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BOOK REVIEW

WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS

By Abraham D. Sofaer, Ballinger Publishing Co., Cambridge, Massachusetts
1976
pp. xxxvi, 533, $15.00

"War" almost inevitably generates national debate over the prerogatives of the President and Congress with respect to warmaking powers. Typical of such discussion was that engendered by the proposed amendment to the Foreign Military Sales Act. Senator Strom Thurmond during Senate floor debate in 1970 urged that:

If we pass this amendment it will undermine the President in carrying out his constitutional duty to do his utmost to provide for the protection of our fighting men . . . . (P)assage of this amendment would be met by jubilation in Hanoi, Moscow, Peking, and other Communist capitals throughout the world, as it would signal the waving of a white flag to the forces of tyranny and oppression.


Senator Church, on the other hand, defended the amendment by saying:

We in the Congress have been derelict far too long in placing adequate restraints on the executive branch in the commitment of our men and dollars abroad. As Senators we should concern ourselves primarily with seeing that Congress carries out its responsibilities, not with the duties of the President. We should worry, not so much about preserving the President's powers which he will faithfully uphold . . . . This debate should be focused, not on whether this proposal ties the President's hands—it does not—but on whether it will help untie the knots by which Congress has shackled its own powers.


I am hardly suggesting that students of foreign policy and U.S. constitutional history prefer a state of war so they can have such grist for their mills. However, the fact remains that
it is usually through foreign and military intercourse with other nations that constitutional doctrine regarding the powers to conduct foreign affairs and military action is clarified.

It was indeed the passion of this country's Indochina involvement which brought the American Bar Association to commission a study such as *War, Foreign Affairs, and Constitutional Power*. Under the aegis of the A.B.A., Professor Sofaer set out to study the powers of the President and Congress with respect to foreign affairs and the conduct of war. From his study project, this first volume has emerged as a definitive constitutional history of early U.S. foreign affairs.

The study covers the time period from the Constitutional Convention through the administration of John Quincy Adams, with initial references to British constitutional experience and early state attempts to conduct foreign affairs during the American Revolution and the era of the Articles of Confederation. As in most constitutional histories, the central importance of George Washington in establishing standard operating procedures is outlined; however, Professor Sofaer's study goes somewhat more in-depth into congressional-executive relations during the Washington administration than have most constitutional histories. The study also notes that during the administration of John Adams the power of the President did not expand significantly because of open congressional resistance and because the Supreme Court ruled that, while both Congress and the President could initiate foreign and military activities, Congress retained the final word in warmaking policies.

Sofaer chronicles the changes in Thomas Jefferson's doctrine and practice after he assumed the Presidency in the tumultuous election of 1800. While Jefferson intended to pursue a presidential style which was less centralized and secretive than that adopted by either Washington or Adams, he came to act more and more in a manner resembling that of his predecessors. The final chapter of the book is a 150-page compilation of diplomatic and military affairs in the post-Jefferson administrations of Madison and Monroe, with an afterthought given to John Quincy Adams. In Sofaer's account, these administrations are marked by further territorial expansion of the United States into Florida, often carried out by the military operating
with vague and legislatively-contested authority from the Commander in Chief.

In Sofaer's monumental attempt to document the constitutional history of U.S. foreign affairs until roughly 1829, we read of numerous examples of prototypical executive behavior which became so visible during U.S. involvement with the rest of the world after 1945. Some of the more common examples include congressional acquiescence to executive initiative, sporadic congressional attempts to limit executive discretion in the use of military force, U.S. intervention in the domestic affairs of other countries, and presidential difficulties in convincing overly eager (and occasionally ruthless) officials to carry out policies within the bounds of executive authority. Except for the cast of characters, it is difficult at times to tell just which century's history the book presents.

However, Sofaer and his associates have gone to great lengths to drive home a central point about the constitutional balance between the Presidents and Congress. While there are numerous precedents in the behaviors of these early presidents and legislators for the actions of our more recent officials, a most crucial difference exists. The early presidents went to great lengths to find legislative bases for their actions, such as through the argument that an appropriation for a military force provides implicit authority for the President to use that force in the absence of a congressional declaration of war. Modern presidents, however, have often gone some distance farther by arguing that they possess inherent constitutional powers to commit the country to military engagements by the sole virtue of being Commander in Chief, chief appointive authority, and central contact figure for foreign diplomats. It is with this important difference that Sofaer concludes his first volume.

The author and his colleagues followed closely their mandate from the A.B.A. to "study and report on the respective powers under the Constitution of the President and Congress to enter into and conduct war." The 118 pages of references at the end and the multitude of footnotes throughout the book attest to the exhaustive nature of the research which culminated in this volume. However, the book generally omits analyses of events and evaluations of other historical writings on the events of this time period. Without doubt, much will be written about the author's overt choice to avoid an argumenta-
tive tone and to downplay historiographical debate. From this perspective, the passion which gave life to the study project is not conveyed in the text of the book.

Still, I cannot fault the book on this count. To charge that the author abstained from polemics is accurate, but to contend that he neither provides nor supports conclusions is shortsighted. On the whole, I am delighted that the book does not provide an evaluation of each and every action on the battlefield (for I enjoy arriving at my own conclusion about General Jackson’s ruthless exercise of military authority in Florida) or every presidential motive (for I enjoy arriving at my own conclusion about Monroe’s duplicitous treatment of Jackson). The book’s charter was to provide a study of constitutional powers, and it does so admirably in spite of an organization and an editorial arrangement which at times make the book appear the written product of a multi-disciplinary university committee.

However, the main effect of the book’s organization and arrangement is simply to limit its market to readers who are already familiar with the general historical outline of the period. Thus the book will certainly have great benefit for upper division and graduate courses in constitutional history, foreign affairs, and national security studies. The main readership is likely to be drawn from the ranks of lawyers, historians, political scientists, and military affairs specialists who want a thorough, detailed view of the actions which have defined the constitutional balance between Congress and the President with respect to warmaking powers. This important book goes a long way toward satisfying this desire. We can eagerly look forward to future volumes by the Sofaer study group.

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