AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Separation of Powers

Caleb Cushing, **Opinion on Ambassadors and Other Public Ministers** (1855)[1]

Attorney General Caleb Cushing, who served under Democratic President Franklin Pierce, laid many of the legal foundations for presidential power in the nineteenth and early twentieth centuries. Synthesizing the work of prior judges and attorneys general, Cushing authored numerous opinions explaining the role of the president to the executive branch. The first full-time attorney general, Cushing proved to be an influential voice for discretionary and inherent presidential power under the Constitution. Cushing authored important opinions for Pierce defending the presidential prerogative to exercise complete discretion over the removal of executive branch officials, to declare a state of emergency and mobilize the militia, to incur governmental expenses even without prior congressional authorization for the spending, and to monitor and control the actions of all executive branch officers even when they were performing congressionally assigned responsibilities (leading him to reject, for example, the possibility of a legislative veto over the decisions of Cabinet members). "I hold," he wrote, "that no Head of Department can lawfully perform an official act against the will of the President; and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal executive chief utterly powerless."[2]

In the opinion excerpted below, Cushing advised the president on his constitutional authority to appoint diplomats in light of a new congressional statute that seemed to regularize the diplomatic corps and hem in the president's discretion on handling American relations with foreign governments. Cushing informed the president that not only did he have inherent constitutional authority to create, empty, fill, and rearrange diplomatic positions as he saw fit but also that he could ignore statutory language that seemed to impinge on that authority.

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1. "Can the President, without the advice and consent of the Senate, appoint envoys extraordinary and ministers plenipotentiary in the place of the ministers resident, and a secretary of legation to each of them?"

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With diplomatic agents [in international law] existing as a class, of recognized legal rights, but of irregular and vague diversities of title and of power, the Constitution of the United States intervenes to lay the foundation of their appointment under this Government in these words:

"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, 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."

Thus it is perceived that the Constitution, specifying "ambassadors" only, as examples of a class, empowers the President to appoint these and other "public ministers," that is, any such officers as by the law of nations are recognized as "public ministers," without making the appointment of them subject, like "other (non-enumerated) officers," to the exigency of an authorizing act of Congress. In a word, the power to appoint diplomatic agents . . . is a constitutional function of the President, not derived from, nor

[1] 7 Op. Atty. Gen. 186 (May 25, 1855).
[2] 7 Op. Att'y Gen. 469 (August 31, 1855).

limitable by, Congress, but requiring only the ultimate concurrence of the Senate; and so it was understood in the early practice of the Government.

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Accordingly, at the first session of the first Congress of the present United States, an act passed to establish the Department of Foreign Affairs, with a secretary thereof . . . but no enactment occurs at that session, either in the act making appropriations or in any other, to define the number or rank of the diplomatic agents of the United States.

Nevertheless, on the 20th of April, 1790, William Short was duly commissioned as charge d'affaires in France, and William Carmichael in Spain. In each of these cases, the designation of the officer was derived from the law of nations, and the authority to appoint from the Constitution.

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It is impossible to believe or imagine that these four Presidents, Washington, John Adams, Thomas Jefferson, and Madison, and the men who participated with them in the conduct of public affairs, emphatically the founders of this Government, did not understand this thing, or, understanding it, failed to legislate therein in conformity with the Constitution. None of the statesmen of that whole generation looked to an act of Congress for the creation of the office of "public minister." Nor is anything to the contrary inferable from assumed differences in constitutional theory on the part of these several Presidents. . . .

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The President's power of appointment is practically limited, to a certain degree, by the necessity of obtaining appropriations from Congress to defray the expenses of a mission; but this limitation is in effect removed by the appropriation of a sum of money for the contingent expenses of foreign intercourse, on which the President may draw for an appointment publicly made, or even for a secret appointment, under the power of the President to file a certificate of any sum expended without explanation of the object of the expenditure. Besides which, an officer may lawfully be, and occasionally is appointed . . . without any existing provision for compensation: which if he be lawfully appointed, creates a valid debt against the Government.

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. . . . I come now to the act submitted to me for examination.

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It the body of the act is one provision in regard to appointments, which, like some other things in the act, must be deemed directory or recommendatory only, and not mandatory: —that, namely, which enacts that to these offices, "the President shall appoint no other than citizens of the United States, who are residents thereof, or abroad in the employment of the Government at the time of their appointment." The limit of the range of selection for the appointment of constitutional officers depends on the Constitution. Congress may refuse to make appropriations to pay a person unless appointed from this or that category; but the President may, in my judgment, employ him, if the public interest requires it, whether he be a citizen or not, and whether or not at the time of appointment he is actually within the United States.

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The enactment-phrase of the act is: *From and after* a certain day, the President *shall*, by and with the advice and consent of the Senate, appoint.

. . . . [I]t is not in the power of Congress, by whatever terms of enactment, to take away any such authority as the Constitution may grant him, to change the mere title of a minister, or to make temporary appointments during the recess of the Senate. All expressions in a statute are to be so construed as to give them constitutional force if it be possible . . . .

. . . [T]he word "shall" must be construed to signify "may;" for Congress cannot by law constitutionally require the President to make removals or appointments of public ministers on a given day, or to make such appointments of a prescribed rank, or to make or not make them at this or that place. He, with the advice and consent of the Senate, enters into treaties; he, with the advice and consent of the Senate, appoints ambassadors and other public ministers. It is a constitutional power to appoint to a constitutional office. Like the power to pardon, it is not limitable by Congress; which can as well say that the President shall pardon all offences of a certain denomination and no others, as to say that he shall

appoint "public ministers" of the grade of "envoy extraordinary" and no others. . . . And, as we are not by construction to assume that a legislative act intends any unconstitutional thing when its words can be so construed as to mean a constitutional thing, we are therefore not to read this act as requiring the President to appoint and maintain a minister of the rank of envoy extraordinary at the courts of London, Paris, St. Petersburg, Madrid, Mexico, Copenhagen, regardless of what may, in his judgment and that of the Senate, be the necessities or interests of the public service; nor to read it as forbidding him to leave either of those legations, or any other, in the hands of a mere charge d'affaires.

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Mr. Attorney General Wirt, Mr. Attorney General Taney, and Mr. Attorney General Legare have thoroughly demonstrated, and conclusively established . . . that, however a vacancy happens to exist, if it exist, it may be filled by temporary appointment of the President. . . .

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But shall the President, during the present recess of the Senate, change the personnel, or essentially modify the character, of the whole or of two-thirds of the diplomatic corps of the United States? He has the constitutional power to do it; and Congress, confiding in his disposition to exercise conscientiously his large power in this respect, has in substance said, by this act and by the corresponding appropriation act, —We complete your power to do this by placing in your hands the requisite pecuniary means, and we submit the whole question, of public policy or exigency involved, to your executive discretion under the Constitution. —What in these circumstances, shall be the rule of decision and action?

The letter of the Constitution and of the acts of Congress empowers the President to make a *voluntary* substitution, either of new officers, or new offices, in all these cases; but the spirit of law demands, or counsels, that the acts of the President, however rightful in the mere sense of power, shall be subject to the guidance and control of the combined elements of public duty and responsibility. . . .

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