

Former President Gerald R. Ford

at the
**J. Reuben Clark
Law School:**

THE IMPERIAL CONGRESS

Former President of the United States Gerald R. Ford

Editor's Note:

On December 4, 1978, former President Gerald R. Ford was a guest lecturer. He appeared at a forum assembly for the general studentbody and then spoke to the Law School in the Moot Court Room. This is the text of his address to the Law School constitutional law classes. It should be noted that Dean Rex E. Lee served as Assistant Attorney General during two years of the Ford administration.

Introduction by Dean Lee:

We have a guest lecturer for our constitutional law classes this afternoon. For some reason during the regular semester classes, we didn't draw quite this well. During the time that our speaker today was my employer, my contact with him was not frequent, but it was frequent enough for me to form the opinion that this is a man who has not only achieved the ultimate in American public service, but he is also a very fine lawyer and particularly a very fine constitutional lawyer and I am pleased that as part of your legal education you are going to have the opportunity today to verify that fact. It is my privilege to introduce to you the 38th, and if the straight thinkers among us have our way, the 40th President of the United States.

Former President Ford:

Thank you.

Dean Lee, I am deeply grateful for your more than generous introduction. I might say it is so kind and much too generous. It sounds like an oral obituary on my tombstone. Let me say it is a pleasure to be in a law school environment and have an opportunity to make some comments. I am especially appreciative of Dean Lee's invitation. He was a very valuable member of



Gerald R. Ford addressing law students

my administration over in the Department of Justice. I happen to think it was an outstanding department of the administration under the Attorney General Ed Levy, who recruited such people as your Dean, and also the new governor of the State of Pennsylvania. So you can see the quality of people we had there.

I understand you are discussing, or have been in the process of discussing, separation of powers and the allocation of authority within the various divisions of our government under the Constitution, so I don't have to go back and give you any fundamental observations, except let me reiterate, our system of

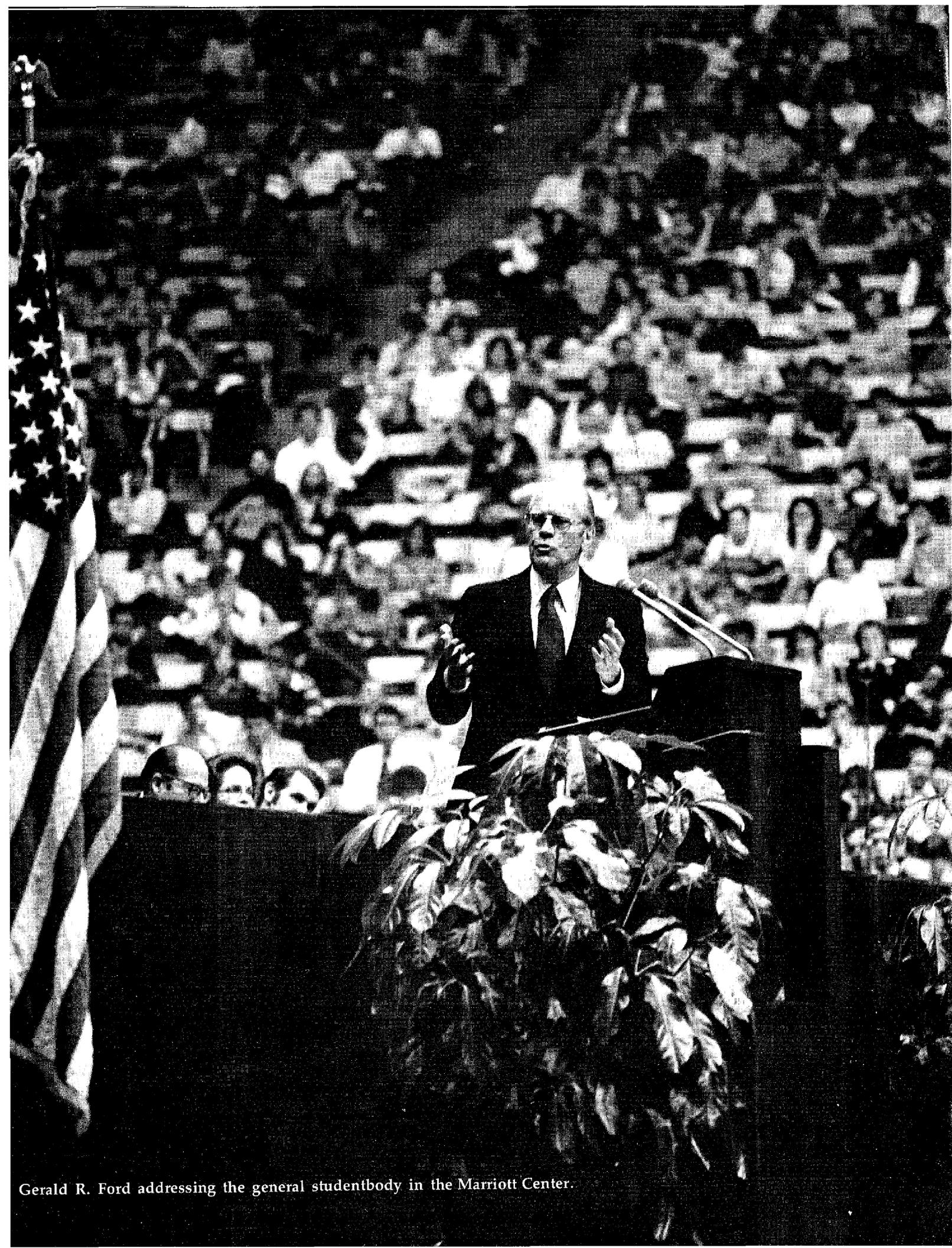
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government, as I understand it, predicated on the constitution, is one of check and balances. Our forefathers came from an environment primarily where they had been oppressed, and when they established our country they decided that no part of our government, no individual, should have total authority, and therefore the system of checks and balances with the separation of powers was devised. Now if I might, I would like to talk of a particular aspect of that situation before we get into questions and answers.

In the days immediately after World War II, I think the country went through what has been pretty well described the imperial presidency. It was understandable. It was an outgrowth of World War II. President Truman came into office in a euphoric situation, then President Eisenhower, President Kennedy — it was easy for the presidency to assume greater responsibilities and have the public and the Congress more or less accept them. With the advent of the war in Vietnam, we have had a shift, and it is more evident now than at any time. I like to categorize the present situation as the Imperial Congress. We moved away from the Imperial Presidency to the Imperial Congress. I happen to think both are bad.

To talk about one aspect of that relationship, let me discuss the War Powers Act. Under the Constitution, as I understand it, the President is designated as Commander-in-Chief and head of the government. He has the authority to negotiate treaties and to submit them for the advice and consent of the Senate; he has the responsibility of appointing diplomats, emissaries. On the other hand, under the Constitution, the Congress has the sole authority to declare war; to raise and support the armies and the navy; to give advice and consent and ratification to treaties submitted by the president; and to have the same responsibility, vis-a-vis, a partise by the president.

Aren't you proud of a Congress that says, "If we do nothing in a crisis then this has to happen?"



Gerald R. Ford addressing the general studentbody in the Marriott Center.

The Imperial Congress

Now these are fairly definitive responsibilities. In the period right after World War II we developed this Imperial Presidency. It wasn't until the advent of the worst aspects of the Vietnamese war that Congress began to encroach and undertake the erosion of the power of the White House. And it has accelerated in the last several years. Let me give you three examples that transpired while I was either in the Congress or while I was President.

Number 1. The limitations on the authority of the President (in Vietnam) to commit our forces or to undertake certain military operations. Traditionally the responsibility of the president.

Number 2. The effort made in 1974 by Senator Jackson and Congressman Bannock in what is called the Jackson-Bannock Act, to pass legislation in the United States in our Congress telling a foreign government what it could do as to the emmigration of Soviet Jews from the Soviet Union. Because in that trade act of 1974 there was written a provision, or it was understood that before the most favored nation clause to the Soviet Union could be implemented, they had to put in writing (they, the Soviet Union had to put in writing) that they would permit 55,000 Soviet Jews to leave the Soviet Union annually. Just to give you some background, for many, many years, there was virtually no emmigration by Soviet Jews. In 1973 it went up to about 20,000. In 1974 up to 35,000, and the effort was to make it 55,000. Now that, I think, was an encroachment on the perogatives of the White House and it just happens it was counter productive. When Congress passed it and made the demands, the Soviet Union immediately stopped the emmigration and in 1975 it went down to ten or 11,000 per year; 1976 about the same; and as I understand it, it is up to around 20,000 now. But Congressional intervention, as well meaning as it might have been, was totally counter-productive in this instance.

Number 3. Another case which I happen to think was far more serious was the embargo imposed in the Congress on the

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sale and delivery of U.S. military hardware to Turkey. If you go back and refresh your memory, in July, 1974, the government of Greece undertook for the Greek Cypriot National Guard the



Moot Court Room

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assassination of President Niykarios and the control of the government of Cyprus. The Turkish government responded, and responded with force and moved in with 40,000 Turkish troops, and in effect took over the Island of Cyprus and have held it ever since. The Turkish Cypriot population is roughly 18 percent of the island; they now occupy about 41 or 42 percent and it is a festering situation, which is not good.

But the Congress, in order (from their point of view) to get Turkey to withdraw the troops, imposed a statutory limitation on our Government to sell to Turkey military arms. Now the tragedy of it was (there were two aspects): 1) before the imposition of that legislation, Turkey had bought and paid for, and had in storage, ready for shipment, significant amounts of U.S. military hardware. The embargo went on and even that which they owned could not be shipped out of this country. Well, the question always came to mind, was the imposition of this arms embargo beneficial? Did it solve the Cyprus problem? The facts are, it was totally counterproductive. And because of Congressional intervention, the problem of Cyprus is still unresolved.

But the worst invasion, in my opinion, of Congressional action, was the passage of the War Powers Resolution in 1973. Understandably, because of the Vietnam War, the War Powers Act gradually worked its way through the Congress. What it sought to do was impose on the President, by law, the need for the President to consult with the Congress before he commits U.S. military forces, to keep them informed, and to make reports following the movement of U.S. forces out of the military situation. There are, of course, very specific provisions that allow the President to commit forces for up to 60 days. If Congress approves, of course, he can keep them there longer.

On the other hand, Congress, by a concurrent resolution, could require their withdrawal. The concurrent resolution is a parliamentary procedure by which the Congress avoids the threat of a presidential veto. A joint resolution, or a piece of legislation in ordinary course, the president can veto. But a concurrent resolution is non-vetoable. That is simply an act of Congress. So here Congress gives to itself the authority to withdraw U.S. troops without any concurrence or objection by a president.

And then the most objectionable feature, in my opinion, was that if nothing is done, if Congress does nothing in that 60-day period, the forces have to be withdrawn automatically. Aren't you proud of a Congress that says, "if we do nothing in a crisis, then this has to happen?" That is a forthright, strong position for 535 members of the Congress to take. Well, you can see I have strong feelings, and I had those feelings when I was in Congress, so I am not just expressing now a position of a former president. I think it is unconstitutional and I think it is impractical. Now let me tell you why I think it is impractical. In April of 1977 I had the privilege and the honor of making a speech at the inauguration of the John Sherman Cooper Foreign Policy Seminar at the University of Kentucky and I took the subject of the War Powers Act. I remember we had some very important data that I thought ought to be on the record. Data that took place while I was president. Let me quote from it because I want to be very precise. "When the evacuation of DaNang was forced upon us during the Congressional Easter recess, not one of the key bipartisan leaders of the Congress was

in Washington. Without mentioning names, here is where we found the leaders of Congress: two were in Mexico; three were in Greece; one was in the Middle East; one was in Europe; two were in the People's Republic of China. The rest we found in twelve widely scattered states of the Union.

This, one might say, is an unfair example since Congress was in recess. But it must be remembered that critical world events, especially military operations, seldom wait for the Congress to meet. In fact, most of what goes on in the world happens in the middle of the night, Washington, D.C. time.

On June 18, 1976, we began the first evacuation of American citizens from the civil war in Lebanon. The Congress was not in recess. It had adjourned for the day. As telephone calls were made (by my legislative liaison people) we discovered, among other things, that one member of Congress had an unlisted number which his press secretary refused to divulge. [laughter] After trying and failing to reach another member of Congress, we were told by his assistant that the Congressman did not need to be reached. We tried so hard to reach a third member of Congress that our resourceful White House tele-

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phone operators (and believe me, they are the best in the world) had the local police leave a note on the Congressman's beach cottage door 'Please call the White House.' " Well, the point that I make, and we have an equally specific categorical recitation of where we found members of Congress, when by a new law we were required in a series of steps to consult, to inform, etc. Now you can't do it. A president, as a practical matter, obviously, because he needs the cooperation and assistance of a Congress ought to go through a responsible modification consultation process. But to write it into law and to, in effect, say "if the president doesn't follow the letter of the law, he is impeachable" I think is not only impractical, but unconstitutional. And I think we have now moved almost to the ultimate of the imperial congressional activity. I believe we have got to have the pendulum swing back so that separation of powers and the system of checks and balances works the way it was intended without one branch of the government dominating the other.

Thank you.

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"You can see I have strong feelings"

Questions from the audience:

Q. You talked briefly about the Imperial Presidency and the Imperial Legislature. Do you see any prospect of an Imperial Judiciary?

A. I have seen no indications during my twenty-eight years and a few months in Washington. I know there were some who felt that the Warren Court had overreached, encroached, etc. But I don't think that is as evil as what I see happening in the relationship between the Congress and the President. The court tends to sway with less widely spread divergences. But when you see what I think has happened, an Imperial Presidency is just as bad as an Imperial Congress. Don't get me wrong, I lived through both and we ought to junk them both when we get into that situation.

Q. You spoke of the conflict between two branches of government. If there were a conflict to come to a head between Congress and the President, should the third branch of gov-

ernment, the Judiciary, settle the conflict? How do you think it should be handled?

A. Well, I think that under our system there are tools which have been and can be used by one branch or the other, whereby the disagreement can be brought to the judiciary. That is done frequently. The president, through the Attorney General, can challenge the constitutionality of a law passed by the Congress, or the Congress has on occasion initiated legal proceedings as to actions taken by the Executive Branch. So the Judicial Branch can, and I happen to think should, be the arbiter in those differences.

Q. What happens if the Congress claims congressional privilege and the president claims executive privilege?

A. Well, I can't tell you what the outcome would be, but I am sure there have been controversies as important as that on the desks of the Supreme Court and they have been resolved and as far as I can recollect from my studies of law, the issue seemed to have been accepted by the loser as well as by the

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winner. That is why our forefathers were so wise. They established that third branch, with that responsibility. Not that I have always agreed with every decision, but at least we accept their decisions as the law of the land.

Q. In the Mayaguez rescue was the War Powers Act of 1973 an obstacle?

A. No, because I didn't accept it as applicable. [laughter] As a matter of fact, during my presidency there were six instances where it could be argued, (I say, it could be argued) that the War Powers Resolution had some applicability: the evacuation of U.S. citizens and refugees from DaNang, Pnom Phen, Saigon, the Mayaguez and the two evacuations from Lebanon. Six of them. Now, I had good legal counsel [looks at Dean Lee]. I'm not saying that Dean Lee made the decisions. I wouldn't want to implicate him. But we had good legal advice that said in none of those cases was the War Powers Act applicable. But let me add this. Just because I wanted to show my good faith we carried out the provisions of the War Powers Resolution. But in every communication I made to the Congress, we were very categorical in saying that we did not feel the operations undertaken (the military operations) were covered by the War Powers Resolution. I think it would be very helpful, I think it would be extremely wise for somebody to institute a law suit. And I think it is possible from what I have listened to by several legal experts, to determine, whether the War Powers Resolution is constitutional. I happen to think it is not, and I know it's not practical. Can you imagine, 535 generals? One hundred in the Senate and 435 in the House? You couldn't even get the leadership to agree, not to go beyond the leadership, and go into the membership of the House and Senate as a whole. It just won't work when you get a big time problem.