

CONSTITUTIONAL IMPLICATIONS OF SENATE “HOLDS” ON TREATIES AND DIPLOMATIC NOMINATIONS

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One of the recurring debates that seems to have nothing to do with ideology and everything to do with which political party happens to occupy the White House involves “holds” and other delays members place on Senate consideration of treaties and diplomatic nominations that have been submitted to the Senate for its “Advice and Consent.”¹ It is the thesis of this short essay that the Senate’s role in both of these functions was intended by the Framers of our Constitution to be a very limited one; that the “negative” entrusted to the Senate was only to be exercised in the case of treaties by a minimum of one-third-plus-one senators and in the case of nominations by half or more of the Senate; and that altering these proportions may properly be done only by *amending* the Constitution pursuant to Article V.² If

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1. U.S. CONST. art. II, § 2.

2. Article V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of

this is true, then it follows that internal Senate rules or accommodations based upon “courtesy” unconstitutionally infringe upon the President’s “executive Power”³ and authority to “make Treaties” and “appoint” diplomats with the advice and consent of the Senate.⁴ Although some of the reasoning in this essay may apply as well to judicial and other nominations, the special nature of foreign relations makes the case for a narrow construction of the Senate’s authority strongest in that area.

The role of the Senate in the realm of diplomacy was understood by the Founding Fathers to be a limited one. Unlike in domestic affairs, where Congress was empowered to establish policy within the limits of its constitutional authority, in foreign affairs the President was expected to both make and execute policy, subject to some very important “negatives” vested in the Senate and Congress.

The general grant of foreign affairs power is contained in Article II, Section 1, which vests in the President the nation’s “executive” power.⁵ This term was understood by most educated Americans in 1787 as it was used by writers such as Locke, Montesquieu, and Blackstone—all of whom included within the scope of executive responsibility what Locke described as the business of “War and Peace, Leagues and Alliances.”⁶ Montesquieu—whom Madison in *The Federalist No. 47* described as “the oracle who is always consulted and cited” on separation-

three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Id. art. V.

3. *Id.* art II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

4. *Id.* art II, § 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . .”).

5. *Id.* art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

6. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 146 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Locke coined the term “federative power” to describe this authority over foreign affairs, but he explained that it belonged with the “executive power” because it could not be effectively managed by “antecedent, standing, positive Laws.” *Id.* §§ 147–48. Moreover, the legislature lacked the requisite qualities of unity of plan, secrecy, speed, and dispatch understood to be necessary for its effective exercise. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 201 (Randall W. Bland et al. eds., New York Univ. Press 1984) (1940).

of-powers matters⁷—distinguished what he termed the executive power “in respect to things dependent on the law of nations” from “the executive [power] in regard to matters that depend on the civil law.”⁸ He described the former of these as that by which “the prince or magistrate . . . makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.”⁹ Similarly, in volume one of his *Commentaries on the Laws of England*, Blackstone noted that “[w]ith regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation.”¹⁰

In Philadelphia during the summer of 1787, the Framers of our Constitution embraced this understanding of “executive power,” but they improved upon the teachings of the great publicists of their day by adding some important checks or “negatives” to our Constitution.¹¹ As University of Chicago Professor Quincy Wright, a distinguished scholar who served as President of the International and American Political Science Associations and of the American Society of International Law, remarked in his classic 1922 study, *The Control of American Foreign Relations*, “when the constitutional convention gave ‘executive power’ to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto.”¹²

In the early days of the First Congress in 1789, Representative

7. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

8. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (Thomas Nugent trans., Hafner Publishing Co. 1949) (1748).

9. *Id.* at 153–54.

10. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 252 (Garland Publishing 1978) (1783).

11. Article II provides in part:

[The President] shall have Power, *by and with the Advice and Consent of the Senate*, to make Treaties, *provided two thirds of the Senators present concur*; and he shall nominate, and *by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

12. QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 147 (1922).

James Madison introduced a bill to create a Department of Foreign Affairs, later re-designated as the Department of State. An issue arose of where the Constitution had placed the power to *remove* the Secretary whose appointment by the President with the advice and consent of the Senate was provided for in Article II.¹³ Madison carried the day¹⁴ by arguing that the removal of an Executive officer was “executive” in character and that since the Constitution had granted the nation’s “executive power” to the President, removal would not require Senate consent. According to Madison, “The association of the Senate with the President in exercising [the appointment] function, is an exception to this general rule [that executive power was vested in the President]; and exceptions to general rules, I conceive, are ever to be taken strictly.”¹⁵

On April 24, 1790, Thomas Jefferson relied upon this same logic in arguing in a memo to President Washington that decisions about diplomacy not mentioned in the Constitution—such as where diplomats should be sent and what title would be appropriate for each post—belonged exclusively to the President. Noting that Article II, Section 1 vested the “executive power” in the President, Jefferson reasoned that “[t]he transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.”¹⁶ President Washington recorded in his diary that both Chief Justice John Jay and Representative Madison agreed with Jefferson’s theory that the Senate had “no Constitutional right to interfere” in such “executive” business.¹⁷

Three years later, Jefferson’s chief rival in the cabinet, Alexander Hamilton, embraced the same theory, writing in his first *Pacificus* essay:

It deserves to be remarked, that as the participation of the

13. See 1 ANNALS OF CONG. 514–21 (Joseph Gales ed., 1851) (discussing the removal of executive officers).

14. See *id.* at 608 (approving the President’s removal power).

15. *Id.* at 516.

16. Thomas Jefferson, *Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments*, in 16 THE PAPERS OF THOMAS JEFFERSON 378, 379 (Julian P. Boyd ed., 1961).

17. 6 THE DIARIES OF GEORGE WASHINGTON 68 (Donald Jackson & Dorothy Twohig eds., 1976).

senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.¹⁸

Prior to becoming perhaps America's most famous Chief Justice, John Marshall served one term as a Federalist member of Congress from Virginia. He played the decisive role in the 1799–1800 debate over the Jonathan Robbins affair and in defending the power of President Adams to surrender a British fugitive pursuant to the extradition clause in the Jay Treaty without any court involvement.¹⁹ The future Chief Justice reasoned that the President was "the sole organ of the nation in its external relations" because "[h]e possesses the whole Executive power."²⁰ Virtually paraphrasing the statement by Sir William Blackstone that "[w]hat is done by the royal authority, with regard to foreign powers, is the act of the whole nation,"²¹ Marshall argued that "the President expresses constitutionally the will of the nation" in foreign affairs.²²

That the Framers viewed the appointment of diplomats and the making of treaties to be "executive" in character is apparent from their inclusion of these authorities within Article II. And it is clear both from the history of our Constitution and its interpretation by the Supreme Court that the role of the Senate and Congress in these areas is a limited one. They were to have a "negative" over nominations to make sure that no "unfit" person was appointed. In *The Federalist No. 76*, Hamilton explained:

To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit

18. Alexander Hamilton, *Pacificus No. 1*, in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 42 (Harold C. Syrett ed., 1969).

19. For the text of Madison's speech, see 1 ANNALS OF CONG., *supra* note 13, at 596–618. For an historical account of the Jonathan Robbins affair, see also Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

20. 1 ANNALS OF CONG., *supra* note 13, at 613.

21. 1 BLACKSTONE, *supra* note 10, at 252.

22. 1 ANNALS OF CONG., *supra* note 13, at 615.

characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.²³

In *The Federalist No. 66*, Hamilton added:

It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice he may have made.²⁴

In addition, one-third-plus-one senators could prevent burdensome treaty terms from becoming part of “the supreme Law of the Land.”²⁵ But, despite modern precedents to the contrary, this power was not intended to give legislators control over the conduct of diplomacy. As the Supreme Court observed in the landmark 1936 *Curtiss-Wright* decision:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”²⁶

The Supreme Court has often observed that all constitutional grants of authority must be exercised consistent with the entire instrument, so that no branch may use its lawful authority to usurp powers given to another branch. As the Court explained in *Curtiss-Wright*:

It is important to bear in mind that we are here dealing . . . [with] the very delicate, plenary and *exclusive*

23. THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 7, at 457.

24. THE FEDERALIST NO. 66 (Alexander Hamilton), *supra* note 7, at 405.

25. See U.S. CONST. art. VI (stating that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”).

26. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (internal citation omitted).

power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, *like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.*²⁷

Although Article I of the Constitution does not expressly state that legislation must receive a majority vote of each house to be enacted, it is implicit in the text and was expressly stated to be the rule repeatedly in *The Federalist Papers*. For instance, in *The Federalist No. 10*, James Madison observed: “If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the *majority* to defeat its sinister views by regular vote.”²⁸ And in *The Federalist No. 54* we read, “Under the proposed Constitution, the federal acts will take effect without the necessary intervention of the individual States. They will depend merely on the *majority of votes* in the federal legislature.”²⁹

There are several exceptions to this general rule. To override a presidential veto,³⁰ consent to the ratification of a treaty,³¹ amend the Constitution,³² or expel a member,³³ a two-thirds majority is necessary. But as Hamilton observed in *The Federalist No. 75*: “[All] provisions which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the government and an indirect one to subject the sense of the majority to that of the minority.”³⁴

To be sure, Article I, Section 5 vests in each House of Congress the power to “determine the Rules of its Proceedings.”³⁵ But this power clearly does not extend to altering the Constitution or departing from its principles in any manner—Congress could not by a simple majority vote decide that constitutional amendments may be submitted to the States if approved by a simple majority of each house or upon the

27. *Id.* at 319–20 (emphasis added).

28. THE FEDERALIST NO. 10 (James Madison), *supra* note 7, at 80 (emphasis added).

29. THE FEDERALIST NO. 54 (James Madison), *supra* note 7, at 340 (emphasis added).

30. U.S. CONST. art. I, § 7, cl. 2.

31. *Id.* art. II, § 2, cl. 2.

32. *Id.* art. V.

33. *Id.* art. I, § 5, cl. 2.

34. THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 7, at 453.

35. U.S. CONST. art. I, § 5, cl. 2.

decision of a single committee chairman. This was made clear by the Court in *INS v. Chadha*.³⁶

From the above, it should be apparent that the Founding Fathers viewed the business of foreign affairs to be a part of the “executive power” vested in the President and subject to certain exceptions (“negatives”) vested in the Senate or the Congress. Those “exceptions” were intended to be “narrowly” or “strictly” construed, and this view was shared by all of the authors of *The Federalist Papers*,³⁷ both branches of the First Congress (a substantial majority of whose members had taken part in the Philadelphia Convention, state ratification conventions, or both³⁸), early Presidents,³⁹ and Chief Justices John Jay⁴⁰ and John Marshall.⁴¹

Because the Constitution specifies that the Senate’s negative over treaty ratification is vested in one-third-plus-one of its members—two-thirds being required for consent—it seems clear that the Senate could not simply amend its rules to provide that treaties failing to receive the support of ninety percent of the Senate could not be reported out and returned to the President for ratification. Similarly, the vote required for Senate consent to a diplomatic appointment could not be changed from a simple majority to a super-majority of ninety or even ninety-nine percent of the votes. Yet, when the Senate by formal rules or principles of “courtesy” effectively permits a single senator or a small group of senators to place a long-term “hold” on a treaty or nomination, this has the effect of altering the constitutional standard in such a way as to require a ninety-nine percent majority—nay, if a single senator can prevent action, it would require a *one-hundred percent* majority—before action could be taken. Such an expansion of the Senate negative, which was intended to be strictly construed, is incompatible with the

36. 462 U.S. 919, 957–58 (1983).

37. For the views of Alexander Hamilton, see *supra* notes 18, 23–24 and accompanying text; for the views of James Madison, see *supra* notes 17, 19 and accompanying text; for the views of John Jay, see *supra* note 17 and accompanying text.

38. For a listing of members who attended the federal convention, a state ratifying convention, or both, see Birth of the Nation: The First Federal Congress 1789–1791, <http://www.gwu.edu/~ffcp/exhibit/p1/members/> (last visited Nov. 25, 2006).

39. For the views of Presidents George Washington and Thomas Jefferson, see *supra* note 17 and accompanying text; for the views of then-Representative—and later President—James Madison, see *supra* notes 15, 17 and accompanying text.

40. For the views of Chief Justice John Jay, see *supra* note 17 and accompanying text.

41. For the views of Chief Justice John Marshall, see *supra* notes 19–22 and accompanying text.

limited constitutional role vested in the Senate regarding the President's constitutional power to "make treaties" and "appoint" diplomats.

From this it would seem appropriate to conclude that the Senate has a constitutional *duty* to give the President an up-or-down floor vote on diplomatic nominations and treaties within a reasonable period of time. The Senate obviously has some flexibility, and one cannot set a firm deadline of thirty, sixty, or ninety days. If a treaty or nomination raises legitimate, complex issues that require extended hearings or staff investigations, delays to accommodate such efforts ought presumptively to be permissible, so long as the process continues to move forward with the other business of the Senate and cannot be unreasonably delayed or sidetracked by anything short of the one-third-plus-one block of the Senate that is constitutionally empowered to veto ratification⁴² of a treaty.

The irony is that *both* political parties have recognized the harm done by permitting "holds" and other procedural techniques to block expeditious consideration of treaties and nominations. When Republicans are in the White House, their leaders in Congress routinely denounce legislative maneuvers by Democrats that prevent their President from getting a formal vote. When Democrats are in the White House, they make the same arguments time and again.

As we approach a presidential election in which the incumbent is ineligible to stand for reelection and both parties seem to be on a fairly equal footing, this may be a good time for both parties to try to set aside partisan considerations and approach the issue on principle. And the guiding principle

42. Although it is commonly asserted that the Senate is empowered to "ratify" treaties, at best that term is inadvisable because the term "ratify" already has a different meaning well established in international treaty law and clearly entrusted to the President under our Constitution. One may reasonably contend that in voicing its constitutional "consent" to the ratification of a treaty, the Senate is, in a sense, itself "ratifying" the President's decision to "make" the treaty. But the final step of exchanging instruments of ratification with another treaty party or depositing the "instrument of ratification" with the United Nations or other appropriate depository set forth in the treaty is already known as "ratification," and that decision—contingent upon the prior consent of the Senate—is executive in character and vested entirely in the discretion of the President. Thus, even if every senator votes to consent to the ratification of a treaty, the President is entirely free to ignore that consent and elect not to proceed to ratification. And because the term "ratify" has such an important meaning in the law of treaties, it promotes confusion when the Senate's approval of a "resolution of ratification" is referred to as "ratifying a treaty."

ought to be that the Constitution is the supreme law and thus internal Senate rules may not properly interfere with the President's conduct of foreign affairs. Half of the Senate is empowered to block appointment of an ambassador, and one-third-plus-one of the Senate may block ratification of a treaty. But these are narrow "exceptions" to presidential power, and it is *improper* for the Senate to depart from those constitutional standards by entrusting to a smaller number of senators—be it the Majority Leader, the chairman or a majority of the Foreign Relations Committee, or any other group—the power to deny the President a vote.⁴³

Again, this is not to suggest that the Senate may not reasonably delay a treaty or nomination either to permit appropriate inquiry and investigation or to give priority to other business. The standard ought to be one of reasonableness, with an agreement on both sides that the President—whatever his political party—is entitled to an up-or-down vote on the Senate floor within a reasonable period of time. This certainly will not solve all of the problems, but it would be an important step in the right direction.

Obviously, this reasoning might well apply to judicial nominations. But at this time, I express no opinion on that issue, which does not centrally concern the foreign affairs power. While some of the same principles clearly apply, the President's special responsibilities for foreign affairs make the case pertaining to treaties and diplomatic nominations even more compelling.

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There is yet another form of "hold" employed by senators as a form of coercion to pressure the President to surrender

43. It might also be useful in this connection to consider the propriety of using filibusters in an effort to prevent the Senate from voting on a diplomatic nomination in a setting where a clear majority, but fewer than sixty senators (the three-fifths of the full Senate necessary to invoke cloture under Rule 22 of the Standing rules of the Senate), support the nomination. Any attempt to address this issue would need to balance the President's constitutional right to make the appointment with the consent of a majority of a quorum of the Senate against the very important right of senators to free and open debate. It may be difficult to establish when legitimate debate on the merits of a nomination has shifted to a calculated effort to prolong consideration so as to prevent an up or down vote on the merits, but establishing in principle that diplomatic nominations ought not be filibustered might at least discourage blatant efforts to prevent a vote, such as extended readings from a phone book.

constitutional authority that often could not constitutionally be seized even by the full Senate. This type of “hold” is sometimes used to pressure the President or an executive department to turn over documents that the Senate has no constitutional right to demand. The Supreme Court has never questioned the constitutional power of the President to withhold sensitive military and diplomatic secrets from Congress or the courts, noting in *Curtiss-Wright*:

Secrecy in respect of information gathered by [the President’s foreign agents] may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . .

. . . .

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information “if not incompatible with the public interest.” A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.⁴⁴

As late as 1957, the great constitutional scholar Edward Corwin declared that “[s]o far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the President . . . is final judge of what information he shall entrust to the Senate as to our relations with other governments.”⁴⁵ It is true that in *United States v. Nixon*,⁴⁶ the Supreme Court sided against a claim of executive privilege in the Watergate controversy, but in so doing, it emphasized that

44. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–21 (1936).

45. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 211–12 (4th rev. ed. 1957).

46. 418 U.S. 683 (1974).

the President's claim did *not* involve "military or diplomatic secrets," explaining:

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In *C. & S. Air Lines v. Waterman S. S. Corp.*, dealing with Presidential authority involving foreign policy considerations, the Court said:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

In *United States v. Reynolds*, dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally

based.⁴⁷

Despite this well-established and uniform precedent, legislators with alarming regularity find it appropriate to virtually “blackmail” the Executive into disclosing national security secrets by placing “holds” on Senate consideration of, often unrelated, nominations. This is no more constitutionally permissible than is the related practice by which “riders” are attached to important appropriations legislation directing that “no funds shall be available” for a specific purpose unless the President exercises his independent constitutional discretion in a manner directed by Congress. In essence, such amendments constitute an effort by Congress to usurp the President’s constitutional authority by the abuse of a legitimate legislative power.

Ironically, in the aforementioned 1790 memorandum to President Washington, Thomas Jefferson acknowledged that it was theoretically possible that the Senate might attempt such a maneuver—exercising a “continual negative[] on the *person*” nominated to compel the President to accept the Senate’s preference on related details of diplomacy—but dismissed the idea as “a breach of trust, an abuse of the power confided to the Senate, of which that body cannot be supposed capable.”⁴⁸ Indeed, legislative abuse of constitutional power has on occasion compelled the Supreme Court to intervene, as it did in *United States v. Klein*⁴⁹ in 1871 to strike down a statute that sought to use congressional authority over the jurisdiction of the Court of Claims to negate the effect of presidential pardons.⁵⁰ Similarly, in *United States v. Lovett*,⁵¹ the Supreme Court rejected an argument by counsel for Congress that the appropriations power was “plenary and not subject to judicial review”⁵² in a case involving an appropriations rider prohibiting the use of Treasury funds to pay the salaries of certain named government employees whom a powerful member of Congress believed to be Communists.⁵³

47. *Id.* at 710–11 (internal citations omitted).

48. Jefferson, *supra* note 16, at 379.

49. 80 U.S. 128 (1871).

50. *Id.* at 147–48.

51. 328 U.S. 303 (1946).

52. *Id.* at 307.

53. *Id.* at 313.

This is not the occasion to discuss at length the constitutional limits on the power of the purse,⁵⁴ but it ought to be self-evident that if Congress may abuse its otherwise legitimate powers so as to seize control over discretion vested exclusively in the President by the Constitution,⁵⁵ then the doctrine of separation of powers is a myth. For if Congress may usurp the Commander-in-Chief Power merely by conditioning the availability of funds for the Department of Defense upon the President's agreement to fight a war in a certain manner, and if Congress may seize the Recognition Power⁵⁶ by constraining funds for the Department of State unless the President agrees to recognize Jerusalem instead of Tel Aviv as the capital of Israel,⁵⁷ what is to prevent it from conditioning appropriations for the Judicial Branch upon the courts not holding acts of Congress to be unconstitutional? Unlike the Commander-in-Chief Power, the power of judicial review is not mentioned in the constitutional text and is but an implied power. Certainly, if Congress can usurp the expressed independent powers of the President, it ought to be able to attach riders to judicial appropriations providing that no funds shall be available for the operation of the Supreme Court if *Roe v. Wade*⁵⁸ is overturned or unless the Court reverses *Texas v. Johnson*.⁵⁹

Three decades ago, the Supreme Court observed that “[t]he debates of the Constitutional Convention, and the Federalist

54. For a discussion of this issue, see Robert F. Turner, *The Power of the Purse*, in THE CONSTITUTION AND NATIONAL SECURITY 73–96 (Howard E. Shuman & Walter R. Thomas eds., 1990), available at <http://www.virginia.edu/cnsl/pdf/PowerofthePurseTurner1990.pdf>.

55. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803) (“By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.”).

56. See, e.g., *United States v. Belmont*, 301 U.S. 324, 328 (1937) (“[W]ho is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts”); *United States v. Pink*, 315 U.S. 203, 229 (1942) (“The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. ‘What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.’ That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition.” (internal citation omitted)).

57. For analysis of this issue, see Robert F. Turner, *Only President Can Move Embassy*, LEGAL TIMES, Jan. 22, 1996, at 46.

58. 410 U.S. 113 (1973).

59. 491 U.S. 397 (1989).

Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”⁶⁰ That fear was not unfounded, and those who cherish liberty must remain alert to abuse of any governmental power. When they do not control the White House, both parties recognize and lament the damage done to the country by “holds” and other unnecessary delays in the advice and consent process. There is a principled way to resolve this issue that will serve the long-term interests of all Americans, and the next two years—during which neither party is likely to have great confidence about the outcome of the next presidential election—should provide an excellent opportunity for the Senate to bring its rules and customs into conformity with the principles of our Constitution in this area.

60. *Buckley v. Valeo*, 424 U.S. 1, 129 (1976).