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Statement of Professor Alfred de Grazia
concerning the Separation of Powers in American
Government, before the Subcommittee on the
Separation of Powers of the Senate Judiciary
Committee, September 13, 1967

The Subcommittee on the Separation of Powers may play an important part in the determination of the future of republican government in America. The very fact that its theoretical deliberations are conducted amidst the overpowering commotion of domestic strife and international warfare emphasizes, rather than detracts from, its significance, for it is precisely under the conditions of such crises that the principles of constitutionalism and the separation of powers are menaced.

The Committee requires an axiom to sum up and guide its further progress towards reconstituting the posture of Congress in relation to the separation of powers. The axiom can be stated as follows:

"Congress can refine or recapture any legislative power authorized to it under the Constitution whenever it can devise an efficient means."

Implied in this axiom are several propositions:

1. Congress does not lose authority. It postpones its use until it has an appropriate occasion and means to employ it. For example, if Congress finds a way of controlling the power to go to war which is efficient, it can use such means of control.

2. The invention of means of using its powers automatically entitles Congress to employ the invention. If Congress has learned that the Committee is an excellent means for defining a legislative delegation, it may use the Committee for that purpose.

3. A new means of using established powers is commanding over precedents that are conflicting or substituting.

For example, a bill has been put forward to create a general Legal Counsel for Congress to replace the dependence of Congress upon the attorneys of the executive branch for advancing its legal position on a number of issues. The new institution receives its justification from the old power of the Congress to rule itself.

Much of the discussion of the right of Congress to invent more effective means of establishing its authority centers around a narrow range of precedents, such as the administrative reorganization acts giving the whole Congress the power to approve or reject presidential plans and in several other laws involving generally the expenditure of funds on discrete projects. Other important developments out of the same device may be foreseen.

There is a general frustration nowadays among Congressmen and the public concerning the right to carry the country into war or other heavy foreign involvements. The authority to engage in war is theoretically that of Congress. The authors of the American Constitution hated the power of kings to carry a people into war and destroy their liberties in the process. Yet Congressmen and scholars have not yet discovered a way of countering the slippage of this war power back into the hands of the executive.

This Committee, and by extension Congress itself, may have in its hands the means to reestablish in a fair and efficient way congressional control over the de facto declaration of war.

It can do so by employing the very means of controlling executive use of legislative power that are employed in several laws presently under discussion wherein the approval of a congressional committee is required for certain executive actions.

Congress can, first of all, enact legislation defining the conditions under which the country will employ force in international affairs without a formal declaration of war. It can delegate the right to act under such conditions to the President and a specially constituted committee of Congress. That committee will have by implication authority to participate in the making of the decision and explicitly must approve the action. If the committee decides that the matter is one for action by the whole of Congress, it so recommends, and to Congress the decision will go.

Congress, at the beginning of each session and as part of its procedure in electing committees, may select the Force Committee members. It can be taken for granted that the gravity of the choice will be reflected in the calibre of the members.

In respect to the combat in Vietnam, for example, where at no point was there a critical moment requiring an immediate determination, it is doubtful whether the U.S.A. would have been committed to force without a declaration of war or something close to it.

In the event that an immediate decision of the use of force had to be taken, the Force Committee would be of great service to the nation. Its advice would be useful because it would be both representative and informed. But, more than advice is power to back up the advice, and this the proposed committee would have.

I would further counsel this committee to take up at some point the power of such a Force Committee in respect to the President's "finger on the button" of the nuclear weapon. I have suggested in several places that a second publicly responsible finger be "on the button" in the form of respected and responsible congressmen, of the same kind as are contemplated for the proposed Force Committee.

Indeed, there are good reasons for removing from the President's control the immediate action of ordering the delivery of nuclear weapons against real targets. Basically, the logic here is that for all the perceived and largely fictional value derived from this presidential power, a number of counter-productive disadvantages accrue in the exercise of the presidential office itself as well as in the congressional authority in war decisions and the separation of powers.

For the reasons given above, and by the examples presented, I hope to have underlined the importance of this Committee's work and stressed my support of the general directions of the Committee's philosophy of action.