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The Congress: Friend or Foe in Foreign Policy?

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ADDRESS

I offer the following remarks about the proper role of the Congress in the formulation and execution of foreign policy as a view from the front lines. These remarks are not theoretical. Rather, they are the result of some years of experience in both the Congress and now more recently in the Department of Defense. Let me say at once that it makes a great deal of difference whether one is dealing in an atmosphere of highly charged partisanship, or one in which a high degree of bipartisan collaboration between the Congress and the executive branch exists. We are not in the days of Vandenberg.[1] Rather, we are in a period of intense partisan political activity that affects everything from the nomination of Justices to the Supreme Court to foreign policy, defense policy, and security policy around the world. It is a moment of fairly extreme partisanship, unfortunately.

The role of the Congress in the execution of foreign policy is particularly critical and sensitive when the United States negotiates with its adversaries. Perhaps I should make it clear at the outset that I regard our principal adversarial negotiating opponent, the Soviet Union, as precisely that: an adversary of the United States that is wholly committed to a set of legal and moral values antithetical to our own.

I am rather skeptical about the pace, direction, and ultimate destination of the changes in the Soviet Union that we are observing at this time. We do not fully understand what goes on behind the Iron Curtain. Sources of information, insight, and knowledge that are available in Western societies are closed to us in the Iron Curtain. Thus, we are entirely justified in evidencing some skepticism toward

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1. *See generally* A. VANDENBERG, JR., THE PRIVATE PAPERS OF SENATOR VANDENBERG (1952). Arthur H. Vandenberg, a Republican Senator from Michigan, served in the Senate from 1928 until his death in 1951. *Id.* at xi-xii. His last decade in office has been characterized as a period in which "nonpartisanship . . . was born and nurtured and finally adapted as a governmental mechanism through which a Democratic Executive Branch and a Republican opposition in Congress united to speak with a single foreign-policy voice at the water's edge." *Id.* at xiii.

the meaning of glasnost[2] and its likely consequences.

Negotiating with the Soviet Union is never easy. The Soviets seldom make concessions, and when they do, it is never early in a negotiation. They signed the Austrian State Treaty[3] in 1955, following ten years of negotiating in which they insisted on a set of arrangements for Austria that would have left the Red Army in permanent control. The Soviet negotiating position shifted only at the last minute. The result is that Austria, although neutral, is a free country today.

Sir William Hayter, who served as British Ambassador to Moscow, once compared negotiating with the Soviets to contending with a nonfunctioning vending machine. He said that it may help to shake the machine, but it is not going to do much good to talk to it.[4] Negotiating with the Soviets, therefore, requires enormous patience. We must be determined in our negotiations with the Soviet Union, have a clear notion of our objectives, and insist upon achieving them as a condition to signing an agreement. If we follow this plan of action, I believe that we can negotiate successfully with the Soviet Union. In recent years, however, our tendency has been to adopt positions that embody the principles that we seek to uphold, only to revise our objectives steadily downward when the going gets rough, until, late in the process, we find ourselves negotiating agreements for agreements' sake. Unfortunately, this scenario has all too often been the pattern of American—indeed Western—negotiations with the Soviet Union. We can only succeed in negotiating with our adversaries if we demonstrate steadiness, persistence, patience, and coherence.

This brings me to the role of the Congress, a body that exhibits none of these successful negotiating characteristics. It is difficult to describe the frustrations associated with sitting across the table from Soviet negotiators and knowing that the Congress has adopted resolutions, and in some cases, even endeavored to pass statutes, that favor the Soviet position and criticize the American position that is on the negotiating table.[5] Four times in recent years American negotiators have found themselves in such a situation.

In 1981 and 1982, for example, some members of Congress

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2. "Glasnost' . . . means openness or transparency, or at the very least, publicity." Swing, *Impressions of Gorbachev: John Temple Swing on the Council on Foreign Relations Delegation's Visit to Moscow, 1987*, II INSTITUTE FOR SOVIET AND EAST EUROPEAN STUDIES, NO. 1, 5 (1987) (emphasis omitted).

3. *See* State Treaty for the Re-Establishment of an Independent and Democratic Austria, May 15, 1955, 6 U.S.T. 2369, T.I.A.S. No. 3298, 217 U.N.T.S. 223.

4. *See generally* W. HAYTER, THE KREMLIN AND THE EMBASSY (1966) (discussing relations between Great Britian and the Soviet Union).

5. *See infra* notes 6-12 and accompanying text.

embraced the concept of a nuclear freeze with enormous enthusiasm. The United States, however, had just embarked upon an absolutely vital program of strategic modernization. The United States was replacing weapons systems that were on the verge of obsolescence, replacing bomber aircrafts that were older than the pilots flying them, replacing submarines built to last twenty years that were in the eighteenth, nineteenth, and in some cases the twenty-third and twenty-fourth years of their operational lives, and replacing missiles that had been in place since the early 1970's. The Soviet Union, for its own reasons, thought that a nuclear freeze was a fine idea. The Soviets, by contrast, had just completed an extensive modernization of their strategic nuclear forces. They had, therefore, every interest in preventing the United States from taking reciprocal action that would give us the opportunity to achieve some stable strategic balance.

The Congress, however, repeatedly voted on resolutions, in some cases passed by the House of Representatives, that called upon the United States to immediately freeze its nuclear forces.[6] This congressional embrace of the idea of a nuclear freeze supported the Soviet negotiating position on the table in Geneva. The Congress took this action with astonishing ignorance about the relative position of the strategic forces of the two sides, the impact that legislation of this nature would have on our strategic nuclear forces modernization program, and the strategic imbalance that would inevitably result from such a freeze. A nuclear freeze could not possibly have been verifiable, and in a fundamental sense, its effects would not have been mutual. In the Congress, however, there was an easy way around such problems—simply phrase the resolution to say that the United States ought to enter into a mutual and verifiable freeze on nuclear weapons. The Congress would then disregard the fact that that such a resolution was a contradiction in terms because to them it was a detail.

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6. *See, e.g.*, S.J. Res. 2, 98th Cong., 1st Sess. (1983) (calling for a mutual and verifiable freeze and reduction in nuclear weapons); H.R.J. Res. 433, 97th Cong., 2d Sess. (1982) (same); H.R.J. Res. 434, 97th Cong., 2d Sess. (1982) (same); H.R.J. Res. 476, 97th Cong., 2d Sess. (1982) (same); H.R.J. Res. 521, 97th Cong., 2d Sess. (1982) (same); H.R.J. Res. 571, 97th Cong., 2d Sess. (1982) (same); H.R.J. Res. 573, 97th Cong., 2d Sess. (1982) (same); H.R. Con. Res. 270, 97th Cong., 2d Sess. (1982) (expressing Congress' sense that action must be taken to freeze the nuclear arms race); H.R. Con. Res. 277, 97th Cong., 2d Sess. (1982) (expressing Congress' sense that there should be an immediate mutual freeze of the nuclear arms race); H.R. Con. Res. 287, 97th Cong., 2d Sess. (1982) (expressing Congress' sense that the United States and the Soviet Union should pursue an immediate halt to the nuclear arms race, and an eventual reduction in the number of nuclear weapons and the size of conventional forces); H.R. Con. Res. 351, 97th Cong., 2d Sess. (1982) (urging that negotiations be initiated between the United States and the Soviet Union with the purpose of freezing, and then reducing, nuclear weapons arsenals to an equal and verifiable level).

The Congress has acted in a similar manner with respect to nuclear testing. On a number of occasions, resolutions have been passed, and in some cases, statutes have almost passed that would have forced the administration to cease all nuclear testing.[7] The simple fact is that we must engage in nuclear testing in order to maintain a safe, secure, and survivable nuclear deterrence force. Most of us would not buy an untested household appliance. In the view of any expert, then, it is an unthinkable notion that we should maintain an inventory of thousands of nuclear weapons without testing them and without minimizing the resultant risks of possible failures and deterioration leading to unsafe conditions. When the Soviets proposed an end to nuclear testing, however, a significant number of members of Congress endorsed that view. Despite this fact, our negotiators in Geneva argued that we could not agree to a cessation of nuclear testing. They insisted that we first conclude an agreement that would make the existing limitations verifiable. Those negotiators, unfortunately, had to cope with the knowledge that the Soviet negotiating team was armed with ammunition provided by the Congress.

The third example of congressional involvement in negotiations with the Soviets is familiar to many people. In this instance, Congress insisted in the form of a statute[8] that the United States continue to be bound by the restrictions of the SALT II Treaty[9] that was signed by President Carter in 1979. Because the Senate of the United States never even ratified this treaty, the constitutional implications of this congressional action are truly staggering. Indeed, the treaty eventually was withdrawn by the Carter administration. It did so, in part, because of the inconvenient invasion of Afghanistan by the Soviet Union in December, 1979. It was additionally withdrawn because the administration could count and, therefore, knew that the SALT II Treaty would be defeated if it were laid before the Senate. Even if the treaty had been ratified, it would have, nevertheless, expired by the time President Reagan announced that the United States would no longer consider itself bound by its terms because of repeated Soviet violations of it and other agreements. Following the President's announcement, however, the House of Representatives passed a bill[10]

7. *See, e.g.*, S.J. Res. 29, 98th Cong., 1st Sess. (1983) (to prevent nuclear testing); S.J. Res. 224, 97th Cong., 1st Sess. (1983) (same); S.J. Res. 556, 97th Cong., 1st Sess. (1983) (same).

8. *See* H.R. 4919, 99th Cong., 2d Sess. (1986) (This unenacted bill sought to limit deployment and maintenance of nuclear weapons that would comply with existing arms limitations agreements.).

9. COMM. ON FOREIGN RELATIONS, THE SALT II TREATY, S. REP. NO. 14, 96 Cong., 1st Sess. (1979).

10. *See* H.R. 4919, *supra* note 8.

aimed at preventing the expenditure of any funds for the purpose of maintaining a strategic arms inventory that exceeded the limits of the SALT II Treaty. In fact, it was even worse than that. The Congress went so far as to select provisions of the SALT II Treaty by which it would have us be bound.[11] The provisions that the Congress chose to include set precisely those limitations that most profoundly inhibited the United States, and did not inhibit the Soviet Union.

The last example of congressional involvement is a current one. It is one that I suspect we will be hearing a great deal about because it concerns the interpretation of the 1972 ABM Treaty.[12] The President and his chief legal adviser at the Department of State, as well as other lawyers throughout the government, have studied the record of that negotiation intensively, fairly, and accurately. These people have concluded that a close reading of the ABM Treaty and the accompanying negotiating records, fully justifies a broader interpretation of the treaty than has previously been the position of prior administrations.

For example, Judge Sofaer conducted an intensive study of the records of the ABM Treaty negotiations.[13] This study occurred after some Defense Department lawyers examined that record and concluded that statements made in 1972, when the treaty was signed, purporting to express the rights and obligations of the parties, had misstated the nature of these obligations in important respects. Due to abundant evidence that existed to support the conclusion of the Defense Department lawyers, Judge Sofaer reached the same conclusion. Abe Sofaer's motives, however, were brutally attacked, and the Congress has now passed legislation in the House and in the Senate. It remains to be seen what will emerge in the Defense Authorization Bill that seeks to compel the President of the United States to respect an interpretation of the SALT II Treaty, that he and his principal advisers have concluded is improper and incorrect.[14] Senator Nunn, who has led this effort in the Senate, had the audacity to suggest that the issue here is the integrity of the Constitution.

The administration has occasionally had the opportunity to negotiate with the Soviet Union without the encumbrance of congres-

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11. *See* H.R. 4919, *supra* note 8, at § 1 (limiting strategic weapons).

12. Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-Union of Soviet Socialist Republics, 23 U.S.T. 3435, T.I.A.S. No. 7503.

13. *See* Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986).

14. *See* National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, §§ 1001-1004, 100 Stat. 3816, 3957-59 (1986) (enunciating Congress' sense that the United States should "continue voluntary compliance with the central numerical sublimits of the SALT II Treaty as long as the Soviet Union complies with such sublimits").

sional actions that give aid and comfort to our negotiating adversaries. The most prominent example of this negotiating freedom took place with respect to intermediate nuclear missiles. In 1981, the President developed and presented a policy calling for the elimination of the entire category of intermediate nuclear missiles. The Soviet Union flatly and categorically rejected this proposal. Then Secretary of State Alexander Haig opposed the President's proposal, however, because he believed it would prove to be nonnegotiable.[15] Mr. Haig has subsequently written in his memoirs that the proposal by the President was based on "absurd" expectations, and was "not negotiable."[16]

In this instance, unlike in others, the Congress gave the administration solid support in its plans to deploy intermediate nuclear missiles in Europe, and to conduct the negotiations as it saw fit. It is worth observing that in seven years of negotiating with the Soviet Union, the elimination of intermediate nuclear missiles is the one area in which we have succeeded, or almost succeeded, in concluding a treaty. I believe that this treaty is in the interest of the United States. It is, however, a treaty that the Soviets said they would never sign. Indeed, they walked out of the negotiations in 1983, rather than negotiate on the basis of the President's proposal. It is a treaty that will require the Soviets to remove four or five warheads, depending on one's intelligence estimate, for every one that the United States removes. The potentiality of this treaty is, I believe, a tribute to the persistence, patience, and determination of President Reagan and Secretary of Defense Weinberger, for friends and allies urged them, at almost every turn, to abandon the proposal and accept something more appealing to the Soviets.

It is not only in dealing with adversaries that the Congress can, and often does, encumber the effectiveness of executive authority. One frequently finds that the Congress makes it difficult, and in some cases impossible, for the executive branch to negotiate effectively with its allies. As currently amended, the Foreign Assistance Act of 1961[17] is approximately 2,000 pages in length. It is worth recalling the attitude towards this type of congressional micromanagement from the viewpoint of a former chairman of the Foreign Relations Committee, J. William Fulbright. Fulbright argued that the Congress does indeed detract from the ability of the President to properly conduct foreign

15. *See* A. HAIG, JR., CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY 223-29 (1984).

16. *Id.* at 229.

17. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended in scattered sections of 22 U.S.C. and 42 U.S.C. (1982, Supp. I. 1983 & Supp. II 1984)).

affairs.[18] He reasoned that although the Congress possesses many powers under the Constitution that relate to foreign affairs, it, nevertheless, remains ill-equipped to initiate or shape foreign policy.[19] Yet a short time later, Fulbright presided over hundreds of amendments to the Foreign Assistance Act that made it virtually impossible for the United States to extend assistance to friends and allies without a battery of lawyers and endless delays.

What had happened in the interim? The principle of congressional restraint that Fulbright found paramount when the Congress was reluctant to permit President Kennedy to extend aid to Poland and Yugoslavia became an entirely different matter when the issue was extending aid to the Republic of Vietnam in the late 1960's. Thus, it is wise to be skeptical of general principles concerning the proper role of Congress when one hears them from members of Congress.

The role of Congress with respect to aid to the Contras exemplifies the need for such skepticism. Several Boland amendments[20] were passed over a period of four years. Each one imposed some restrictions on the freedom of the Executive to give assistance to the Contras, but never enough to prevent some form of assistance from continuing to flow. This type of congressional involvement in foreign policymaking has effectively obscured the responsibilities of all of the parties involved and rendered incoherent the President's desire to give assistance to the Contras in Nicaragua.

Finally, let me say a word about the role of the Congress in the

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18. Fulbright, *American Foreign Policy in the 20th Century Under An 18th-Century Constitution*, 47 CORNELL L.Q. 1, 5 (1961).

19. *Id.* Fulbright attributes the Congress' ineffectiveness in pursuing foreign policy objectives to the wide dispersal of powers throughout the Congress, sensitivity to executive encroachment, and the "glacial legislative process," which is the appropriations process. *Id.*

20. Between 1982 and 1984, Congressman Edward Boland of Massachusetts sponsored three initiatives affecting military aid to the Nicaraguan paramilitary force known as the Contras. The Boland amendment prohibited military aid "to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua." Pub. L. No. 97-377, § 793, 96 Stat. 1865 (1982). The Boland cap limited financial support for direct or indirect military operations in Nicaragua to $24 million of Department of Defense or intelligence agency funds during fiscal year 1984. Pub. L. No. 98-212, § 775, 97 Stat. 1452 (1983). The Boland cutoff provided that no funds made available to any intelligence agency and the Department of Defense could be used to support direct or indirect military operations in Nicaragua during fiscal year 1985. Congress did, however, permit up to $14 million in such support if, among other things, the President reports to Congress that the support is necessary and that the government in Nicaragua is providing support to anti-government forces in Central America. Pub. L. No. 98-473, § 8066, 98 Stat. 1935 (1984). *See Congress Sought to Place Limits Early on U.S. Covert Assistance to 'Contras'*, 41 CONG. Q. 76, 76-77 (1985) (discussing the history of the Boland initiatives and the political atmosphere surrounding their adoptions).

disposition of military power. I would not presume to comment on the War Powers Resolution,[21] about which there are many experts at this symposium whose knowledge is greater than my own, except to say that it strikes me as one of the sillier pieces of legislation to emerge in the last two decades. This law represents an abject lesson with respect to the passage of legislation in the aftermath of great upheavals and events that lead the Congress to rush to correct what it believes to be yesterday's mistakes. In my judgment, as one who sat through that debate from the vantage point of a Senate staff member, the War Powers Resolution was intended, more than anything else, to create the impression that the Vietnam War had somehow been the responsibility of excessive independent activity by the executive branch. The history is perfectly clear in showing, however, that every single authorization and appropriation act enabling that war to be fought was passed by a majority of both houses of Congress.

We are now engaged in protecting our interests, our democratic values, and the interests and democratic values of our friends and allies in a world in which we seldom encounter war declared in the traditional sense. We frequently encounter a test of wills, in which military power, and the willingness to bring military power to bear, is a crucial ingredient in the decisions that are made both among friends and among adversaries.

An observant Turkish officer once said, "[T]he trouble with you Americans is you are always stabbing yourselves in the back." There is an important lesson here. Our enemies abroad know that they can shop for venues. They know that the power and authority of the Executive may well be limited by congressional encroachment on the use of military power, or on the budgets supporting military forces. Our enemies have a variety of strategies at their disposal that threaten our ability to operate effectively.

Our adversaries have discovered that if they can create sufficient confusion about the facts and the circumstances in which executive actions have to be taken, they can frequently mount effective campaigns in the Congress to restrain any coherent or persistent action. They have also discovered that the Congress does not handle ambiguity well. Situations need to be crystal clear in order for the Congress to coalesce behind the exercise of executive authority. The exercise of such executive authority is so vital, and so fundamental, in the dangerous world in which we live. Thus, our enemies have found ways to exploit the division of authority and responsibility between the Con-

21. War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982).

gress and the Executive, in a manner that fundamentally threatens our ability to protect our interests.

There is no substitute in this world for strong executive authority that is backed by the Congress. There is also no substitute in a democracy for the concomitant political accountability that can cause the elected officials of the Congress to give the Executive the support that is necessary to protect this nation and its friends around the world.