

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal and Great Society Era – Separation of Powers

Robert H. Jackson, *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers* (1940)¹

In May 1940, Nazi Germany invaded France, leaving Great Britain as the only major western European power still fighting German expansion. The German advance was rapid, and France fell just months after the start of World War II. American public opinion and the U.S. Congress were still divided over whether to enter the war in Europe, which was just a generation after the costly First World War, but the Franklin Roosevelt administration was determined to help stop the German advance. Throughout the 1930s, over the objections of the president, Congress insisted on American neutrality in the war. The Neutrality Act of 1939 extended an arms embargo, blocking the sale of weapons and material to the belligerents in Europe and Asia. The 1939 resolution included a controversial “cash-and-carry” exception, which allowed arms sales if the foreign nation paid in cash and provided its own transport. Congressional supporters of the neutrality resolutions were concerned that any American provision to the warring powers would lead to reprisals and eventually draw the United States into the conflict.

Britain was quickly running out of the required gold to make the cash-and-carry purchases of American weapons, however, and the Roosevelt administration searched for other alternatives. The president declared that the United States should be the “arsenal of democracy,” even if it would not enter the war. In March 1941, Congress agreed to the “lend-lease” plan, which supplied billions of dollars’ worth of munitions to the Allied powers on “lease” or credit and at steep discounts. At the end of the year, the United States declared war on Japan, Germany, and Italy in the aftermath of the Pearl Harbor bombing.

Before calling on Congress to support Lend-Lease, Roosevelt pursued a unilateral option. In September 1940, the president agreed to provide fifty destroyers to Britain in exchange for options on long-term leases on several military bases held by Britain in the Western Hemisphere. To complete the trade, the Navy was pressured to certify that the ships were no longer fit for use. The deal was formalized through an executive agreement between President Roosevelt and Prime Minister Winston Churchill, bypassing Congress. Attorney General Robert H. Jackson provided the legal authority for the president’s actions. Jackson concluded that the president did not need Senate ratification of a treaty to complete the transaction, that the president had a constitutional authority to acquire military bases and dispose of unneeded military property, and that Congress had not blocked the sale of these destroyers to Britain. His opinion has since been used as a key precedent for the independent presidential authority to dispose of military property and conduct foreign policy and for an expansive power to make executive agreements with other nations that do not require the consent of Congress. A leading New Deal lawyer within the administration, Jackson was FDR’s seventh appointment to the U.S. Supreme Court, winning confirmation in 1941.

Is Jackson persuasive that the president’s actions were consistent with congressional statutes? How well can Jackson’s opinion in this case be reconciled with his opinion in *Youngstown Sheet & Tube v. Sawyer* (1952)? Given Jackson’s reasoning, could Congress prohibit the president from selling the destroyers? Could Congress prohibit a president from exchanging missiles for hostages or accepting the opportunity to establish a military base next to a hostile power? Was the Neutrality Act of 1939 constitutional, or does the president always have the authority to provide arms to belligerent powers if he believes that the sales are in the national interest?

¹ Excerpt taken from 39 Op. Att’y Gen. 484 (1940).

My Dear Mr. President: In accordance with your request I have considered your constitutional and statutory authority to proceed by Executive agreement with the British Government immediately to acquire for the United States certain off-shore naval and air bases in the Atlantic Ocean without awaiting the inevitable delays which would accompany the conclusion of a formal treaty.

....

There is, of course, no doubt concerning the authority of the President to negotiate with the British Government for the proposed exchange. The only questions that might be raised in connection therewith are (1) whether the arrangement must be put in the form of a treaty and await ratification by the Senate or (2) whether there must be additional legislation by the Congress. . . .

One of these [constitutional powers of the president] is the power of the Commander in Chief of the Army and Navy of the United States, which is conferred upon the President by the Constitution but is not defined or limited. . . . I do not find it necessary to rest upon that power alone to sustain the present proposal. But it will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States

The second power to be considered is that control of foreign relations which the Constitution vests in the President as a part of the Executive function. The nature and extent of tis power has recently been explicitly and authoritatively defined . . . in *United States v. Curtiss-Wright Export Corp.* (1936):

“It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive 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 existence 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. . . .”

The President's power over foreign relations while “delicate, plenary, and exclusive” is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed. However, the acquisitions which you are proposing to accept are without express or implied promises on the part of the United States to be performed in the future. . . . The Executive agreement obtains an opportunity to establish naval and air bases . . . but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. . . .

There are precedents which might be cited, but not all strictly pertinent. . . .

....

The right of the President to dispose of vessels of the Navy and unneeded naval material finds clear recognition in at least two enactments of the Congress and a decision of the Supreme Court. . . .

[A federal statute of 1883 restricting how the Secretary of Navy disposes of ships no longer fit for use nonetheless] recognized and confirmed such a right in the President free from such limitations. It provides:

“But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, *unless the President of the United States shall otherwise direct in writing.*” [Italics supplied.]

....

So far as concerns this statute, in my opinion it leaves the President as Commander in Chief of the Navy free to make such disposition of naval vessels as he finds necessary in the public interest

Furthermore, I find in no other statute or in the decisions of any attempted limitations upon the plenary powers of the President as Commander in Chief of the Army and Navy and as the head of the

State in its relations with foreign countries to enter into the proposed arrangement for the transfer to the British Government of certain over-age destroyers and obsolescent military material

[T]o prohibit action by the constitutionally created Commander in Chief except upon authorization of a statutory officer subordinate in rank is of questionable constitutionality. However, since [a 1940 statute blocking the disposal of any military equipment unless it has been certified as non-essential] requires certification only of matters as to which you would wish, irrespective of the statute, to be satisfied, . . . it seems unnecessary to raise the question of constitutionality which such a provision would otherwise invite.

. . . .

Whether the statutes of the United States prevent the dispatch to Great Britain [of these ships] depends upon the interpretation to be placed on . . . the act of June 15, 1917. This section reads:

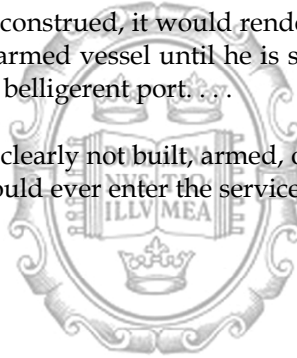
“During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war . . . with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation”

This section must be read in light of section 2 of the same act and the rules of international law So read, it is clear that it is inapplicable to vessels, like the over-age destroyers, which were not built, armed, equipped as, or converted into vessels of war with the intent that they should enter the service of a belligerent. If this section were not so construed, it would render meaningless section 2 of the act which authorizes the President to detain any armed vessel until he is satisfied that it will not engage in hostile operations before it reaches a neutral or belligerent port. . . .

. . . .

[The over-age destroyers] were clearly not built, armed, or equipped with any such intent or with reasonable cause to believe that they would ever enter the service of a belligerent.

. . . .



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