Who Makes American Foreign Policy?

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The debate over who makes American Foreign Policy is never ending. American public officials frequently disagree on this question. The matter is often confusing to American citizens. Trying to find an answer to the question must be frustrating to persons in other nations, especially those who negotiate with or do business with the United States.

There is no simple answer to this question. Indeed, those who drafted the American Constitution did not intend there to be a simple solution to the question. They were concerned about concentrations of power, regardless whether the power was in one individual or in one institution. Disbursal of power under a system of checks and balances was the goal.

Powers are distributed among the three different branches of the national government: the Congress, the President, and the judiciary. Each branch has independent powers, but also each branch operates as a check on the other branches. This system ensures that there will be broad participation in decision- making, but it can also mean deadlock and delay if the different branches are in disagreement.

Division of power does not occur only at the national level. The federal system of government means that power is shared between the national government in Washington and each of the fifty states. The national government can exercise only those powers that are enumerated in the Constitution. All remaining powers belong to the states. Again it is not unusual for there to be disagreement over what powers properly belong to the national government and what powers properly belong to the states.

We shall examine the role of each of these organs of government in the making of American foreign policy and look at how some questions of foreign policy have been resolved. The solution to the question of who makes foreign policy requires us to look, first, to the American Constitution, and, second, to historical experience. The American Constitution is a legal document that is binding on all members of the government. The American Constitution is the final authority on who can exercise power.

But frequently the American Constitution does not provide a clear answer to how power is to be properly exercised. In many instances, examining historical practices can be helpful. While historical practices cannot change the law in the Constitution, historical practices can provide a guide to how power is actually exercised in the United States within the confines of the Constitution.

Hence power in the United States consists of a blending of law and policy, a blending of theory and pragmatism. Considerable leeway exists for those who want to exercise power, but this leeway is ultimately circumscribed by limitations in the Constitution and political reality.

The President

The most obvious symbol of American foreign policy is the President. The Constitution is vague about the President's powers over foreign affairs. Article II vests the executive power in the President. It also makes the President the Commander in Chief of the Armed Services. The President can make treaties and appoint ambassadors, public ministers, and consuls, but only with the advice and consent of two thirds of the Senate. The President can also receive ambassadors and public ministers from other nations.

Historical experience confirms that the President has wide-ranging powers in the area of foreign affairs. While the treaty making power is shared with the Senate, the President has independent powers to make executive agreements with other nations without consulting Congress. These agreements are binding on the United States and are recognized as law under the Supremacy Clause of the Constitution. Over the years, the Congress has acquiesced in many of these executive agreements, and little law has been developed concerning whether an executive agreement can conflict with other legislation passed by Congress or whether the President can use an executive agreement to by-pass the more formal process of treaty ratification.

In 1816, the United States Senate Committee on Foreign Relations reported that:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution.

The pragmatic reasons for lodging the power of foreign affairs in the President are readily apparent. The United States Supreme Court has explained the presidential role in foreign affairs as follows:

It is quite apparent that if, in the maintenance of our international relations, embarrassment – perhaps serious embarrassment – is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through

negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

The independent role of the President in foreign affairs may be best illustrated by the secret negotiations that produced the trips of President Nixon and his Secretary of State Henry Kissenger to China in 1971 and 1972, and by President Carter's decision, over significant congressional opposition, to recognize the People's Republic of China and to terminate relations with Taiwan in 1979.

The Congress

From what has been said, one would assume that the President's powers over foreign affairs are immense, and indeed they are. Nonetheless, if Congress chooses to exercise power, it can control or check virtually everything that the President does. As already noted, the President needs the support of two-thirds of the Senate to ratify a treaty or to confirm his appointments of ambassadors or public ministers. A good example is the Senate's rejection of the Versailles Treaty after World War I. President Wilson had persnaded a skeptical Europe to include the League of Nations in the Versailles Treaty, but the Senate refused to ratify the Treaty because of its reluctance to involve the United States in foreign disputes. Article 1, Section 8 of the Constitution gives Congress legislative power over foreign commerce and over immigration to the United States. Congress has power to define and punish piracies and felonies committed on the high seas and against the Law of Nations, to declare war, and to regulate the military. These are all extremely important powers. But perhaps the most important power of Congress is its power over the purse. Virtually everything a President does costs money, and a President cannot spend money that is not authorized by Congress. Hence if Congress does not like what a President is doing, it can simply refuse to appropriate money to pay for it.

Relationships between the President and Congress vary from one administration to another. A popular President can exercise much power over foreign affairs. A President that has little support in Congress may find it difficult to accomplish anything.

However, congressional power is not absolute. The Constitution expressly prohibits Congress from imposing a tax on exports from the states. All legislation passed by Congress is subject to an executive veto. If the President vetoes a bill, it then

must be repassed by a two–thirds majority of both Houses of the Congress to become law. A presidential veto is thus a difficult obstacle for Congress to overcome.

In summation, the system works best when the President and Congress agree on a foreign policy.

The tension between Congress and the President is best illustrated by looking at the war power. The Constitution states that only Congress can declare a war. But this does not render a President powerless. The President is the Commander in Chief of the Armed Services. Many military actions have been undertaken by American presidents without a formal declaration of war by Congress. The Korean War and the Vietnam War are the most notable of the presidential wars that were waged without a formal congressional declaration of war.

Once a President takes the country into a war, it can prove politically difficult for Congress unilaterally to stop the conflict, whether by direct action or by refusing to appropriate money to fight the war. Therefore, after the Vietnam War, Congress hoped to prevent future problems by passing the War Powers Resolution, which gives the President power to introduce American military troops into armed conflicts but requires him to report to Congress within forty eight hours. The President must terminate the hostilities within sixty days unless Congress authorizes the action or at anytime if Congress so directs.

Debate over the constitutionality of the War Powers Resolution has been intense. Those who believe in strong presidential powers argue that the resolution unconstitutionally restricts presidential power and that Congress cannot by–pass the President's veto power by simply passing a resolution directing the President to remove troops from hostilities. On the other hand, those who favor congressional power argue that the War Powers Resolution is unconstitutional because it purports to give the President power to commit troops to military operations when not previously authorized by Congress. Those who favor the Resolution argue that it creates a balance between the President and Congress that is consistent with the Constitution's framework.

Presidents have not liked the War Powers Resolution. Congress adopted the Resolution over President Nixon's veto. President Bush invaded Panama and deployed troops to Saudi Arabia to counter an alleged Iraqi invasion without prior congressional authorization. Nonetheless, Bush did finally seek congressional authorization before he began the bombing of Iraq and before he sent ground troops into battle against Iraqi troops to „liberate" Kuwait. The Congressional debate over the Gulf War was just the kind of consultation between the Congress and the President that the Constitution requires.

Professor Louis Henkin, one of the leading scholars in the United States on presidential powers, has summarized the presidential and congressional roles in foreign affairs as follows:

In foreign affairs, the President represents the people of the United States to the World. Congress represents the people at home, the different regions, groups, constituencies, and interests (general and special). And the representative functions of the President and Congress are different. The President leads and initiates; Congress deliberates, legislates, confirms (or rejects); Congress can also anticipate and regulate, even in foreign affairs. The presidency is confidential, classified; Congress is open and more accessible for citizen participation. Both are accountable, but the President's accountability is essentially plebiscitarian quadrennially. Congress – its members – are accountable directly, daily.

The Judiciary

The judiciary plays a unique and important role under the constitutional system that prevails in the United States. In matters of foreign affairs, Article III of the United States Constitutional allows the federal courts to hear cases arising under the Constitution, laws and treaties of the United States, to hear cases affecting ambassadors, public ministers and consuls, to hear cases of admiralty and maritime jurisdiction and to hear cases between a state, or a citizen thereof, and foreign states, citizens, and subjects. The federal courts, and ultimately the United States Supreme Court, are the final interpreters of the Constitution and can protect the rights of individuals against unconstitutional actions of executive officers or unconstitutional acts passed by Congress.

Despite these broad powers, the federal courts are often reluctant to decide questions involving United States foreign relations, largely on the ground that they involve questions of policy best left to the political branches of the government.

Justice Brennan summarized the judiciary's approach to questions of foreign affairs in the case of **Baker v. Carr**, where he stated:

[Issues of foreign affairs] frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature;...[M]any such questions uniquely demand single–voiced statement of the Government's views....[However,] it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. The United States Supreme Court has held that American citizens whose constitutional rights have been violated by a treaty can obtain redress through the courts. In **Reid v Covert**, where a treaty between the United States and Great Britain purported to deprive a United States citizen of her right to trial by jury, Justice Black declared that „No

agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."

However, more recently, the United States Supreme Court has held that a citizen of a foreign country who is kidnapped by American agents and brought to the United States for trial cannot claim the protection of the United States Constitution against the acts of United States agents committed outside of the United States.

The Foreign Sovereign Immunities Act, passed by Congress in 1976, limits the instances when foreign governments can be sued in United States courts. An important exception is when the case involves a commercial activity carried on in the United States by a foreign state. Foreign states can be sued in the United States courts for their commercial activities carried on in the United States.

The United States Supreme Court narrowly construed the commercial exception to the Foreign Sovereign Immunities Act in a case involving Saudi Arabia. Saudi Arabia recruited an American worker in the United States to come to Saudi Arabia to work. The worker alleged that while he was in Saudi Arabia, he made a work-related complaint and that he was dismissed from his job, arrested by Saudi agents, and tortured. He sued the Saudi government for damages in the United States courts, but the Supreme Court rejected his claim because his torture did not arise from a commercial activity carried on by the Saudi government in the United States.

A separate federal statute purports to give the United States courts jurisdiction of cases brought by citizens of other nations for a tort committed in violation of the Law of Nations or a treaty of the United States. In **Filartiga v Pena–Irala**, a lower federal court held that it had jurisdiction to decide a damage claim brought by a citizen of Paraguay against a former Paraguayan police official who was residing in the United States for the torture and death in Paraguay of the Paraguayan citizen's son. The court held that it had jurisdiction because torture violated the Law of Nations and the Law of Nations is considered to be part of the federal common law enforceable in the United States courts.

The States

The national government has complete control over foreign affairs. This power of the national government over foreign affairs exists apart from any of the affirmative grants in the Constitution. The Constitution expressly prohibits the states from entering any treaty, alliance or confederation with a foreign power or issuing Letters of Marque and Reprisal. The states may not, without the consent of Congress, tax imports or exports, except what may be absolutely necessary for executing their inspections law. Nor may the states, without the consent of Congress, keep troops in time of peace, enter into any agreement or compact with a foreign nation, or engage in war, unless actually invaded or imminently threatened with invasion.

These provisions effectively exclude the states from making foreign policy. For instance, in **Zschernig v Miller**, the Supreme Court struck down an Oregon law that required a probate court to inquire „into the type of governments that obtain in particular foreign nations" before allowing a citizen of a foreign nation to inherit property from a citizen of the state of Oregon. The Oregon Probate Court refused to allow a citizen of former East Germany to inherit property from a resident of Oregon because East Germany did not allow reciprocal rights to Americans to inherit from East Germans.

The Court held that the Oregon law was „an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." The Court struck down the law even though the United States State Department had given an opinion that the statute had almost no effect on United States foreign policy.

However, despite the complete control over foreign affairs by the federal government, states can and do make decisions that effect foreign policy and trade. Although the federal government regulates foreign commerce, the states retain their police powers to regulate the health and safety of their citizens. Hence states can pass inspection laws to improve the quality of goods. They can also pass quarantine laws and health laws to protect their citizens. Nonetheless, if these policies intrude too deeply into matters of federal concern or conflict with federal statutes or regulations, they will be held unconstitutional.

A distinction may be drawn between situations where a state is regulating private businesses and industries and when a state is itself participating in the market as a buyer or seller. In the latter case, the courts have given greater leeway to the states to make their own policies that do not conflict with federal statues and regulations.

Although the states retain broad taxing power over property or activities within the state, the Supreme Court has held that when a state tax risks the possibility of multiple taxation by foreign powers or impairs federal uniformity, it will be struck down. Thus, in **Japan Line, Ltd v. County of Los Angeles**, the Court held that California could not impose an apportioned **ad valorem** property tax on a Japanese shipping company's cargo containers that were temporarily present in California. The containers were in fact taxed by Japan, and the Court held that the tax undermined the Customs Convention that the United States had signed with Japan.

However, in a later case, **Container Corporation of American v Franchise Tax Board**, the Court allowed California to tax the income of a domestic corporation located in California, including income derived from its foreign subsidiaries. Some of the income was also taxed by foreign nations, but the Court held that the apportionment formula used by California was fair, even if it did not completely eliminate multiple taxation, and that there were no conflict with any specific federal

policy.

A Case in Point

The complexity of American law is best illustrated by the difficulty the United States had in the 1980's to formulate a policy towards South Africa. During the 1980's, many Americans opposed South Africa's Apartheid policies and wanted the United States to cease investing in the South African economy until South Africa improved its racial policies. The Reagan Administration opposed the divestment efforts, arguing that there were better, more constructive ways to encourage South Africa to relax its racial policies.

When the federal government did not act to require divestment, many states and local governments passed laws and ordinances to divest their securities held in corporations doing business in South Africa. They also acted to cease buying goods or services from corporations that did business in South Africa. Critics of these laws argued that the states were intruding themselves into foreign affairs, an area open solely to the federal government. Supporters of these laws argued that they only incidentally affected foreign commerce and that the states were acting as market participants rather than market regulators in deciding how state funds were to be invested and what companies they would do business with.

No judicial decision was rendered regarding the legality of these actions because the United States Congress quickly became involved. Congress passed an Anti-Apartheid Law to establish a national prohibition on certain imports and exports and business dealings with South Africa. The President vetoed this law, but his veto was overridden by a two thirds vote of both Houses of the Congress. In the meantime, the President, hoping to thwart more drastic legislation, signed an executive order that attempted to mobilize the private sector to influence racial relations in South Africa.

These events demonstrate how the different segments in American government can effect foreign policy. Actions taken by the states and Congress moved the President to modify his own position, and the actions by the President clearly modified positions popular in Congress and in the states. The final action probably reflected the consensus of most Americans.

Conclusion

The President is the spokesperson for United States foreign policy. But the President does not act alone in making that policy. The President operates within the legal constraints of the Constitution and within the political constraints defined by public opinion. Presidents that can marshall political opinion behind them will speak with authority. Presidents whose policies are unpopular will be in trouble and their words may ring hollow.