Shared Powers: The Constitutional Setting

(外交権の分担 ── 合衆国憲法の場合 ──)

Xin, Qiao (喬新)

Table of Contents

INTRODUCTION

In a sense, democracy and the making of foreign policy are somewhat contradictory to each other. According to the principles of democracy, the decision-making process should be open to the participation of as many people as possible. However, the qualities needed for foreign policy-unity, secrecy, information and expertise about foreign situations, and quickness to act-require, on the contrary, strict control by a small group. As a result, the question of what role the legislature should play in regard to foreign policy has become a dilemma for democratic governments. On the one hand, because the legislature represents the people by providing different sentiments, opinions, and values of the society with an opportunity of free play and participation, it should certainly be an active partner with the executive in foreign policy-making and conduct. On the other hand, as many observers have noted, foreign policy, if intruded by the legislature, will suffer from a disaster.

Out of such a consideration, many legislatures in the democracies play a relatively minor role in foreign policy. However, the United States makes and conducts its foreign policy in a unique method. Its legislative branch, namely the Congress, enjoys great power not only in domestic affairs but also in foreign affairs.

This thesis focuses upon the role played by the U.S. Congress in external policy-making, as well as upon developments in regard to the internal structure of Congress and the global agenda that have promoted the congressional participation in the foreign policy process. My basic argument in this thesis is that the principles of liberal democracy should be applied not only to domestic but also to foreign policy. This means that the legislature should not be excluded from the foreign policy process but rather that it should have enough power to perform its function of checking the president both in domestic and foreign policy-making. At the same time, such a legislature is not a liability but rather an asset to the foreign policy-making.

This is the second chapter of my thesis. In the previous chapter, I introduced the general feature of the contradiction between democracy and foreign policy. The comparative study in chapter 1 between Britain and the United States concerning the method of foreign policy conduct has provided us the fact that the U.S. Congress has been playing a significant role in history in the field of foreign policy despite its periodical decline and resurgence. Then in this chapter, I try to analyze the U.S. Congress from the constitutional perspective: what foreign policy powers it enjoys and why it does.

☆☆☆☆☆

The Constitution of the United States provides a cornerstone for the study of American politics. It is of great significance to know what the Constitution tells about power distribution among branches of government, particularly between the executive and the legislative. But reading it, one may find that it says very little about who shall make foreign policy. Arthur Schlesinger has characterized the Constitution as "cryptic, ambiguous, and incomplete" in its allocation of powers affecting foreign policy.(1) Edward S. Corwin even called it "an invitation to struggle for the privilege of directing American foreign policy".(2)

"Ambiguous" as it is, "an invitation to

struggle" or not, it does tell something on foreign policy-making. At least, it established the doctrine of separation of powers and the system of checks and balances, meaning that the president and Congress respectively have different but overlapping responsibilities and powers on both internal and external issues. As well, though little, it really has some clear provisions, providing bases for both the president and Congress to perform authorities within the constitutional framework. For example, the president has the power to command the Army but Congress has to pay the bills for the Army.[3]

To know what prerogatives the "ambiguous" provisions have given the two branches is helpful to make clear what the president and Congress should do and should not do, or whether they have usurped power when a contentious foreign policy appeared.

PRESIDENTIAL PREROGATIVES

As Sundquist says that power is distributed among the institutions of government by the Constitution at first, then by customs, usages, precedents and sometimes historical necessities[4], we may divide the presidential and the congressional powers into two parts, the constitutional authorities and the informal powers.

The President's Main Constitutional Authorities

The constitutional authority of the president with regard to foreign affairs stems from Article II, Sections 2 and 3, of the Constitution. These provisions grant the president the powers to serve as Commander in Chief of the armed forces, to make treaties, to appoint and receive ambassadors, and to recognize foreign governments.

Commander in Chief Article II, Section 2 of the Constitution designates the president as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

This is an area where arouses a great deal of quarrels between the president and Congress. The problem whether this provision merely confers a title as Commander in Chief or implies additional powers for the president is the core of these quarrels. As Cecil V. Crabb, Jr and Pat M. Holt questioned,

> Did the Founding Fathers intend that the president should merely function symbolically or ceremonially as commander in chief (much like the British monarch in modern history), leaving the determination of military strategy and the development of the armed forces to others, possibly Congress? . . . Or, did they (like President Franklin D. Roosevelt during the Second World War, and President Lyndon B. Johnson during the Vietnam War), contemplate that chief executives would actually determine military strategy and tactics, sometimes with momentous implications for the future military and diplomatic fortunes of the United States?[5]

While the Constitution gives no answers to these questions, the history does. Generally speaking, many argued, the president has commanded greater power in history in this area than Congress. This view can be well proved by the fact that of all the approximately 130 military interventions the United States has been involved in from President Jefferson's decision in 1801 to send a warship and marine contingent to deal with the Barbary pirates, to

President Bush's dispatching of a major U.S. military force in 1990 to the Persian Gulf, only five were pursuant to a congressional declaration of war and only one, the War of 1812, involved a real debate on the merits of the action rather than simple ratification of the president's decision.[6] The Congress's acquiescent attitudes in all the undeclared wars have provided a condition for the expanding presidential power in this area. This presidential prerogative has also been supported by the public, who thought that the president as Commander in Chief should be granted strong enough power to gain the most at the least cost by presenting military initiatives to the world.

However, in the 1970s, the Congress vigorously challenged this privilege enjoyed by the president. The Vietnam War experience dispelled the belief that military intervention was a relatively costless enterprise. This, together with the realizaton that a combinaton of presidential deception and congressional permissiveness had been responsible for one of the most egregious misadventures in the U.S. history, led Congress to take its first step toward the recapturing of its constitutional powers.

Treaty-Making Power ArticleII, Section 2, of the Constitution says that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

This is still an area that causes controversy about the real meaning and requirements of this statement. This time focuses on the question of whether the "the process of negotiating treaties was an exclusively executive function" or whether the advice and consent of the Senate can "extend to the negotiation of treaties, as well as to senatorial consideration of them."[7]

Despite the occasional resistance from Congress, the president enjoys more power than the Congress in this treaty-making area. The idea that the executive branch makes treaties, and then submits them to the Senate for its acceptance has been embraced by the president and also by Congress. As a result, the negotiation of treaties-and more broadly, all official negotiations with foreign governments-remains an executive responsibility[8], and the Congress is gradually excluded from the negotiation process. Though in the post-World WarII period, senators had been invited by the White House into the negotiation group, the Senate advised hardly anything and finally lost the chance of playing a role due to their pursuance of a bipartisan foreign policy in the postwar period.

The reason lies in the treaty-ratification process. Only experienced diplomats and experts of the White House can initiate and conduct negotiations, and in the last sign treaties with foreign governments. After signing the treaty with concerning parties, the negotiators will then submit the document to the Senate for its consideration. Knowing little details about the negotiation process, having little knowledge about the contents of the treaty, also because of being uninformed, the Congress will either approve or reject it, neither with convincing reasons. Even it may attach amendments, reservations or understandings to the treaty, the Congress does not know what impacts these actions will leave for the prospect of the treaty, for the United States and also for the foreign governments related to the treaty. For example, see the congressional rejection of the Versailles Treaty after World War I .

The incumbent presidents have also invented another way to avoid congressional influence on treaty-making, namely the use of executive agreement, a method not mentioned in the Constitution. Not only has the number of executive agreements entered into by the United States has expanded considerably but the ratio of agreements to treaties has surged greatly as well throughout American history. According to one study, the first fifty years following independence of the country witnessed 87 international compacts, of which 60 were treaties. During the next half-century, there were 215 treaties but 238 executive agreements.[9] This trend has persisted into recent decades. At the end of World War II, in 1945, 54 executive agreements and 6 treaties were signed. By 1986, the numbers were 400 and 17 respectively.[10]

As Louis Fisher has noted that "the precise boundary between treaties and executive agreements has never been defined to anyone's satisfaction,"[11] the standard to distinguish them is blurred. Therefore, it is not surprising that there aroused imaginable quarrels on the question whether executive agreements shall be the law of the land, or whether they, like treaties shall be made "by and with the Advice and Consent of the Senate". The consequence of the quarrels is that the president does submit executive agreements dutifully to the Senate, but only on relatively less important issues and for important ones, the Senate more often than not remains uninformed. One senator complained in 1972, "We are not put in the Senate to deal only with treaties on copyrights, extradition, stamp collections and minor questions of protocol. If that is the meaning of the Constitution, then I think the Founding Fathers wasted their time."[12] As a result, "the executive agreement is an undeclared treaty which, like an undeclared war, seeks to avoid paying its constitutional dues by changing its name."[13]

Since this is also an important area of committing American obligations abroad, the congressional tolerance on executive autonomy disappeared at the end of the 1960s and a resurgent Congress challenged vigorously these executive agreements by enacting the National Commitments Resolution of 1969 and the Case Act of 1972.

Appointment Power Article II, Section 2, of the Constitution also stipulates that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls."

Fisher argued that "Nomination (at least in theory) is the President's prerogative".[14] It is true that the president plays a decisive role in this field, from chosing the nominees, to the final nomination. Congress, it seems, disdains to make obstructions for the president. Sometimes the Congress raises many difficult questions to the nominees when summoning them to congressional hearings, yet it seldom vetoes the president's choice.

Because the president's nomination shall be "by and with the Advice and Consent of the Senate", the president, as Crabb and Holt found, has discovered some methods to avoid neatly this congressional function. One is the "interim appointment", which means that an official so appointed by the president may hold office and perform important duties while the Senate is not in session, and after the Senate reconvenes, the president sometimes nominates another person (more acceptable to the Senate), or sometimes decides not to fill the position at all. Their other observation is that the presi-

dent often uses cabinet officers to undertake diplomatic assignments or appoint personal representatives to bypass senatorial confirmation.[15]

Recognition Power This power derives from Article II, Section 3 of the Constitution, saying that the president "shall receive Ambassadors and other public ministers (from foreign governments)."

The president has absolute power to recognize or non-recognize foreign governments. One reason is that the traditional manner of the mutual recognition among governments is generally made by executives. Another reason is that both the American president and Congress share the same view of inter-governmental recognition, namely the "Wilsonian" criteria. Unlike the classical standard which means to recognize a foreign government depending upon whether it is stable, has established authority throughout the country and is fulfilling its international obligations, the "Wilsonian" view depends upon whether the new government enjoys popular support and respects the rights of its citizens, or even whether it shares the same ideology with America.[16] As an example see President Nixon's visit in 1972 and President Carter's recognition in 1979 of the People's Republic of China.

The President's Informal Powers

In addition to these constitutional powers, the president still has some other informal or extraconstitutional powers in regard to foreign policy-making. Crabb and Holt summarized these powers into five aspects: the president's unrivaled access to information sources required for effective decisionmaking; the chief executive's influential role as a legislative leader; the president's ability to influence public opinion in foreign policy-making; the president's role as a political leader; the president's power to commit the nation to a position or course of action in foreign affairs.[17] Reading these words, one may find that the president's informal powers can persist into all important aspects of the state affairs.

Although these informal powers are not explicitly mentioned in the Constitution, we can still find some evidences to support them in the Constitution. Article II, Section 1 of the Constitution states that "the executive power shall be vested in a President". Thus, Clinton Rossiter read the Constitution as giving the president the powers of Chief of State, Chief Executive, Chief Diplomat, Commander in Chief, and Chief Legislator.[18] Being supreme chief of the nation, it is not surprising that the president usually plays a leading role in state affairs, both internal and external. Therefore, naturally the American people often look to the White House for effective leadership in responding to internal and external crises and in protecting American interests abroad.[19]

In sum, the American president enjoys considerable prerogatives in the realm of foreign policy-making. These powers come from both the Constitution and those beyond the Constitution, or of extra-Constitution. It is true that there are innumerable limitations on his powers, mainly from Congress, but conversely his powers serve him as a good weapon in the fight against these limitations.

CONGRESSIONAL PREROGATIVES

Similar to the president, the Congress has both formal, or constitutional powers—those enumerated in the Constitution, and informal, or extra-constitutional powers-those not mentioned in the Constitution.

The Constitutional Powers of Congress

Article I, Section 1 of the Constitution says that "all legislative Powers herein granted shall be vested in a Congress of the United States." The Constitution designates Congress as the sole national legislative body. Therefore, as distinquished from the executive, the Congress performs its constitutional powers in state affairs mainly through legislation.

The Constitution confers Congress many powers and responsibilities in many areas. According to the Constitution, the Congress has the following powers: to control the armed forces because it shall "raise and support Armies" and "provide and maintain a Navy" (Article I, Section 8); to control the revenue and approve the expenditure of the national government, because it shall "lay and collect Taxes" (Article I, Section 8) and because that "No Money shall be drawn from the Treasury, but in the consequence of Appropriations made by Law" (Article I, Section 9); to play an important role in the treaty-making and nomination processes, since these presidential actions shall be "by and with Advice and Consent of the Senate" (Article II, Section 2); and as the legislative body, to exercise the executive oversight.

The Constitution does not explicitly state whether these powers shall be used for domestic issues or foreign issues. However, all these powers have proven tremendously important for the conduct of foreign affairs. The general legislative powers assigned to Congress grant it nearly limitless authority to affect the flow and form of foreign relations. As a result, the Constitution appears to give the Congress more far-reaching foreign policy powers than it gives the president. In particular, congressional authority over war, treaties and the purse would appear to give it a commanding position, enabling it to set overall policy much like a board of directors does in a private enterprise.

War Powers Assigning, respectively, to the Congress the power to declare war and to the president the title as Commander in Chief to order the armed forces, the Constitution outlines different spaces for the two branches to act when engaging in war.

Since the Founding Fathers considered the power to declare war too important to entrust to the president, they gave it to Congress. Therefore, the Constitution may read that Congress has the ultimate power to decide the ultimate question—whether the nation shall or shall not go to war. Once Congress has decided that the nation should wage war and then declared war, the president, as Commander in Chief, would undertake the responsibility to use the armed forces to conduct the war and, in the end, to try his best to win the war. The Congress also decides when the war should end by imposing a time limit on its duraton or by re-defining the purpose of the war. It can even declare an end to the war as it did in the two World Wars by resolutions and in Vietnam War by denying appropriations for continuing it.

These conclusions may be what one could draw from the constitutional clauses. However, the reality, when looking at American history, has not followed this constitutional spirit. In practice, the Congress has shown little influence on this crucial question of war or peace and the president has performed his authority as Commander in Chief with hardly any limitation. Most of the hostilities the presidency has initiated with other nations were rarely accompanied with a congressional declaration. When Congress did issue a declaration

of war, the declaration itself asserted that a condition of warfare actually existed; it was not an occasion for Congress to debate whether hostilities ought to have existed.[20] Consequently, the legislative prerogative to declare war has become "largely a formality."[21]

Congressional unwillingness to confront the president is one reason to explain its minor role in this area. William Fulbright, once an outspoken critic of presidential dominance in foreign policy-making, argued that the Congressional role with regard to war powers was "in the authorization of military and major political commitments, and in advising broad policy directions, while leaving to the executive the necessary flexibility to conduct policy within the broad parameters approved by the legislature."[22] However, even in regard to the executive authorization, the Congress would often seem to be unwilling. "Zone of twilight," meaning Congress neither grants nor denies authority to the president, shows that, in the mind of the Congressmen, flexibility for the president might be the best pretext to escape responsibility. As Fisher argued, "Congress's influence depends on its willingness to act and take responsibility. A failure to act creates a vacuum into which Presidents can enter,"[23] hence, the Congressional unwillingness to assume responsibility results in the second reason, that is, the presidential misuse of power.

Presidential misuse of power, making Congress more alienated from war powers, resulted from two concerns: the title of the president as Commander in Chief and the precise definition of war. Hamilton, writing in Federalist 69, observed that the presidential authority as Commander in Chief "would amount to nothing more than the supreme command and direction of the military and naval forces as first general and admiral of the confederacy." The Supreme Court has since agreed. It once judged that the implication of the Commander in Chief clause was that "his duty and his power are purely military."[24] Similarly, academics share the same view. Louis Henkin argued that "the President's designation as commander in chief . . . appears to have implied no substantive authority to use the armed forces, whether of war (unless the United States was suddenly attacked) or for peacetime purposes, except as Congress directed."[25] Nevertheless, this designation is routinely misunderstood by the president as the source of war-making authority and, in some unexpected cases, for more general foreign policy powers.

Should the United States be attacked by an enemy, of course, the president will promptly and automatically react with a defensive war. However, receiving few attacks, the United States has in history carried out countless military interventions in other nations. Most of them, proclaimed the president, were short of war and hence had nothing to do with Congress. The definition of war is thus a blurred one. Henkin criticized this presidential misuse of power by arguing that the congressional power to control war includes the power to control things closely connected to war.[26] This is because the distinction between police actions and war is rarely clear. The progression from a show of force, to police action, to all-out war is often continuous with no obvious transition between them. Therefore, congressional oversight of war powers is not only necessary but vital for the nation to avoid unwilling wars.

In short, congressional unwillingness to check the president in this field leads to the presidential misuse of power; however, the

repeated misuses of power by the president will conversely result in congressional reassertion. As a reaction to the misadventure of the Vietnam War by the president, the War Powers Resolution of 1973, passed over President Nixon's veto, became the main measure for the Congress to recapture its constitutional powers in the 1970s.

Treaty-Making Unlike war powers, the power distribution between the two branches with regard to treaty-making seems to be clear in the Constitution. The congressional influence on treaty-making rests in the Senate. Granted by the Constitution, the Senate has the power to advise the president on his foreign negotiations, and finally it can either reject the presidential arrangements with other countries, or approve and hence legalize them, "provided two-thirds of the Senators present concur" (Article II, Section 2).

Like the power to declare war, the Senate and by extension, the Congress as a whole has the power, at least in theory, to decide the ultimate question—whether to permit or not the American obligations abroad brought about by the president. Because most of the commitments would bring a great impact on both the people's lives and national security, the Congress, as the people's branch, should have responsibility to decide whether this impact is valuable or invaluable.

According to the Constitution, the unique manner in which the Senate exercises its authority on treaty-making is, of course, advice and consent. The main method of advice is for the Senate itself to participate in the negotiation processes; the main method of consent is for the Senate either to attach reservations or conditions to the treaties signed by the president or to simply veto them when the president cannot fulfill the conditions. Cases of congressional uses of both methods are apparent in history. The former method has been widely used ever since the Senate's rejection of the Versailles Treaty; for the second, the failure of the Versailles Treaty was impressive.

However, throughout the course of American diplomatic history, the vast majority of treaties has been approved by the Senate despite a few celebrated cases.[27] As a result, the reality is that the Senate often plays a relatively minor role in this area of making American commitments abroad. As the sole legal representative of the nation in negotiating with foreign countries, the president has unique power in treaty-making. However, this, by no means, implys that the Congress has nothing to do with treaty-making. The explicit constitutional statement—the senatorial "Advice and Consent" clause— provided an important power basis for the Senate in treaty-making.

The Power of the Purse The constitutional authority for Congress to make laws on appropriations availls it a strong say in both domestic policy-making and international relations. This prerogative implys that all of the governmental expenditures must be approved by the Congress through legislation or non-statuatory methods.

Since the president comes to the Congress for money for various purposes, domestic and foreign, the Congress and congressional committees can use appropriations and the appropriation process to also bargain over other elements of presidential policy in foreign affairs. Crabb and Holt wrote of this nearly unlimited power of the Congress,

> It (the Congress) may increase funds for particular programs above White House

> recommendations; it may also refuse to grant funds for programs and policies in the foreign policy field; it may terminate programs already in existence; it may provide the required funds only when certain conditions have been met abroad; and it may exercise legislative oversight into administration of external programs, investigating such questions as whether they are achieving their objectives or whether their continuation is in the national interest.(28)

This authority can extend into every aspect of policy-making, as long as that policy will cost even one dollar. With this prerogative and its power on the national budget, the Congress may be able to control the foreign aid and the military expenditures, and to reshape, consequently, the nation's foreign relations. Thus, one may easily conclude that the Congress still has ultimate power to decide the ultimate question—whether the nation shall or shall not spend on a certain program proposed by the president. As a result, it is reasonable to draw the conclusion that the congressional prerogative to control the purse has guaranteed it, if not a superior one, at least an equal position when competing with the president.

The congressional influence on foreign policy through appropriation and budget has two stages, the authorization and appropriation processes.(29) The former is the province of the Senate Foreign Relations Committee and the House Foreign Affairs Committee. The latter belongs to the management of the Senate and House Appropriations Committees. As a result, these four committees became the locus of real power to influence the nation's foreign policy. Their chairmen often possess great authority both in the party and in the committee.

The precedent of assigning different responsibilities and respective prerogatives between the one who is to spend and the one who is to pay has a historical origin. The power of the purse, James Madison noted in Federalist 58, represents the "most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." Emphasizing the constitutional separation of the purse (the responsibility of Congress) and the sword (the responsibility of the president), Fisher even argued in 1991 that "the growth of democratic government is intimately tied to legislative control over revenues and appropriations."(30)

Since the president orders the armed forces, it is regarded as the sword. The innovative proposal to separate the purse and the sword has been popular since ancient times. Madison argued:

> Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.(31)

Similarly, Thomas Jefferson also praised the transfer of the war power "from the executive to the Legislative body, from those who are to spend to those who are to pay."(32) In 1995, Fisher argued that "the idea of keeping the purse and the sword in distinct hands was a

bed-rock principle for the framers."[33]

However, the congressional power of the purse is not always "complete and effectual," for it is often constrained by the president. As this power appeared to be so important to the conduct of foreign policy, the president has discovered several methods to bypass the congressional oversight on expenditure and budget control. Among them, an important one is for the president to use non-appropriated funds, namely the money solicited from private citizens and foreign governments. The others are, for example, impoundments and secret spendings. As a result, in Crabb and Holt's words, the congressional power of the purse "has seldom been utilized to its fullest potential to affect foreign relations."[34]

The Informal Powers of Congress

If Congress exercises its constitutional powers mainly through its nearly unlimited legislative authority, it is mainly through non-statutory methods that Congress performs its extra-constitutional authorities.

One of these methods is for the Senate and the House to pass resolutions expressing the opinions of legislators on diplomatic issues. Simple resolutions (adopted by either house) and concurrent resolutions (adopted by both houses) are used by Congress to direct administrative action. They express the "sense of Congress" (or of either house) on some aspect of public policy. Although these resolutions are not laws and are not binding upon executive policy-makers, expressions of congressional sentiment are not ignored or treated lightly by the White House, because every incumbent president quite knows that a constructive relationship with Congress is essential for his diplomatic success.

The Congress may also direct administrative action through the use of other nonstatutory controls: language placed in committee reports; instructions issued by members during committee hearings; correspondence from committee and subcommittee heads to agency officials; travel by legislators or their staff to foreign countries, either on their own willingness or by request of the president; speeches given by congressmen through mass media when they are unsatisfied with the executive's foreign policy conduct.

All these informal powers, together with the constitutional authority of Congress, have played a significant role in its competition with the president. Particularly in the 1970s after the Vietnam War, the Congress of the United States has achieved a position not as a participant but rather as a decision-maker for the nation's foreign policy, through bringing all its powers into full play.

SEPARATION OF POWERS AND CHECKS AND BALANCES

I have mentioned in chapter 1 that from 1774 to 1781, the Continental Congress of the United States had to perform all the functions of government: legislative, executive, and adjudicative. However, the repeated failures of that Congress to make a reliable and quick policy convinced the framers of the Constitution that this was not the system they hoped for and a new form of government was needed to promote administrative efficiency.

At the same time, father of the thought of representative government, Montesquieu's theory had given the framers much to think about. "In every government," wrote Montesquieu early in 1748, "there are three sorts of power: the legislative; the executive in respect to

things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."[35] It was his firm conviction that these three powers should be exercised by three separate branches of government; each branch should be confined to the implementation of its own power and the personnel who operate these powers should be different. If not, he had no doubt about the consequences:

> when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprenhension may arise lest the same monarch or senate should erect tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[36]

Montesquieu's above view that liberty could only be guaranteed through the use of separation of powers was apparently accepted by the framers of the Constitution. Writing in Federalist 47, James Madison argued that according to the theory of separation of powers as handed down by "the oracle" Montesquieu, "the accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, or few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

Thus, the unsatisfactory record of the Continental Congress and Montesquieu's thory about democratic governmental system became the two main sources that led to the creation of the separated branches in the United States. Because of the first source, the new system of government in the mind of the framers should aim to seek efficiency; because of the second, it should, at the same time, intend to preserve liberties. Moreover, the oppressive British rule on the colonies convinced the framers that preservation of liberties should be considered as the prior purpose of the government. With the fear for authorities to be concentrated into one hand like that happened in Britain, they were determined that a decentralized form of government could well fulfill this main purpose.

This is the origin of the doctrine of separation of powers in the United States. With the doctrine, the Founding Fathers divided the then-omnipotent Continental Congress into "three sorts of powers" and let them serve different purposes. For efficiency, they separated a strong executive branch from the Continental Congress; for liberty, they still made the Congress to be of great powers. The "three sorts of powers", in modern parlance, are just the three branches of American government. In the very beginning, the framers had felt satisfied with this doctrine.

The doctrine of separation of powers was thus established and had become dominant both in theory and in practice by the late 1780s. However, the doctrine itself was not a perfect one, it still had problems. The doctrine provided the general structure for a cooperative relationship between the executive and the legislative. But it was clear that a strict separation would hamper the institutional cooperation on policy-making. As well, particularly separation would open the door to abuses of power, for if there was a clear separation of powers,

nothing would prevent one branch of government from abusing those powers given exclusively to it. These two problems showed that the separation doctrine itself would not be able to block the tyranny, which was, for the Founding Fathers, the worst enemy. Hence, the doctrine gradually lost its persuasiveness by the late 1780s. When publishing his views in 1788, a contemporary of the framers even ridiculed the separation doctrine as a "hackneyed principle" and a "trite maxim".(37)

Although the framers of the Constitution relied on the separation doctrine to provide an essential structure for the federal government, they became increasingly too aware of its inadequacy and felt that it needed to be modified. This they did by attaching to it what appears to be two contradictory devices. First, they gave the three branches a degree of independence from each other. They designated specific but limited powers to each branch, powers could not be modified by the other branch. This was quite in compliance with the separation doctrine. At the same time, they used the second device which was to creat a degree of interdependence and, in violation of the separation doctrine, a fusion of powers. With the latter device, each branch would have a say in the powers of others. A kind of overlapping powers appeared and the idea to avoid an absolute or strict separation of powers prevailed the framers.

The intention behind the points of fusion was to ensure that legislation, or other forms of policy-making, could only emerge from the federal government with the cooperation of the president and Congress. With the fusion of powers or overlapping powers, no branch would be able to act independently, though they had a degree of independence, and thus subtle cooperation among branches of government, between the executive and the legislative in particular, became outstandingly necessary. However, cooperation is just one side of the same coin, the other side is competition. More often than not, the overlapping powers would not encourage agreement but rather foster hostility and tension. The president and Congress would carefully guard their roles, functions and powers, and would check and balance each other rather than working in harmony.

By the late 1780s, the doctrine of a strict separation of powers had lost ground to the idea of checks and balances.(38) Madison, in a speech to the Federal Convention, provided the rationale for the notion of checks and balances:

> A people deliberating in a temperate moment . . . on the plan of Government most likely to secure their happiness, would first be aware, that those charged with public happiness, might betray their trust. An obvious precaution against this danger would be to divide the trust between different bodies of men, who might watch and check each other.(39)

Since the doctrine of separation of powers and the system of checks and balances seemed somewhat contradictory, the framers had to explain the sharing between branches. In Federalist 48, Madison warned: "Unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never be duly maintained." In Federalist 51, he even concluded that "ambition must be made to counteract ambition." Alexander Hamilton, in Federalist 66, also argued that the true meaning of the separation maxim

was "entirely compatible with a partial intermixture" and that overlapping was not only "proper, but necessary to the mutual defence of the several members of the government, against each other."

Therefore, the framers were determined that the system of checks and balances, together with the doctrine of separation of powers might well preclude the tyranny of either power center. An independent executive alone would not provide sufficient protection against the tyranny of the legislature. It was ironic that for institutional independence to survive, a system of "mutual relations" among institutions was required, one that would prevent the "gradual concentration of powers in the same department" by "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."(40) This strategy of "mutual relations" provided the Founders with a safeguard against the legislative tyranny and at the same time the executive despotism.

As a result, the doctrine of separation of powers and the system of checks and balances were both accepted by the Constitution and together became its foundation. They do not contradict each other. On the contrary, in Fisher's words, "far from being contradictory, they complement and support one another. An institution, cannot check unless it has some measure of independence; it cannot retain that independence without the power to check."(41) They play different functions and each is of vital importance. If there is only the separation of powers, as I have mentioned, tyranny would by no means be avoided; if there is only the system of checks and balances, the government would get bogged down in endless debates and confusions. Though the branches of government are separated, powers of government are not but shared. With the system of checks and balances, the separation of powers can be redefined as "separated institutions sharing powers".(42)

The unique American Constitution created its unique system of government. It is unique not because of the separation doctrine only, but because of this doctrine and the system of checks and balances together. The politics of separation of powers exists, too, in other democracies and even in the authoritative nations; their difference is nothing more than the degree of separation. What is unique is the mutual checks in the United States, particularly the ability of the legislative to check the executive, and particularly its checks on the issues of foreign affairs. When a former British ambassador to the United States of the 1970's was asked what surprised him most about the conduct of American diplomacy, he replied: "The extraordinary power of your Congress over foreign policy . . . ."(43)

Similar to the making of domestic policies, the Constitution assigns the executive and the legislative also great independent powers on the making of foreign policy. However, it by no means imply that each branch shall perform its powers without considering the interests of other branches. "Mutual relations" between the executive and the legislative exists too with regard to foreign affairs. It is possible to say that one branch has definite power on a certain process of a certain foreign policy-making, but it will be wrong to say that one has 100 percent authority to make out the final decision in a certain area. More often than not, final decisions on foreign policy are products of the compromises and cooperation worked out by

the two together.

CONCLUSION

It is only natural that, with the doctrine of separation of powers and the system of checks and balances, the Constitution indeed seems ambiguous on its allocation of foreign policy powers between the president and Congress. Because the powers are shared, upon any foreign policies, the two branches both have a large role to play and enjoy respective prerogatives. Sometimes people will be easily confused that "who really was in charge of the making of (American) foreign policy?"[44]

However, though ambiguous, it really supplies a general structure for these two branches of government, assigns specific functions and responsibilities to each, and reserves certain rights to the people.[45] We have seen in this chapter that both the president and Congress have different constitutional powers on foreign affairs, despite that the former possesses comparatively larger independence and autonomy. Louis Henkin has given out an outline of the shared powers in the making of foreign policy,

> The President makes foreign policy by his conduct of foreign relations generally: by international acts as 'sole organ' or as Commander in Chief (including some deployments of U.S. forces); by concluding international agreements; by asserting rights for the United States or responding to claims by others against the United States; by proclaiming 'doctrines' that announce national intentions; by occasional domestic regulation; in a few circumstances even by direction to the courts. Congress makes foreign policy by regulating foreign commerce and intercourse, and by other legislation that impinges on U.S. foreign relations; by spending for the common defense and by some of its spending for the general welfare; by declaring and making war; by adopting statutes or resolutions (such as the War Powers Resolution) defining Executive authority; by authorizing or approving executive agreements.[46]

And even for the execution of foreign policy, the sharing is also apparent. He continues: "in a sense, there is also a division of executive function: the President carries out the foreign policy that he makes as well as that made by Congress, but Congress 'executes' the President's policies, too, by enacting legislation to implement treaties and by appropriating funds to pay for Executive programs and activities."[47]

The Constitution has been dominating the political stage of the nation for more than two centuries. Students of government and politics, U.S. citizens, and friends (or critics) elsewhere, might ask whether 'it works': does the Constitution promote an effective system for the governance of U.S. foreign relations at the turn of a new century?[48] Fisher answered this question by arguing that the separation doctrine, subjected to ridicule for much of the twentieth century, still remains vital.[49]

The Constitution confers the Congress, the people's branch, ample powers and thus promises great opportunities for the expression of different sentiments, opinions and values, on the making of foreign policy. This free play of ideas is essential to the American democratic government. It is important for the president, representing secrecy, unity, decision, dispatch, superior sources of information that are vital to

the conduct of foreign affairs, to have great powers. It is equally important for the Congress, representing the people's voice, to have sufficient powers.

The idea that "the people should be involved in foreign affairs in a democracy"(50) has been accepted as a general principle. The political pluralism guarantees the people's involvement in the making of foreign policy. Just because of the people's participation, the American political system possesses a capacity of self-correction. The congressional check on the president with regard to foreign affairs is not only necessary but a part of the normal play of democratic principle. With a powerful Congress and its strong function to check the executive in particular, the United States has avoided the tyranny Madison described. A deferential Congress is not in compliance with the constitutional spirit and will result in wrong makings of foreign policy. For example, note the misadventure of the Vietnam War that was started by President Kennedy and furthered by President Johnson and Nixon.

NOTES

(1) Arthur Schlesinger, Jr., "Congress and the Making of American Foreign Policy," *Foreign Affairs*, 51 (October 1972): 80.

(2) Edward S. Corwin, *The President: Office and Powers, 1787-1984* (New York: New York University Press, 1984), p.201.

(3) The presidential power to command the Army stems from the Commander in Chief Clause of Article II, Section 2 of the Constitution; the Congressional power to pay the bills comes from Article I of the Constitution.

(4) James L. Sundquist, *The Decline and Resurgence of Congress* (The Brookings Institution, 1981), p.11.

(5) Cecil V. Crabb, Jr. and Pat M. Holt, *Invitation to Struggle: Congress, the President and Foreign Policy* (Congressional Quarterly Press, 1980), p.9.

(6) The Gulf of Tonkin Resolution was regarded by President Johnson as the equivalent of a declaration of war. However, it was the product of misleading information on the Gulf of Tonkin incident. On January 11, 1991, both the Senate and the House of Representatives passed resolutions authorizing President Bush to use military force to force Iraq out of Kuwait, if it did not itself withdraw by January 15. This followed a sober and sophisticated debate on the merits of alternative courses of action, and it may be considered to be a contingent declaration of war.

(7) Crabb and Holt, *Invitation to Struggle: Congress, the President and Foreign Policy*, p. 11.

(8) Ibid.

(9) See Louis Fisher, *The President and Congress: Power and Policy* (New York: Free Press, 1972).

(10) Mary H. Cooper, *Treaty Ratification*, Editorial Research Reports, *Congressional Quarterly* (1988), p.41.

(11) Louis Fisher, *The Constitution Between Friends: Congress, the President, and the Law*(New York: St. Martin's, 1978), p.204.

(12) Senator Clifford Case, *Congressional Record* (June 19, 1972), S9641.

(13) Thomas M. Franck and Edward Weisband, *Foreign Policy by Congress* (New York: Oxford University Press, 1979), p.141.

(14) Louis Fisher, *Constitutional Conflicts Between Congress and the President*, 3rd ed. (University Press of Kansas, 1991), p.23.

(15) Crabb and Holt, *Invitation to Struggle:*

Congress, the President and Foreign Policy, pp.14~15.

(16) Ibid., p.16.

(17) Ibid., pp.16~19.

(18) Clinton Rossiter, *The American Presidency* (New York:Signet,1956), especially chs.1 and 4. Quoted in Philippa Strum, *Presidential Power and American Democracy* (Goodyear Publishing, 1979), p.1.

(19) Crabb and Holt, *Invitation to Struggle: Congress, the President and Foreign Policy*, p. 19.

(20) Ibid., p.44.

(21) Ibid.

(22) See William J. Fulbright, "The Legislator as Educator," *Foreign Affairs*, 57 (Spring 1979): 726.

(23) Fisher, *Constitutional Conflicts Between Congress and the President*, p.279.

(24) *Fleming v. Page*, 9 Howard 603, 615 (1850). Quoted in Arthur Schlesinger, Jr. *The Imperial Presidency* (Boston: Houghton Mifflin Company, 1973), p.62.

(25) Louis Henkin, "Foreign Affairs and the Constitution," *Foreign Affairs*, 66 (Winter 1987-88): 290.

(26) For a detailed explanation, see Louis Henkin, *Foreign Affairs and the U.S. Constitution*, 2nd ed. (New York: Oxford University Press, 1996), pp.103~105.

(27) Crabb and Holt, *Invitation to Struggle: Congress, the President and Foreign Policy*, p. 39.

(28) Ibid., p.41.

(29) Ibid., pp.41~42.

(30) Fisher, *Constitutional Conflicts Between Congress and the President*, p.212.

(31) Quoted in Fisher, Ibid.

(32) Quoted in Louis Fisher, *Presidential War Powers* (University Press of Kansas, 1995), p. 9.

(33) Ibid., p.8.

(34) Crabb and Holt, *Invitation to Struggle: Congress, the President and Foreign Policy*, p. 43.

(35) Montesqieu, *De L'Esprit des Lois*, first published in 1748, translated by T. Nugent and F. Pritchard, 2 vols. (New York: Appleton, 1949), 1: p.16.

(36) Ibid.

(37) Quoted in Fisher, *Constitutional Conflicts Between Congress and the President*, p.10.

(38) Louis Fisher, *The Politics of Shared Power*, 2nd ed. (Congressional Quarterly Press, 1987), p.3.

(39) Max Farrand,ed., *The Records of the Federal Convention of 1787*, 2 vols. (New Haven: Yale University Press, 1911), 1: p.423.

(40) *Federalist 51*, pp.321~322.

(41) Fisher, *The Politics of Shared Power*, p.4.

(42) Richard E. Neustadt, *Presidential Power* (Wiley, 1960), p.33. Quoted in James Sundquist, *The Decline and Resurgence of Congress* (The Brookings Institution, 1981) p.16.

(43) Views of Ambassador Peter Jay. Quoted in Crabb and Holt, *Invitation to Struggle: Congress, the President and Foreign Policy*, p. 189.

(44) David M. Abshire was asked this question when he traveled abroad as Assistant Secretary of State for Congressional Relations. See Abshire, "Foreign Policy Makers: President vs. Congress," Abshire and Ralph D. Nurnberger,ed., *The Growing Power of Congress* (Sage Publications, 1979) p.22.

(45) Fisher, *Constitutional Conflicts Between Congress and the President*, p.22.

(46) Henkin, *Foreign Affairs and the U.S. Constitution*, p.83.

(47) Ibid.

(48) Ibid., p.313.

(49) Fisher, *Constitutional Conflicts Between Congress and the President*, p.14.

(50) Melvin Small, *Democracy and Diplomacy* (The Johns Hopkins University Press, 1996), p.xvii.

Xin, Qiao（喬新）