

Perversion or Progression?

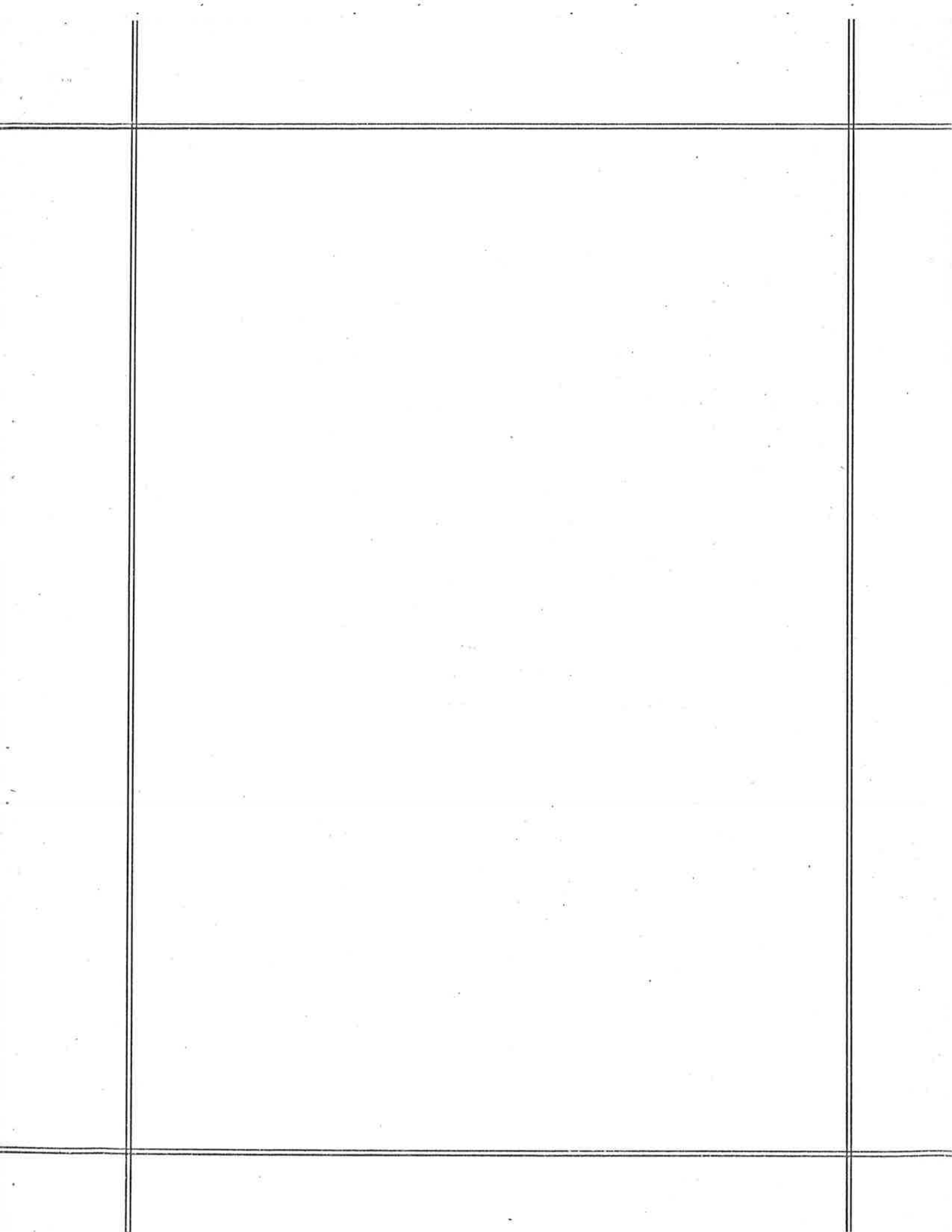
An Examination of Our Constitution's Contemporary

Validity in Foreign Affairs

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## Preface

This paper shall serve as partial fulfillment of the requirements for Political Science 31, "International Politics," as conducted by Dr. Lawrence Juda of Muhlenberg College during the Fall Semester, 1973.

As always, I am particularly grateful to Ms. Valborg Jepsen, our Inter-Library Loan Librarian, for her unending efforts on my behalf, and her incredible tolerance of over-whelming demands. Without her, most of my papers would have been far more mediocre and boring.

Despite the growing irrelevance of a concept such as "honor," in our milieu at least, I affirm that I have adhered to the provisions of the Honor Code institutionalized at Muhlenberg.



Robert David Steele

December 7, 1973

P.S. Four books were carded with regard to the Dominican Republic, which was to have been a case study in support of our intimations --- but once I realized how bloody long this thing was going to be, I decided it would not be worth it to either of us, to transcribe the cards and, in essence, rehash in detail what had already been covered in theory.

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## Introductory Outline

It is our purpose to explore the contemporary validity of the Constitution of the United States in the conduct of foreign affairs by those members of the government that have assumed that function. Based on the material examined prior to the writing of this paper, we suggest tentatively that the old balance of power between the branches of government which the Constitution was meant to protect is no longer a salient feature of the administration of American foreign affairs. The legislative branch appears to have defaulted much if not all of its power; the Supreme Court seems to have sanctioned this unconstitutional deficiency with its own statutory extensions of Presidential power; and finally, the bureaucracy, by virtue of its omnipresence and its eminent suitability for dealing institutionally with the complex miriad of other national organizations, emerges as the only viable and representative sector of the American government concerning itself seriously with the conduct and design of American foreign policy.

A second hypothesis follows naturally from our supposed delinquency of the other branches; we propose that a new balance of power has emerged within the executive branch, one which continues to provide some protection against the tyranny of the President qua individual, but one which does not represent the democratic diversity of constituencies which the Founding Fathers intended.

In conclusion it is our intention to speculate freely on the need our nation may have for a new Constitution, or other reforms.

A single caveat must be presented to the reader --- we are aware that such a topic deserves more extensive and subtle examination than this brief and superficial report. Hampered by a lack of time and a limit of length which has been sadly abused, we offer this more as an introduction in itself, than any kind of comprehensive statement.

of Senate participation, which have essentially destroyed the balance of power the Founding Fathers intended should characterize the American government.

That such was their intention, especially with regard to foreign affairs, is made clear by Raoul Berger when he points out that the only power given solely to the President is that of receiving Ambassadors; he emphasizes that Hamilton and others made clear the ceremonial character of this duty, and that it may in no way be construed as having policy ramifications.<sup>4</sup>

Berger continues, examining the nuance of expression evident in the phrase "advice and consent," concluding that as the Founders carefully weighed every word, leaving no room for misconceptions; "advice" must be seen as a mandate on the President for constant communication with the Senate during the period of negotiation. Were he to approach the Senate for advice with a de facto situation, "advice" would be rendered superfluous.<sup>5</sup>

There appear to be four pillars supporting the presidential "monopoly" of foreign relations, each of which Berger enumerates and then counters. E. Corwin, in a classic work, The President's Control of Foreign Relations (1917) is said to have cited Washington's refusal to provide the House of Representatives with information regarding the negotiation of the Jay Treaty of 1794.<sup>6</sup> This pillar is quickly refuted once the distinction between the House and the Senate is drawn -- Washington was correctly adhering to the precepts of the Constitution, which required that treaty power be vested exclusively within the Senate and the Executive.<sup>7</sup>

The second pillar "of the claimed presidential monopoly of foreign relations is John Marshall's famed statement in 1799 that 'the President is the sole organ of the nation in its external relations.'"<sup>8</sup> It is this statement that Berger suggests formed the foundation for later judicial conclusions regarding the legitimacy of executive agreements. Relied on by Justice Sutherland in United States vs. Curtiss-Wright Export Corp.<sup>9</sup> and Justice Douglas in United States vs. Pink<sup>10</sup>, this statement, "torn from context," was raised to "the level of dogma."<sup>11</sup> Berger examines the original context, and concludes, together with Corwin, that "clearly, what Marshall had foremost in mind was simply the President's role as instrument of communication with other governments."<sup>12</sup>

A third pillar often cited has been Hamilton's own work following his ex post facto change of mind, specifically his "Pacifcus" papers in which he expressed the view that "general executive power was not restricted by the specifically enumerated powers that followed."<sup>13</sup> This justification is refuted by pointing out that the change of perspective took place after the fact; only the explanations considered by the people at the time of adoption; while Hamilton was free to revise his position, this should not be considered a "constitutional warrant" until the people demonstrated their change of mind.<sup>14</sup>

The fourth pillar appears to be "an 1816 Report by the Senate Committee on Foreign Relations, which counseled against 'interference of the Senate in the direction of foreign negotiations.'<sup>15</sup> This warning was based on notions of expediency, as to which men may differ, rather than upon the historical context of the treaty power. Opposed to this Report is a Senate debate in 1806, which discloses that the Senate then 'believed

that, constitutionally, it possessed authority to participate in treaty-making at any stage in the process."<sup>16</sup> Greater weight is placed on a statement made by Senator Rufus King in 1818. King, whom Berger identifies as a member of the Continental Congress and the Federal Convention (where his Committee on Detail helped draft the final provision for presidential participation in treaty-making), said

In respect to foreign affairs, the President has no exclusive binding power, except that of receiving Ambassadors... To the validity of all other definitive proceedings in the management of the foreign affairs, the Constitutional advice and consent of the Senate are indispensable... In this capacity the Senate may, and ought to, look into and watch over every branch of foreign affairs...they may, therefore, at any time call for full and exact information respecting foreign affairs...To make a treaty includes all the proceedings by which it is made; and the advice and consent of the Senate being necessary in the making of treaties, must necessarily be so, touching the measures employed in making the same.<sup>17</sup>

According to the constructionist view of the Constitution, of whom Berger appears to be a fair representative, supported as he was by Padover and Kurland, the President must share with the Senate all aspects of treaty-making, and may not present the Senate with a fait accompli for ratification alone.

It appears that Presidents have found their ability to conclude successful treaties (from their point of view) threatened by the Senate. As a result, each succeeding President has resorted increasingly to the "Executive Agreement," which began as a temporary international compact outside the jurisdiction of the courts.<sup>18</sup> The extent of its use or abuse may be seen in the following excerpt from an editorial in the New York Times cited by Berger.

The tendency of Presidents to circumvent the Constitutional requirement for Senate approval of treaties by concluding executive agreements has reached extraordinary proportions in

recent years. In the 150 years prior to 1939, the United States entered into 799 treaties and 1189 executive agreements, one-and-one-half times as many. In the last 26 years, according to State Department compilations, 368 treaties have been concluded but fifteen times as many executive agreements have been signed--a total of 5590. In addition, there are over 400 secret agreements, the nature of which the State Department declines to reveal. Moreover, thousands of other executive agreements evidently have been concluded by other government agencies, particularly the Defense Department, which reportedly refuses to disclose the details even to Congressional Committees.<sup>19</sup>

In Berger's view, and with the implicit agreement of Padover and Kurland<sup>20</sup> the executive agreements are unconstitutional as they are now being administered, and they must be regarded as treaties for all <sup>in</sup> extents and purposes. Berger points out that in its historical context, "treaties" must be considered in its broadest sense; its definition in a dictionary of the times was "an agreement between two or more distinct Nations concerning Peace, Commerce, Navigation, etc."<sup>21</sup> Hamilton also reiterated this broad definition:

I aver, that it was understood by all to be the intent of the provision to give that power the most ample latitude--to render it competent to all the stipulations which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and every other species of convention usual among nations... and it was emphatically for this reason that it was so carefully guarded; the cooperation of two-thirds of the Senate, with the President, being required to make any treaty whatever.<sup>22</sup>

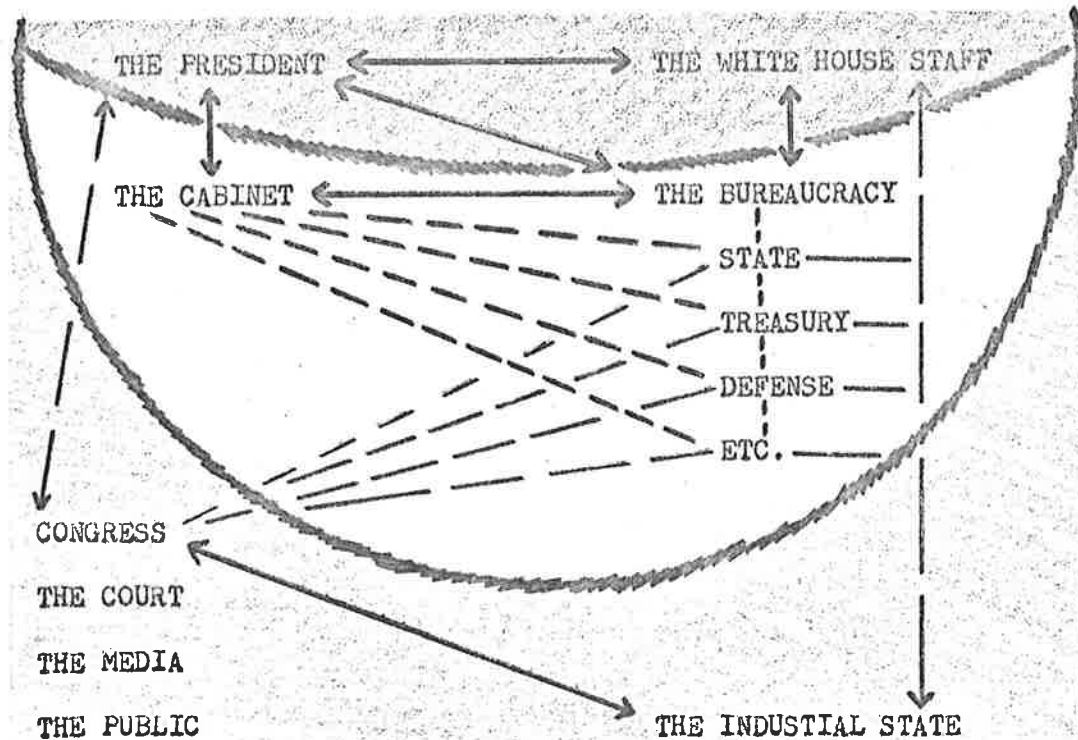
We have remained with Berger throughout this section of the presentation because his was the most systematic consideration of the problem immediately available. It is our belief that his interpretation of the Constitution is as correct as any could hope to be in this day. In closing, we share the implied caveat offered by Berger in the closing pages of his article: "'Ours is a government of divided authority,' declared Justice Balck in 1957, 'on the assumption that in division there is not only strength but freedom from tyranny.'"<sup>23</sup>

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Foreign Affairs

and the  
Constitution

## The Emperor and His Ministers

We have tried to demonstrate the unconstitutionality of the present state of affairs in American foreign policy. This is not to say that the executive organization must be abolished -- nor do we feel that the Constitution should be regarded as sacrosanct. Our conclusion may elaborate on this further. For the moment however, it may be best to take a look at the actual relationships among the members of the executive branch, and explore the ramifications of this new and comprehensive form of organization. The situation as we see it is best illustrated below:



Significance of dotted lines as opposed to solid lines?  
9  
different colors etc.

Our schema means to suggest the isolation of the President and his staff from all other institutions in the policy-making sense. The White House Staff is also, credibly we hope, given relatively autonomous status as an institution in itself. The Cabinet is perceived as "off in left field" in a very literal sense, being tied to the President and somewhat impotent, not having any Constitutional standing or other buttress on which to base its autonomy. The bureaucracy is regarded as an institution of itself, broken down into departments, each of which may be considered an independent interest group consorting with constituencies (Congress and business) other than the office of the Chief Executive. While no elaboration will be provided, the picture would not have been complete without depicting the influence of the Galbraithian industrial state, *need for real caution here - Congressional Committee may have great impact on exec. dept.* the minor but visible interaction of Congress with the departments of the executive, and the relative lack of impact (on a day-to-day policy-making basis) of the media, the Court, and the public.

The President. Emmet John Hughes (Rutgers) and James David Barbour (Duke) have pointed out the importance of distinguishing between the office and the person of the President. Hughes has emphasized the importance of understanding the President's conception of his own power, and his understanding of his duties -- it is these, he suggests that affect the role played by the Executive, and not the actual powers themselves.<sup>24</sup> Barbour is completely in accord -- he defends the system of government as it now stands (constitutionality being regarded a moot question for the time being), and suggests that we need to take more care in selecting our Chief Executive, rather than attempting to institutionalize safeguards that will not be as applicable to each individual President.<sup>25</sup>

Using Nixon as an example of the importance of character rather than ideology or organization in determining performance, Barbour focuses on aspects of Nixon's character which in retrospect should have provided warning; e.g. his need for an image of toughness, of "being cool." This is of special concern to Barbour, who has noted a tendency by Nixon to sometimes equate toughness with naughtiness, as in his childhood, when a proof of toughness was the willingness to sneak out behind the barn and smoke, drink, etcetera. While we feel that most people need the security of feeling tough, Nixon's case appears to be an extreme one.

In examining the character of the incumbent President, Barbour tried a number of alternatives in searching for Nixon's motivation. He was finally forced to conclude that Nixon's greatest motivation is with himself, with his role as executive director of the world's greatest scenario, in which he also plays the lead (and is best supporting actor, actress, scenery, etcetera.). This concept of self can be frightening, given Nixon's discontinuity of images and his lack of roots in any area, or ties to any constituency. He is moved to present a new face for every occasion, and sees no need to tie them all together in a consistent package.<sup>26</sup>

Were the President merely another figure in an encompassing organization, such personal idiosyncracies would not be as detrimental to performance as Nixon's have proved to be. Unfortunately, three developments have contributed to the isolation of the President from mellowing and prescriptive constituencies, and have facilitated the ease with which a man like Nixon may fall under the neurotic self-delusion. It was suggested by Kearnes (Harvard) and Frankel (Times) that with the as-

sumption by the Federal Government of welfare spending, and with the pre-emption by the media of the function once served by political rallies, that the political party in America has lost its original functions which served to tie it to the grass roots and allowed it to thereby influence a Presidential election.<sup>27</sup> The party has also been hurt by the institution of primaries, which eliminated party caucuses, and by the increasing mobility of the American population, which eliminated the rapport and desire for neighborhood organizations which had once provided the party with so much power.<sup>28</sup> The party is no longer a significant influence on Presidential policies and activities. *Once elected - George McGovern had no party behind him & look what happened.*

Congress is no longer the representative organization it once was. Where the average age of the Congressman was once 30, and the average turnover in the House was 90%, it is now 67 and 10% respectively. *1973 Century?* Due to the seniority system, if Ralph Nader were to be elected tomorrow, it would be the year 2013 before he could chair an important committee. Part of the cause of this stagnation is the influence of the "corporate few" to whom Congressmen must look for support in their expensive campaigns. As it is to the advantage of the corporations to continue to deal with known quantities (increasingly beholden in turn to the corporations), the support for incumbents is more easily forthcoming. The media helps to perpetuate this tendency, since the incumbents are "news" and the challengers are generally not.<sup>29</sup>

The influence of the corporate organization is visible within the executive in another way, and helps to further undermine the influence of Congress on the policies instituted by the President. John Kenneth Galbraith has outlined the significance of organization in the world of to-

day; Congress simply does not have the organization required to perpetuate growth and guard against decline. Only the President has the experts and the supporting staffs at his disposal, and it is they who interact most intimately with the members of the industrial world.<sup>30</sup>

Stephen K. Bailey has remarked on the "pervasive executive," noting that it is the President who sets the legislative agenda, supervises the passage of important bills, and carries the "whip of a possible veto."<sup>31</sup> Because only the executive branch possesses the expertise and organization which Galbraith has singled out as crucial to the contemporary order, it is generally the executive branch that actually drafts the bills submitted to Congress.<sup>32</sup>

Berger pointed out earlier, in the context described, the manner in which practice becomes dogma. It should come as no surprise then, that the ability of the executive to deal quickly with occasional emergencies has gradually been exercised during other times as well, and finally become effectively, and unconstitutionally, institutionalized. As Bailey puts it, "only the President, it was reasoned, had the sources of intelligence, the unity of command, and the ability to act with the necessary dispatch in the day-to-day conduct of national security. Furthermore, the President could mobilize public opinion swiftly, and usually sympathetically, behind his foreign policy stands and actions [through the exploitative use of the media]."<sup>33</sup> While the Congressional committees continue to investigate matters of policy, and are taking an increasingly assertive stance regarding the separation and sharing of powers, notably in foreign policy and specifically with regard to the President's war-making powers,<sup>34</sup> the tendency on the part of Congress has been one of

passivity "on the large issues of troop commitments, overall military budgets, choice of investments in expensive military hardware, appropriate responses to international threats, the size and location of overseas bases, and the fine print in international executive agreements and defense pacts."<sup>35</sup> Congress has defaulted to the Presidential organization.

Padover (The New School) and Kearns (Harvard) have recently stressed the role the Cabinet once played, and its lamentable decline in the face of strong Presidents and massive lobbying organizations. Padover points out the impotence of Cabinet officers, personally selected by the President, who subsequently serve at his whim. The Senate, he and his colleagues<sup>36</sup> imply, has not exercised its right to insist that Cabinet officers be responsible to the Senate -- they are left with no real or implied constitutional standing.<sup>37</sup> Even though they are appointed by the President, were the Senate to insist that a strict accounting be adhered to, the President might not dismiss recalcitrant Cabinet officers so hastily, knowing that the Senate might not approve subsequent selections.

Kearns goes on to point out that departments, and particularly their Cabinet members, were representative of large constituencies in their own right. Prior to the organization of national lobbying groups for many of the functional interests (e.g. farming), it was up to the responsible Cabinet officer to lobby for the small group of constituents that approached him. Any President dismissing such a member arbitrarily would risk alienating the people and groups tied to the officer. As a result of these two developments, then, the Cabinet joins the Congress and the political party as an ineffective influence on Presidential

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policy-making, particularly in the field of foreign affairs.<sup>38</sup> The traditional instruments of the balance of power envisioned by the Founding Father have been rendered irrelevant to the formulation and enforcement of policy in the foreign arena.

The White House Office. Earlier we mentioned the influence of the media in bringing about the decline of the American political party --- this pre-emption by the media of the parties major role, the presentation of candidates and their views to the people, has had another major consequence. The willingness of individuals to remain at home and judge for themselves<sup>39</sup> has allowed the rise of what Max Frankel (Times) terms "gang politics," wherein a candidate and a small group of well-trained and dedicated followers can "capture" the nomination and perhaps the election without requiring any serious or substantial base, using only people well-versed in the utilization of the media as a means of presenting the candidate to his best (real or imagined) advantage. Consequently it is the President and "His Gang" that move into the White House Office, and not the President and a far-reaching party. Further, it is usually an image that has been elected, and not a man.<sup>40</sup> Doris Kearns (Harvard) added a personal anecdote meant to confirm the importance of the media and the length to which the "gang" would go to "hit" the six-o'clock news -- the meeting at which the news item, any news item (so long as it was exciting, not necessarily accurate) was plotted was the single most important daily event during the campaign.<sup>41</sup>

This gang of the President's contributes to his delusions and sense of omnipotence by denying him nothing. His staff spares no effort in satisfying the President's every trivial desire; further, it is charac-

teristic of the recent White House staffs, beginning perhaps most notably within the Kennedy Administration, that they affirm their loyalty not to the Constitution (which we have shown irrelevant in today's context) but to the President, from whom all favors flow.<sup>42</sup>

To reiterate then -- the party as a political force guiding the actions of the President has been superceded by the bureaucracy and by the media; the Congress of the United States has yielded, through passivity and a lack of organization, many of its powers to the executive branch; the Cabinet has lost whatever sense of autonomy it may once have had, and thereby is no longer able to impress its own perspectives upon the President for consideration -- each of these factors has contributed to a sense of Presidential isolation in which policy-making appears more reflective of the man and his immediate staff than of the government and people he is to represent. Then, by way of a coup de grace, we find that whatever latent tendencies the President may have toward self-delusion are further encouraged by his staff. Finally we add to this the observation by Kearns that Johnson (and by extension, other modern Presidents) was really primarily concerned with his historical competition; the place his "great society" was going to occupy in the history books. This perspective can not help but induce a further loss of touch with reality.<sup>43</sup>

Even the White House staff can not be relied upon to provide the least bit of insight into the contemporary reality; not only are they inclined to agree with their Chief at all times, but the competition among one another for special assignments and time with the President drives each to come earlier and leave later, so losing touch with their own private lives, further isolating the White House from the public life.<sup>44</sup>

We have pointed out the natural predominance of the executive over the legislature in foreign affairs as a result of its organization and expertise. For the same reason, the past three presidents have found it expedient to centralize power within the White House Office, giving rise once again to the "fourth power" which Kurland indicates once drove the Americans to revolt against the British.

Because agencies within the bureaucracy may circumvent Presidential intentions, as we will explore more fully in the next section, and because their complexity often makes even their organized action very slow, efforts have been made to institutionalize the decision-making process, in an attempt to make it more responsive to the desires of the Chief Executive. This began with the National Security Act of 1947, which established the Department of Defense and the National Security Council, which Novick tells us was an attempt to synchronize the civilian and military portions of the national security process. Immediately Truman, and then Eisenhower, Kennedy, Johnson, and today Nixon began using the NSC machinery for their own purposes -- Truman making it clear that the NSC did not decide policy, but merely submitted alternatives for the President's consideration. "Eisenhower replaced the NSC career executive secretary with his own special assistants. Kennedy institutionalized the Special Assistant for National Security Affairs and made him an active participant in the policy process. Kennedy rarely used the NSC machinery except as a rubber stamp. Johnson initiated bi-weekly meetings of the council, but the agenda was made up of minor matters."<sup>45</sup> Nixon has increased substantially the White House role, and we should all be familiar with the incredible scope of responsibility delegated to Henry Kissinger,

who, among other things, chaired the new Defense Policy Review Committee, which Novick tells us "reviews and analyzes weapons systems proposals and major defense, fiscal, and military program issues in terms of their doctrinal, diplomatic, strategic, and fiscal implications."<sup>46</sup> The NSC was, and continues to be, a creature of the President and his delegate, a member of the White House staff.

Nixon justified the expansion of Kissinger's authority by suggesting that only in this manner could the President be exposed to as many options as possible. The implication was that the national security organizations, left to themselves, would compromise among themselves and then present the President with one alternative which they would support unanimously.<sup>47</sup> With the same breath used to cite Nixon, Rourke warns us that the centralization of control over foreign policy within the White House can not help but subject it "to an undesirable extent, to the influence of White House personalities."<sup>48</sup> What will be gained in "efficiency" will be lost to the "pathology of personal ambition."<sup>49</sup> This alternative will continue to be preferred by Presidents, since the White House people "make up in loyalty and responsiveness to the president what they may lack in formal diplomatic experience."<sup>50</sup>

It is this ascession of the White House staff members to seats of power that seems to be at the heart of many of our Constitutional dilemmas and public distress over the lack of accountability evident in the executive branch today. That members of the White House staff are appointed and not elected has certainly been pointed out by many students of the recent Watergate conspiracy.<sup>51</sup> It is this centralization of power within the White House, and its subsequent redistribution to various

relatively autonomous cohorts of the President that encourage the conspiracies represented by Watergate and implied by the I.T.T. affair. Philip B. Kurland (Chicago Law), likens the White House staff of today to the so-called "fourth power" of revolutionary times, the ministers and cohorts of the king. Kurland indicates that it was the excesses of this group, unconstitutional in England, that drove us to revolt. Not being restrained by constitutional sanctions, they were able to usurp and abuse the king's power, to the detriment of the rights of the people. The same condition is said to exist today. By way of illustration, Kurland notes that the corruption of today consists of the ability of lesser members of the White House staff to approach other officials and induce obedience by saying "it is the President's wish." In times past, for instance during the Roosevelt era, Kurland suggests that officials, and properly so, would have responded, "well, if that's what he wants, let him tell me."<sup>52</sup>

## The Bureaucratic Balance

Having dismissed the Cabinet and condemned the White House staff as factors influencing Presidential decision-making in foreign affairs,<sup>53</sup> it remains for us to examine the bureaucracy for its potential as an autonomous agent of policy in its own right.

By way of preamble, we will start by considering the concept of accountability, and the concept of power. Each is a prerequisite if we are to delineate significantly the relationship between the President and his executive organization, the bureaucracy. In 1959 Charles E. Gilbert enumerated twelve "values" which he perceived as inherent to the American form of government as set forth in the Constitution and reinforced by the complex of popular and contemporary inclinations. The twelfth of these, accountability, was said to encompass and affect the nature and degree of each of the others (i.e. responsiveness, flexibility, consistency, stability, leadership, candor, competence, efficacy, prudence, probity, and due process).<sup>54</sup> The key question for Gilbert was "accountability to whom? to what?" Depending on the <sup>subject(s)</sup> ~~party~~ to whom the President is accountable, the nature of each of the other values is subject to change.<sup>55</sup> This point should be borne in mind when later considering the relative value of bureaucratic balancing versus the original balance suggested by the Founding Fathers.

Our second question concerns power. Given the diversity of definitions of power rampant today,<sup>56</sup> we might be well served, if we are to restrict the scope of this presentation, to select and adhere to a parti-

cular concept. In considering the effectiveness of the President's power over the bureaucracy, we will adopt Dahl's basic concept of interpersonal influence, where the measure of B's reaction to A's intervention is the degree of power A can exert over B.<sup>57</sup> A corollary of this definition is that of Bachrach and Baratz, in which they suggest that "simply to maintain the status quo through inaction, or as a slight variation, to limit action within fixed boundaries (remember the policy of 'containment') may constitute a 'mobilization of bias,' which can result in significant advantages for one group over others."<sup>58</sup>

Two avenues of bureaucratic power are pointed out by Rourke -- "the ability of executive agencies to shape the views of elected officials and the general public on foreign policy issues....[and] the fact that bureaucratic organizations have technical capabilities upon which the achievement of policy goals often depends."<sup>59</sup> In keeping with our emphasis on inaction as a source of power, Rourke maintains the paramount importance of "inertia" as the "most potent form of bureaucratic energy."<sup>60</sup> Examples of bureaucratic action in the first instance might be found in the inflated body counts, news embargoes, and other techniques and gambits which the military command in Viet-Nam used to present a particular picture to the American public and its officials. The Central Intelligence Agency and its unique information-gathering apparatus is a good example of a vital service, no doubt subject to the abuses of the first sort. Possibly the most classic example of the third source of bureaucratic power is that drawn by Robert Kennedy in his discussion of the Cuban missile crisis, at which time President Kennedy discovered that the missiles which he had ordered removed from Turkey several months

earlier were still in place and available to Khrushchev as substance for pressure.<sup>61</sup>

Finally, and perhaps most significantly in terms of reflecting the interaction between the bureaucracy, the media, and the public, one must consider the use of "leaks" as a means of publicizing activities by the President or other departments which are not approved of by a particular official or section of the executive branch, one which has reason to believe that a disclosure by the media and subsequent public outrage may change the course of policy.<sup>62</sup> The exposure of the My Lai massacre is one example of a single attempt to affect the government. Another would be the "leak" to a N. Y. Times columnist in the vague past of the proposed American position at pending S.A.L.T. talks. The publication of this material is said to have seriously undermined the course of the negotiations as they had been planned to take place. That the result may have satisfied another is clearly implied.

There is no question but that the various departments comprising the bureaucracy reflect a diversity of interests. Such a diversity may even be detrimental to the national interests, since personal and organizational interests are likely to predominate over those of the country *or to be interpreted in such a manner as to be* as a whole.<sup>63</sup> The emphasis may be on growth through greater appropriations, toward a greater monopolization of the President's time and attention, or toward the achievement of goals aspired to by particular interests associated with the agencies.<sup>64</sup> The case that Galbraith has made in support of his contention that the agencies conduct a symbiotic relationship with specific industries seems too well made to refute, and too extensive to encompass here.<sup>65</sup> *as the interest with the country as a whole.*

One well documented example of an agencies' ability to institute and enforce policy is provided by A. Lee Fritschler in his examination of the politics of adopting Federal prescriptions regarding the labeling of cigarettes as hazardous to one's health. Fritschler concludes that there is no such thing as a master-servant relationship between the bureaucracy and Congress (or any other power, we hasten to insert) due to the same sources of power we cited above.

Given the facets of bureaucratic power we have discussed, it seems clear that Neustadt's emphasis on the need for presidential persuasion is correct.<sup>66</sup> Only rarely can a President indulge in the luxury of ordering a specific course -- not only will the circumstances in all likelihood conspire to hamper the feasibility of that action<sup>67</sup> but it may prove self-defeating in the long-run, when the President must ask for something, only to meet the resentment generated in the past. The bureaucracy has power. To the extent that the President must recognize this power, he is accountable to the diversity of interests represented by the bureaucracy.<sup>68</sup> This may help allay some of the discomfort felt by the constructionists lamenting the passing of Congressional influence on the Chief Executive and his organizations. It may in fact be the only alternative --- tied as we are to organizations, it may be that rather than re-asserting the original intentions of the Founding Fathers, as Congress has begun doing with its gyrations on war-making powers, executive privilege, and the Watergate investigation, we should be thinking in terms of institutionalizing a new balance of power within the executive. This will be the subject of speculation in our final section.

## The Revisionist's Constitution

Our presentation has tried to summarize a series of perceptions now current among scholars interested in the fate of the Presidency and the Constitution as manifested in the separation of powers prescribed throughout the charter of government. We have paid special attention to Article II and the sections dealing with the enumeration of the powers of the Chief Executive applicable to the conduct of foreign affairs.

Relying primarily on Raoul Berger, but with the implicit support of his colleagues Saul Padover and Philip Kurland, we have outlined the arguments demonstrating the unconstitutionality of executive actions with regard to the formulation and application of foreign policy. The Senate has clearly been excluded from a sphere of activity which has assumed far more importance today than the Founding Fathers might ever have imagined. Major factors in the perpetuation of this malpractice have been the quiescence of the Senate, which has relied too heavily upon the adroit and convenient capabilities of the executive agencies, and the statutory sanction of the Supreme Court, which has seen fit to allow the expansion and continuation of the President's emergency powers into the peaceful "state of emergency" we have grown accustomed to, and which has particularly condoned the excessive use of "executive privilege" and "executive agreements;" the one preventing Senate supervision of the Chief Executive and his minions, the other precluding Senate participation in the negotiation or ratification of international agreements.

We have illustrated briefly what we perceive to be the actual in-

terrelationships within the executive branch, which has been allowed to become a government unto itself. The lack of extant influence on the person of the President has been stressed by pointing out the decline of the political party, the Congress, and the Cabinet as significant authorities in the (foreign) policy-making process now dominated by the President and his staff. The expansion of the White House staff, and the ramifications this implies in terms of furthering the self-delusion of the President, restricting the presentation of diverse perspectives, and encouraging the abuse of authority by the "fourth power" have all been emphasized.

Finally we considered the role of the bureaucracy relative to the White House, and concluded that the combination of unique technical capabilities, a propensity to inertia, and a natural sense of competition among the diverse agencies all contributed to the provision of a very definite sense of autonomy we believe is characteristic of the executive organization today. That each agency conducts its own symbiotic relationship with organizations outside the boundries of the executive branch only furthers our case.

The Alternatives. Despite the seeming perversion of the Founding Father's intentions demonstrated in the lack of regard with which the executive, and by silent consent, the other branches, have held the Constitutional provisions specifying a particular separation of powers, we believe that the principle remains a good one if we are to prevent any particular organization from achieving dominance over the American society. It is a question of method --- we must consider whether the particular method advocated by the Founding Fathers is appropriate to to-

day's largely revolutionized world. If so, then we must suggest methods to reassert the old balance of power between branches of government, providing each branch with the requisite capabilities for the assertion of its responsibilities, capabilities which may not have been considered vital at a time when the individual was the unit of measure in America, but which are now of paramount importance in a society of institutions.

If not; if we believe that branches of government are no longer applicable, then we must find a new way of institutionalizing the principle of separation to which we have just committed ourselves anew. This might include changes in the personal office of the president, changes in the institutional office, or changes within the entire executive branch.

Which shall it be?

The Prescription. In the true spirit of mediation, our response must contain elements of both alternatives. Eventually the Constitution may really be revised, and Congress or the bureaucracy may be institutionalized anew as the instrument of functional representation --- individuals will "vote" through their organizations.<sup>69</sup> Eventually the character of the President and his office may be immunized against the detrimental effects of personal idiosyncrasies and self-delusions of power righteousness. [ Before this happens, the entire fabric of the society will have to change, either further in the direction of the "industrial society"<sup>70</sup> or further away, toward the communal society advocated by men such as Paul Goodman.<sup>71</sup> ] We will not concern ourselves with such long-range predictions or recommendation, short of acknowledging their importance.

For the moment, it appears best to rectify the existing institutions so that they may conform with our perception of the Founding Fathers in-

tentions. Specific measures which might be effected in the near future include, but are not limited to:

A) The impeachment of the incumbent President; this is not to say that he will actually be removed from office --- but as Richard M. Nixon appears to be the culmination of personal neuroticism and organizational conspiracy, it would be best to conduct a full investigation so that our future course in these regards may be clarified.

B) The elimination of primary elections, which are not only incredibly expensive (and force each candidate to beholden himself to a number of special interest groups) but which eliminate the party almost completely from the mainstream of American political life. It would seem a remedy at this point for us to return to the party caucus as a means of selecting a candidate -- if the President must owe political debts, let it be to a broadly representative party rather than the special interests of particular corporations. A President so nominated would be less likely to succeed in selling an "image."

C) In keeping with our distrust of the image as a criterion for election, the influence of the media on elections should be carefully guided -- for instance, by requiring only "live" presentations such as debates and interviews instead of the packaged "spots" which sell products sometimes as noxious as cigarettes.

D) Decrease the detrimental impact of Federal welfare and other spending on local communities and the party by sharing revenues and decentralizing the administration of national programs concerned with smaller political and economic units such as the state or the community.

This would make local programs more responsive to party influence. - but at what

cost?

inefficiency, waste,  
Corruption

Return to  
the way of  
the party  
won't

E) Re-assert the influence of the Cabinet as a member of the decision-making process. As a means of doing this, the Cabinet should be made responsive to the Senate (through confirmation and the restriction of executive privelege), not to the whim of the President. The autonomy of each of the executive departments should be institutionally assured, protected against undue influence from the White House staff. The independence of such agencies as the C.I.A., the F.B.I., and the Internal Revenue Service should be particularly guarded, as they may be used to coerce individuals and other organizations. On the other hand, they should be made much more responsive to the Congress and, if necessary, the Supreme Court.

F) Reduce the scope and authority of the White House staff, which has expanded largely as a result of its involvement with the other departments of the government -- once the Congress acquires its own organization (as noted in a moment), the President should not be allowed to over-see, by himself, the many executive departments which have acquired policy ramifications unforeseen by the Founding Fathers (witness the possibilities of the Department of Agriculture concluding wheat deals with Russia). Reduce the expenditures and other resources of the White House staff which might provide substance for undue influence over others, of delusion of self. Introduce a psychiatrist to the staff, as a means of safe-guarding the President's mental health to the degree which his physical health is of concern.<sup>72</sup> Reassert the right of the Senate to subpoena any member of the executive branch, particularly members of the White House staff; renew the loyalty of the staff to the country in this fashion, by making them responsive to influence other than the President's.

G) Rejuvenate the Congress of the United States, which is yet representative of another age, the age of the individual, the age of generalists capable of comprehending and restricting in its entirety the operations of the government. This is no longer the case. In addition, the influence of the corporations, the media, and the seniority system have served to reduce even that type of representation.

1) Eliminate the seniority system, and devise another manner of allocating chairmanships. Possibly party appointments might be worthwhile, securing further the influence of the party in the political process.<sup>73</sup>

2) Expand the technical staff of Congress so that it must not rely on the opinions and gyrations of members of the executive staff, and so that it may seriously supervise all aspects of executive decision-making, which has assumed paramount importance in the contemporary world of organized and instantaneous action.

3) Given the staff, which will provide a sense of continuity in Congress much as the Civil Service was meant to do within the executive, one might consider pre-disposing the electorate against the election of the incumbent, on the assumption that the less time in office, the more representative the members of Congress are likely to be, and the less likely they are to form affiliations with rewarding agencies within the executive department.

4) Establish Federal funding for national campaigns, as a means of restricting the lengths to which candidates may go in seeking election, and as a means of eliminating the detrimental dependency of candidates on the industrial world for support.

5) Establish a general budget committee, to over-see the general distribution of funds among the various agencies. This committee would apportion funds on the basis of national priorities, leaving it to the existing "tactical" committees to review specific requests for funds from specific agencies with which they are affiliated. The specific requests may or may not be granted, but must adhere to the budget limit set by the general committee.

What about  
problem of  
dividing up the  
pie?

H) The above suggestions, representing some of the best thought available to the public, must be seen as only the beginning. The importance of these recommendations to us stems from the fact that they represent a visible effort to re-assert the intent of the Constitution, by adapting contemporary institutions. The principles of the Constitution may be somewhat sacrosanct --- but the institutions should not be.

An excellent paper, very  
well written and thought out -  
Very good integration of material,  
excellent sources -

A

## The Constructionist's Constitution

Given the extensive scope and complexity of the Executive branch today, one may be surprised to find that the relevant lines contained in the Constitution of the United States are few.

### Article II, Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States...

He shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present shall concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls...

### Article II, Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient...<sup>1</sup>

Raoul Berger, a leading authority on the American Constitution, recently commented on the extension by present and past Presidents of their role as "first general" into spheres of influence which he believes must be regarded as without the bounds of Executive authority as specified above.<sup>2</sup> Citing reports of dialogues recorded during the framing of the Constitution by the Founding Fathers, Berger insists that the role of the President in relation to the Armed Forces was meant to be a functional one subject to the decisions of the legislative branch. He was meant to direct the men once an engagement was inevitable -- but he was not authorized to single-handedly place the nation in a military position from which particular courses of action were inevitable and beyond

the "Advice and Consent" of the Senate. <sup>Congress?</sup> Examples which we might suggest of these superficially innocuous actions should include the establishment of military bases overseas, and the promotion of massive military research and development. Our own view is that the Defense Department may be reconciled structurally with the Constitution, but its policy ramification may not, having become so extensive that no legislature as we now limit it could hope to continue its intended role of mutual negotiator of American foreign policy.

Little of the material we reviewed placed any great emphasis on the abuse by the President of his role as Commander-in-Chief, although undoubtedly some comment must be available. This being a concise report, it remains only for us to reiterate the extent and complexity of the Armed Forces in instigating and continuing actions of a very political nature --- the aid or suppression of insurgents within another nation, the financial support of domestic industries significantly involved with foreign subsidiaries, etcetera. While most of these activities will be reviewed concurrently with the examination of the role of executive agreements, this is a particular aspect of Presidential presumption which must be considered in our conclusion.

In discussing the assumption by the Presidency of almost all responsibility for foreign affairs, Berger and his colleagues, notably Padover of the New School and Kurland of Chicago Law, single out the Congressional acquiescence and judiciary sanction (through statutory legitimation) of Executive Agreements as the most significant perversion of the Constitution's intent.<sup>3</sup> It is these agreements, silently granted the force of treaties without the inconvenience to the President