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Departmental Comment

Congressional Affairs

Activities of the Second Session of the 92d Congress Relating to International Law and Foreign Affairs.

Debates in the 1972 Congress on foreign policy were largely centered on two aspects of what is basically constitutional law. The paramount issue of the first session of the 92d Congress, the relative war powers of the executive and legislative branches, was continued in the second session. There also appeared deep differences between the President and the Congress on the use of executive agreements instead of treaties to formalize international undertakings.

The Senate Foreign Relations Committee held hearings in May on the causes and origins of the war in Vietnam. It focused its attention on the President's decision to mine the harbors and ports of North Vietnam. Several scholars and former government officials were invited to testify. Much of the material for discussion was provided by the Defense Department's Compilation of "United States-Vietnam Relations 1945-67" (The Pentagon Papers), then declassified and published. Chairman Fulbright said, "Unfortunately the high ranking officials who were invited either refused to testify or backed out at the last moment." The Chief of the Pentagon's task force that prepared the Papers, Leslie H. Gelb, now a fellow at Brookings Institution, stated: "The United States is not the keeper of Vietnamese morality and it is wrong to perpetuate this war." James C. Thompson, Jr., of Harvard University, who was a Far-eastern expert in the Department of State 1961-1966, said that the decision to mine the North Vietnamese harbors compounded the tragedy of the last 25 years. On the origins of the war, Arthur Schlesinger, Jr., said, "the system failed dismally. It failed to provide any systematic and serious assessment of American stakes in Vietnam. It was terribly wrong in regard to Hanoi and the Viet Cong as the spearhead of Chinese aggression . . . the Vietnam adventure was marked much more by ignorance, misjudgment, muddle and

stupidity than . . . by efficiency, foresight, awareness and calculation.” Abbot Low Moffat, Chief of the State Department’s Division of Southeastern Affairs, 1945–1947, said, “We are reaping today . . . the tragedy of our fixation on the theory of monolithic aggressive communism. . . .”

The ninety second Congress, however, refused to challenge the President on the conduct of the war. Having left four Presidents with the decision to begin and continue the Vietnam War, the Congress left to President Nixon the decision of how and when to stop it. The Senate took its toughest stand but the House, as usual, supported the administration and refused to agree to a date for withdrawal.

War Powers

On April 13, the Senate passed S2956 defining the powers of the Congress and the President in decisions involving the Armed Forces in hostilities. This was the first time either house had undertaken to codify the war powers which were left vague by the Constitution. It was also the first step by the Senate in its effort to restore to Congress its share of constitutional powers over decisions involving war or peace which many Senators believe has been usurped by successive Presidents since World War II.

Despite opposition by President Nixon, the bill was supported by a broad coalition of Republicans and Democrats and was passed by a vote of 68 to 16. The chief sponsors of the bill were Senators Jacob R. Javits (R. N. Y.) and John C. Stennis, (D. Miss), the latter, the Chairman of the Armed Services Committee.

S2956 provided:

- (a) In the absence of a declaration of war by the Congress, Armed Forces could be committed to hostilities or to situations where imminent involvement in hostilities is clearly indicated by the circumstances, only:
- (1) To repel an armed attack on the United States or to forestall the “direct and immediate threat of such an attack.”
 - (2) To repel an armed attack against United States Armed Forces outside the United States or to forestall the threat of such attacks.
 - (3) To protect and evacuate United States citizens and nationals in another country if their lives were threatened.
 - (4) Pursuant to special statutory authorization by Congress (not to be inferred from any existing or future law or treaty unless special authorization were provided). Special statutory authority would also be required for assignments of United States military

personnel to assist a foreign nation's forces in hostilities or situations where hostilities were imminent.

- (b) That the President report promptly to the Congress the commitment of Armed Forces for such purposes.
- (c) A limit of thirty days for the involvement of United States forces unless the Congress by special legislation authorizes their continued use.
- (d) Congress, by act or joint resolution could terminate the use of the Armed Forces by the President before the end of the thirty day period.
- (e) Procedures to require prompt consideration in both houses of any bill or joint resolution authorizing or terminating the use of the Armed Forces by the President.
- (f) Made the act effective upon enactment, but exempted from its provisions any hostilities in which United States forces were engaged at that time.

The House passed an amended version of S2956, but it died in Conference at the end of the Session.

Executive Agreements

The Senate Judiciary Subcommittee on the Separation of Powers, chaired by Senator Sam J. Ervin, Jr., (D.N.C.), had hearings in April and May on S3475 which would require congressional consideration of all executive agreements.

In the years after World War II, executive agreements were increasingly used where treaties had formerly served. Many were kept secret, some even from the Congress, and several Senators regarded this as a major aspect of Presidential usurpation of their constitutional powers. The executive branch argued that the executive agreement was a useful and necessary instrument in the conduct of diplomacy by a major power under modern conditions of rapid communications and nuclear weapons.

As of January, 1972, the United States was a party to 947 treaties, and over 4000 executive agreements.

S3475, introduced on April 11 by Senator Ervin, was referred to the Judiciary Committee with the understanding that if approved, it would then be referred to the Foreign Relations Committee which was giving major attention to the subject.

The bill defined an executive agreement and required that each agreement be sent to both houses of Congress. If the President determined that disclosure would threaten national security, an agreement could be sent to

the Senate Foreign Relations Committee and the House Foreign Affairs Committee under an injunction of secrecy. Each agreement would go into effect 60 days after its transmittal to Congress, unless both houses adopted a concurrent resolution of disapproval.

At hearings begun on April 24, Senator Fulbright, Chairman of the Foreign Relations Committee, said that either house by itself should be able to reject an executive agreement. Since the House and Senate have differing views of international affairs, the requirement of a joint resolution would be a prescription for a stalemate which would permit every executive agreement to receive tacit approval.

Senator Clifford P. Case (R.N.J.), who had introduced four measures dealing with executive agreements approved by the Senate, said that executive agreements should be used only for relatively unimportant matters. He pointed out that the Congress is asked to pay the costs of such things as foreign bases and Korean mercenaries but is never able to exercise its constitutional responsibility of considering them in advance.

Senator Stuart Symington (D. Mo.), Chairman of the Foreign Relations Committee's Subcommittee on United States Security Agreements and Commitments Abroad, testifying in support of S3475, said that his subcommittee's investigation found that the United States now maintains 375 major bases and more than 3000 minor installations around the world, a large number of which were established under executive agreements or understandings. Many of these were unknown to most members of Congress.

Testimony in disapproval of S3475 characterized it as unworkable, unnecessary and to the extent that it covered agreements entered into pursuant to the sole executive authority of the President, unconstitutional.

The Legal Adviser of the Department of State, John R. Stevenson, asserted that the President's ability to resolve international differences by firm agreements with immediate binding effect is frequently of critical importance in obtaining and formalizing concessions from other governments. Mr. Stevenson had previously explained (October 21, 1971) the standards which guided the State Department in choosing the type of agreement for a given transaction.

A treaty is used:

1. Where the subject matter and treatment thereof is traditionally handled by treaty.
2. Where the subject matter and treatment thereof is not wholly within the delegated powers of Congress and is not solely within the constitutional authority of the President.
3. When the agreement itself is to have the force of law without

legislative action by the Congress, and the action contemplated is not solely within the President's constitutional authority.

4. When the agreement implies commitments affecting the nation as a whole.

5. When it is desired to give the utmost formality to the commitment with a view to requiring similar formality on the part of the other government concerned in the interest of long continued respect for its terms.

An executive agreement is used:

1. When the undertaking is made pursuant to or in accordance with existing legislation or a treaty.

2. When made subject to Congressional approval or implementation.

3. When made under and in accordance with the President's constitutional power.

No further action was taken on S3475.

It fell to the Senate Foreign Relations Committee to develop the bill which finally was enacted into law. Senator Clifford P. Case (R.N.J.) introduced S596 on February 4, 1971. Hearings were held during the first session. The bill required the Executive Branch to submit the texts of all international agreements to Congress within 60 days after execution. The Committee reported the bill at the beginning of the second session. On February 16, the Senate approved it by a vote of 81-0. Earlier, the Department of State opposed the measure, but when the Senate voted unanimously for it, decided not to oppose it further. The House passed the measure by a voice vote on August 14 and it was signed into law eight days later. P.L. 92-403.

The Moscow Agreements

Among the seven agreements which President Nixon and Soviet Communist Party Secretary Leonid L. Brezhnev signed in Moscow in May were the treaty limiting the deployment of anti-ballistic missiles and an executive agreement limiting for five years the number of offensive weapons to those already under construction or deployed. The treaty limited ABM systems to two designated areas in each country and the executive agreement also limited the number of missile submarines to be constructed.

The interim executive agreement was submitted for Congressional approval because a provision in the 1961 law establishing the Arms Control and Disarmament Agency required that any agreement to limit U.S. Armed Forces or armaments be approved by legislation or treaty.

The Senate adopted a resolution of ratification of the treaty on August 2. (Exh. L.)

H. J. Res. 1227 proposed to approve the interim agreement on offensive weapons. In the Senate, Senator Henry M. Jackson (D. Wash) offered an amendment requiring any future permanent treaty on offensive arms control to assure each country of rough numerical equality in inter-continental strategic forces. The interim agreement gives the Soviet Union a sizeable numerical edge which was thought to be offset by American technological superiority. Senator Jackson also added a stipulation that any Soviet action that threatened United States deterrent capability would be grounds for repudiating the interim agreement. Upon an understanding with the White House, the latter stipulation was dropped and there was substituted a statement that failure to negotiate an offensive arms treaty by 1977 would be grounds for repudiating the ABM treaty. The House accepted the Senate amendment and the Congress cleared H.J. Res. 1227 on September 25. P.L. 92-448.

Other Treaties approved by the Senate are as follows:

AGREEMENT WITH BRAZIL CONCERNING SHRIMP

*Ex. P (92-2) – Resolution of ratification
agreed to October 3, 1972*

Restricted the number of U.S.-flag vessels which may fish in the designated area during a single season to 325 shrimp boats; limited to 160 boats the number allowed to fish in the area at one time; required U.S. vessels to register with a United States agency and to carry a permit to fish; provided that the U.S. give \$200,000 to Brazil to aid Brazil in its enforcement responsibilities; and further provided that the U.S. compensate Brazil in the amount of \$100 for each day a U.S. shrimp vessel is under the control of Brazilian enforcement authorities due to a violation of this agreement.

AIRCRAFT SABOTAGE CONVENTION

*Ex. T (92-2) – Resolution of ratification
agreed to October 3, 1972*

Required the extradition or prosecution of persons who commit acts of sabotage or otherwise destroy aircraft or who endanger the safe flight of an aircraft by damaging it or destroying or damaging air navigation facilities.

**AMENDMENT TO STATUTE OF INTERNATIONAL
ATOMIC ENERGY AGENCY**

*Ex. C (92-1) – Resolution of ratification
agreed to October 17, 1972*

Increased the membership of the Board of Governors of the International Atomic Energy Agency from 25 to 35 for the purpose of

achieving more equitable representation on the Board for the countries of the lesser developed regions as well as to increase the representation of countries more advanced in the technology of atomic energy.

CONVENTION ESTABLISHING AN INTERNATIONAL
ORGANIZATION OF LEGAL METROLOGY

*Ex. I (92-2) – Resolution of ratification
agreed to August 11, 1972*

Established an International Organizations of Legal Metrology to promote international cooperation in the field of legal metrology which deals with standards for instruments and measurement techniques involved in the legal determination of quantity and quality.

CONVENTION FOR THE SAFETY OF LIFE
AT SEA AMENDMENTS

*Ex. O (92-1) – Resolution of ratification
agreed to October 3, 1972*

Required that specified navigational equipment be carried aboard certain vessels; specified conditions of operation that must be met by vessels using automatic pilots; required that all ships subject to the Convention carry adequate and up-to-date nautical publications; and improved the requirements for firemen's outfits and personal equipment in cargo ships as well as requirements for lifebuoys, life jackets, radio installations, and shipborne navigational equipment.

CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE
CAUSED BY SPACE OBJECTS

*Ex. M (92-2) – Resolution of ratification
agreed to October 6, 1972*

Provided reasonable assurance of the payment of fair and prompt compensation in the event that a space object of a State causes injury or damage to the citizens of another State.

CONVENTION ON TAKING OF EVIDENCE ABROAD IN CIVIL
OR COMMERCIAL MATTERS

*Ex. A (92-2) – Resolution of ratification
agreed to June 13, 1972*

Made the employment of letters of request a principal means of obtaining evidence abroad; improved the means for securing evidence abroad by increasing the powers of consuls and by introducing in the civil law world, on a limited basis, the concept of commissioners; provided means for

securing evidence in the form needed by the court where the action is pending; and reserved all more favorable and less restrictive practices arising from internal law, internal rules of procedure, and bilateral or multilateral conventions.

CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT, AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY

*Ex. B (92-2) – Resolution of ratification
agreed to August 11, 1972*

Prohibited the importation of stolen cultural property in order to combat the increasing illegal international trade in national art treasures and established a system of export certification for cultural property designated by each member country as being of importance.

CONVENTION TO PREVENT AND PUNISH ACTS OF TERRORISM

*Ex. D (92-1) – Resolution of ratification
agreed to June 12, 1972*

Condemned crimes of violence against officials of foreign states and international organizations as common crimes regardless of the motive for which they were committed and thus excluded such crimes, for purposes of extradition and asylum, from being treated as political offenses for which diplomatic or territorial asylum is often extended.

EXTRADITION TREATY WITH ARGENTINA

*Ex. F (92-2) – Resolution of ratification
agreed to June 13, 1972*

Listed 30 extraditable offenses, including those relating to narcotics and aircraft hijacking; permitted extradition in the case of conspiracy to commit any of the offenses mentioned; provided that if one of the parties refuses to extradite a national of the other party, then that party is obliged to undertake to try the individual requested when the offense is punishable under its own laws and it has appropriate jurisdiction; provided for judicial cooperation in criminal matters by the execution of letters rogatory; and contained other provisions.

INTERNATIONAL PLANT PROTECTION CONVENTION

*Ex. D (84-2) – Resolution of ratification
agreed to June 12, 1972*

Promoted international cooperation in controlling pests and diseases of plants and plant products and in preventing their introduction and spread across international boundaries.

PARTIAL REVISION OF THE RADIO REGULATIONS
RELATING TO SPACE TELECOMMUNICATIONS

*Ex. E (92-2) – Resolution of ratification
agreed to June 13, 1972*

Revised the Radio Regulations in regard to the use of space telecommunication techniques, radio frequency allocations, technical criteria, and administrative procedures.

PROTOCOL TO AMEND SINGLE CONVENTION ON
NARCOTIC DRUGS

*Ex. J (92-2) – Resolution of ratification
agreed to September 18, 1972*

Provided for a three-fold approach to the problem of preventing illicit traffic in narcotic drugs and the abuse of those drugs: (1) by strengthening the international control machinery to enable it more effectively to uncover and curb both the excess and the illicit cultivation of the opium poppy, as well as the illicit production, manufacture, and trafficking in narcotic drugs; (2) by expanding the provisions of existing bilateral extradition treaties with a view to assuring that offenders of narcotic laws will find no haven from prosecution; and (3) by establishing guidelines for avoiding drug abuse and for the treatment of individuals.

PROTOCOL TO NORTHWEST ATLANTIC
FISHERIES CONVENTION

*Ex. C (92-1) – Resolution of ratification
agreed to October 3, 1972*

Provided a more expeditious method of amending the 1949 International Convention for the Northwest Atlantic Fisheries by allowing amendments to the convention to enter into force 120 days after the approval of only three-fourths of the contracting governments unless a contracting government files an objection within 90 days of the date of notification by the depositary government.

SEABED ARMS CONTROL TREATY

*Ex. H (92-1) – Resolution of ratification
agreed to February 15, 1972*

Provided that the parties undertake not to emplant or emplace nuclear weapons or other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof beyond the outer limit of a "seabed zone" as defined therein.

TREATY WITH HONDURAS ON THE SWAN ISLANDS

*Ex. H (92-2) – Resolution of ratification
agreed to June 12, 1972*

Settled longstanding differences between the United States and Honduras resulting from their conflicting claims to the Swan Islands.

UNIVERSAL COPYRIGHT CONVENTION AS REVISED AT PARIS
ON JULY 24, 1971, TOGETHER WITH TWO RELATED PROTOCOLS

*Ex. G (92-2) – Resolution of ratification
agreed to August 14, 1972*

Made limited compulsory licensing systems available for the benefit of developing countries with respect to translations and reproductions in order to satisfy their practical needs for ready access to literary, scientific, and artistic works, without weakening the structure and scope of copyright protection presently offered by the developed countries under the two multilateral conventions on copyright, the Universal Copyright Convention, and the Berne Convention (to which the United States is not a party).