

# Departmental Comment

## Congressional Affairs

*Activities of the Second Session of the 91st Congress Relating to International Law and Foreign Relations*

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The significance of the activities in the field of international relations of the prolonged second session of the 91st Congress cannot be gauged by the number of bills enacted, or treaties approved, by the Senate. In this area, the record of the Congress is largely a reflection of the work of the Senate Foreign Relations Committee. In summarizing the activities of that committee, its Chairman, Senator J.W. Fulbright, stated:<sup>1</sup>

The legislative history of the Committee on Foreign Relations during the 91st Congress somewhat resembles an iceberg. Few of the significant developments of this period appear in the itemized list of measures approved by the Committee . . . Most of the Committee's efforts were devoted to redefining the Constitutional relationships between the Executive and Legislative Branches in the field of foreign policy.

For many years the role exercised by the Committee on Foreign Relations was that of the unquestioning advocate of policies and programs submitted to the Senate by the Executive Branch of the Government. Regardless of the political complexion of the Executive or the Congress, the Committee—albeit with minor exceptions—tended to go along with the “facts” presented, the analysis of those facts, and the policy conclusions drawn therefrom by the Administration. Unquestioningly the Committee accepted Executive Branch judgments on what should be secret, what should be Executive Agreements, and where troops should be sent in foreign lands. The inquiring attitude was lacking. The emphasis in the Senate's role in “advice and consent” was on consent. In short, for many years the Committee *got along* with the Executive Branch of the Government because it *went along*.

This role has been changing. The Committee has become aware that it is no service to the nation to accept without question judgments made by the Executive. Indeed, many of our current difficulties might have been avoided if we had taken time to stop, look and listen.

The Committee has during this Congress for the first time in decades

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<sup>1</sup>Summary of Activities of the Committee on Foreign Relations, 91st Congress, Congressional Record, December 30, 1970; p. S 21477.

sought to exercise a truly independent critical judgment of proposals on foreign and defense policy matters. The cozy relationship has been replaced by questions.

Senator Symington put the constitutional roles of the Executive and the Senate very clearly in his final report on Security Agreements and Commitments Abroad. He wrote: ". . . although the Constitution makes the President Commander-in-Chief and gives him authority to negotiate treaties and nominate Ambassadors, his role is not that of sole determination of foreign policy, but of conducting foreign policy."

The first session of the 91st Congress did not complete legislative action on a number of measures. Appropriation bills for foreign assistance and related programs (H.R. 15149), for the Peace Corps and for the International Development Association required the attention of the second session. Several resolutions on the Vietnam war had been introduced. S.3000 submitted by Senator Charles E. Goodell on September 25, 1969 set a deadline of December 1970 for a troop pullout. Other resolutions proposed more rapid, or immediate pullouts. S. Res. 268 of October 8, 1969 called for termination of aid to Saigon unless political reforms were undertaken. A bi-partisan group of 109 members in the House, on October 6, 1969, introduced H. Con. Res. 564, commending the President's withdrawal policy. S.J. Res. 166, which proposed repeal of the 1964 Tonkin Gulf resolution, and three other measures delegating Emergency powers to the Executive, was introduced on December 8, 1969.

After cuts in authorization (S.2546) and appropriations (H.R. 15090) for chemical-biological warfare (CBW), several members requested the President to resubmit to the Senate a 1925 Geneva protocol banning first use of war "of asphyxiating, poisonous or other gases and of bacteriological methods of warfare." On November 25, 1969, the President announced that he would do so.

On November 18, 1969 the President sent his trade bill to the Congress. He requested: 1. authority to make modest reductions in tariffs for which his previous authority lapsed with the expiration of the 1962 Trade Expansion Act; 2. repeal of the American Selling Price (ASP) system of fixing duties; 3. changes in current escape-clause provisions to make it easier for industries adversely affected by import competition to obtain relief through temporary import restrictions; 4. liberalization of adjustment-assistance provisions to allow workers and individual firms to receive financial aid if they suffered injury from imports; and 5. expansion of Presidential authority to retaliate against nations erecting "unfair" barriers against United States exports. The President also announced, on October 31, 1969, that he would seek legislation allowing preferences for imports from Latin American countries.

Trade quotas were demanded by substantial numbers of members of

Congress. Restrictions on imports of textiles, footwear, dairy products, meat and iron and steel products were particularly stressed. S. 2885 would establish quotas on textiles and other products, but the first session took no action in order to give the Administration time to work out voluntary agreements with other nations. However, a Senate amendment to the tax reform bill (H.R. 13270) would have authorized the President to impose import restrictions to protect American industries. The amendment was dropped from the final bill.

As the second session began, it appeared that the mood of the 91st Congress had changed from emphasis on "free trade," which marked the tariff cuts of the Kennedy Round, to the "fair trade" of the Nixon-Administration policy.

The new role of the Foreign Relations Committee, and its approval by the Senate, is illustrated by the action on the extension of the Spanish base agreement. Disclosure, in February 1969, that the Defense Department was conducting negotiations with Spain for a renewal of the base agreement suggested that important new commitments were being considered. In order to make sure that foreign policy considerations and the prerogatives of the Senate were given appropriate weight, the Committee held five executive sessions during the period March 1969-April 1970, at which the Executive Branch was made fully acquainted with the Committee's views, particularly that the proposed commitments were of such a nature as required their submission to the Senate in treaty form. Unsuccessful in efforts to convince the Executive, the Senate adopted, on December 11, 1970, S.Res. 469, offered by Senator Frank Church, expressing the sense of the Senate that the understanding renewing the base agreement (Agreement of Friendship and Cooperation Between the United States and Spain) does not constitute a commitment by the United States to Spain.

The incursion of United States combat troops into Cambodia in May 1970, resulted in a major confrontation between the Senate and the Executive over the extent of our involvement in the Indo-Chinese war. Senators John Sherman Cooper and Frank Church sponsored an amendment to the Military Sales Act of 1970 (H.R. 15628), to prohibit the involvement of combat troops, advisers or mercenaries into Cambodia, thereby broadening an existing limitation on sending American combat troops into Laos or Thailand. A similar Cooper-Church amendment was made to the Foreign Aid Supplemental Act of 1970 (H.R. 19911). The former bill was agreed to on December 31 (P.L. 91-72) and the latter on December 22 (P.L. 91-652).

In the report of the Senate Democratic Policy Committee on the Ac-

complishments of the 91st Congress,<sup>2</sup> the majority leader, Senator Mike Mansfield, said:

Cooper-Church was a necessary restraint on a pendulum which had swung the control of this nation's affairs abroad too far away from the Constitutional purview of the Congress. In truth, it was a restraint on a pendulum which was moving ever further away even from the control of our elected President.

Within the context of the Cooper-Church resolution and its several variants, came S.Con. Res. 64 proposed by Senator Charles McC. Mathias, Jr., with Senators Jacob K. Javits, Mike Mansfield, Claiborne Pell and William B. Spong, Jr. The resolution proposed to terminate the joint resolution entitled "Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia," authorizing the use of the armed forces in certain areas outside the United States—commonly known as the Gulf of Tonkin Resolution. The Senate adopted the resolution on July 10, 1970, and it was subsequently incorporated in the Military Sales bill (H.R. 15628) passed on December 31 (P.L. 91-672).

The Senate continued its examination into the relationship between defense policy and foreign policy and, as it manifested during the first session, showed concern over the extent of military involvement in foreign relations. In addition to those on the renewal of the Spanish base agreement, there were hearings on chemical and biological warfare, military policy and programs in Latin-America, underground weapons tests, ocean space and on Vietnam.

In its more thorough examination of Executive proposals and statements of fact, the Foreign Relations Committee claimed that information supplied by the Executive has sometimes been incomplete or so highly classified that in its sanitized form it was virtually useless. To augment its information, the Committee from time to time sent members of its staff abroad to collect facts from official and private sources. Also, in a move for better communication, and to strengthen the role of the State Department, the Committee suggested, early in the first session, that the Secretary of State present to the Congress each year a posture statement similar to that submitted by the Department of Defense. This suggestion apparently stimulated the President's foreign policy report to the Congress early in the second session. He promises another to the 92nd Congress.

In concluding his statement on the work of his Committee for the 91st Congress, Chairman Fulbright said:<sup>3</sup>

... I should note that Secretary Rogers, despite some reluctance to engage in public dialogue with the Committee on foreign policy issues, has shown

<sup>2</sup>Congressional Record, January 2, 1971, p. S 21736.

<sup>3</sup>*Supra*, n. 1, p. S 21478.

understanding of our desire to exercise an independent judgment on these vital foreign-policy issues. Unlike the previous administration, the present administration did not object to the National Commitments resolution, or to repeal of the Tonkin Gulf and similar resolutions. It has attempted to meet the Committee's criticism with respect to bestowing the personal rank of ambassador or minister on large numbers of persons not subject to confirmation. These are examples of improved give-and-take between the Committee and the administration. I hope they will set a pattern of new cooperative relationships for the 92nd Congress.

The Committee does not seek domination of foreign policy as some have suggested. It is searching for means to establish a balance between the Executive and Legislative branches of the Government. The constitutional balance which has been lost is largely the result of a half century of wars when there has been a premium on quick, decisive, autocratic action. It is hard for a democracy to survive in time of war.

Gibbon wrote in the *History of the Decline and Fall of the Roman Empire*, that the "principles of a free constitution are irrevocably lost when the legislative power is dominated by the executive.

The relatively negligible place in the work of the Senate represented by its consideration of treaties did not pass unnoticed. Chairman Fulbright remarked in his report:<sup>4</sup>

In past decades treaties were the main fare of the Committee on Foreign Relations. But times change. Not only does the Committee have legislative responsibilities broader than in the past, but the earlier Committee role of acquiescence in Executive proposals has led to a deterioration of the use of treaties as a means of concluding significant agreements. Thus, the Committee's record on treaties is more noteworthy for omissions than approvals, a situation the new Committee approach may change.

Nevertheless, it is interesting to reflect that of the 27 treaties submitted by the present administration, 10 had been negotiated by previous administrations (one indeed by the Coolidge administration); another 8 were routine bilateral extradition, double taxation and consular conventions; 5 were concerned with trivia; one terminated a 1914 canal route treaty; and only 3 could be said to be breaking some new ground—those dealing with oil pollution on the high seas.

In fact, I voted "present" on one of the treaties, not because I was against it on the merits—it involved a minor payment to Canada for flood control benefits—but because I wanted to register my opposition to the shabby use of the treaty-making process. The significant U.S. commitments that should be studied and debated by the Senate, were not submitted as treaties. Perhaps, as with the Congress' power to declare war, the shared treaty-making process is becoming atrophied. During the last Congress, the Senate approved 42 treaties; during this Congress the score is 20. And of these 20 treaties, which are listed in the summary at the end of my remarks, only one is worthy of special note—the Nonproliferation treaty submitted by the Johnson administration.

Treaties approved by the Second Session are as follows:<sup>5</sup>

<sup>4</sup>*Supra*, n. 1, p. S 21478.

<sup>5</sup>Report of the Senate Democratic Policy Committee by the majority leader, Congressional Record, January 2, 1971, p. S 21755, 6.

1. *Convention on the privileges and immunities of the United Nations*: Accords certain privileges and immunities to the United Nations, as an organization, and to the representatives of its Members, United Nations officials, and experts on missions for the United Nations. Ex. J. (91st, 1st). Resolution of ratification agreed to 3/19/70.

2. *Extradition treaty with New Zealand*: Covers 32 extraditable offenses including, for the first time, aircraft hijacking and offenses relating to narcotics and other dangerous drugs. Ex. C (91st, 2d). Resolution of ratification agreed to 5/27/70.

3, 4 *Intellectual and industrial property conventions*: Both Conventions refer to patents and copyrights. The Convention Establishing the World Intellectual Property Organization is to be responsible for the overall administrative activities of related organizations and the promotion of the protection of intellectual property on a worldwide basis, and the Paris Convention for the Protection of Industrial Property revised the Industrial Property Convention to bring its finances and structure and that of its Secretariat into line with the more modern principles of international organization. Ex. A (91st, 1st). Resolution of ratification agreed to 2/28/70.

5. *Protocol to the Northwest Atlantic Fisheries Convention*: Provides for the removal of the Convention's restrictions relating to (1) the number of commissioners on each of the special panels established by the Convention; and (2) the kinds of measures which the International Commission for the Northwest Atlantic Fisheries may propose in order to achieve optimum utilization of fish stocks in the Convention area. Ex. I (91st, 1st). Resolution of ratification agreed to 3/19/70.

6. *Radiotelephone stations agreement with Canada*: Provides for the reciprocal issuance of permits by the United States and Canada to licensed private operators of radiotelephone stations of one country while temporarily in the jurisdiction of the other. Ex. A (91st, 2nd). Resolution of ratification agreed to 5/27/70.

7. *Supplemental extradition convention with France*: Principally designed to add to the list of extraditable offenses that of aircraft hijacking, and to clarify and expand the offenses relating to narcotics, which now will include hallucinogenic and other dangerous drugs. Ex. F (91st, 2d). Resolution of ratification agreed to 9/21/70.

8. *Tax convention with Belgium*: This convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income relates to such matters as the definition of a permanent establishment, the treatment of income from real property, business profits, dividends, interest and royalties, and the taxation of social security payments and private pensions and annuities. Ex. I (91st, 2d). Resolution of ratification agreed to 11/25/70.

9. *Tax convention with Finland*: This convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and property covers such matters as the definition of a permanent establishment, taxes on dividends, interest, royalties, income from real property, capital gains, private pensions, alimony, annuities, social security payments, income from the operation of ships or aircraft and the taxation of industrial or commercial profits, personal service income from teaching or research, and tax exemptions for students and trainees. Ex. E (91st, 2d). Resolution of ratification agreed to 11/25/70.

10. *Tax convention with the Netherlands*: This convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to

taxes on estates and inheritances relates to such matters as the tax treatment of immovable property and property forming part of a permanent establishment, taxation on the basis of domicile and citizenship, and credits for taxes imposed by either country. In addition, there is a related protocol which sets forth understandings regarding certain matters of interpretation and application of the convention. Ex. G (91st, 1st). Resolution of ratification agreed to 11/25/70.

11. *Tax convention with Trinidad and Tobago*: This convention for the avoidance of double taxation, the prevention of fiscal evasion with respect to taxes on income, and the encouragement of international trade and development relates to such matters as the definition of a permanent establishment, taxes on business profits and the income from the operation of ships or aircraft, interest, royalties, and dividends. The treaty was approved by the Senate subject to the following reservation: "The Government of the United States does not accept article 7 of the convention relating to tax deferral for technical assistance." Ex. D (91st, 2d). Resolution of ratification agreed to 11/25/70.

In the area of foreign relations, the second session also approved 21 bills and joint resolutions and 10 concurrent and senate resolutions.