AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Presidential War and Foreign Powers

*David J. Barron*, **Constitutionality of Restriction on Funds for the United Nations** (2009)[[1]](#footnote-1)

*In the twenty-first century, Congress has frequently included a rider in appropriations bills specifying that none of the appropriated funds may be used to pay expenses for any United States delegation to any specialized agency or commission of the United Nations that is chaired by country that the United States has designated as a state sponsor of terrorism. President George W. Bush directed that such statutory riders should be treated as “advisory,” and subsequently sent American representatives to meetings of United Nations agencies that were chaired by Iran, despite the fact that Iran had been designated by the United States as a state sponsor of international terrorism.*

*Another version of this statutory provision was included in the Omnibus Appropriations Act of 2009. When President Barack Obama signed this act into law on March 11, 2009, he issued a signing statement noting “a small number of provisions of the bill [that] raise constitutional concerns.” The president indicated that his administration would not treat those provisions as legally binding. He noted, for example, that Section 7050 prohibited the use of federal funds to support United Nations peacekeeping missions in which American forces are placed under the command of a foreign national. The president observed that constrained his choices in how to perform specific military missions and his diplomatic negotiating authority, and as a consequence “I will apply this provision consistent with my constitutional authority and responsibilities.” President Obama did not single out Section 7054 of that same bill, though it was likely included in a general disclaimer that he would not treat various unspecified provisions of the law “as limiting my ability to negotiate and enter into agreements with foreign nations.” Section 7054 imposed a restriction on the expenditure of federal funds on United Nations agencies chaired by countries that sponsored terrorism.*

*A few months later, the Office of Legal Counsel provided a legal opinion for the acting legal advisor to the Department of State regarding the constitutionality of Section 7054. The OLC informed the State Department that Section 7054 “unconstitutionally infringes on the President’s authority to conduct the Nation’s diplomacy, and the State Department may disregard it.”*

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As noted, President Bush announced in previous signing statements that the Executive Branch would construe as advisory restrictions that are functionally identical to section 7054. Were such a construction available here, there would be no need to resolve the question of section 7054’s constitutionality, and we are mindful that “[t]he executive branch has an obligation to attempt, insofar as is possible, to construe a statute so as to preserve its constitutionality.” In our view, however, section 7054 is not susceptible to a saving construction. Congress’s injunction—“None of the funds made available under title I of [the Foreign Appropriations Act] may be used . . . .”—is unambiguously phrased in mandatory terms, and we see no evidence that Congress intended the word “may” to mean “should.” Section 7054 is “plain and unambiguous.” . . . Therefore, we do not think that section 7054 can be construed as merely advisory, even to avoid the serious constitutional question we now address.

In our view, section 7054 impermissibly interferes with the President’s authority to manage the Nation’s foreign diplomacy. To be sure, a determination that a duly enacted statute unconstitutionally infringes on Executive authority must be “well-founded,” and Congress quite clearly possesses significant article I powers in the area of foreign affairs, including with respect to questions of war and neutrality, commerce and trade with other nations, foreign aid, and immigration. As ample precedent demonstrates, however, Congress’s power to legislate in the foreign affairs area does not include the authority to attempt to dictate the modes and means by which the President engages in international diplomacy with foreign countries and through international fora. Section 7054 constitutes an attempt to exercise just such authority: It effectively denies the President the use of his preferred agents—representatives of the State Department—to participate in delegations to specified U.N. entities chaired or presided over by certain countries. As this Office has explained, such statutory restrictions are impermissible because the President’s constitutional authority to conduct diplomacy bars Congress from attempting to determine the “form and manner in which the United States . . . maintain[s] relations with foreign nations.” Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18 (1992).

The President’s basic authority to conduct the Nation’s diplomatic relations derives from his specific constitutional authorities to “make Treaties,” to “appoint Ambassadors . . . and Consuls” (subject to Senate advice and consent), and to “receive Ambassadors and other public Ministers.” It also flows more generally from the President’s status as Chief Executive, and from the requirement in article II, section 3 of the Constitution that the President “shall take Care that the Laws be faithfully executed.” As a result of these authorities, it is well established that the President is “the constitutional representative of the United States in its dealings with foreign nations.” *United States v. Louisiana* (1960). . . . As John Marshall noted in his famous speech of March 7, 1800 before the House of Representatives (while still a member of that body), the Executive Branch is “entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements, with foreign nations, and for the consequences resulting from such violation.” . . .

In addition, the Executive Branch has long adhered to the view that Congress is limited in its authority to regulate the President’s conduct of diplomatic relations. Specifically, it may not (as section 7054 would) place limits on the President’s use of his preferred agents to engage in a category of important diplomatic relations, and thereby determine the form and manner in which the Executive engages in diplomacy. Secretary of State Thomas Jefferson, for example, set forth this view in a legal opinion that he delivered to President Washington in the midst of an ongoing debate in the first Congress over a proposed amendment to a bill to fund the exercise of foreign relations—a bill that eventually became the Act Providing the Means of Intercourse Between the United States and Foreign Nations (1790). . . . The proposed amendment would have given the Senate a role in approving the President’s assignments of particular grades of diplomats to particular foreign posts. Jefferson—objecting to what he believed to be the Senate’s impermissible attempt to extend its advice and consent authority over treaties and presidential appointments to Executive determinations about the conduct of diplomacy—also shed light on the special role that the Constitution assigns to the President when it comes to the conduct of diplomatic relations. “The transaction of business with foreign nations is Executive altogether . . . *except* as to such portions of it as are specially submitted to the Senate,” Jefferson stated, with “*[e]xceptions* . . . to be construed strictly.” In the course of objecting to the proposal at hand, Jefferson not only opined that “[t]he Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department . . . [they cannot] therefore be qualified to judge of the necessity which calls for a mission to any particular place . . . ,” but also that “[a]ll this is left to the President.” . . .

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Members of Congress expressed similar views in other contexts during the Nation’s early history. In 1796, for example, Senator Robert Ellsworth, a future Supreme Court Justice, explained that “[n]either [the legislative nor the judicial] branch had a right to dictate to the President what he should answer [to foreign nations]. The Constitution left the whole business in his breast.” . . .

Consistent with these principles, Congress may by statute affirm the President’s authority to determine whether, how, when, and through whom to engage in foreign diplomacy. But when Congress takes the unusual step of purporting to impose statutory restrictions on this well recognized authority, the Executive Branch has resisted. For example, Congress enacted an appropriations rider in 1913, providing that “[h]ereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so.” The Executive has not acted in accord with that requirement . . . and the measure is now a “known dead letter.” Indeed, when first informed of the provision’s existence (more than three years after its enactment), President Wilson reportedly termed it “utterly futile.” Wilson’s dismissive characterization accorded with the view, expressed in a leading treatise of the day, that the President “cannot be compelled by a resolution of either house or of both houses of Congress to exercise” his constitutional powers with respect to “instituting negotiations.”

In more recent decades, the Executive has continued to object when Congress has attempted to impose limits on the form and manner by which the President exercises his diplomatic powers. In particular, the Executive has asserted on numerous occasions that the President possesses the “‘exclusive authority to determine the time, scope, and objectives’” of international negotiations or discussions, including the authority “to determine the individuals who will” represent the United States in those diplomatic exchanges. . . .

For example, we concluded that it would be unconstitutional for Congress to adopt joint resolutions mandating that the President enter negotiations to modify the rules of the World Trade Organization. Relatedly, we determined that a legislative provision purporting to prevent the State Department from expending appropriated funds on delegates to an international conference unless legislative representatives were included in the delegation was an “impermissibl[e] interfere[nce]” with the President’s “constitutional responsibility to represent the United States abroad and thus to choose the individuals through whom the Nation’s foreign affairs are conducted.” And the Executive Branch has objected numerous times on constitutional grounds to legislative provisions purporting to preclude any U.S. government employee from negotiating with (or recognizing) the Palestine Liberation Organization (“PLO”) or its representatives until the PLO had met certain conditions.

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Judicial support for the Executive Branch’s position can be found in *Earth Island Institute v. Christopher* (9th Cir. 1993). In that case, the United States Court of Appeals for the Ninth Circuit struck down a statute purporting to require the Secretary of State to initiate negotiations with, and otherwise engage, foreign governments for the purposes of developing and entering into international agreements for the protection of sea turtles. The court deemed the statute an unconstitutional “intru[sion] upon the conduct of foreign relations by the Executive.” Additional judicial support can be found in the Supreme Court’s clear dicta in *United States v. Curtiss-Wright Export Corp.* (1936): “[T]he President alone has the power to speak or listen as a representative of the nation. . . . Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”

That the President possesses the exclusive power to determine how to conduct diplomacy with other nations does not mean that Congress is without relevant authority. For example, the Senate must approve the treaties the President negotiates, and Congress can, by a subsequently enacted statute, limit the effect of treaties. . . . The statutory limitation at issue here, however, does not constitute such an exercise of Congress’s legitimate authority in the area of foreign affairs; rather, it purports to restrict the President from engaging in diplomacy through international fora that are organized pursuant to a treaty to which the United States is a party. . . .

. . . . [F]ull U.S. participation in such bodies facilitates the type of direct diplomacy that is critically important to advancing U.S. objectives with respect to the issues under discussion. Moreover, the decision to send a full complement of government representatives to a class of entities that are so centrally important to the business of the U.N. may affect the standing and influence of the U.S. within the community of nations and thereby have a deleterious effect on the President’s diplomatic efforts more broadly. . . .

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Our conclusion is not affected by the fact that Congress has drafted its restriction as a prohibition on the use of appropriated funds rather than as a direct prohibition. Congress’s spending power is undoubtedly broad, and, as a general matter, Congress may decline to appropriate money altogether for a particular function, or place binding conditions on the appropriations it does make. But as the Executive Branch has repeatedly observed, “it does not necessarily follow that [Congress] may attach whatever condition it desires to an appropriation,” for “Congress may not deploy [the spending power] to accomplish unconstitutional ends.” The Supreme Court has affirmed this fundamental proposition on a number of occasions. The most notable case is *United States v. Lovett* (1946). There, the Court expressly rejected the proposition that the appropriations power is “plenary and not subject to judicial review,” and struck down as an unconstitutional bill of attainder a provision in an appropriations act that barred the payment of salaries to named federal employees. . . .

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Accordingly, the Secretary would be justified in disregarding section 7054—and using funds appropriated in title I for the purpose of paying the expenses of delegations to U.N. entities chaired by terrorist list states.

1. Excerpt taken from David J. Barron, Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act (June 1, 2009). [↑](#footnote-ref-1)