23rd National Security Law Institute

The Constitutional Separation of National Security Powers

Prof. Robert F. Turner
Associate Director
Center for National Security Law
What you are about to hear is NOT the modern conventional wisdom. Most of you are presumably familiar with that, and I’m going to present a dissenting view that I believe reflects the original understanding of the Constitution in this area. Consider it on the merits of the evidence and not as *ex cathedra* wisdom.
Because I’m going to focus on presidential powers, some people assume I think Congress has no rule in this area. Congress has tremendously important responsibilities, as does the Senate. But there are limits to their power in war, intelligence, and foreign affairs; and in the post-Vietnam era I believe they have often exceeded those limits.
“The habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.”
Our task may seem difficult . . .

Nowhere in the Constitution do we find the words “foreign policy,” “foreign affairs,” or “national security.” Did the Framers forget this important issue? What theory should govern the separation of foreign affairs powers?
Modern Conventional Wisdom on Separation of Foreign Affairs Powers

- Harold Koh (former Dean of Yale Law School; State Department Legal Adviser)
- John Hart Ely (late Dean of Stanford Law School)
One cannot read the Constitution without being struck by its astonishing brevity regarding the allocation of foreign affairs authorities among the branches. Nowhere does the Constitution use the words “foreign affairs” or “national security.” . . .

[T]he first three articles of the Constitution expressly divided foreign affairs powers among the three branches of government, with Congress, not the president, being granted the dominant role . . .

Article I gives Congress almost all of the enumerated powers over foreign affairs and Article II gives the president almost none of them . . . .
“Article II grants the president but four powers bearing on foreign relations - the power to receive ambassadors (which is his alone), the powers to appoint ambassadors and make treaties (each of which must be exercised jointly, with the advice and consent of the Senate), and the power to act as commander in chief (which depends on Congress’ s having authorized a war . . .).”

- Ely, War and Responsibility 139 n.3.
Prof. John Hart Ely on the President's Foreign Relations Powers

“... the power to act as commander in chief (which depends on Congress’s having authorized a war . . .)?”

- Ely, War and Responsibility 139 n.3.
An excerpt from a lecture by Prof. John Hart Ely on the President's foreign relations powers. Article II grants the president four powers bearing on foreign relations:

1. The power to receive ambassadors (which is his alone).
2. The power to appoint ambassadors and make treaties (each of which must be exercised jointly, with the advice and consent of the Senate).
3. The power to act as commander in chief (which depends on Congress's having authorized a war).

The slide poses the question: Who is Commander in Chief during times of peace?

- Ely, War and Responsibility 139 n.3.
Competing Approaches to the Separation of National Security Powers

- President must “faithfully execute” laws passed by Congress
- Total the enumerated powers of each branch
- The Constitution as an “Invitation to struggle” (aka the Corwin or “jump ball” theory)
- Foreign policy as a “shared” power
  - With Congress as ultimate “senior partner” (aka the Steel Seizure approach?); or
  - With the President as “senior partner”?  
- General “executive” control subject to important but narrowly-construed “vetoes” by the Senate and Congress (aka the Curtiss-Wright theory)
- I think Curtiss-Wright (by far the most cited Supreme Court decision in the area of foreign affairs) got the right answers for the wrong reasons.
Constitutional Powers of Congress

Article I

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States.

Section. 8. The Congress shall have power...

- To regulate Commerce with foreign Nations...
- To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
- To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- To raise and support Armies;
- To provide and maintain a Navy;
- To make Rules for the Government and Regulation of the land and naval Forces;
- To provide for calling forth the Militia;
- To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof;
“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”

This provision of Article I, Section 9, also gives Congress very important powers relevant to war and foreign affairs. Congress can end virtually any major war by simply refusing to appropriate new funds. But as we will discuss, this is not a general grant of all governmental powers to Congress simply by using conditional appropriations.
Constitutional Powers of the President

Article II

Section. 1. The Executive Power shall be vested in a President of the United States....

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States . . . .
He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .

Section. 3. He...shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed . . . .”
The “Shared Powers” Paradigm
“Shared Powers” Paradigm

- It is common today to describe our system in foreign affairs as one of “shared powers.”
- While many major initiatives require the involvement of the President and either the Senate or Congress, I believe this terminology promotes sloppy thinking and thus is unhelpful. The roles of the two political branches are not interchangeable.
Which Powers Are Really “Shared”? 

- Nomination of Ambassador (President)
- Confirmation of Ambassador (Senate)
- Appointment of Ambassador (President)
- Negotiation of Treaty (President)
- Consent to Ratification of Treaty (Senate)
- Ratification of Treaty (President)
- Execution of Int’l Political Obligation of Treaty (President)
- Funding of Treaty Obligation (Congress)
- Creation & Funding of Military Force (Congress)
- Approval of Decision to “Declare War” (Congress)
- Conduct of Military Operations (President)
Constitutional Theory

What was the “Original Understanding” of the Framers?
Experience with Legislative Tyranny (1776-1787)
Charles Thach, *The Creation of the Presidency 1775-1789* at 52 (1922)

“State experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers. **The idea, more than once utilized as the basis of the explanation of Article II of the Constitution, that the jealousy of kingship was a controlling force in the Federal Convention, is far, very far, from the truth.** The majority of the delegates brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that, if their new plan should succeed, it was necessary for them to put forth their best efforts to secure a strong, albeit safe, national executive.
Experience with Legislative Tyranny (1776-1787)
Charles Thach, *The Creation of the Presidency 1775-1789* at 52 (1922)

“Madison expressed the general conservative view when he declared on the Convention floor:

**Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent. If no effective check be devised for restraining the instability and encroachment of the latter, a revolution of some kind or the other would be inevitable.**
Jefferson to Madison  
(11 days after Const. went into effect)

“The executive, in our governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present . . . .”

- 16 Papers of Thomas Jefferson 661.
The debates of the Constitutional Convention, and the Federalist 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.

The Issue of Institutional Competency

Executive Branch
- Energy
- Secrecy
- Speed and Dispatch
- Unity of Design

Legislative Branch
- Deliberation and Circumspection
- Representation of Diverse Viewpoints
- Frequent Public Accountability
- Knowledge of Public Sentiment
§ 147. These to Powers, Executive and Federative, though they be really distinct in themselves, yet one comprehending the Execution of the Municipal Laws of the Society within its self, upon all that are parts of it; the other the management of the security and interest of the publick without, with all those that it may receive benefit or damage from, yet they are always almost united. And though this federative Power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick [sic] good…. 
“[W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variation of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.”

—J. Locke, Second Treatise of Government
Jefferson described “Locke’s little book on government” as “perfect, so far as it goes.”
Secrecy and the Continental Congress

“We find, by fatal experience, the Congress consists of too many members to keep secrets.”
[T]here frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.
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"There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done will therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest."
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That was the prevailing paradigm in all three branches until about 1973, when Congress demanded a role in this “business” in the wake of Vietnam and Watergate.
The “Second” Constitutional Convention

“At the Constitutional Convention, many a problem had been compromised by not being solved at all, but left to be worked out in practice. The first active period of the new government, the more than five months that comprised the first session of Congress, was, in effect, a second Constitutional Convention.”

“Be it enacted . . . That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary . . . , who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution . . . ; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President . . . shall from time to time order or instruct.”

—1 Stat. 28 (1789).
Note that the Nation’s “Executive Power” is vested not in a branch (as in Articles I and III) but in an individual – this is the basis of the “unitary executive” debate. The Secretary of State is bound to carrying out “the will of the President,” and exercises discretion only as permitted by the President.

—1Stat. 28 (1789).
The sole purpose of that organization was to carry out, not legislative orders, as expressed in appropriation acts, but the will of the executive. In all cases the President could direct and control, but in the ‘presidential’ departments [war and foreign affairs] he could determine what should be done, as well as to how it should be done. …Congress was extremely careful to see to it that their power of organizing the department did not take the form of ordering the secretary what he should or should not do.”

(Don’t tell the person sleeping next to you)

Pay attention to this next point—it will be on the pop quiz at the end of the lecture!
The Constitutional Separation of National Security Powers

Breaking the Code: The “Executive Power” Clause
The Constitutional Separation of National Security Powers

Breaking the Code:

"Executive Power" Clause

aka the "Vesting Clause"

Breaking Code:

The "Executive Power" Clause
A paper which Hamilton provided to Madison during the Convention, outlining his preferred constitution, provided in Article I, § 2, that:

“The Executive power, with the qualifications hereinafter specified, shall be vested in a President of the United States.”

Hamilton’s Plan also gave the Senate “advice and consent” over treaties and nominations, and gave the President “the direction of war when commenced,” but gave the Senate power “to declare war.”

Madison on the Meaning of the “Executive Power” Clause (June 1789)

“[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department. …

In truth, the Legislative power is of such a nature that it scarcely can be restrained either by the Constitution or by itself. And if the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the encroachments of the Legislative department.”

—letter to Edmund Pendleton, 21 June 1789,
5 Writings of James Madison 405-06 n.
“The Constitution . . . . has declared that the Executive powers shall be vested in the President, submitting special articles of it to a negative by the Senate . . . .
“The 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.”
Again, the “executive power” is vested in one individual: the President.

The 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.

Thomas Jefferson
Memorandum to President Washington
(April 1790)
“The senate is not supposed by the constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them . . . .”

- 3 The Writings of Thomas Jefferson 16, 17

(Mem. ed. 1903).
It is noteworthy that in his initial draft of this memo, Jefferson wrote that the Senate was not supposed to be acquainted with the “secrets” of the Executive branch.
“Tuesday, 27th [April 1790]. Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay’s and Mr. Jefferson’s—to wit—that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.”

4 Diaries of George Washington 122 (Regents’ Ed. 1925).
George Washington on Executive Power Over Foreign Affairs

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His opinion coincides with Mr. Jay’s and Mr. Jefferson’s—to wit— that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.

Jay clearly did not know he was not supposed to give “advisory opinions.”

4 Diaries of George Washington 122 (Regents’ Ed. 1925).
“The general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument. . . .

It deserves to be remarked, that as the participation of the 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.
“While, therefore, the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the “executive power” to do whatever else the law of nations . . . enjoin in the intercourse of the United States with foreign Powers.”


"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him. The treaty, which is a law, enjoins the performance of a particular object."

House Debate on the Jonathan Robbins Affair

When President John Adams turned a British deserter over to a British officer pursuant to an extradition clause in the Jay Treaty without involving the courts, Republicans introduced a resolution in the House to censure Adams.
“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him. The treaty, which is a law, enjoins the performance of a particular object.
“The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. . . . The department which is entrusted with the whole foreign intercourse of the nation . . . seems the proper department to be entrusted with the execution of a national contract like that under consideration. In this respect the President expresses constitutionally the will of the nation . . . .”

This last sentence is right out of Blackstone’s Commentaries:

“With 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 . . . .”

- 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 245 (1765).

In this respect the President expresses constitutionally the will of the nation.

- 10 Annals of Cong.
Albert Gallatin’s
Response to John Marshall’s Address—1

“Marshall had convinced even Gallatin himself. . . . He had . . . been chosen to answer Marshall’s speech. He took a place near Marshall and began making notes for his reply; but soon he put his pencil and paper aside and became absorbed in Marshall’s reasoning. . . .
Albert Gallatin’s 
Response to John Marshall’s Address—2

“When the Virginian closed, Gallatin did not come forward to answer him as his fellow partisans had expected. His Republican colleagues crowded around the brilliant little Pennsylvania Swiss and pleaded with him to answer Marshall’s speech without delay. But Gallatin would not do it. ‘Answer it yourself,’ exclaimed the Republican leader in his quaint foreign accent; ‘for my part, I think it unanswerable,’ . . . .”

—2 Albert J. Beveridge, The Life of John Marshall 474-75 (1919). [Without further debate, the Republican resolution was defeated by 35 to 61.]

10 Annals of Cong. 619 (1800).]
Support for Presidential Authority Under the “Executive Power” Clause

Early support for the idea that Article II, Section 1 of the Constitution vested in the President all Federal Government powers of an “Executive” nature not expressly vested elsewhere, including the general control of diplomacy and intelligence, came from:

- The first President of the United States,
- The first Chief Justice of the United States,
- A majority of both chambers in the First Congress of the United States,
- The leaders of both political parties (Federalists and Republicans) of the era, and
- All three of the authors of the Federalist papers.

Yet the view is largely ignored by scholars today.
Thus, when the constitutional convention gave ‘executive power’ to the President, the foreign relations power was the essential element in the grant, but the carefully protected this power from abuse by provisions for senatorial or congressional veto.

—The Control of American Foreign Relations 147 (1922)

Prof. Quincy Wright

- President of the APSA
- President of the IPSA
- President of the ASIL
- Repeatedly nominated for the Nobel Peace Prize.
- Author of The Control of American Foreign Relations (1922).
- First sparked my own interest in this subject in 1966.
Thus, when the constitutional convention gave ‘executive power’ to the President, the foreign relations power was the essential element in the grant, but the carefully protected this power from abuse by provisions for senatorial or congressional veto.”

—The Control of American Foreign Relations 147 (1922)
Professor Louis Henkin on “Executive” Power

“The executive power…was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone.”

- Foreign Affairs and the Constitution 43 (1972)
“He asked me if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. ‘But,’ said he, ‘at least, Congress are bound to see that the treaties are observed.’ I told him no, there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. ‘If he decides against the treaty, to whom is a nation to appeal?’ I told him the Constitution had made the President the last appeal.”

—Quoted in 4 John Bassett Moore, *Digest of International Law* 680-81 (1906).
USURPATION OF EXECUTIVE AUTHORITY

Mr. [Roger] GRISWOLD said he wished to lay a resolution upon the table, relative to a subject which, in his opinion, deserves consideration. Its object is to punish a crime which goes to the destruction of the **Executive** power of the Government. He meant that description of crime which arises from an inference of individual citizens in the negotiations of our Executive with foreign Governments. …The resolution was in the following words:

[Continued on next slide…]
Resolved, That a committee be appointed to inquire into the expediency of amending the...[criminal code] to extend the penalties, if need be, to all persons, citizens of the United States, who shall usurp the Executive authority of this Government, by commencing or carrying on any correspondence with the Governments of any foreign prince or state, relating to controversies or disputes which do or shall exist between such prince or state, and the United States.
“He [Gallatin] believed, in certain situations such a correspondence would be highly improper. In our situation, for instance, said he, it would be extremely improper for a member of this House to enter into any correspondence with the French Republic.

...  
It might, therefore, be declared, that though a crime of this kind cannot be considered as treason, it should nevertheless be considered as a high crime.”

—9 Annals of Cong. 2498
“He [Gallatin] believed, in certain situations, such as those now existing, it would be extremely improper for a member of this House to enter into any correspondence with the French Republic. …It might, therefore, be declared, that though a crime of this kind cannot be considered as treason, it should be considered, on the same ground, as a high crime."

—Annals of Cong. 2498
Albert Gallatin on the Logan Act
(Annals of Congress 1798)

“He [Gallatin] believed in certain situations such as the one now before us, it would be improper for a member of this House to enter into any correspondence with the French Republic. …It might, therefore, be declared, that though a crime of this kind cannot be considered as treason, it should at least be considered as a high crime.”

—Annals of Cong. 2498
“The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution.
“The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.”

“There was a contingent fund of $50,000 allowed to the President by law, which he was authorized to expend without rendering to Congress any account of it—it was confided to his discretion, and, if the compensation of the Commissioners had been made from that fund,…it would not have been a proper subject for inquiry. …”

Rep. Forsyth added during the debate: “It was true the President might have taken it out of the secret service fund, and no inquiry would have been made about it.”

—32 Annals of Cong. 1466 (1818).
“It is to be remembered that effective intervention in foreign affairs sometimes requires the cooperation of other nations, while on the other hand, the expectancy of future intervention sometimes stirs up foreign governments to take preventive measures. Intervention, like other matters of diplomacy, sometimes calls for secret preparation, careful choice of the opportune moment, and swift action. It was because of these facts that the superintendence of foreign affairs was intrusted to the executive and not to the legislative branch of the Government. . . .
“[O]ur Constitution gave the President power to send and receive ministers . . . [etc.]. These grants confirm the executive character of the proceedings, and indicate an intent to give all the power to the President, which the Federal Government itself was to possess—the general control of foreign relations. …That this is a great power is true; but it is a power which all great governments should have; and, being executive in the conception of the founders, and even from its very nature incapable of practical exercise by deliberative assemblies, was given to the President.

“The Senate has nothing to do with the negotiation of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty. . . .
Senator John C. Spooner
on Executive Control Over Foreign Affairs (1906)—1

"From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests . . . the conduct of our foreign relations exclusively in the President. And, Mr. President, he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined."
Senator John C. Spooner
on Executive Control Over Foreign Affairs (1906)—2

“I do not deny the power of the Senate either in legislative session or in executive session—that is a question of propriety—to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate or by the House or by both Houses it is beyond any possible question purely advisory, and not in the slightest degree binding in law or conscience upon the President. . . .
“[S]o far as the conduct of our foreign relations is concerned, excluding only the Senate’s participation in the making of treaties, the President has the absolute and uncontrolled and uncontrollable authority.”

-40 Cong. Rec. 1417 (1906).
So far as the conduct of our foreign relations is concerned, excluding only the Senate's participation in the making of treaties, the President has the absolute and uncontrolled and uncontrollable authority.

- 40 Cong. Rec. 1417 (1906).
Senate Responses to Senator John C. Spooner (1906)

“Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making…[than] we have heard from the Senator from Wisconsin [Sen. Spooner].”

—Senator Henry Cabot Lodge

(Harvard Law Graduate who later helped defeat ratification of League of Nations’ Treaty)

Senator Bacon, whose request for treaty negotiating records had led to Senator Spooner’s lengthy address, responded that the Senate’s claim to the information was based not upon “legal right” but upon “courtesy” between the President and the Senate.

—See E. Corwin

"Declarations of foreign policy may be made by Congress in the form of joint resolutions, but such resolutions are not binding on the President. They merely indicate a sentiment which he is free to follow or ignore. Yet they are often couched in mandatory terms and in defense of his independence the President has frequently vetoed them."

- The Control of American Foreign Relations 278 (1922).
Constitutional Theory

Judicial Interpretation
by the
Supreme Court
Chief Justice John Marshall

Madison’s Nightmare:
How Executive Power Threatens American Democracy
By Prof. Peter M. Shane

“Surely, this would have been Madison’s worst constitutional nightmare. . . . a theory of government . . . that treat our Constitution as vesting in the President a fixed and expansive category of executive authority largely immune to legislative control or judicial review.”
Chief Justice John Marshall

*Marbury v. Madison* (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. . . . The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive.”

- 5 U.S. (1 Cranch.) 137, 165 (1803).

Center for National Security Law - Separation of Powers Project
Does the President Have Any “Unchecked” Powers?

*Marbury v. Madison* (Marshall, C.J.)

“The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. . . . The acts of such an officer, as an officer, can never be examinable by the courts.”

*-Marbury v. Madison* (Marshall, C.J.)
Once again, we see the idea of the “unitary executive”

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-Marbury v. Madison (Marshall, C.J.)
“Hamilton’s argument was that the Constitution, by vesting the executive power in the President, gave him the right, as the organ of intercourse between the nation and foreign nations, to interpret national treaties and to declare neutrality. He deduced this from Article 2 of the Constitution on the executive power, and followed exactly the reasoning of Madison and his associates as to the executive power upon which the legislative decision of the first Congress as to the Presidential removal depends, and he cites it as authority . . . .

(Continued on next slide . . . . )
Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, [and] . . . that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication.

*Meyers v. United States*  
272 U.S. 52, 137, 164 (1926)  
(Majority Opinion by Chief Justice William Howard Taft).
United States v. Curtiss-Wright Export Corp. on Executive Power Over Foreign Affairs - I

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.

299 U.S. 304, 319-20 (1936)
United States v. Curtiss-Wright Export Corp.

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Ergo, these are exclusive presidential powers.

299 U.S. 304, 319-20 (1936)
United States v. Curtiss-Wright Export Corp. on Executive Power Over Foreign Affairs - II

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 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.
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 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.**
“The pre-eminent responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs “which the Constitution does not vest elsewhere in clear terms.” He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation’s power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.”
When the public turned against the Vietnam War, Congress began usurping control over military deployments, intelligence, and other areas it has historically recognized were vested in the Executive by the Constitution.
GROWTH OF LEGISLATIVE RESTRICTIONS ON EXECUTIVE CONDUCT OF FOREIGN AFFAIRS

Legislation on Foreign Relations

- 1968 edition — 658 pages
- 1988 edition — 5 volumes of more than 1000 pages each
The Modern Trend

- Today, most writers assume that Congress may micromanage foreign affairs as it desires, and Congress is far more involved in Intelligence and other traditional “executive” business.
- Congress regularly seeks to direct negotiations by statute—often using “conditional appropriations” to impose its will.
- This may be good or bad as a policy matter, but it was *not* the original constitutional scheme.
“Critics on the right, in contrast, argue that to preserve our activist foreign policy, we must revise constitutionalism, abandoning the *Youngstown* vision in favor of *Curtiss-Wright*. Yet because many of these same critics also espouse the constitutional jurisprudence of original intent, they are forced to engage in revisionist history to contend that the Framers did not originally draft the Constitution to promote congressional dominance in foreign affairs.”

Critics on the right, in contrast, argue that to preserve our activist foreign policy, we must revise constitutionalism, abandoning the Youngstown vision in favor of Curtiss-Wright. Yet many of these same critics also espouse the constitutional jurisprudence of original intent, they are forced to engage in revisionist history to contend that the Framers did not originally draft the Constitution to promote congressional dominance in foreign affairs.”

I’ve always been grateful to Harold for citing one of my articles before John’s.
Harold and I had some great debates in the early 1990s, but in recent years he has repeatedly refused to debate.
I’ve always been grateful to Harold for citing one of my articles in John’s book.

We twice paid him double our usual honorarium to debate me on *Youngstown vs. Curtiss-Wright*, and both times he essentially tanked the debate, spending his time talking about his work on behalf of Haitian refugees at Guantanamo one year.

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FYI, this was a 1990 CNN CROSSFIRE show during which Harold asserted targeting Saddam would be illegal “assassination.”
Some of you may recall that as State Dep't Legal Adviser in 2010 Harold defended the targeting of individuals by drones far from any "battlefield."
Youngstown vs. Curtiss-Wright: There Is No Inconsistency

Put simply, Harold is mistaken in treating *Youngstown* as a “foreign affairs” case.
Youngstown Sheet & Tube Co. v. Sawyer
343 U.S. 579 (1952)

Mr. Justice Black delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills...
Youngstown Sheet & Tube Co. v. Sawyer
343 U.S. 579 (1952)

“W]e cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.”
Youngstown Sheet & Tube Co. v. Sawyer
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We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession and operate most of the Nation’s steel mills.

Even though “theater of war” be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.”

Fifth Amendment

“No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”
Youngstown Sheet & Tube Co. v. Sawyer
343 U.S. 579 (1952) (Jackson, J. Concurring)

"We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.

Justice Jackson's Concurring Opinion
Youngstown Sheet & Tube Co. v. Sawyer
343 U.S. 579 (1952) (Jackson, J. Concurring)

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"But, when it is **turned inward**, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. . . . . [I]t is not a military prerogative, **without support of law**, to **seize** persons or **property** because they are important or even essential for the military and naval establishment."
Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region... The issue tendered... involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible. United States v. Curtiss-Wright Corp., 299 U.S. 304; Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103.

Did Jackson think he was overturning Curtiss-Wright?
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In footnote 2 of his *Youngstown* opinion, Justice Jackson expressly referred to the *Curtiss-Wright* decision, observing: “That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories . . .”

343 U.S. at 635.
“Youngstown has not been considered a foreign affairs case.”

- Louis Henkin,
Foreign Affairs and the Constitution 341 n. 11 (1972).
Goldwater v. Carter
444 U.S. 996 (1979) (Rehnquist, Concurring)

“The present case differs in several important respects from Youngstown . . . . In Youngstown, private litigants brought a suit contesting the President’s authority under his war powers to seize the Nation’s steel industry, an action of profound and demonstrable domestic impact. . . .

[A]s in Curtiss-Wright, the effect of this action, as far as we can tell, is “entirely external to the United States, and [falls] within the category of foreign affairs. . . .”

[Justice Rehnquist, concurring—joined by Chief Justice Burger and two other members of the Court]
The “Power of the Purse”

Does Legislative Control Over Appropriations Give Congress Constitutional Authority to Direct the Execution of Commander-in-Chief Powers?
Are there no limits on the Power of the Purse?

“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 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.”

Curtiss-Wright
“[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually…”

U.S. Statutes at Large, vol. 1, p. 129 (1790).

Article I, Section 9, of the Constitution requires that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. …”
Thomas Jefferson on Appropriations
letter to Secretary of the Treasury Albert Gallatin
(19 February 1804)

The Constitution has made the Executive the organ for managing our intercourse with foreign nations....The executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . From the origin of the present government to this day...it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.

The Writings of Thomas Jefferson,
vol. 11, pp. 5, 9, 10 (Mem. ed. 1903).
Congress May Not Lawfully Use Its Powers to Usurp the Constitutional Powers of Another Branch

- *United States v. Klein*
- *United States v. Lovett*
United States v. Klein
80 U.S. (13 Wall.) 128, 145, 147-48 (1872)

“[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court has adjudged them to have….The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive….It is the intention of the Constitution that each of the great coordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit. …Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration.”
United States v. Lovett
328 U.S. 303, 313, 315, (1946)

“We…cannot conclude, as [Counsel for Congress] urges, that [the section] is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure’s constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress had final say….We hold that [the section] falls precisely within the category of congressional actions which the Constitution barred by providing that ‘No Bill of Attainder or ex post facto Law shall be passed’ ”
Clear and Present Danger

The modern practice of using “conditions” on appropriations bills to exercise control of powers vested elsewhere in the Constitution is a threat to the core doctrine of Separation of Powers. If Congress can seize the Commander-in-Chief power, it can destroy the Judicial power too . . . .
Supreme Court Neutralization Act of 2015
(not yet introduced)

Be it hereby enacted, that…

No funds appropriated by this or any other act shall be available to finance the operations of the Supreme Court, other than to pay the salaries of the Justices, if the Court holds any statute or part of a statute enacted by Congress to be unconstitutional.
Could the Power of Judicial Review Survive Such a Statute?

(Unlike the Commander-in-Chief Power, Judicial Review is an implied power not mentioned in the Constitution.)
Any Questions?

I always like to reserve the first question for someone who is really angry or upset.