



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Separation of Powers

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State Department Memorandum, "Authority of the President to Order the Armed Forces of the United States Abroad" (1951)¹

In 1950, President Harry Truman ordered the American military to move from occupied Japan to the Korean peninsula to help South Korea repel an invasion by North Korea. The president did not seek a declaration of war from Congress, and the administration argued that no expression of congressional authorization for the use of military force in Korea was necessary. American treaty obligations through the United Nations charter were sufficient to justify unilateral presidential action. At the same time, some in Congress were questioning American military commitments in western Europe and contending that Congress would have to approve the long-term stationing of American troops on the doorstep of the Soviet Union and the Eastern bloc. Those troops, some argued, were better kept at home than remaining in harm's way where the United States could easily be dragged into another war in Europe.

Secretary of State Dean Acheson took the lead in responding to congressional challenges to presidential foreign policy decisions. Secretary Acheson scolded the critics in Congress, "It seems to me that perhaps a little more is involved here, and that we are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour."² He submitted a memo produced by the Department of State outlining the constitutional authority of the president to unilaterally commit troops abroad. What are the limits to the doctrine that the Truman State Department laid out? What constitutional authority did Congress have to prevent the United States from engaging in hostilities abroad? Is it possible to limit Truman's view without undermining the efficacy of treaties?

....
 The President as Commander in Chief of the Armed Forces of the United States has full control over the use thereof. He also has authority to conduct the foreign relations of the United States. Since the beginning of United States history he has upon numerous occasions utilized these powers in sending Armed Forces abroad.

The President's control over the Armed Forces of the United States is based on Article II, section 2, of the Constitution which provides that he "shall be Commander in Chief of the Army and Navy of the United States."

In *United States v. Sweeney* (1895), the Supreme Court said that the object of this provision was "evidently to vest in the President the supreme command over all the military forces – such supreme and undivided command as would be necessary to the prosecution of a successful war."

A. *That the President's power to send the Armed Forces outside the country is not dependent on congressional authority has been repeatedly emphasized by numerous publicists and constitutional authority.*

Professor Willoughby writes: "As to his constitutional power to send United States forces outside the country in time of peace when this is deemed by him necessary or expedient as a means of preserving or advancing the foreign interests or relations of the United States, there would seem to be equally little doubt . . . [T]he President, under his powers as Commander in Chief of the Army and Navy, and his general control of the foreign relations of the United States, has this discretionary right vested in him, and, therefore, not subject to congressional control. . . ."

¹ *Assignment of Ground Forces of the United States to Duty in the European Area: Hearings before the Senate Committee on Foreign Relations*, 82nd Cong., 1st sess. (1951): 88–93.

² *Ibid.*, 93.



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In an address before the American Bar Association in 1917, [Charles Evans] Hughes stated that "There is no limitation upon the authority of Congress to create an Army and it is for the President as Commander in Chief to direct the campaigns of that Army wherever he may think they should be carried on." . . .

. . . . Senator Walsh of Montana stated in the debate [over the Treaty of Versailles in 1919] "The whole course of our history has been a refutation of such a declaration, namely, that the President of the United States . . . has no power to employ the land or naval forces without any express authorization upon the part of Congress. . . ." [O]ur Navy travels the sea "in order to safeguard and protect the rights of American citizens in foreign lands. Who can doubt that the President has no authority thus to utilize the naval and land forces of the United States?"

. . . .
The basic interest of the United States is its own security. The United States has throughout its history, upon orders of the Commander in Chief to the Armed Forces, and without congressional authorization, acted to prevent violent and unlawful acts in other states A tabulation of 85 instances of the use of American Armed Forces without a declaration of war was incorporated into the *Congressional Record* for July 10, 1941. . . .

B. . . . *In many instances, of course, the Armed Forces have been used to protect specific American lives and property. In other cases, however, United States forces have been used in the broad interests of American foreign policy.*

. . . .
C. *In other cases United States forces have been used to implement provisions of treaties to which the United States was a party. It is the President's duty under the Constitution to take care that the laws are faithfully executed. That this applies to treaties . . . as well as to statutes is unquestioned. . . .*

. . . . The view that the President is entitled to use the Armed Forces in implementation of the Charter of the United Nations, which is a treaty, was also expressed in the Senate debates in connection with the ratification of the Charter. . .

[A full] expression of this point was made by Senator Austin, who stated:

. . . . "[T]here are other specific references in the Constitution which show that he has authority to employ armed forces when necessary to carry out specific things named in the Constitution; but the great over-all and general authority arises from his obligation that he take care that the laws are faithfully executed. . . .

"It may be asked, How does a threat to international security and peace violate the laws of the United States? Perhaps . . . it would not have violated the laws of the United States previous to the obligations set forth in this treaty. Perhaps we never before recognized as true the fundamental doctrine. . . . But we are doing so now. We recognize that a breach of the peace anywhere on earth which threatens the security and peace of the world is an attack upon us; and after this treaty is accepted . . . that will be the express law of the world . . . and it will be the law of the United States, because we shall have adopted it in a treaty. . . . I am bound to say that I feel that the President is the officer under our Constitution in whom there is exclusively vested the responsibility for the maintenance of peace."

D. *Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.*

. . . . In 1922 . . . Senator Reed asserted that the Congress could not order the President to bring home American troops from abroad. Senator Borah state:

"We could not make the President do it. He is Commander in Chief of the Army and Navy * * * and if in the discharge of his duty he wants to assign them there, I do not know of any power that we can exert to compel him to bring them home. We may refuse to create an army, but when it is created he is the commander."