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American Guarantees to Israel and the Law of American Foreign Relations

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American Guarantees to Israel and the Law of American Foreign Relations

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INTRODUCTION

It is widely accepted and expected that any peace settlement in the Middle East will be accompanied by some form of American guarantee.[1] Attention has therefore quite naturally been focused on the lessons which might be culled from the past history of unilateral and multilateral guarantees to small states in general, and to the states of the Middle East in particular.[2] There is, however, a further perspective from which the issue of the future effectiveness of American guarantees might be approached, namely, that of the "law of American foreign relations." From this perspective several questions need to be asked. What form, for example, should the American guarantee take if it is to have "constitutional legitimacy"? Would an executive declaration of guarantee suffice? Must the guarantee be embodied in a formal treaty bearing the consent of two-thirds of the Senate? Would an executive declaration that received the assent of both houses of Congress give rise to a commitment as valid, in a constitutional sense, as one incorporated in a treaty? In whatever form the guarantee is embodied, would the President be empowered to "redeem" the American pledge in a specific instance — by means of direct military involvement and/or military and economic assistance — without receiving the further specific approval of Congress? What difficulties, with regard to the respective functions of the President and Congress, might be involved in the attempt to implement the guarantee? What would be the likely *scope* of the guarantee, in light of past American practice and post-Vietnam tendencies? Who would be constitutionally authorized to renege on, or terminate, an American commitment?

The answers to these questions are by no means self-evident; indeed,

1. See, in particular, transcript of Secretary Kissinger's interview in Peking, November 13, 1973. See also subsequent articles and press reports on the possibility of extending American guarantees to Israel (e.g., Richard H. Ullman, "After Rabat: Middle East Risks and American Roles," *Foreign Affairs* 53 (1975): 284–296; John Lawrence Hargrove, "Guaranteeing Israel's Borders," *Washington Post,* January 14, 1975; and reports in the *New York Times* and *Washington Post* during February 1975). Some of the more recent suggestions would have American guarantees *replace,* rather than supplement, a peace agreement between the local contenders.

2. See the incisive discussions by Alan Dowty, "The Application of International Guarantees to the Egypt-Israel Conflict," *Journal of Conflict Resolution* 16 (1972): 253–267; and *The Role of Great Power Guarantees in International Peace Agreements,* Jerusalem Papers on Peace Problems, no. 3 (February 1974).

in the American system of government, many of the issues raised here are perennially debated and never finally resolved.[3] Nevertheless, even tentative suggestions can be arrived at only on the basis of an appreciation of the "law of American foreign relations" — understood, in this context, as the dictates of the United States Constitution in the sphere of foreign relations together with the gloss offered by subsequent practice.[4] Special emphasis needs to be placed on the most recent practice evoked by the trauma of Vietnam. For in the wake of that agony, questions regarding the limits of presidential and congressional powers in foreign policy have been sharply debated, and the supine acquiescence of Congress in the growing hegemony of the President has been seriously called into question.[5] Moving to restore the constitutional "balance," Congress has

3. In the oft-quoted words of Corwin, the American Constitution "is an invitation to struggle for the privilege of directing American foreign policy." Edward S. Corwin, *The President: Office and Powers, 1787–1957,* 4th rev. ed. (New York: New York University Press, 1957), p. 171.

4. As noted by Henkin in his definitive book on the subject, the "Law of American Foreign Relations" embraces "both international law as applied by the United States and the constitutional law particularly relevant to the conduct of foreign affairs." Sometimes, too, "the field is defined to include . . . statutory and other nonconstitutional materials relating to foreign affairs." Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, N.Y.: Foundation Press, 1972), p. viii. It is in the latter, wider, sense that the term is used in this paper.

5. In one sense, as James MacGregor Burns has observed, "war is the forcing-house of executive power, and the end of war usually brings a reaction against the Presidency" (*New York Times,* April 8, 1973). However, the present reaction has been perhaps more intense and sweeping than preceding ones. See John Norton Moore, "Contemporary Issues in an Ongoing Debate: the Roles of Congress and the President in Foreign Affairs," *International Lawyer* 7 (1973): 733–745. Moreover, the Watergate scandal, coming as it did in the last stages of the Vietnam involvement, reinforced the outcry against presidential "usurpation."

It might be noted that the role of the courts in the current debate over the limits of presidential and congressional prerogatives in foreign policy has generally been minimal and self-negating, primarily because of the "political question" doctrine. Nevertheless, there have been some relevant judicial decisions. Particularly significant is the line of federal judicial decisions which deemed military appropriations and other Vietnam-related legislation to constitute implied congressional authorization of the war (see, for example, *Berk* v. *Laird,* 429 F. 2d 302 [2nd Cir. 1970]; *Orlando* v. *Laird,* 443 F. 2d 1039 [2nd Cir. 1971], *cert. denied,* 404 U.S. 869 [1971]). These pronouncements had some influence on congressional reticence regarding further appropriations for the Cambodian bombing (see below). On the judiciary and the Vietnam War generally, see Anthony A. D'Amato and Robert M. Oneill, *The Judiciary and Vietnam* (New York: St. Martin's Press, 1972); Louis Henkin, "Vietnam in the Courts of the United States," *American Journal of International Law* 63 (1969): 284–289; John Norton Moore, "The Justiciability of Challenges to the Use of Military Forces Abroad," *Virginia Journal of International Law* 10 (1969): 85–107; Burt

sought to restrict — some would say hobble — executive discretion and to reactivate its own prerogatives, particularly in respect of two powers directly relevant to any American guarantees: the power to commit the United States to foreign nations and the power to employ American forces abroad. The tools which Congress has used to restrain the President have included non-binding "sense" resolutions (such as the Senate National Commitments Resolution);[6] well-publicized investigations and hearings (as, for example, the Fulbright hearings on the circumstances leading to the Gulf of Tonkin Resolution and the investigations conducted by the Symington subcommittee of the Senate Foreign Relations Committee in 1969–1970 which disclosed, *inter alia,* American involvement in the war in northern Laos and the existence of secret U.S. bases in and commitments to Thailand);[7] binding legislation (such as the War-Powers Resolution of November 1973, passed over a presidential veto);[8] and even the power of the purse (*vide,* the cut-off of funds for the continued bombing of Cambodia and for continued military aid to Turkey).[9] Quite

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Neuborne, "The Legality of the American Bombing of Cambodia: The ACLU Position," *Brooklyn Law Review* 40 (1973): 1–34; and Lawrence R. Velvel, "The War in Vietnam: Unconstitutional, Justifiable, and Jurisdictionally Attackable," in Richard A. Falk, ed., *The Vietnam War and International Law,* vol. 2 (Princeton: Princeton University Press, 1969), pp. 651–710.

6. For text and discussion of this resolution, see the section on purely executive commitments, below.

7. See *Security Agreements and Commitments Abroad, Report to the Senate Committee on Foreign Relations by the Subcommittee on Security Agreements and Commitments Abroad,* 91st Cong., 2nd Sess. (1970) (hereinafter cited as *Symington Subcommittee Report);* and see, generally, Francis O. Wilcox, *Congress, the Executive, and Foreign Policy* (New York: Council on Foreign Relations, 1971), pp. 135–137; and J. William Fulbright, *The Crippled Giant: American Foreign Policy and Its Domestic Consequences* (New York: Random House, 1972), pp. 213–214. In reaction to congressional criticism, the Nixon Administration apparently disavowed the secret commitment to Thailand. See *New York Times,* August 16, 20, 21, and 22, 1969.

8. For a discussion of this resolution, see the section on execution, non-execution, and termination of the guarantee, below.

9. For a review of the background to the cut-off of funds for the Cambodia bombing, see Richard L. Madden, *New York Times,* July 1, 1973. On the suspension of military aid to Turkey, see *New York Times,* October 19, 1974, and February 6, 1975.

The "impeachment" tool should also be mentioned in this context, since it can no longer be viewed as a mere theoretical threat. Recalled from oblivion as a result of a domestic scandal (Watergate), it nevertheless bears important implications for the President's conduct of foreign relations. Although the particular article of impeachment regarding President Nixon's secret bombing of Cambodia was rejected by the House Judiciary Committee (in contrast to articles on domestic conduct), the fact that it was seriously raised and received considerable support must make future Presidents more concerned to stay on safe constitutional grounds when using force abroad.

clearly, all of these developments are highly pertinent to the question of the form, scope, execution, and termination of an American commitment to foreign states and can scarcely be ignored by any potential recipient of American guarantees.

FORM OF THE GUARANTEE

The United States in the past has assumed commitments to foreign states by several methods: purely executive action; joint presidential-congressional action (involving a *simple* majority of *both* houses of Congress); and formal treaty-making (requiring the President to receive the "advice and consent" of two-thirds of the Senate). A prospective "promisee" of the United States might well wish to examine the strengths and weaknesses of each of these forms of commitment.[10]

PURELY EXECUTIVE COMMITMENTS

This type of commitment—which is not mentioned in the Constitution—embraces both formal "executive agreements" and less formal "executive declarations." In neither case is the Senate or Congress as a whole asked for its approval; in some instances Congress has even been unaware of the existence of such commitments.[11] Among the more famous of the purely executive undertakings of the past are the Destroyer-Bases Deal, the Yalta and Potsdam Agreements and, more recently, the Agreement on Ending the War and Restoring Peace in Vietnam. In the Middle East context, the Tripartite Declaration of 1950 (in which the United States, the United Kingdom and France pledged "unalterable opposition to the use of force or threat of force between any of the states" in the area) falls into this category, as do the Eisenhower-Dulles assurances to Israel in 1957 regarding freedom of passage through the Straits of Tiran. Moreover, the succession of presidential declarations in support of Israel has been widely viewed as the equivalent of an American commitment —a point to be further discussed below.

From time to time the constitutional legitimacy of purely executive

10. The question of the bilateral or multilateral nature of any future guarantee will be discussed in the following section on the scope and content of the guarantee.
11. See n. 7, above. To prevent secret executive commitments in the future, Congress adopted the Case Act in August 1972 (Pub. L. no. 92–403, 86 Stat. 619), which requires transmission to the Congress for its information—or, if national security dictates, to the foreign affairs committees of both houses—of every executive agreement within sixty days after its conclusion.

commitments has been challenged.[12] The Brickerite movement of the 1950s—in large measure a reaction to the allegedly extravagant use of executive agreements during World War Two—aimed to curtail drastically (or even eliminate) the possibility of sole executive commitments.[13] In the current period, the challenge has been renewed, this time spearheaded by liberal forces in Congress bent on retrenchment from presidentially-inspired "over-extension" in foreign lands. The present movement is designed to confine executive agreements to minor matters[14] and to impress with the stamp of rank illegitimacy sole executive agreements purporting to "commit" the United States.

The most prominent manifestation of this trend was the adoption by the Senate, on June 25, 1969, of the National Commitments Resolution,[15] which states:

> Whereas accurate definition of the term "national commitment" in recent years has become obscured: Now, therefore, be it
>
> *Resolved,* That (1) a national commitment for the purpose of this resolution means the use of the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the Armed Forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.

Furthermore, recognizing that the establishment of military bases abroad may, in practical terms, be as effective a commitment to the host country

12. See, in general, Henkin, *Foreign Affairs and the Constitution,* chap. 6, and the works cited therein; John R. Stevenson, "Constitutional Aspects of the Executive Agreement Procedure," *Department of State Bulletin* 66 (1972): 840–851; and Fullbright, *The Crippled Giant,* pp. 216–217.

13. See Stephen A. Garrett, "Foreign Policy and the American Constitution: the Bricker Amendment in Contemporary Perspective," *International Studies Quarterly* 16 (1972): 187–220.

14. See, for example, the plaint of the Senate Foreign Relations Committee in 1969 that "the traditional distinction between the treaty as the instrument of a major commitment and the executive agreement as the instrument of a minor one" has been all but reversed. Cited in Fulbright, *The Crippled Giant,* pp. 224–225.

15. S. Res. 85, 91st Cong., 1st Sess., 115 Cong. Rec. 17245 (1969).

as a mutual defense pact (if not more so),[16] the Senate has in recent years attempted to persuade, and even compel, the Administration to conclude base agreements in the form of a treaty, subject to Senate consent. In 1970 Senator J. William Fulbright and members of the Senate Foreign Relations Committee strongly urged use of the treaty instrument for extending the Spanish base agreement (first concluded in 1953 as an executive agreement and similarly renewed in 1963). When the Administration, denying that any military commitment was involved, proceeded to conclude the agreement without submission to the Senate, the Senate adopted a "sense" resolution stating its understanding that nothing in the agreement "shall be construed as a national commitment by the United States to the defense of Spain."[17] Subsequently, in 1972, the Senate adopted a resolution proposed by Senator Clifford Case calling on the President to submit the then-pending Azores and Bahrain base agreements to the Senate for its consent. This non-binding advice was also not heeded.[18]

It should be noted that none of the aforementioned resolutions—including the National Commitments Resolution—legally bind the President. This does not, however, necessarily detract from their importance. It is, after all, always possible that "Congress might support its 'sense' by

16. See, for instance, the statement by General Wheeler, former Chairman of the Joint Chiefs of Staff, in a 1968 memorandum: "By the presence of the United States forces in Spain the United States gives Spain a far more visible and credible security guarantee than any written document." Cited in Fulbright, *The Crippled Giant,* p. 218; and see *Symington Subcommittee Report,* pp. 11–12, 20–21. The Symington subcommittee concluded that "overseas bases, the presence of elements of United States armed forces, joint planning, joint exercises, or extensive military assistance programs represent to host governments more valid assurances of United States commitment than any treaty or agreement" (ibid., p. 20). Even the War-Powers Resolution concedes that the President may constitutionally use force to repel an attack against U.S. armed forces abroad; hence, the critical significance of any decision to station troops in a particular country.

17. S. Res. 469 introduced by Senator Church. See *New York Times,* July 25, August 3, 6, and 7, 1970; and Fulbright, *The Crippled Giant,* pp. 218–220. Earlier Spanish base agreements had contained a declaration that an attack on either country would be "a matter of common concern." In the new agreement each side agreed to "support the defense system of the other" and to "make compatible their defense policies." Many Senators (and apparently Spain too) deemed the new agreement a more extensive security commitment than preceding ones. See, generally, *Hearing Before the Senate Committee on Foreign Relations on the Agreement of Friendship and Cooperation between the United States and Spain,* 91st Cong., 2nd Sess. (1970).

18. *New York Times,* February 10 and March 4, 1972; Fulbright, *The Crippled Giant,* p. 227.

adopting or denying actions or appropriations that are within its powers."[19] Significantly, Senator Case followed up his resolution with proposed binding legislation to deny funds for implementing the Azores and Bahrain base agreements until those agreements were submitted to the Senate as treaties, and the Senate adopted this proposal as well as one that would have denied funds for any new base agreement which had not received the advice and consent of the Senate.[20] Although these pioneering attempts at employing the power of the purse to compel the use of the treaty instrument in place of executive agreements were unsuccessful, they may have set a precedent for the future.[21] As for the National Commitments Resolution—clearly intended as a warning that "the Senate for its part reserves its right not to implement Presidential commitments"[22]—foreign governments probably would do well, given the present mood of Congress, not to entirely ignore the warning.[23]

There are indications, moreover, that the warning has not gone totally unheeded by the President either. Thus in 1972, for example, the Legal Adviser of the State Department deemed it unquestionable that "agreements which involve a basic political commitment, such as an undertaking to come to the defense of another country if it is attacked, should

19. Henkin, *Foreign Affairs and the Constitution,* p. 86.

20. The proposals were offered as amendments to the Military Aid Authorization Bill *(New York Times,* April 3, May 24, and June 20, 1972). Neither of the proposals were adopted by the House. More recently, Senator Case has moved to require Senate *or* congressional consent to base agreements before any expenditure of funds is authorized. See, especially, the Case amendments to Sections 10 and 11 of the Department of State/USIA funding authorization bill for fiscal 1975, regarding appropriations for military base agreements generally, and for the Diego Garcia base in particular, S.3473, 93rd Cong., 2nd Sess. (1974). (See also *Briefings on Diego Garcia and Patrol Frigate, Hearings Before the Senate Committee on Foreign Relations,* 93rd Cong., 2nd Sess. [1974].)

21. Should the President use the veto, Congress would, of course, have to muster a two-thirds vote in both houses to override (as with the War-Powers Resolution). However, through the device of "riders" to essential legislation (especially appropriations bills), Congress may make its will prevail, even by simple majority. Then again, if both President and Congress (though lacking the requisite two-thirds majority to override) remain adamant—as in regard to the cut-off of funds for the bombing in Cambodia (see *New York Times,* June 30 and July 1, 1973) and for military aid to Turkey (see *New York Times,* October 19, 1974)—some compromise may need to be found. In any of these eventualities, the President could not readily ride roughshod over congressional opinion.

22. Henkin, *Foreign Affairs and the Constitution,* p. 183.

23. But cf. Henkin, ibid., for the conclusion that the resolution "is not likely to determine Executive behavior" and that "in the end Senates and Congresses, while theoretically free to disown . . . [executive] commitments, cannot do so lightly."

be cast in the form of a treaty in the constitutional sense."[24] It has been the practice in the past, however, to cast "basic political commitments" in treaty form, but to proceed thereafter to executive interpretations and supplementary executive agreements which created new obligations and commitments and nullified, in effect, the requirement of Senate consent. The North Atlantic Treaty, for example, was "fleshed out" by numerous executive agreements;[25] and the executive interpretations of the South-East Asian Treaty (SEATO) may have constituted a virtual revision of the treaty.[26] Similarly, any future American guarantee of a Middle East settlement might, theoretically then, be embodied, in the first instance, in a formal treaty, but subsequently supplemented by further executive interpretations and agreements. However, awareness of, and resistance to, such executive extension of treaty commitments have sharpened in recent years,[27] and it cannot lightly be presumed that the Senate would acquiesce

24. Stevenson, "Constitutional Aspects of the Executive Agreement Procedure," pp. 846–847. See also the recently revised State Department "Circular 175" which lists as a consideration dictating the choice of the treaty form "the extent to which the agreement involves commitments or risks affecting the nation as a whole." Department of State, *Foreign Affairs Manual,* vol. 11 (October 25, 1974), para. 721.3. Cf. also Moore, "Contemporary Issues in an Ongoing Debate," p. 738, to the effect that no NATO-like defense commitment to a foreign nation was concluded by executive agreement.

The fact that the agreement to end the war in Vietnam was not submitted to the Senate or Congress for approval was defended by the President on the basis of his competence as Commander-in-Chief to terminate hostilities and on the grounds that no new commitments were involved. However, when the Administration subsequently attempted to justify the bombing in Cambodia (without congressional authorization) by reference to the need to police the executive cease-fire agreement, the ire of Congress was aroused, and moves to cut off funds for the bombing were initiated. See, especially, Secretary of State Rogers' justification of the bombing, *New York Times,* May 1, 1973; the *New York Times* editorial, May 5, 1973; and congressional actions and reactions throughout May and June, as reported in the *New York Times.*

25. See Wilcox, *Congress, the Executive, and Foreign Policy,* pp. 160–161; and Henkin, *Foreign Affairs and the Constitution,* p. 425.

26. Fulbright, *The Crippled Giant,* pp. 220–221.

27. See ibid., pp. 218–227; and see, in general, *Symington Subcommittee Report,* and, especially, its warning that "the day-to-day implementation of policy . . . frequently and sometimes almost imperceptibly provides the building blocks for future commitments" (ibid., p. 1).

In 1974 the Senate adopted the Ervin Bill (S.3830) which, on the surface at least, contains particularly far-reaching restrictions on presidential sole executive-agreement-making. According to its provisions, executive agreements may enter into force only after a sixty-day period of continuous session of Congress and only if not disapproved within that period by a concurrent resolution of Congress. However, agreements entered into by the President "pursuant to a provision of the Constitution or prior authority

in the future in what it may view as an arrogation by the executive of the entire treaty-making power.

It is significant perhaps to note that the present American "commitment" to Israel is based primarily on executive declarations made by successive administrations. (The Eisenhower Doctrine, an executive declaration endorsed by joint resolution of Congress, is another possible basis, to be discussed below.) What force and scope, then, are to be attributed to the existing commitment? In the view of some observers, the United States has contracted a "virtual commitment" to Israel.[28] The assessment of Senator Fulbright is more ambivalent and particularly interesting—also in terms of potential guarantees to Israel in the future. The present commitment, he states, is not "constitutionally legitimate"; it is "de facto and undefined," and it "could be very great."[29] At another point he considers that "simply by repeating again and again that we have an obligation . . . we have come . . . to suppose that our word and even our national honor are involved, as completely as they would be by duly ratified treaties." Over the years the commitment to Israel has been "elevated . . . from factuality to solemnity to sanctity." Fulbright's suggestion for a United States-Israel security treaty (see below) is put forward "not in the belief that we would be contracting a new obligation but, quite frankly, for the purpose of codifying and limiting a de-facto obligation."[30] In such circumstances Israel might naturally wish to know whether it would be worth "trading in" a vague, possibly open-ended *de facto* commitment of anomalous constitutional status for a formalized, constitutionally-legitimate commitment severely limited in scope and possibly greatly restrictive of Israel's freedom of action. The answer, of course, would very much depend on the scope and content of any future guarantee.

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given to the President by treaty or law" are exempt from the provisions of the bill. The measure was referred to the House but was not reported out of the House Rules Committee.

28. Arthur Schlesinger, Jr., "Congress and the Making of American Foreign Policy," *Foreign Affairs* 51 (1972): 101.

29. Fulbright, *The Crippled Giant,* p. 135. See also Fulbright's testimony in *Congressional Oversight of Executive Agreements, Hearing on S.3475 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary,* 92nd Cong., 2nd Sess. (1972) (hereinafter cited as *Ervin Subcommittee Hearing*), p. 376.

30. Fulbright, *The Crippled Giant,* pp. 217–218. See also the following explanation by Wilcox of Fulbright's proposal: "Fulbright reasoned . . . that Israel in any case had what amounted to a U.S. security guarantee and that so long as this was implicit rather than explicit, it was open-ended. This being so, he felt it would be desirable to make the guarantee explicit but conditional on certain behavior by Israel" (*Congress, the Executive, and Foreign Policy,* p. 140). For a different suggestion regarding Fulbright's motives, see n. 87, below.

EXECUTIVE COMMITMENTS ENDORSED BY CONGRESS

Although the National Commitments Resolution attempts to cast doubt on the validity of purely executive commitments, it does not insist that congressional participation in the assumption of commitments be registered only by means of formal, constitutionally sanctioned "treaties." Bracketed together with treaties, as giving rise to a legitimate national commitment, are statutes and concurrent resolutions of both houses of Congress. Thus the Senate recognizes what has come to be constitutional practice: an international obligation assumed jointly by the President and Congress is an acceptable alternative to a treaty.[31] (Of course, a simple majority in both houses is generally more readily obtained than a two-thirds majority in the Senate.)

In this context it is relevant to recall the pattern of joint resolutions that Presidents in the period 1955–1964 solicited in order to receive congressional sanction for the use of force abroad. Several of these could be interpreted by the foreign governments concerned as entailing a *unilateral* American commitment to their defense.[32] The trend began with the 1955 joint resolution on the defense of Formosa, authorizing the President to employ American armed forces "as he deems necessary" to protect the security of Formosa, the Pescadores and related positions and territories.[33] It continued with the 1957 joint resolution supporting the Eisenhower Doctrine. After reciting American determination to preserve "the independence and integrity of the nations of the Middle East," Congress declared that "if the President determines the necessity thereof, the United States is prepared to use armed force to assist any nation or group of nations requesting assistance against armed aggression from any country controlled by international communism."[34] By far the most famous and controversial joint resolution in this pattern was that adopted in August 1964, after the Gulf of Tonkin "incident," in which Congress approved and supported "the determination of the President, as Commander-in-Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression," and declared that "the United States is . . . prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast

31. See Henkin, *Foreign Affairs and the Constitution,* p. 175.
32. On the matter of unilateral American commitments, see, for example, *Ervin Subcommittee Hearing,* pp. 129–130, 190, 195, and 285.
33. 69 Stat. 7 (1955).
34. Pub. L. no. 85–7, 71 Stat. 5 (1957).

Asia Collective Defense Treaty requesting assistance in defense of its freedom."[35]

From the standpoint of the President and potential "promisee" states, this form of commitment may be deemed preferable to a treaty in one respect. A treaty, in the view of many constitutional lawyers, can never entail more than a contingent and tentative promise to use force in the future; execution of the promise requires further specific authorization by Congress. (Otherwise, it is argued, the treaty-makers—the President and two-thirds of the Senate—would be unconstitutionally usurping the war-making powers of Congress.[36]) On the other hand, a joint resolution of Congress may be viewed as having a *dual* nature. Internationally, it may be deemed a unilateral declaration of intention by the United States to pursue a certain policy abroad, and, from the standpoint of American law, it may fulfill the requirement of congressional authorization of presidential use of force. Thus, it may represent the combination in one instrument of the treaty-making (commitment to foreign states) and war-making (use-of-force) functions. Despite such theoretical benefits, however, it must be recognized that the future availability (to Presidents, and hence, to foreign governments) of the formerly prevalent variety of joint resolutions is extremely questionable. This cannot be attributed to the joint resolution *form;* that, after all, conforms with the senatorially-set standards for undertaking commitments. The difficulty with these resolutions and the discredit into which they have fallen in the aftermath of the Tonkin Gulf Resolution are due, rather, to other factors. These include misgivings regarding presidential intentions in soliciting the resolutions; the contexts in which the resolutions were adopted; the "blank-check" nature of the authorizations to the President; and the purposes to which they were later put. Congress, it is charged, has been used by Presidents more as a "witness" than as a meaningful participant,[37] or, worse yet, has been duped into providing a "fig leaf" for subsequent unrestrained presidential action.[38] In a word, although Congress has not really been

35. Pub. L. no. 88–408, 78 Stat. 384 (1964). See also the resolutions adopted in 1962 in connection with Cuba (Pub. L. no. 87–733, 76 Stat. 697 [1962]), and Berlin (H. Con. Res. 570, 76 Stat. 1429 [1962]).

36. See n. 60, below.

37. See, for instance, Alexander M. Bickel, "The Constitution and the War," *Commentary,* July 1972, p. 52.

38. On the problems involved in the use of joint resolutions of the Tonkin Gulf variety, generally, see Note, "Congress, the President, and the Power to Commit Forces to Combat," *Harvard Law Review* 81 (1968): 1801–1803; Eric F. Goldman, "The President, the People, and the Power to Make War," in Richard A. Falk, ed., *The Vietnam War and International Law,* vol. 3, *The Widening Context* (Princeton: Prince-

"in on the take-offs," it has nevertheless been implicated in the "crash landings,"[39] and Congress will be wary of allowing itself to be used in this manner again.[40] Future joint resolutions, to the extent that they may embody commitments to the use of force, will probably be far more strictly circumscribed in their terms and will probably provide for regular and periodic congressional review of the initial authorizations.

With respect to the Middle East, the primary (and perhaps sole)[41]

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ton University Press, 1972), pp. 498, 505; W. Taylor Reveley, III, "Presidential War-Making: Constitutional Prerogative or Usurpation?" ibid., p. 542, n. 59; Wilcox, *Congress, the Executive, and Foreign Policy,* pp. 17–18, 107–108; and Schlesinger, "Congress and the Making of American Foreign Policy," p. 98.

39. The aviation metaphor is that of Senator Vandenberg, cited in Wilcox, *Congress, the Executive, and Foreign Policy,* p. 17. As Wilcox suggests, the problem may at times have been a congressional change of mind between "take-off" and "crash-landing" (ibid., p. 18). Significantly, even such staunch opponents of the Vietnam involvement as Senators Eagleton and Cooper have conceded that Congress *did* authorize —unwisely, in their view—the Vietnam war. See Thomas F. Eagleton, "Whose Power is War Power?" *Foreign Policy,* no. 8 (Fall 1972), p. 26; and the citation of Senator Cooper's views by Eugene V. Rostow, "Great Cases Make Bad Law: The War Powers Act," *Texas Law Review* 50 (1972): 834, 880. Applying the criteria of the National Commitments Resolution, one of the problems, insofar as the Tonkin Gulf Resolution was concerned, was not whether there had been "affirmative action taken by the executive and legislative branches," but whether such action could reasonably be construed as "specifically providing for such commitment." The legislative discussions preceding adoption of the resolution hardly permit an unequivocal answer. Cf. John Norton Moore, "The National Executive and the Use of the Armed Forces Abroad," in Falk, *The Vietnam War and International Law,* vol. 2, pp. 820–821, with Velvel, ibid., pp. 674–681. There is, of course, the further problem whether Congress was supplied with misleading information, as well as the issue of undue delegation of legislative authority to the executive. On the latter point, see, e.g., Bickel, "The Constitution and the War," pp. 51–52; Velvel, "The War in Vietnam," p. 680; and Francis D. Wormuth, "The Vietnam War: The President versus the Constitution," in Falk, *The Vietnam War and International Law,* vol. 2, pp. 780–799.

40. "The rubric of war-by-resolution," it has been suggested, "is passing out of fashion." It "went out of the congressional window with the bitter experience over the 1964 Gulf of Tonkin resolution" (Max Frankel, *New York Times,* June 25, 1970; John W. Finney, ibid., July 5, 1970).

41. It is perhaps arguable that, by approving economic and military appropriations to Israel, Congress has implicitly endorsed the executive commitment to Israel's defense. Cf. the decisions of the federal courts which viewed military appropriations as a proper form of congressional participation in the war powers, n. 5, above. However, this line of reasoning has not been sustained in all cases (see, for example, the discussion of *Mitchell* v. *Laird* in the letter of Anthony A. D'Amato, *New York Times,* April 11, 1973). Moreover, this very line of argument might well lead Congress to disallow appropriations for a commitment it does not wholeheartedly endorse, or, at the very least, to enter suitable disclaimers, as it several times did, in fact, in relation to Cambodia. (Foreign aid to Cambodia, Congress insisted, "shall not be construed as a

possible source of any existing "congressional-executive" commitment to Israel is the Eisenhower Doctrine, endorsed by a congressional joint resolution of 1957. Is this resolution, then, still in force, and if so, does it provide the necessary basis for any future American actions to guarantee a Middle East settlement?

By its terms, the resolution provides for its expiry upon either presidential determination "that the peace and security of the nations in the general area of the Middle East are reasonably assured by international conditions," or its prior termination by a concurrent congressional resolution. Formally, since neither of these actions was taken, the resolution may be deemed still in force. However, on May 12, 1970, commenting on a proposal by Senator Mathias to repeal the Formosa, Cuba, Middle East, and Tonkin Gulf resolutions, the Nixon Administration stated that "the Administration is not depending on *any* of these resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans."[42] Thus, it may be that the resolution has lapsed, for all practical purposes.

Assuming, nevertheless, that the resolution remains fully operative, several points need to be noted.

First, while military aid may be extended to any Middle East nation "desiring such assistance," the resolution contemplates the use of force by the United States only in reaction to "armed aggression from any country *controlled by international communism.*"[43] Second, the employment of force is to be "consonant with . . . the Constitution of the United States"—thus making the current debate regarding the war powers even more relevant to the issue of application of the Doctrine than it might otherwise be.[44] And finally, the discretion of the President is very wide—"if the President determines the necessity thereof"—and it may well be

commitment by the United States to Cambodia for its defense." See *New York Times,* April 5, 1973.)

42. Falk, *The Vietnam War and International Law,* vol. 3, p. 590. Emphasis supplied.

43. Emphasis supplied. Perhaps because of its restricted terms, the resolution was not relied on by Eisenhower to justify his actions in Lebanon in 1958. Rather, he invoked his inherent constitutional powers to protect American lives and property as well as to protect a nation whose independence was deemed vital to the United States and to world peace. See Harvard Note, p. 1792; Reveley, "Presidential War-Making," p. 542, n. 59; and Schlesinger, "Congress and the Making of American Foreign Policy," p. 99. In the present period, it might be more difficult for a President to successfully invoke such alternative bases, particularly where, unlike the Lebanese case in 1958, the President could not readily claim to be using force merely as a matter of "neutral interposition." (See Bickel, "The Constitution and the War," p. 51.)

44. See the section on execution, non-execution, and termination of the guarantee, below.

questioned whether the President would have much incentive to counter with force local aggression totally unrelated to any cold-war configuration.[45] In this sense, the restriction regarding "international communism" contained in the Doctrine may be but a reflection of considerations of *Realpolitik* which retain their validity with or without the Doctrine.

TREATIES

Commitments embodied in treaties are undoubtedly "constitutionally legitimate"—and indeed, use of the treaty tool would seem to be most natural for the extension of American guarantees. As noted earlier, the executive has also conceded that "a basic political commitment, such as an undertaking to come to the defense of another country if it is attacked, should be cast in the form of a treaty in the constitutional sense."[46] Before such a treaty could be ratified, however, it would have to receive the "advice and consent" of two-thirds of the Senate—that is, one-third of the Senate plus one would suffice to block entry into force of a treaty. At present the United States is committed by mutual defense pacts to some forty-two states; but significantly, none of these have been contracted in recent years. Given the post-Vietnam reaction to "over-commitment" to foreign nations and the concomitant insistence that the United States maintain a "low profile" abroad, how prepared would the Senate be to assume new defense commitments in the form of "guarantees" to foreign states? And if prepared, would the Senate not wish to hedge the new obligations—as it is constitutionally entitled to do—with reservations designed to ensure that any future use of force in fulfillment of the commitment will be subject to further specific congressional approval? Even without such an explicit reservation or provision, would the President be required to obtain legislative sanction before proceeding to fulfill the promises contained in the treaty? The answers to these questions are to be found in an examination of the scope of defense commitments in the past and in an appreciation of the current debate on the use-of-force competence of the President. The treaty form is undoubtedly legitimate;

45. See, in general, Dowty, "Application of International Guarantees"; idem, *The Role of Great Power Guarantees;* and Shlomo Slonim, *United States-Israel Relations, 1967–73: A Study in the Convergence and Divergence of Interests,* Jerusalem Papers on Peace Problems, no. 8 (September 1974).

46. See n. 24, above. See also Henkin, *Foreign Affairs and the Constitution,* p. 184, who states: "Often the treaty process will be used at the insistence of other parties to the agreement because they believe that a treaty has greater 'dignity' than an executive agreement, because its constitutional effectiveness is beyond doubt, because it will 'commit' the Senate and the people and make its subsequent abrogation or violation less likely."

but this may be less than meaningful for a prospective guarantee recipient if the content, scope, and probability of future execution of the treaty are found wanting.

SCOPE AND CONTENT OF THE GUARANTEE

Clearly, the starting point for any discussion of the scope and content of possible future American guarantees of a Middle East settlement must be an examination of the scope and content of past American defense commitments. Generally undertaken within the rubric of mutual security pacts,[47] these obligations are uniformly characterized by vagueness and non-specificity as to the means of giving effect to the commitment and the explicit denial of any automatic obligation to use force. In the North Atlantic Treaty, for example, each party agreed "that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all," and in such an event, each was to take "*such action as it deems necessary,* including the use of armed force."[48] Subsequent treaties, including the SEATO treaty, contained weaker mutual defense provisions and also made specific references to the requirement of acting in accordance with "constitutional processes," obscuring, in effect, the nature of the American commitment by "leaving for the future the decision in each case whether and under what circumstances force might be used and the relative roles of the President and the Congress in deciding it."[49]

The non-specificity and non-automaticity of the obligation to use force undoubtedly accords with the desire of the United States, as promisor, to keep its options open and its absolute discretion intact in deciding whether, and how, to redeem its promise.[50] On the other hand, the needs and desires of a promisee state are the reverse: the greater the probability

47. Between a great and small power, such a pact is, in effect, equivalent to a guarantee by the former to the latter. See, generally, Dowty, *The Role of Great Power Guarantees,* p. 8.

48. Emphasis supplied.

49. Wilcox, *Congress, the Executive, and Foreign Policy,* pp. 162–163. See also Henkin, *Foreign Affairs and the Constitution,* pp. 159–160, 306; and Harvard Note, pp. 1799–1801. Even absent any explicit references to "constitutional processes," specific congressional authorization to implement a treaty by means of the use of force would probably be required. See the discussion of the execution, non-execution, and termination of the guarantee, below, and, especially, n. 60.

50. Current American defense commitments, as Katzenbach testified in hearings on the National Commitments Resolution, leave the United States perfectly free to determine "in light of future facts" exactly "what is necessary." Harvard Note, p. 1783, n. 67.

of an instant and automatic response, the greater the credibility of the commitment.

In the light of past practice and current tendencies, it is highly improbable that any American guarantee of a Middle East settlement would be *more* specific and automatic in application than existing mutual defense commitments of the United States. To the contrary, such a guarantee is likely to be of a lesser order of obligation for the United States—for example, a "mutual defense" provision requiring the United States to view an attempt to upset the settlement by force as an attack on the United States (in the NATO style) or as "endanger[ing] its own peace and safety" (the SEATO version) would almost certainly not be included. In this regard, it is illuminating to note the scheme of guarantee set forth by Senator Fulbright, since in its main outlines (if not in all its details) it seems to parallel closely State Department thinking.[51] The treaty of guarantee would not, in this plan, contain a mutual defense provision; the United States would obligate itself "to use force if necessary, *in accordance with its constitutional processes,* to assist Israel against any violation of its ... borders ... *which it could not repel itself.*"[52] (Presumably, the U.S. government would be free to judge which attack Israel could or could not repel.)

There are other aspects of the Fulbright scheme which raise important questions regarding the shape and extent of an American Middle East guarantee. For example, would a guarantee to Israel be a unilateral one (given by the United States to Israel in a bilateral instrument) or a multilateral one in which other powers joined in the guarantee, whether in a U.N. or extra-U.N. framework? From Israel's standpoint, a unilateral commitment might offer the advantage of placing a greater onus on the United States to fulfill the guarantee, whereas a multilateral commitment might provide too-ready an excuse for evasion based on the inaction of the co-guarantors. A U.N.-linked multilateral guarantee, in addition, would present with it all the pitfalls connected with the current constellation of political forces within the world body. Fulbright's scheme is an interesting hybrid in this regard. There would, indeed, be a bilateral arrangement with Israel, but this treaty would merely supplement and repeat

51. It has served as the prototype for several other suggestions. See, especially, the testimony by John Lawrence Hargrove in *The Middle East, 1971: The Need to Strengthen the Peace, Hearings Before the Subcommittee on the Near East of the House Committee on Foreign Affairs,* 92nd Cong., 1st Sess. (1971) (hereinafter cited as *1971 House Middle East Hearings),* pp. 168–202; and Hargrove, "Guaranteeing Israel's Borders."

52. Fulbright, *The Crippled Giant,* p. 147. Emphasis supplied.

a previously adopted U.N. Security Council guarantee; it would "neither add to, nor detract from, nor in any way alter the multilateral guarantee."[53] In essence, then, the guarantee would be neither unilateral, nor even multilateral, but universal, thus compounding the proven fragility of "consensus guarantees"[54] with the added disadvantage of present anti-Israel tendencies in the United Nations. The terms of the American guarantee would be reduced to the lowest common denominator to which *all* the permanent Security Council members and four additional Council members would be willing to subscribe. (Fulbright's insistence on pegging any American unilateral commitment to a multilateral guarantee, it should be noted, is consonant with a strong current in the Senate in recent years—particularly evident among southern Senators—to prefer multilateral to unilateral American action in the Middle East.[55])

The Fulbright-proposed guarantee would be "multilateral" not only on the promisor side, but also on the promisee side—i.e., it would be extended to Israel and the Arab states, and would protect the "secure and recognized borders" of each.[56] Thus, the guarantee would be given both *to* and *against* Israel, and could be greatly restrictive of Israel's freedom of action. For the posited inviolability of *all* borders raises numerous thorny question which, although unnoticed or ignored by Fulbright, could not be readily glossed over by the states concerned. For example, what reactive measures, if any, would Israel be entitled to take against violation of its borders by *irregular* forces operating from one of the "protected" Arab states?[57] Would a pre-emptive strike by Israel, even

53. Ibid., pp. 147–148.

54. Dowty, *The Role of Great Power Guarantees,* pp. 8–12.

55. In 1967 many Senators—particularly those from the South— insisted that any action to enforce Israel's right to freedom of passage through the Straits of Tiran be undertaken only multilaterally; this apparently had some influence on President Johnson's moves in this regard. See Lyndon Baines Johnson, *The Vantage Point: Perspectives of the Presidency, 1963–1969* (New York: Holt, Rinehart and Winston, 1971), p. 292.

56. Fulbright, *The Crippled Giant,* pp. 146–147; and see, to the same effect, the views of Hargrove, cited in n. 51, above. For a discussion of the rarity, ineffectiveness, and difficulty of guaranteeing *both* sides to a local conflict (and an explanation, in this sense, of a central weakness of the 1950 Tripartite Declaration), see Dowty, "Application of International Guarantees," p. 261.

57. See, e.g., the testimony by Hargove before the House Foreign Affairs Subcommittee on the Near East, in which he advocates excluding guerrilla actions from the American guarantee to Israel while guaranteeing Israel's Arab neighbors against an attack by Israel (*1971 House Middle East Hearings,* pp. 173–175). In illuminating testimony before the same subcommittee, Nadav Safran lists among several liabilities which Israel might suffer as a result of an American security guarantee or mutual

in the face of an anticipated massive enemy attack, nullify the guarantee? (A restrictive interpretation of Article 51 of the U.N. Charter, which makes a state's right of self-defense conditional on an actual "armed attack," might lead to such a conclusion.[58]) Apart from borders, other interests, including freedom of navigation through the Suez Canal and the Straits of Tiran (the Straits of Bab al-Mandeb are not mentioned) would be embraced within the guarantee. But if such interests are violated —and, after all, their violation was a *casus belli* in 1967—what actions are permissible for Israel and obligatory for the guarantors (individually or jointly)?

As it stands, the Fulbright scheme is one which offers Israel, as a prospective guarantee recipient, what may well be the worst of all possible worlds. With its own future freedom of action severely limited, Israel receives, in return, a commitment which is neither very specific nor very reliable. The United States retains the option to decide if, when, and how to act. Moreover, *within* the United States—and the inevitable reference to "constitutional processes" serves merely as a reminder in this respect—the question of who is constitutionally authorized to execute, fail to execute, or terminate a commitment adds a further dimension to the question of the reliability and credibility of the American commitment.

EXECUTION, NON-EXECUTION, AND TERMINATION OF THE GUARANTEE

The essence of any guarantee is, of course, a willingness to use force, if necessary, to implement it. The issue of use-of-force competence under the U.S. Constitution has, however, become the focus of one of the most heated controversies to emerge from the Vietnam agony. How far may the President, in the course of diplomacy and in execution of treaty obligations, employ American armed forces abroad without specific congressional authorization? In what situations and in what manner must congressional concurrence in the use of force be obtained?

From dissatisfaction with the *substance* of American policies in Vietnam it was an easy step to question, and react against, the *procedures* by which those policies had been adopted. The blame, so far as many congressional

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defense treaty the probable inhibition of Israeli action in the sphere of "current security" (i.e., guerrilla actions) and the likelihood that the United States might "not be sufficiently forthcoming with its arms supplies on the grounds that it is after all responsible for Israel's security" (ibid., pp. 175–220).

58. Cf. S. Slonim, "The U.S. Constitution and Anticipatory Self-Defense Under Article 51 of the U.N. Charter," *International Lawyer* 9 (1975): 117.

critics of Vietnam were concerned, lay in an inflated conception of the President's "inherent powers" as executive and Commander-in-Chief; in the possibility of viewing treaty commitments (such as SEATO) and "blank-check" congressional authorizations of force as the "functional equivalent" of a congressional declaration of war;[59] and in the invocation of congressional appropriations and other war-related legislation as congressional consent to the use of force. The solution, then, was to restrain "presidential war-making" and to insist on the explicit and specific approval of Congress for the commitment of armed force abroad. Prior treaty commitments were not sufficient, for the treaty-makers—the President and the Senate—were specifically denied the power to make war, which was granted to Congress as a whole.[60] Nor would resolutions on the Tonkin Gulf model[61] or appropriations[62] constitute sufficient congressional participation in the use-of-force competence.

Congressional attempts to curb "presidential war-making" culminated, in October 1973, in passage of the War-Powers Resolution. Enacted into law on November 7 over a presidential veto,[63] the resolution provides for presidential notification to Congress within forty-eight hours after

59. The term and explanation were offered by Katzenbach in testimony before the Senate Foreign Relations Committee: *U.S. Commitments to Foreign Powers, Hearings on S. Res. 151 Before the Senate Committee on Foreign Relations,* 90th Cong., 1st Sess. (1967), pp. 71–110.

60. This point is widely made. See, for instance, Harvard Note, pp. 1799–1801; Velvel, "The War in Vietnam," p. 657 and n. 33; Eagleton, "Whose Power is War Power?" pp. 29–30; and Moore, "The National Executive and the Use of the Armed Forces Abroad," p. 816. One might nevertheless argue, as does Quincy Wright, that "the President's powers as Commander-in-Chief permit him to use force short of war in pursuance of a treaty" ("The Power of the Executive to Use Military Forces Abroad," in Falk, *The Vietnam War and International Law,* vol. 3, p. 513). However, the dominant view in Congress no longer accepts this.

61. Since, unlike treaties, joint resolutions are adopted by Congress as a whole, they should theoretically not be assailable for want of congressional participation in a use-of-force decision. In fact, a considerable body of respected opinion (including some vigorous opponents of the Vietnam involvement) did deem the Tonkin Gulf Resolution proper (though perhaps misguided) congressional authorization of American involvement in the Vietnam War. See, for example, the views cited in n. 38 above; and see also Henkin, *Foreign Affairs and the Constitution,* p. 333 (adducing, in support, the views of the Senate Foreign Relations Committee in 1967). But cf. the opposing opinions, cited in n. 38. Irrespective of the constitutional merits of the issue, there prevails a widespread determination in Congress to avoid in the future the Tonkin-Gulf type of broad delegation of use-of-force competence. See the discussion of executive commitments endorsed by Congress, above.

62. See nn. 5 and 41, above.

63. Pub. L. No. 93–148.

committing forces to a foreign conflict or after "substantially" enlarging the number of troops equipped for combat in a foreign country; termination of the commitment after sixty days (or ninety days, if the President certifies that a thirty-day extension is necessary to complete the safe withdrawal of U.S. forces); and the possibility of congressional termination of the commitment by concurrent resolution (i.e., a resolution of both houses of Congress not subject to a presidential veto) at any time during the sixty- or ninety-day period. Congressional use-of-force authorization, according to the resolution, was *not* to be inferred from appropriations or other legislation not specifically intended to constitute such authorization; nor was it deducible "from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing" the use of force.

In the view of a substantial body of opinion, in Congress and in the academic world, the War-Powers Resolution does not go beyond codification of the constitutional imperative for congressional authorization of all use of force (except such as is urgently needed to repel an attack on the United States or its forces).[64] (In fact, some liberal Congressmen voted against the final version of the war-powers legislation because they considered that the bill did not go far enough; it endowed the President with the unconstitutional competence to commit armed forces abroad for sixty to ninety days unless *dis*approved by Congress, whereas the Constitution required *affirmative* congressional action for such a commitment.[65]) On the other hand, President Nixon[66] and some academic critics[67] deemed the bill objectionable both on constitutional and practical grounds. On constitutional grounds, the contention was that Congress was substituting "rigidly codified procedures" for the studied vagueness and flexibility which the Founding Fathers, in their wisdom, enshrined in the Constitution; and that the automatic lapse of presidential authority after sixty days through congressional inaction, or its earlier lapse by means of a mere

64. The purpose of the War-Powers Resolution is stated to be "to fulfill the intent of the framers of the Constitution," and any intention "to alter the Constitutional authority of the Congress or of the President" is emphatically denied. For similar earlier-expressed views of the constitutional position, see, generally, Velvel and Wormuth, in Falk, *The Vietnam War and International Law,* vol. 2, pp. 651–807; Bickel, "The Constitution and the War"; and Jacob K. Javits and Don Kellerman, *Who Makes War: The President vs. Congress* (New York: Morrow, 1973).

65. See, especially, the views of Senator Eagleton, cited in *New York Times,* November 8, 1973.

66. See President Nixon's veto message of October 24, 1973, in *Presidential Documents: Richard M. Nixon,* 1973, pp. 1285–1287; *New York Times,* October 25, 1973.

67. See, especially, Rostow, "Great Cases Make Bad Law."

concurrent resolution, deprived the President of the constitutional prerogatives of his office. On practical grounds, it was felt that American credibility abroad would be gravely impaired. As stated in the veto message:

> . . . it would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis. As a result, the confidence of our allies in our ability to assist them could be diminished and the respect of our adversaries for our deterrent posture could decline. A permanent and substantial element of unpredictability would be injected into the world's assessment of American behavior, further increasing the likelihood of miscalculation and war.
>
> If this resolution had been in operation, America's effective response to a variety of challenges in recent years would have been vastly complicated or even made impossible. We may well have been unable to respond in the way we did during the Berlin crisis of 1961, the Cuban missile crisis of 1962, the Congo rescue operation in 1964, and the Jordanian crisis of 1970—to mention just a few examples. In addition, our recent actions to bring about a peaceful settlement of the hostilities in the Middle East would have been seriously impaired if this resolution had been in force.
>
> . . . . an adversary would be tempted to postpone serious negotiations until the 60 days were up . . . . In addition, the very existence of a deadline could lead to an escalation of hostilities in order to achieve certain objectives before the 60 days expired.

The theme of credibility, so grossly overplayed to justify the prolonged torment of the Vietnam involvement, could scarcely strike a very receptive chord in Congress, but it must nevertheless arouse some misgivings among actual and potential promisees of the United States. It is always possible, of course, that the war-powers legislation will have little effect in curbing a forceful President. Writing in 1971, for example, James Reston opined that "passing bills to give the Congress more power to restrain the President is not likely to be more effective than the power the Congress already has over money, and refuses to use."[68] Since 1971, however, Congress has become more emboldened and has evinced a greater willingness to use the appropriations weapon, as in the cut-off of funds for

68. *New York Times,* May 16, 1971. Cf. also Louis Henkin, " 'A More Effective System' for Foreign Relations: The Constitutional Framework," Statement Before the Commission on the Organization of the Government for the Conduct of Foreign Policy, May 1974 (mimeograph), pp. 34–35.

continuing the bombing in Cambodia. Yet it is noteworthy that when that cut-off was voted, the American combat-presence in Vietnam had already been terminated.[69] Where American troops are actually stationed, the conventional practice whereby parliaments refuse "to punish the troops for the sins of those who sent them into the line" by denying them essential supplies, may still apply.[70] Perhaps, in the last analysis, congressional war-powers legislation, while it would not necessarily restrain a forceful and determined President, "might serve to discourage a hesitant President, promote policies of non-action, and enable him to shift the responsibility for action or inaction to Congress."[71] For, undeniably, the onus for execution or non-execution of a commitment is, at least in the first instance, on the President.

Instead of employing American armed forces, the United States might act to implement a guarantee by means of military and economic assistance designed to bolster the guaranteed state's own defense capabilities. Indeed, such methods, the Nixon Doctrine would suggest, are to be vastly preferred to direct military involvement. But presidential requests for aid must receive congressional authorization and appropriations, and these can by no means be taken for granted. In fact, Congress has been evincing an increasingly critical attitude to all aid requests, and for reasons not always related to its sympathy (or lack of sympathy) for the states concerned. In the aftermath of Vietnam, Congress has become understandably haunted by the specter of possible future "wars by proxy"[72] and by the prospect that the introduction of "military advisers" in a foreign country will lead, willy-nilly, to direct American military involvement.[73] (Significantly, the Defense Department felt it necessary to reassure Congress that, in respect of the American air lift to Israel during the Yom Kippur War, no American military men were "involved in anything remotely resembling any combat assignment," and that only "specialists in communications and cargo handling" had been sent, "to facilitate the unloading of the transports."[74]) Furthermore, domestic economic conditions have conduced to a general

69. The American withdrawal from Vietnam was completed by the end of March 1973; the fund cut-off was voted in June 1973.

70. Schlesinger, "Congress and the Making of American Foreign Policy," p. 101. See also Harvard Note, p. 1801; Fulbright, *The Crippled Giant,* p. 197; and Reveley, "Presidential War-Making," p. 553.

71. Henkin, *Foreign Affairs and the Constitution,* p. 103.

72. Wilcox, *Congress, the Executive, and Foreign Policy,* p. 33.

73. The *Symington Subcommittee Report* (p. 20) lists "extensive military assistance programs" as one of the factors which "represent to host governments more valid assurances of United States commitment than any treaty or agreement."

74. *New York Times,* October 20, 1973.

retrenchment in respect to foreign aid.[75] These general factors apart, Congress has also begun scrutinizing more closely the policies of specific aid beneficiaries and has occasionally registered its disapproval by closing the congressional purse. The suspension of military aid to Turkey — a NATO ally — is particularly instructive: it was premised on the feeling that Turkey had violated the terms of the military assistance grant by using American-supplied arms for aggressive, rather than defensive, purposes[76] and that it was not being sufficiently flexible and cooperative in seeking a solution to the Cyprus problem.[77] (The implications for Israel are obvious and potentially far more serious: such issues as the right to exercise anticipatory self-defense and the limits of permissible "flexibility" in peace negotiations are matters which, in Israel's eyes at least, relate to the very survival of the state.[78])

As noted earlier, it must be recognized that the execution or non-execution of a commitment is primarily, and at least in the first instance, the responsibility of the President. It is he who determines—initially and sometimes finally — whether to deploy military forces abroad, how to use the forces so deployed, and whether to request congressional authorization for the use of force. Requests for economic and military assistance must also pass through his office, and he determines when (and sometimes whether) to actually extend such assistance as has been congressionally approved.[79]

75. See the interview with Prime Minister Rabin in *Ma'ariv,* September 25, 1974, in which he notes that Israel was harmed by the general attitude to foreign aid, not because of any lack of friendship for Israel. Cf. also the article by Leslie H. Gelb, "Congress Support of Israel is Strong but not Automatic," *New York Times,* February 14, 1975.

76. American foreign assistance laws specify that U.S.-supplied arms may be used only for "self-defense, internal security, and participation in collective arrangements or measures consistent with the United Nations Charter"; otherwise the receiving country becomes "immediately ineligible for further assistance." See *New York Times,* October 13, and December 2, 1974. (It might be noted that Turkey justified its actions on the basis of the 1960 Treaty of Guaranty to which Turkey, the United Kingdom, Greece, and Cyprus were parties.)

77. See *New York Times* reports in October 1974, and February 6, 1975.

78. On the possibility that congressional views on these matters may be shifting somewhat, see Gelb, "Congress Support of Israel."

79. Even under the recently-passed Impoundment Control Act of 1974 (Pub. L. No. 93–344) which seeks to curb presidential impoundments, the President retains considerable latitude in this regard. (According to the new law, a proposed rescission of funds requires the approval of Congress within forty-five days; deferral of funds continues in effect until disapproved by either House or Senate; and court action to release funds may be initiated by the Comptroller-General [as well as by members of Congress].) Of course, the act was prompted by the controversy over *domestic* impoundments, and politically (although not legally) it has less relevance for the issue of foreign-aid

Any commitment — whether purely executive, congressional-executive, or treaty-based — must be interpreted and applied by the President. And, as is commonly known, the line between interpretation, on the one hand, and breach, evasion, and non-execution, on the other, may be thin indeed. (What constitutes "interpretation" for the promisor may well be seen as "breach" by the promisee.) Given the very broad and vague terms of most commitments, evasion by means of interpretation would not be a difficult task. Moreover, recent legislative restrictions on presidential war-making could readily be cited as additional justification for non-execution or evasion. (It might be recalled that in 1967, even prior to the enactment of such legislation, President Johnson invoked constitutional and congressional difficulties as one ground for his slowness to fulfill the 1957 Eisenhower-Dulles assurances regarding the Straits of Tiran.[80]) In realistic terms, the President's decision for execution or non-execution will depend fundamentally on his perception of the national interest at the time implementation is called for (and the credibility of American promises will be only one factor in the overall calculus) and on his assessment of the prevailing international constellation of political forces.

The congressional role, so far as the execution of commitments to foreign states is concerned, is primarily a "braking" one.[81] Thus, as provided by the War-Powers Resolution, Congress may act to disallow, or fail to extend, presidentially-initiated use of force, even when undertaken in pursuance of a treaty; and, above all, it may fail to appropriate funds necessary to implement or sustain a commitment (in whatever form embodied) which it opposes.

With so many possibilities of non-execution open to the President and Congress — and constitutionally, the violation of international law by

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funds (in respect of which, in any event, the tendency has been "to spend every available dollar"). See Louis Fisher, "Impoundment of Funds: Uses and Abuses," *Buffalo Law Review* 23 (1973): 157. The argument has also been put forward in the past that impoundments related to foreign policy were more justifiable because of the President's broader constitutional authority in the sphere of foreign affairs. (See Henkin, " 'A More Effecive System' for Foreign Relations," pp. 19–20, 36; and see the discussion in Fisher, "Impoundment of Funds," pp. 156–157.) Irrespective of the validity of the argument, foreign-aid legislation has, in fact, frequently been framed so as to give the President greater discretion to withhold funds.

80. See Johnson, *The Vantage Point,* pp. 291–296. The assumption made by former U.N. Ambassador Arthur Goldberg, that had the 1957 assurances been embodied in a formal treaty, they would have been honored in 1967, is questionable. "Constitutional processes" would still have had to be respected and could as readily have been used as an excuse.

81. Henkin, *Foreign Affairs and the Constitution,* p. 123.

one or both is not proscribed — there may be little incentive to formally terminate a commitment deemed no longer viable. However, should he wish to do so, the President may normally terminate any of the three forms of commitment. He may abrogate purely executive commitments; he has usually been empowered by joint resolutions to make determinations which would lead to the automatic expiry of the resolutions;[82] and, although treaties must have the consent of the Senate, the denunciation and abrogation of treaties is unquestionably a presidential prerogative (for which no Senate consent is required).

As for Congress, it may obviously terminate by legislation use-of-force authorization which it extended by joint resolution. In addition, Congress has normally reserved for itself the right to terminate such joint resolutions by mere concurrent resolutions not subject to the veto.[83] And although executive commitments and treaties are not terminated by Congress, they may be nullified in practice by means of the power of the purse and the legislative power. Subsequent statutes, it should be noted, override treaties *internally.* (Congressional legislation of 1971 on the importation of Rhodesian chrome, which violated U.N. sanctions on Rhodesia, is a case in point.)

CONCLUSIONS

For potential recipients of American guarantees, one of the crucial issues posed by a study of the law of American foreign relations (in its post-Vietnam manifestation) is the credibility of an American commitment. It would be a grave error to assume that a commitment, however impeccable its constitutional credentials, would carry with it any automatic assurance of fulfillment. As noted by Bickel:

> No one should ever have reasonably assumed, and well-advised allies have not assumed — the late Charles de Gaulle for one never did — that the United States would go to war automatically, simply in pursuance of supposed treaty or like commitments, contrary to our constitutional arrangements.[84]

82. Expiry has standardly been made dependent on a presidential determination that the "peace and security" of the area concerned are "reasonably assured."

83. On the constitutionality of this practice, see Henkin, *Foreign Affairs and the Constitution,* p. 370; and Corwin, *The President: Office and Powers,* pp. 129–130. The Tonkin Gulf Resolution, of course, could have been terminated at any time prior to its actual repeal in 1970. The fact that it was not was frequently noted by President Johnson.

84. Bickel, "The Constitution and the War," p. 55.

The actual fulfillment of the most sacred treaty promises depends on subsequent decisions of President and Congress, with Congress insisting on assuming a greater share in the decision-making process than it was allotted in recent years. This increasedly assertive congressional posture may restrain the President; it may also provide him with a ready opportunity to evade both unwelcome obligations and the blame for his evasions.

Distinctions have been drawn by the Senate in recent years between true "national commitments," based on treaties or joint executive-legislative action, and "policy statements" made by the executive alone and constituting a mere declaration of intention not binding on the Congress.[85] Yet in a very real sense, even treaties must be viewed as mere policy statements. They reflect valid — indeed solemnly accepted — policy of the moment of their adoption, but their future implementation will be dependent on the shape of *future* policy as surely as will the execution of purely presidential commitments. No American treaty incorporating a defense commitment has failed — if only by its very vagueness and by its specific allusion to "constitutional processes" — to leave all future U.S. options entirely open.[86]

Under the prevailing circumstances, what advantages could Israel, as a potential recipient of future American guarantees, hope to obtain beyond those which she may already derive from the existing *de facto* commitments? Assuming that the Senate, in its present neo-isolationist mood, would be willing to consent to a treaty of guarantee — and this assumption is far from unchallengeable[87] — Israel might finally receive a commitment unquestionably legitimate in its form. However, the likely limited scope and content of any such treaty would probably cancel out any possible benefits accruing from such newly-attained legitimacy. For while the United States is unlikely — and perhaps constitutionally unable — to close its future options in any significant way, Israel may find itself burdened with new and more onerous restrictions on its own behavior. If so, Israel may find that continuation of its present status as "recipient of *de facto* commitments" is no worse — and possibly better — than any future

85. See, generally, *Senate Committee of Foreign Relations, National Commitments,* S. Rep. No. 797, 90th Cong., 1st Sess. (1967); and *Ervin Subcommittee Hearing.*

86. Thus, the claim made by so many proponents of American guarantees to Israel, that a treaty would reduce the ambiguity in the United States–Israel relationship, is not as tenable as it appears to be on the surface. See also n. 80, above.

87. Indeed, as Ullman notes, Fulbright's "more recent statements sometimes seem to suggest" that his motive for proposing a United States–Israel guarantee treaty was "to make the U.S.–Israeli relationship subject to a blocking vote by one-third of the Senate" ("After Rabat," p. 291).

status of "formal guarantee awardee" (particularly if the formal guarantee is "multilateral" on both promisor and promisee sides). The formality of the guarantee will most certainly not be the decisive factor in the crunch; as in the past, the execution or non-execution of the guarantee will be determined primarily by the perceived real interests of the guaranteeing power at the "moment of truth."

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