EDITORIAL COMMENT

EXECUTIVE DISCRETION IN THE CONDUCT OF FOREIGN RELATIONS

The proposal to confer on the President power to impose restrictions on the exportation from the United States, during the existence of war abroad, of certain commodities whenever in his judgment such restrictions would serve to promote the security or preserve the neutrality of the United States or protect the lives or commerce of American nationals has aroused a degree of opposition to the principle of executive discretion such as had not heretofore been known in this country. In a statement laid before the Senate Committee on Foreign Relations in January, 1936, a well known American authority on international law declared that such a proposal as that referred to above if adopted "would constitute the worst form of dictatorship ever set up," that power of this kind if conferred on the President could be "used in unneutral ways that would make the United States in fact, even though not avowedly, a party to the war" and that it would be a "disreputable policy not in accord with any system of real legal neutrality."[1] Another high authority not only expressed a similar opinion regarding the "unneutrality" of such a policy, but asserted that there was reason to believe that those who advocated it "do not desire neutrality at all" and that many of them wish "to put the United States behind Article 16 of the Covenant of the League of Nations to enforce peace."[2] While the writer of this note has little faith in the utility of embargoes as a means of enabling the country laying them to avoid being drawn into foreign wars, he is unable to share opinions such as those quoted above regarding the danger to the country of conferring on the President discretionary power such as that proposed. In his opinion there is little in the past history of the executive power in the United States to justify such fears as those expressed by the two distinguished jurists quoted above and by others who hold similar views. Congress has in fact on various occasions in the past conferred on the President full discretion in respect to the laying and lifting of embargoes and it has been exercised without involving the creation of a dictatorship or without embroiling the country in foreign wars. Sometimes the President has declined to exercise the power conferred, as President Wilson did in 1916, thus showing that he could be trusted not to abuse it or to use it unwisely.

It is believed that those who oppose as dangerous to the peace and welfare of the country the proposed addition to the discretionary authority of the President, overlook the fact that the Constitution already vests him with vast

[1] Statement of John Bassett Moore, Hearings before the Committee on Foreign Relations, U. S. Senate, 74th Cong., 2d Sess., S. 3474, pp. 176–177.

[2] Edwin M. Borchard, testimony before the same committee, *ibid.*, especially p. 191 ff., and letter in the New York Times of Feb. 7, 1937, under the caption "unneutral neutrality."

powers in respect to the conduct of foreign relations which, if unwisely exercised, might involve equal or greater danger to the country. As if this were not sufficient, Congress has from time to time conferred additional powers upon him. As Mr. Justice Sutherland pointed out in his opinion in the Chaco arms embargo case,[3] practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress conferring discretionary authority on the President in the field of international relations. In view of the attacks upon the proposal referred to above, it may not be out of place to call attention here to some elementary facts regarding the nature and extent of the vast power which the President already possesses in respect to the conduct of foreign relations.

From the beginning, American statesmen and writers on constitutional law have emphasized the dominating rôle which he plays in the determination of our foreign policy and the wide discretion which he enjoys in the exercise of his power in virtue of the Constitution, the statutes and custom.[4] Jefferson went so far as to remark that "the transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are especially submitted to the Senate. *Exceptions are to be construed strictly.*" [5] The reasons why the authors of the Constitution considered it wise to vest the President with such power, so much of which is discretionary, are well known and need not be restated here. It has been said that as a result he "holds in his keeping the safety, welfare and even permanence of our internal and domestic institutions." [6] An examination of his powers in respect to the conduct of foreign relations will show that this statement is hardly an exaggeration. He alone may negotiate treaties with foreign states. Resolutions of Congress urging the negotiation of a treaty for the accomplishment of a particular object are in no sense binding upon him. He alone is the judge as to whether the welfare or safety of the country would be served by the conclusion of a particular treaty and, if so, what its provisions shall be. While the consent of the Senate is necessary to the ratification of "treaties," it is admitted even by the critics of executive discretion that under the name of "executive agreements" he has what is in effect a large and important treaty-making power which is independent of the control of the Senate. This power could of course be unwisely exercised and it might lead to embarrassment and arouse dangerous controversy with foreign nations, but so far there have been no instances in practice.

In the exercise of his power to see that treaties are executed he has con-

[3] Printed, *infra*, p. 334.

[4] See Corwin, The President's Control of Foreign Relations (1917); Wright, The Control of American Foreign Relations (1922); Berdahl, The War Powers of the Executive in the United States (1920); and the speech of Senator Spooner in the Senate in 1906 (59th Cong., Record, 1st Sess., Vol. XL, Pt. 2, p. 1417 ff., reprinted in Reinsch, Readings in American Federal Government, p. 81 ff.

[5] Quoted by Corwin, *op. cit.*, p. 203.

[6] Pomeroy, Constitutional Law, p. 565.

siderable discretion. Until there has been a final decision of the Supreme Court, he may decide for himself what the treaty requires and what it permits. Obviously, the interpretation which he chooses to put upon it might lead to serious controversy with the other party or it might involve the waiving of American rights which other departments of the government and public opinion considered to have been granted by the treaty. The failure of the other party to execute the treaty as interpreted by the President might lead him to have recourse to reprisals against the defaulting party. His own refusal to execute the treaty as interpreted by the other party likewise might cause it to resort to reprisals against the United States. It is admitted also that in certain circumstances the President may denounce and terminate a treaty to which the United States is a party. President Taft's denunciation in 1911 of the treaty of 1832 with Russia will be recalled in this connection.[7] Even as to treaties which he has no power to denounce, he may consider them as having lapsed and therefore no longer binding on the United States if in his opinion the other party has defaulted in the performance of its obligations. It seems clear that the discretion of the President in respect to the interpretation and execution of treaties might, if unwisely used, become a source of controversy with foreign countries, but happily there has been little if any in fact.

In the exercise of his power to receive diplomatic representatives he might give offense to a foreign government by refusing to receive a particular representative for reasons which seemed derogatory to its dignity and self-respect, and he might cause still greater offense by dismissing a foreign representative and requiring him to leave the country. It is of course within his power to sever diplomatic relations with a foreign government for any reason which in his opinion may seem sufficient. While the severance of diplomatic relations is not in itself an act of war, it is in fact generally followed by an outbreak of war.[8] Here again is an example of discretionary executive power of the first magnitude in the field of foreign relations and one which may be exercised in such a manner as to involve the country in war.

In this connection reference may be made to the power of the President in respect to the recognition of foreign states, governments and belligerent Powers—a full and completely uncontrolled discretion. He is at liberty to accord or withhold recognition whenever in his opinion the facts or the interests of the United States permit or require it. If accorded before the tests laid down by international law have been met, it is an act of intervention in the internal affairs of a foreign state and may be a justifiable cause of war. The President might, if he had elected to do so, have recognized in 1919 the revolutionary organization of the so-called Republic of Ireland as the *de facto* government, although it might have involved us in war with Great Britain. He might also have recognized the Franco régime in Spain when

[7] See President Taft's own explanation of his action, in Our Chief Magistrate, pp. 116–117.
[8] Woolsey, I Proceedings Amer. Pol. Sci. Assoc., p. 57 ff.

Germany and Italy did in November 1936, although it would have been an act of intervention for which the legitimate government could, if it survives, hold the United States responsible. On the other hand, he might by refusing to recognize a new state or government conceivably provoke reprisals and jeopardize peaceful relations between the United States and the unrecognized state.

There are other ways in which the exercise by the President of his discretionary power as the director of foreign relations might embroil the country in dangerous controversy and even war with other countries, such as the expulsion of aliens, the ordering of foreign vessels to leave American ports, demands for apologies or salutes of the flag, displays and even the use of force, the sending of military forces into foreign countries, resorts to reprisals, offensive public pronouncements, failure to protect the representatives of foreign governments in the United States, etc.

While the war-making power is by the Constitution conferred on Congress, the President may by the manner in which he conducts the foreign relations of the country bring about a situation which may make a declaration of war a virtual necessity, and in any case his influence in determining the action of Congress in declaring war is usually decisive.[9] In fact every declaration of war that has been made by Congress was made on the initiative of the President and in no case would there probably have been a declaration of war without his initiative. As is well known, President McKinley in 1898 was subjected to almost violent attack by certain members of Congress for his unwillingness to recommend a declaration of war against Spain,[10] and if he had not yielded to this pressure it is doubtful whether there would have been a war.[11] The late Senator Lodge hardly overstated the fact when he declared that "the President under his constitutional powers can, if he chooses, get the country into war." [12]

[9] "The President cannot declare war; Congress alone possesses this attribute. But the President may, without any possibility of hindrance from the legislature, so conduct the foreign intercourse, the diplomatic negotiations with other governments, as to force a war, as to compel another nation to take the initiative; and that step once taken, the challenge cannot be refused. How easily might the Executive have plunged us into a war with Great Britain by a single dispatch in answer to the affair of the *Trent*. How easily might he have provoked a condition of active hostilities with France by the form and character of the reclamations made in regard to the occupation of Mexico." Pomeroy, *op. cit.*, p. 563.

[10] Olcott, Life of William McKinley, Vol. II, p. 26 ff.

[11] Representative Dill stated in the House of Representatives on Jan. 21, 1919, that "History shows . . . that while Congress does possess that power [to declare war], in reality, the President exercises it. Congress has always declared war when the President desired war, and Congress has never attempted to declare war unless the President wanted war. That was true of the war of 1812. It was true of the Mexican war. It was true of the Spanish-American war. It was true of this war. It will probably be true of every war in which the nation engages so long as the present method of declaring war continues." Quoted by Berdahl, War Powers of the Executive in the United States, p. 93.

[12] Quoted by Mathews in The Conduct of American Foreign Relations, p. 302.

It is clear from this summary that the discretionary power which the President has, either as civil executive or commander-in-chief of the armed forces, is such that it may be used to embroil the country in dangerous controversy and even war with other states. The proposal to extend it by statute to include the placing of restrictions on the exportation of certain commodities from the United States in time of foreign war will, if adopted, involve only a slight addition to the sum total of the vast power which admittedly he already possesses. If this augmentation of his power in the domain of international relations will make him a potential dictator and endanger the peace and security of the nation, consistency would seem to require that he should be deprived of the far greater and potentially more dangerous powers which he already possesses. But no one has seriously proposed that this should be done and there is little in our past experience to justify an argument in support of such a proposal. Professor Corwin, who has made a detailed study of the subject, concludes that "on the whole, therefore, the net result of a century and a quarter of contest for power and influence in determining the international destinies of the country remains decisively and conspicuously in favor of the President." [13] It would seem that, if there is a discernible tendency, it is in the direction of increasing rather than diminishing the President's power in the domain of international relations. The Supreme Court in its opinion in the recent Chaco arms embargo case pointed out that if embarrassment—perhaps serious embarrassment—is to be avoided in the conduct of the foreign affairs of the country, it is necessary to accord to the President a degree of discretion and freedom which would not be admissible in the conduct of domestic affairs. The court also emphasized that the sources of information at the command of the Executive and his ability to act with promptness and dispatch when prompt action may be necessary, make him a more efficient and maybe a safer organ to be trusted than the Congress would be.

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ENGLAND AND EGYPT

The Treaty of Alliance between Great Britain and Egypt signed in London August 26, 1936, and ratified December 22, 1936, is a masterly solution of a serious controversy.[1] The World War made a live issue of the question of Egyptian independence. England by reason of its war with Turkey was compelled to declare a protectorate over Egypt in 1914. It was constrained to acknowledge, with reservations, the independence of Egypt on March 15, 1922. This ambiguous situation created increasing distrust and tension between Egypt and England. The Italo-Abyssinian War affected Egypt so vitally that a definite solution was imperatively needed. Egypt was none too sure it could stand up alone against possible Italian aggression. England

[13] The President's Control of Foreign Relations, p. 207.

[1] The treaty is printed in the Supplement to this JOURNAL, p. 77.