of war powers to the two branches, it would seem that the Resolution may effect changes of constitutional provisions. For one thing Congress may substitute its judgment for that of the President as Commander-in-Chief. Also, it may require the President to abandon military actions in process. In other ways, it curtails or limits or vetoes the commitment of United States forces to hostilities or the endangering of such forces, though their use may be required under mutual defense treaties to which our country is a party. Congress rejects the interpretation of such treaty obligations as NATO, SEATO and ANZUS as self-executing. Obviously, regardless of treaty commitments, Congress has always retained power through its control of appropriations to restrict military engagements. The President is required under the Resolution, even in instances of sudden attack and self-defense, to report to Congress within 72 hours as to his reasons for the commitment of United States armed forces outside or within the United States, and a limit of 120 days is imposed on the engagement of such armed forces, unless specifically authorized by Congress. Some members of the Congress have argued that the Resolution extended the Executive's constitutional authority in some respects and severely restricted his authority in other respects. Further, the Resolution's provisions put the House and the Senate on equal footing; would this then suggest that the Senate may not act alone on ratification of treaties calling for mutual defense? Under the United Nations Charter, members are required "to take collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression" [Art. 1(1)]. Article 51 preserves the "inherent right of individual or collective self-defense if an armed attack occurs against a Member." Separate treaties such as NATO, SEATO and ANZUS, like many other regional or mutual pacts, uniformly provide that an act of aggression against the territory or the inviolability of the territory or against the sovereignty or political independence of a member state shall be deemed an act of aggression against the other member states and they provide for reciprocal assistance. Our participation in the Viet Nam War was defended on grounds which included our commitment to defend South Viet Nam under SEATO, a treaty to which the Senate gave its advice and consent by a vote of 82 to 1.

There are other situations in which we have committed our armed forces, by way of intervention. We sent our Marines to Lebanon and we participated in the United Nations expeditionary force to the Congo. In the Korean operations, the Security Council entrusted us with responsibility to provide a multinational

force. "While intervention as such may be said to be an illegal interference with the internal affairs of another state, intervention may be legal if it is necessary for self-defense or if undertaken under United Nations authority" (Re: International Law p. 925).

It is uncertain how the Resolution will actually affect our treaty commitments under the language of the Resolution. But we may recall the statement of then Under-Secretary of State George W. Ball, in support of our position in Viet Nam, that "we are living up to those commitments by helping South Viet Nam defend itself from the onslaught of Communist force, just as we helped Iran in 1946, Greece and Turkey in 1947, Formosa and Korea in 1950 and Berlin since 1948. . . . We cannot defend Berlin and yield Korea. We cannot recognize one commitment and repudiate another without tearing and weakening the entire structure on which the world's security depends."

Some have argued that the Resolution avoids the amendment provision of the Constitution. *Federalist* No. 43 says of the amendment process that "it guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults."

Executive powers have been restricted also by the National Emergencies Act. For some years emergency proclamations of the Executive have raised questions in the Congress which believed that some such actions trespassed on its constitutional prerogatives. While Congress recognized that procedural delays in a democracy often require the Executive to exercise temporary or extraordinary powers, it felt some restraint and regulation necessary to protect its legislative authority. Accordingly, this Act terminates the four states of national emergency declared by (1) President Roosevelt, March 4, 1933 on closing the banks because of the depression; (2) President Truman, December 16, 1950 to better prosecute the Korean War; (3) President Nixon March 23, 1970 to handle the Post Office strike; and (4) President Nixon August 15, 1971 to enforce foreign economic control by currency restrictions. Each of these was in force until terminated by the Act. The Act provides procedures to govern the handling of future national emergencies. When the President declares the existence of a state of emergency, by proclamation, he must specify his reasons therefor and the statutory powers he intends to invoke. The Congress then has six months to affirm or reject the President's use of these powers. Extensions will require affirmative action by the Congress. If Congress does not act, the declared emergency will lapse after six months.

The third Act—Title I of the "Presidential Recordings and Materials Act" (44 U.S.C.A. § 2107, effective Dec. 19, 1974) was directed only to former President Nixon's tapes and papers which were taken into custody of the Administrator of General Services, to be processed and screened by its archivists to determine what materials are personal and private and to be returned to Mr. Nixon. The

other materials are to be held under regulations of the Administrator as government property with the right to Nixon or his designee to inspect the same. These materials are to become available to public access. On June 28, 1977 the Supreme Court, with a sharp dissent by Chief Justice Burger, held this Act constitutional, thus ending the historical practice of almost 200 years, under the separation of powers, of ownership and possession by a President of his documents during his administration, though they pertain to matters of governmental interest.

These three legislative enactments, adopted at a time of public disbelief engendered by the discontent and disillusionment over the Indo-China wars and the anger over the Watergate crimes, were designed to restore to the Congress powers it had allowed the Executive to assume and have invested the Congress with some powers or rights traditionally reposed in the Executive. Sofaer has discussed the frequent situations, during the period covered by this book, in which a President withheld papers from the Congress though these were of governmental interest. The subject of ownership and possession, however, is one that merits historical treatment in the forthcoming books under the research project.

One can wonder whether the trend to greater power in the legislative branch is not part of the process of formation, growth and zenith, described by Polybius (204-122 B.C.) as an undeviating law of nature—"the regular cycle of constitutional revolutions and the natural order in which constitutions change, are transformed and then return to their original stage" (*The Cycles of History*). That the pendulum has swung power from the executive to the legislative branch may be the way our basic concept of checks and balances is being preserved.

This book, despite the complexities of the subject, is easy to read. "There are some books," said Francis Bacon "that ought to be tasted, others to be swallowed and some few to be chewed and digested." This book belongs to the latter few. Frequent reference should prove enlightening and enjoyable. Indeed, this landmark book should be required reading not only in law schools but in colleges and high schools throughout the country.

Law and Legal Literature of Peru, A Revised Guide

David M. Valderrama; Library of Congress, United States Government Printing Office, Washington, D.C. 1976. ix and 296 pp. (Index of Persons). \$7.30.

Reviewed by ALWYN V. FREEMAN

This new guide to Peruvian law, a revision of the work prepared by Helen L. Clagett of the Library of Congress in 1947, marks a welcome stage in updating and expanding the earlier series of twelve books on Latin American legal systems which appeared during 1943-1948. The original project of legal guides to foreign countries had been conceived and carried out some sixty years ago by the then Law Librarian of the Library of Congress, Professor Edwin M. Borchard; and that unique series of compendia became indispensable as a practical vehicle enabling lawyers and academicians to acquire some familiarity with foreign legal systems.

Valderrama's work brings the legal history of Peru up to the present period, with the changes and essential amendatory legislation adopted over the past thirty years. Of particular interest are the sections on social and agrarian reform, along with other areas emphasized by the 1968 revolutionary government such as the new rules on industrial development and foreign investment.

While it is not designed as a survey of substantive or procedural law (in no sense can it be described as a treatise on the topics covered), as a reference tool to facilitate research in depth, the volume provides an extremely broad coverage in its less than 300 pages. This is typified by such sections as that on Administrative Law relative to the Indian problem (few countries of Latin

America have been more preoccupied with it than Peru); municipal law application; financial legislation, taxation, transportation (and communication) and land, water and mining laws; agrarian reform and petroleum. The thirty pages of material on commercial law embraces, among other subjects, mercantile companies, banking and insurance, bankruptcy, patents, trademarks and copyright, industrial and investment legislation, and finally, commercial arbitration.

Ten other major fields of law are treated, with illuminating discussion of the contributions of various scholars in their several specialties, both in the annotation of statutory provisions and commentaries on the law. In each, exhaustive references are provided to the available digests and treatises, which cannot fail to spare anyone who takes the trouble to explore them, many hours of effort in ferreting out the available source materials.

As might be expected, the area of Peruvian civil law is given special attention, beginning with an eight-page presentation, in chronological progression, of the annotation codes and treatises. By contrast, the section on Public International Law concentrates heavily on the more parochial history of Peru's numerous boundary disputes with its neighbors.

In short, with the superb bibliography which accompanies the text discussions, backed by the lists of law collections, legal dictionaries, court reports, digests, legal periodicals and general bibliographies assembled in the last forty pages of the volume, researching Peruvian law should present fewer problems for anyone accustomed to working in the Spanish legal idiom.

Dr. Valderrama has performed a most useful service to the profession in revising this guide. It is to be hoped that the standard of excellence which it represents, and the enthusiastic reception it should receive, will encourage the completion of other revisions of the series at an early date.

Oil Resources : Who Gets What How?

Kenneth W. Dam; University of Chicago Press, 5801 Ellis Avenue, Chicago, Illinois 60637; 1976; 191 pp.; \$11.95

Reviewed by STEVE HUGHES

Mr. Dam is a professor at the University of Chicago Law School and author of other published works, including *Federal Tax Treatment of Foreign Income* and *The GATT: Law and International Economic Organization*. This, his most recent book, is a discourse focusing on exploitation, licensing, and allocation of petroleum resources.

After an introduction commenting on the licensing decision and government-company relationships in OPEC countries, Mr. Dam treats the allocation methods in Britain and Norway. In his discussion on the British procedure, Mr. Dam examines the argument advanced for their discretionary system. The chapters on allocating in Norway deal with that country's carried interest system, and Statoil as the country's instrument for participation.

Following this are two sections on natural gas and oil in Britain. The first theorizes on the capture of economic rent through a negotiated gas price. It also contains tables on why exploration dropped off in the Southern Basin of the British North Sea, in addition to comparative drilling rates and success ratios in that same area.

Critical analyses of the 1974 White Paper and the 1974 proposed Petroleum Revenue Tax are included, as well as arguments (both pro and con) concerning royalties, taxation, and extensive ways and means of government participation. The author also presents criteria by which to judge the particular instrument, such as how effectively it captures economic rent, how much revenue it generates for the government, and the degree of impact of a particular instrument on economic activity.

The sixth section, which deals with allocating in the United States, is a lengthy discussion on the auction system that typifies United States oil distribution. The author distinguishes bonus bidding from royalty bidding, then finalizes the first part of the section with a capsule analysis of S.521, printed as passed by the Senate in the *Congressional Record* (daily ed.), vol. 121, p. S 14362 et seq. (31 July 1975). This bill required the Secretary of the Interior to experiment with various forms of lease sale bids.

The second half of this section deals with the possible anticompetitive impact of joint bidding and the possible separation of the exploration stage from the development stage in order to auction the right to develop after completion of exploration.

Mr. Dam has executed a technically fine book. Although he draws no firm conclusions, none are really needed, particularly for economists and pseudo-economists, who will be able to draw their own. The average layman will not be able to—neither will he be able to understand the content of the book.

Oil Resources: Who Gets What How? has a very limited purpose and a very limited reading audience. However, should one be inclined or compelled to purchase a small book with an overview of North Sea oil, in order to either know something about that current problem or to draw generalizations to other oil developments, this volume would be fully adequate.