



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

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*William H. Rehnquist, Testimony to Congress on Presidential Impoundment (1971)*¹

During President Richard Nixon's first term of office, the White House and Congress were increasingly at odds over the power of the president to "impound," or refuse to spend, appropriated funds. Nixon made much more expansive use of the impoundment power than other presidents had done, using it as a general tool for budget-cutting and targeting a wide range of domestic spending projects that the president thought wasteful. Congress responded with alarm. As part of the congressional reaction, a subcommittee of the Senate Judiciary Committee held hearings on the impoundment power and questioned number of administration officials on the scope and justification for the power. Assistant Attorney General William H. Rehnquist in the Office of Legal Counsel was among the witnesses called to testify. After making an initial statement, he was questioned not only by the senators on the committee but also by a group of law professors employed by the committee to interrogate the witnesses. Those experts included Alexander Bickel of Yale Law School and Arthur Miller of Harvard Law School, two of the most prominent liberal constitutional law scholars of the day. The discussion with Rehnquist was wide ranging but drifted quickly onto the topic of presidential war powers, with Rehnquist taking the view that Congress was limited in how far it could bind the president in foreign affairs. What are the implications of Rehnquist's view? Could Congress regulate which weapons are used on the battlefield and how?

Mr. REHNQUIST. . . . If, on the basis of the consideration of all the laws, the conclusion is that the intent of Congress was to mandate the spending, then our office has taken the position . . . that the President is not at liberty to impound in the case of domestic affairs which have no national defense or foreign policy considerations. . . .

. . . . But given the foreign affairs power of the President and a case like the *Curtiss-Wright* case (1936), which certainly indicates that the President's power in that area is quite different from the domestic field, I think a different conclusion could well be reached.

. . . . Professor BICKEL. . . . [I]t seems to me the Commander in Chief is subject to the will of Congress. He commands whatever the Congress provides or fails to provide.

Mr. REHNQUIST. You have a specific thing in the Constitution that no money shall be withdrawn from the Treasury unless appropriated by Congress. Certainly a more general power such as the power of the Commander in Chief would not be construed . . . to override that. But you do not have the same categorical direction at all in the Constitution as to whether the President must spend where Congress has appropriated. That is much more doubtful.

Professor BICKEL. . . . The very distinctly stated duty of the President to execute laws, just as distinct as the prohibition against spending money that is not appropriated by law

Mr. REHNQUIST. Well, to say that because the President is required to take care that the laws be faithfully executed, that he simply has a ministerial duty to carry out whatever law Congress has passed regardless of the fact, say, that it may, in his opinion, and quite justifiably, infringe on some constitutional prerogatives of his, is not an idea you would subscribe to.

Professor BICKEL. No, I certainly would not. Nor did I suggest that. . . .

So my problem is that I have difficulty seeing where the power of the Commander in Chief or the power of foreign relations as such cuts into this general scheme and allows for the argument that where –

¹ *Executive Impoundment of Appropriated Funds: Hearings before the Senate Subcommittee on Separation of Powers*, 92nd Cong., 1st sess. (1971): 235–250.



as a mandatory appropriation in the domestic field would have to be obeyed, a mandatory appropriation to buy tanks or to hand over \$50 million to Israel or Saudi Arabia does not have to be obeyed.

Mr. REHNQUIST. . . . I do think it is clear beyond dispute that . . . the power of Congress to compel spending in the national defense area, where you are talking about whether you are going to have additional planes or not, is not the same as its authority in the domestic field. And I suspect that I could cite examples from either the foreign affairs field or from the defense field where Congress can't compel the President to act, whether it be spending money or otherwise, to the same extent it can in the domestic field. . . .

Professor BICKEL. . . . I would dispute that except as you come to very specific functions that can be defined as those of the Commander in Chief Congress can't tell you who should command a regiment It can't tell you how to command those troops tactically or, if you will, strategically. But I do not follow that this has a sort of vague, continually outgoing reach. It has been the fashion since World War II . . . to regard the foreign affairs and war power as sort of interminable vistas that reach out into an undefinable future and I think one of the salutary things about the day we are living in now is that people are reexamining [the idea that] the President is in charge of foreign relations, and he can do virtually anything.

Mr. REHNQUIST. I fully agree with you.

. . . .

Senator ERVIN. I think Congress' power of the purse applies to foreign affairs just as much as it does to domestic affairs.

Mr. REHNQUIST. Senator, certainly so far as the power of the purse being the power to insist that money be appropriated before it is spent I think it is a more difficult question when you start talking about the power to compel money to be spent.

Let me, if I might, pose an example that would certainly trouble me Supposing Congress appropriates a million dollars and says it has to be spent to equip all the people in regiment "A" with blue uniforms and the President decides he does not want blue uniforms on regiment "A." Now, I think, clearly within his power as Commander in Chief, he has a right to prescribe the mode of dress of that regiment. Can he be compelled to spend that money even though he is perfectly free under the Constitution to refuse to use the proceeds of it?

Senator ERVIN. I respectfully disagree with you, because I think the power to make rules for the Government and regulations of the land and navy forces includes the power to say what kind of uniforms they should wear if Congress should so specify. . . .

Mr. REHNQUIST. I do not agree with the view that power to make regulations governing land and naval forces would go as far as you suggest

Senator GURNEY. . . . Some people seem to indicate that the Commander in Chief can do anything. I certainly do not agree with that at all. I think if Congress decides to make a statement on the subject, it has all the full force and effect of law. . . . I think we were both recognizing the fact that, yes, he is the Commander in Chief and certainly entitled to run the war tactically, as you put it. . . .

Professor MILLER. I ask Mr. Rehnquist what he sees as in the inherent Executive power of the Commander in Chief and foreign affairs? Do you find any limits at all that you can perceive, Mr. Rehnquist?

Mr. REHNQUIST. I would not speak of it as inherent Executive power. . . . The power of the Commander in Chief and the foreign affairs power that is impliedly conferred by the Constitution, is certainly recognized in the *Curtiss-Wright* case.

Professor MILLER. . . . [W]hat Mr. Justice Sutherland said in that case was dicta, was it not, not necessary to the case itself? You are relying on a pretty flimsy straw when you rely on *Curtiss-Wright*. . . .

Mr. REHNQUIST. Well, we have a nearly unanimous opinion written by Sutherland, and concurred in by Brandeis and Cardozo. I would not regard that as flimsy. . . . It may be carrying it beyond what was necessary for the holding of the case, but the Court speaks in terms of the President, not of the National Government when it is talking about the foreign affairs power.

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Senator ERVIN. I always thought that expression of Justice Sutherland just proved that judges are like Senators; sometimes they talk too much.

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Mr. REHNQUIST. . . Supposing . . . the Congress had passed a law or a resolution saying that in no circumstance should another assault be made on "Hamburger Hill." To me, that would be a rather clear invasion of the President's power as Commander in Chief.

Professor MILLER. Why is it clear?

Mr. REHNQUIST. I think that you try to find [the standards] from historical precedent, from what was meant by the Framers at the time they gave the Commander in Chief power to the President, and from reasoning from other provisions of the Constitution. It is the most difficult area of the Constitution, I think, because it is amorphous. . . .

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Supposing the United States had no troops in the Eastern Hemisphere at all If Congress were then to prohibit the President from sending any troops in the Eastern Hemisphere and there was nothing of any continuing nature going on there that he could justify as a basis for sending troops by reason of a treaty or something like that, I think, in that situation, that is certainly the prerogative of Congress.

Senator GURNEY. Well, suppose in the Eastern Hemisphere you had a missile site and your intelligence told you . . . they were going to land a missile on the Capitol of the United States from that site . . . ?

Mr. REHNQUIST. Certainly he ought to go to Congress if there is time. But . . . I think under those circumstances, he would have the authority to disobey the law that Congress had passed. I think he would not be disobeying it. He would, in effect, be perfectly right in concluding that Congress had not intended it to apply to this situation. . . .

Senator ERVIN. That would be a threatened invasion, would it not, and he has the power under the Constitution to repel invasions.

Mr. REHNQUIST. Yes. . . . [I]f you look at the Constitution and read cases like *In re Neagle* (1890) and *Curtiss-Wright*, the President has the powers under the law that are necessary to respond to these emergencies. But I would shy away from the doctrine that he is a law unto himself under certain circumstances.

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