THE PRESIDENT'S EXCLUSIVE FOREIGN AFFAIRS POWERS OVER FOREIGN AID: PART I†

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Part I

THE DEVELOPMENT OF CONSTITUTIONAL STANDARDS WITH RESPECT TO THE SEPARATION OF FOREIGN AFFAIRS POWERS

† Part II will appear in the June 1970 issue of the *Journal*.

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In response to Peru's expropriation of the Peruvian properties and investments of the International Petroleum Company, a subsidiary of Standard Oil of New Jersey,[1] President Nixon warned that unless adequate, prompt, and effective compensation was paid to IPC by April 9, 1969, he would have no choice but to terminate both American foreign aid to Peru and Peru's quota of American sugar imports.[2] Peru subsequently charged that the United States was engaged in "economic aggression" and threatened to create a bloc of Latin American nations to oppose the economic interests of the United States.[3]

Although many Peruvians, and others, would be incredulous, the President, who it is commonly supposed controls the conduct of American foreign affairs, was compelled to take the steps he did by congressional legislation: the so-called Hickenlooper Amendment to the Foreign Assistance Act[4]—the basic statute governing the United States' foreign aid program—and section 408(c) of the Sugar Act of 1948.[5] This article investigates the constitutionality of the Hickenlooper Amendment and other similar congressionally-imposed restrictions on the President's discretion[6] in foreign aid. It will be seen that the Constitution, as it has developed, has conferred upon the executive branch exclusive powers over a "core area" of

1. Some of the long history of the dispute that culminated in the expropriations is set out in Goodwin, *Letter from Peru,* NEW YORKER, May 17, 1969, at 41.

2. N.Y. Times, Mar. 5, 1969, at 9, col. 3.

3. N.Y. Times, May 2, 1969, at 8, cols. 1-2.

4. Foreign Assistance Act of 1961 § 620(e), 22 U.S.C. § 2370(e)(1) (1964).

After his initial response, President Nixon sent a special emissary, John N. Irwin II, to Peru. As a result, Secretary of State Rogers was able to announce on April 7, 1969, that the good faith discussions between the Peruvian government and IPC constituted "appropriate steps" within the meaning of section 620(e) of the Foreign Assistance Act (FAA) that would toll its running, at least temporarily. N.Y. Times, April 8, 1969, at 1, col. 1. As of the date of publication of this article, its running still remains tolled.

5. 7 U.S.C. § 1158(c) (1964).

6. These restrictions in the FAA, and other legislation governing the foreign aid program—which relate to the commencement and continuation of aid to all or particular countries as well as to its amount, conditions, and character—will be discussed in greater detail, along with the Hickenlooper Amendment, in Part II of the article. Some of these other restrictions have also been applied to Peru in recent years. *See, e.g.,* FAA § 620(o), 22 U.S.C. § 2370 (o) (Supp. IV, 1969) (with respect to countries seizing United States fishing vessels) and FAA § 620(v), 22 U.S.C. § 2370(v) (Supp. IV, 1969) (with respect to countries purchasing sophisticated weapons); *cf.* Foreign Military Sales Act § 3(b), 22 U.S.C. § 2753 (1964) (the so-called Pelly Amendment dealing with the seizure of fishing vessels). It was the invocation of this last provision which apparently led to Peru's cancellation of its invitation to the Rockefeller mission in June, 1969. N.Y. Times, June 15, 1969, at 25, col. 1.

decisions in the field of foreign affairs, and this article will explore the extent of this core and delineate the congressional controls or interference from which this core area is immune. What is involved is an examination of one aspect of the "separation of powers"; more specifically, a clarification of the interrelation of the independent powers of the executive in foreign affairs and the legislative powers of Congress, principally the appropriations power, with respect to foreign affairs.[7] Following a discussion in Part I of the constitutional devclopmcnt of standards affecting the separation of foreign affairs powers, this article will investigate in Part 11 the manner in which these powers have interacted in the area of foreign aid. Because Congress can completely withold from the executive appropriations for foreign aid, it has been suggested that it can do "less" and restrict the discretion of the President with respect to foreign aid in any way that it wishes.[8] This article concludes that such may not be the case.

PART I

THE DEVELOPMENT OF CONSTITUTIONAL STANDARDS WITH RESPECT TO THE SEPARATION OF FOREIGN AFFAIRS POWERS

There are no directly relevant court cases involving the separation of powers with respect to foreign aid;[9] nor are there congressional-executive precedents on all fours with the issues raised in this article;[10] nor is there much scholarly writing on the subject.[11]

7. Although questions of war and foreign affairs are often related, this article does not focus on the former, or on the relation of executive and congressional powers with respect to it. The President's "war-making power" does, however, provide some useful analogies with respect to forcign affairs and foreign aid. *See* Revely, *Presidential War-Making: Constitutional Prerogative or Usurpation?* 55 VA. L. REV. 1243 (1969); Note, *Congress, The President, and the Power to Commit Forces to Combat,* 81 HARV. L. REV. 1771 (1968).

8. *See, e.g.,* the statements of Senators Saltonstall and Keating upon the submission of an Amendment to the Foreign Assistance Act of 1961. 107 CONG. REC. 14694 (1961); *cf.* Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations,* 289 ANNALS AM. ACAD. POL. & SOCIAL SCI. 145, 146 (1953) [hereinafter cited as Nobleman].

9. The foreign aid program has only rarely given rise to litigation, and the issues raised have not involved the separation of powers. *E.g.,* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968) (application of Webb-Pomerene Act to foreign aid commodity program).

10. The term "congressional-executive precedents" includes episodes, usually not giving rise to litigation, in which issues of the separation of powers between the executive and the Congress are contested between those branches, as well as statements and opinions by officials of the executive—such as the Attorney General—and instruments of the legislature—such as

Therefore, an examination of the constitutional standards developed for foreign affairs generally is necessary. So defined, these standards may then be applied to foreign aid specifically.

EXECUTIVE POWERS

The Constitution has conferred upon the President a wide range of foreign affairs powers: "independent" powers, so-called because they have not been delegated to the President by the Congress. The situation is quite different from that of domestic affairs where the President has few independent substantive powers;[12] most of the President's vast powers in the domestic area having been delegated.[13] While the Constitution nowhere *expressly* grants the President powers over "foreign affairs" as such, he has been deemed to derive such authority from a number of other powers which, taken together or separately, have been the subject of express grant:[14] principally, the "executive power,"[15] the powers of "Commander-in-Chief,"[16] and, to a lesser degree, the power to appoint and receive ambassadors.[17]

committees—which may over time give rise to constitutional standards accepted by all the branches of government. The statements of just one branch may of course be no more than those of an "advocate." *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 611, 640 (1952). It can be argued that such episodes and statements as there have been with respect to foreign aid have not focused on issues peculiar to foreign affairs, but might have arisen with respect to domestic programs as well. See Part II.

11. Nobleman 145 n.2.

12. One of the President's independent domestic substantive powers is the pardon power. U.S. CONST. art. II, § 2, cl. 1; *In re* Grossman, 267 U.S. 87 (1925); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

13. The outer limits of congressional power to delegate to the executive in the domestic area are discussed in Bowles v. Willingham, 321 U.S. 503 (1944), and Yakus v. United States, 321 U.S. 414 (1944).

14. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 121, comment *a* at 379 (1965); Bishop, *The Structure of Federal Power Over Foreign Affairs*, 36 MINN. L. REV. 299 (1952). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

15. U.S. CONST. art. II, § 1, cl. 1. It is now generally conceded that this clause is not merely declaratory but constitutes an affirmative grant of power. Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 350 (1955) [hereinafter cited as Mathews].

16. U.S. CONST. art. II, § 2, cl. 1.

17. U.S. CONST. art. II, § 2, cl. 2, § 3. The role of the President as "sole organ" for foreign affairs as well as his recognition powers have been said by some to derive, in part at least, from these powers. E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 71 (1917) [hereinafter cited as CORWIN—FOREIGN RELATIONS]. It has also been suggested that the requirement that the President "shall take care that the laws be faithfully executed," U.S. CONST. art. II, § 3, may be a source of presidential power. Thus, it is this clause that requires

Independent Powers

Speaking of the President's foreign affairs powers, former Attorney General and Undersecretary of State Katzenbach stated that "[t]he Founding Fathers did not attempt to spell out the outer limits of Executive or Legislative powers . . . ."[18] The outer limits of the President's foreign affairs powers are in fact unclear. It has been stated by the Supreme Court that the national government[19] received its foreign affairs powers as "necessary concomitants of nationality,"[20] and the Court has strongly suggested that the exeeutive is the repository of such powers.[21] The extent of the powers of the national government—and probably the President—is in concept equal to those of other nation-states. Thus the Court noted in *United States v. Curtiss-Wright Export Corp.*[22] that "[a]s a member of the family of nations, the right and power of the United States in . . . [the field of external affairs] are equal to the right and power of the other members of the international family."[23] As a practical matter they are far greater than most. Indeed, as the world role of the United States has grown, the power and responsibilities of the Government and the President have grown accordingly.[24] Notwithstanding Mr. Katzenbach's demurral—"I am not suggesting that the Constitution can be amended by international developments"[25]—the necessity which has often led to an

the President to cause international law and treaties to be executed. *See* Martin v. Mott, 25 U.S. (12 Wheat.) 10 (1827); Mathews nn.88, 107, 115, 118-20.

Most discussions of the President's foreign affairs powers do not deal with his exclusive powers, with which this article is concerned, but rather with the wider range of his independent powers, and with the treaty power, U.S. CONST. art. II, § 2, cl. 1, which he shares with the Senate.

This article will initially consider both aspects of his powers: the independent powers because their growth has probably enlarged the area of exclusive powers and the treaty power because of the number of useful analogies that it provides.

18. *Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 185 (1967) (letter to Senator McCarthy) [hereinafter cited as *1967 Hearings*].

19. Professor Corwin points out that what is often called the federal government is in fact the national government at the center of the federal system. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548, 549 (1923) [hereinafter cited as Corwin—*Spending Power*].

20. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

21. *Id.* at 319-22.

22. 299 U.S. 304 (1936).

23. *Id.* at 318; *cf.* Missouri v. Holland, 252 U.S. 416 (1920).

24. According to Mr. Katzenbach, "we have a responsibility which simply comes from the position of the United States in the world today." *1967 Hearings* 179.

25. *Id.* at 161.

enlargement of the outer limits of presidential power[26] has, in fact, added to the content of the President's foreign affairs powers.

The assertion of independent power by the President has a long history, including such famous episodes as President Washington's proclamation of neutrality in 1793 and his Farewell Address in 1796,[27] Jefferson's Louisiana Purchase,[28] the Rush-Bagot Agreement of 1817 demilitarizing the American-Canadian border,[29] the Monroe Doctrine of 1823,[30] President Polk's initiative in committing the United States to the war with Mexico,[31] the "opening-up" of Japan by Commodore Perry's visit in 1853,[32] the peace protocol with Spain in 1898,[33] the use of American troops by President McKinley in the Boxer Rebellion in China in 1900 to promote America's "commercial development" there,[34] Theodore Roosevelt's placing the customs houses of Santo Domingo under United States control by executive action in 1905 after the Senate had failed to consent to a treaty for that purpose,[35] the Lansing-Ishii Agreement of 1917,[36] Woodrow Wilson's arming of merchantmen in 1917 after Congress had failed to authorize the same,[37] Franklin D. Roosevelt's exchange

26. One authority wrote many years ago that "popular demand" and general ideas of necessity are a conventional source of executive authority. Dunning, *The Constitution of the United States in Civil War,* 1 POL. SCI. Q. 163, 174 (1886). Necessity may not increase the government's power vis-a-vis individuals, however. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649-53 (1952) (Jackson, J., concurring).

27. *See* S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 336-46 (1965) [hereinafter cited as MORISON]. In his Farewell Address, President Washington said: "It is our true policy to steer clear of permanent alliances with any portion of the foreign world." Quoted by Undersecretary of State Katzenbach, *1967 Hearings* 72.

28. *See generally* MORISON 364-67.

29. This executive agreement is discussed in McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy,* 54 YALE L.J. 181, 247 n.138 (1945) [hereinafter cited as MacDougal & Lans]. *See generally* MORISON 406-07.

30. *See* E. CORWIN, THE PRESIDENT. OFFICE AND POWERS 1787-1957, at 217-220 (1957) [hereinafter cited as CORWIN—PRESIDENT]. *See generally* R. PALMER, A HISTORY OF THE MODERN WORLD 451-52 (1961).

31. *See generally* MORISON 558-60.

32. *Id.* at 579.

33. Moore, *Treaties and Executive Agreements,* 20 POL. SCI. Q. 385, 391 (1905). The President's independent power to enter into armistice agreements seems to represent a blend of his diplomatic and Commander-in-Chief powers. Mathews 353.

34. *See generally* MORISON 807; R. PALMER, *supra* note 30, at 655.

35. *See generally* R. PALMER, *supra* note 30, at 626.

36. What McDougal and Lans have described as "one of the key instruments in the formulation of American policy towards Japan" was a "mere executive declaration of policy." McDougal & Lans 281. *See generally* CORWIN—PRESIDENT 236, 414.

37. *See generally* MORISON 859.

of 50 destroyers for 99-year base leases with the British in 1940,[38] his dispatch of troops to Iceland and Greenland[39] and convoys to Britain in that year,[40] his proclamation of the Atlantic Charter with Winston Churchill in 1941,[41] and his conclusion of the Yalta,[42] Potsdam,[43] and Teheran agreements.[44] What is not certain about each of these assertions of executive power, in most of which Congress, happily or not, ultimately acquiesced,[45] is whether they evidence the outer limits of the President's independent powers under the Constitution, or rather *faits accomplis* of the executive which the Congress had no choice but to accept.[46] It may not be possible to draw the conceptual line between the two at this time.

It is clear that the Constitution has given the President great capacity for initiative in foreign affairs,[47] which he has increasingly exercised.[48] That such initiative may, notwithstanding the fact that Congress has been given the power to declare war,[49] inevitably involve the nation in war has been long recognized.[50] The President's

38. One authority has stated F.D.R.'s executive action was not only within the independent powers of the President, but was an "inherently executive power, not subject to Congressional interference"; that is to say, within the President's exclusive powers. Jones, *The President, Congress, and Foreign Relations*, 29 CALIF. L. REV. 565, 580 (1941).

39. The dispatch of troops outside the Western Hemisphere was apparently in contravention of then existing legislation. Jones 583 n.55; Mathews 382; *cf.* R. TAFT, A FOREIGN POLICY FOR AMERICANS 30 (1951).

40. *See generally* MORISON 999.

41. *See generally* R. PALMER, *supra* note 30, at 844.

42. *See generally id.* at 845-47.

43. *See generally id.* at 847-48.

44. According to Mathews, the Yalta Agreement "was a valid exercise of the President's power as Commander-in-Chief." Mathews 358. Many of these episodes, from Washington's proclamation through these last agreements, are discussed in CORWIN—PRESIDENT.

45. Of course there have been cases where Congress has not acquiesced. Thus Congress sought to censure President Polk's Mexican initiative in tones reminiscent of recent congressional strictures over Indo-China. And, Senator Fulbright's hearings and more recent events certainly reflect considerable unease in some congressional quarters over our recent adventures in Indo-China. *Cf. 1967 Hearings.*

46. Probably the most clear and dramatic example of executive *fait accompli* was President Theodore Roosevelt's dispatch of the fleet around the world, confronting Congress with the necessity to appropriate funds to bring it back. CORWIN—PRESIDENT 137.

47. U.S. CONST. art. II, § 2, cls. 1-2.

48. In recent decades the President has exercised great initiative in domestic affairs as well.

49. See notes 110-17 *infra* and accompanying text.

50. Thus, the President's conduct of foreign relations, combined with his responsibility for the interpretation and execution of treaties, can bring the country close to war. *See generally* CORWIN—FOREIGN RELATIONS 97, 129. The President's power as Commander-in-Chief to command and dispatch troops has always given him the power to bring the nation close to war. *Id.* at 131.

power is now such that his policies—in the war and other foreign areas—may be all but irresistible by Congress. As enunciated by one commentator, the Congress has "limited power partly because once the President makes a public statement of policy the pressure on Congress to support him is terrific."[51] Certainly it is this interaction which may explain "the tendency [begun in 1939] on the part of Congress to whittle away at the powers of the President, particularly in foreign affairs."[52] Chancellor Kent's suggestion that there is a "Republican tendency of reducing all executive power," quoted in *Myers v. United States*,[53] should also be borne in mind.[54]

The Treaty Power

The treaty power[55] is not, to be accurate, a purely presidential power; rather, it is an independent power shared by the President and the Senate.[56] However, the shift, early in our history, from Senate to President in the actual implementation of the treaty power, is reminiscent of presidential initiative with respect to the foreign affairs powers and may intimate an *inevitability* of executive action in external matters.

Senate participation in the treaty power was one of the significant changes that the Constitution worked in the area of foreign affairs—an area previously dominated by the royal

51. *1967 Hearings* 255 (statement of Prof. W. Stull Holt).

52. Memorandum from Leonard C. Meeker, Legal Adviser to Undersecretary of State Ball (Oct. 1, 1964).

53. 272 U.S. 52, 149 (1926).

54. The problem of the expansion of the President's power is to be distinguished, conceptually, from the impact of such power—expanding possibly because of necessities of war and not necessarily with respect to affairs abroad—on individual liberties. Examples include Lincoln's suspension of the writ of habeas corpus, and the measures taken during World War II against the Japanese-Americans, CORWIN—PRESIDENT 252, bringing with them overtones of Locke's prerogative. J. LOCKE, TWO TREATISES OF GOVERNMENT bk. 2, §§ 159-66 (Churchill printing 1690) "nay, 'tis fit that the Laws themselves, should in some Cases, give way to the Executive Power, or rather to this Fundamental Law of Nature and Government, *viz.* That as much as may be, all the Members of the Society are to be preserved." *Id.* § 159, at 383.

55. U.S. CONST. art. II, § 2, cl. 2.

56. That the treaty power is a power independent of congressional delegation is revealed by the fact that treaties have often dealt with subjects also entrusted to the Congress. Commerce has been the principal subject, but captures, definitions of international law, and other matters over which Congress has power have also been the subject of treaties. The power to appoint officials, ambassadors and other emissaries, U.S. CONST. art. II, § 2, cl. 2, shared by the President and Senate, is another power independent of Congress.

executive.[57] It was initially thought that the Senate would act as a sort of executive council, assisting the President in all foreign matters; certainly it was believed that the Senate would participate in treaty-making with the President, from the early stages of a proposed treaty, at least by consultation if not in actual negotiation.[58] Such belief ended early in George Washington's administration, however, with an episode that has often been related. President Washington had gone to the Senate expecting to discuss a proposed Indian treaty, only to be informed that the Senate intended to consider it alone. Thereupon he vowed that "he would be damned if he went [to the Senate] again" during negotiations, and no President has since done so.[59] This shift, at least during the negotiating stage, has been such that the President has even refused to disclose information to the Senate during negotiations with a foreign power, a practice in which the Senate has acquiesced.[60]

While the "advice" function has thus been formally reduced, the executive will on occasion informally consult with the Senate on important treaties, because of its capacity to disapprove treaties or amend them by "reservations."[61] While the Senate thus apparently retains its "consent" power, this in turn has been subject occasionally to the *fait accompli* pressures inherent in the executive's capacity to initiate and, indeed, conclude treaty negotiations with or without informal Senate participation.[62]

57. *See* Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 143-46 (1922) [hereinafter cited as WRIGHT—FOREIGN RELATIONS]; see note 143 *infra* and accompanying text.

58. In fact, the Senate continued to meet in "executive session" when considering treaties until the fight over the Versailles Treaty. E. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 34 (1944).

59. Berry, *Foreign Policy Making and Congress,* 1 EDITORIAL RESEARCH REP. No. 15 (April 19, 1967).

60. CORWIN—PRESIDENT 182-83 & n.41.

61. *Cf.* Senate representation on some negotiating delegations. *See id.* at 185.

62. Senator Douglas's testimony at *Hearings on H.R. 9042 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess. 85-86 (1965), although in terms addressed to executive agreements submitted to Congress for ratification, rather than treaties as such, is revealing:

> I happened to have been the Senator who cast the deciding vote against the Bricker amendment, so I think my credentials on the subject are fairly well established. But the administrative branches of Government, I think, have provoked the Congress and the Senate very often in entering into agreements with foreign countries not requiring Senate ratification which are, in effect, treaties, and then after the agreement has been signed we are placed in the very uncomfortable position that if we disapprove of it, of the agreement, nevertheless, to refuse to pass the agreement places the administration and the foreign policy of the country in a very difficult situation. I grant that in many

The practical role of the Senate has been further reduced by the emergence of the executive agreement, a development accelerated by the failure of the Senate to consent to the Treaty of Versailles.[63] The agreements are of two sorts: those based on the President's independent foreign affairs powers and those authorized or ratified by Congress. While the allowable scope of executive agreements is not clear, they are now widely used.[64] Moreover, the executive maintains that it may freely decide, without constitutional inhibition, whether to employ a treaty or an appropriate variety of executive agreement in a particular case.[65]

CONGRESSIONAL POWERS

The Constitution confers many independent powers on the Congress—broadly divisible into the appropriations power and certain substantive legislative powers—which have some bearing on foreign affairs.

The Appropriations Power

The appropriations power[66]—which applies to all domestic and foreign affairs—and its basis, the power to tax,[67] are the basic powers of Congress which together constitute the "power of the purse." Denominated the "historic bulwark of legislative

matters the need for speed is great, and that you can't go through the long process of submitting a treaty to the Senate. But I do say there is a temptation for officers of Government and particularly for officers of the State Department to try to circumvent the Senate and present the Congress, as in this instance, with an accomplished fact, and I hope that the Bricker amendment will not be revived.

But I can only say that actions such as these will strengthen the movement behind another Bricker amendment.

63. *See generally* McDougal & Lans.

64. The history of the emergence of the two types of agreements is traced in McDougal & Lans. A parallel development, although not of such magnitude, has been the President's use of "secret agents" and other emissaries appointed by him pursuant to his own powers, in lieu of ambassadors appointed with the consent of the Senate. *See* CORWIN—PRESIDENT 71, 206-07.

65. Letter from Leonard C. Meeker, Acting Legal Advisor to Senator Fulbright, Feb. 24, 1965, *reprinted in* A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 359 (1968).

66. U.S. CONST. art. I, § 8, cl. 1 ("to pay the Debts and provide for the common Defence and general Welfare of the United States"); *cf. id.* art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

67. U.S. CONST. art. I § 8, cl. 1. ("Power To lay and collect Taxes, Duties, Imposts and Excises").

authority,"[68] the exercise of this power constitutes "the core legislative process—underpinning all other legislative decisions and regulating the balance of influence between the legislative and executive branches of government."[69]

While rhetoric sometimes suggests no limit to the power of the purse, it is, like every other power given by the Constitution, limited: the power of the purse has been "clipped to the dimensions of a constitutional right and must accommodate itself to the entire constitutional scheme."[70] The Supreme Court recognized this in *United States v. Butler*,[71] where, in striking down the Agricultural Adjustment Act of 1933 as unconstitutional, the Court stated that "the power to spend [is] subject to limitations."[72] Similarly in *United States v. Lovett*,[73] the Court invalidated a provision in a Defense Department appropriations act, barring payments to certain named persons, characterizing it as a bill of attainder.[74] Both cases stand for the proposition that the power of appropriations is not unlimited, but the exact limits of the power, or, indeed, its exact nature, are unclear. President Monroe thought that "[t]he right of appropriation is nothing more than a right to apply the public money to this or that purpose."[75] Although often called the spending power, this is in fact a misnomer, as it is the executive which spends, "expenditure . . . [being] primarily an executive function, and conversely . . . the participation of the legislative branch is essentially for the purpose simply of setting bounds to executive discretion—a theory confirmed by early practice under the Constitution."[76]

68. R. FENNO, THE POWER OF THE PURSE xiii (1966). The power is especially relevant to foreign aid, as opposed to other aspects of foreign affairs, because of the relatively large amount of "program" (as distinguished from administrative) funds that it has involved.

69. *Id.*

70. CORWIN—PRESIDENT 136.

71. 297 U.S. 1 (1936).

72. *Id.* at 66.

73. 328 U.S. 303 (1946).

74. *Id.* at 315-18.

75. Corwin—*Spending Power* 562. But the President must take care to see the laws are faithfully executed, which may entail the expenditure of money. And the executive, if only for the practical reason that it wishes to receive appropriations in subsequent years at comparable or higher levels, feels pressed to spend by the annual congressional appropriations cycle. This is revealed in the description of this process and the related executive budget as "action forcing processes." *Hearings on Administration of National Security Before the Subcomm. on Nat'l Security Staffing and Operations of the Senate Comm. on Government Operations*, 88th Cong., 1st & 2d Sess. pt. 1, at 106 (1965).

76. CORWIN—PRESIDENT 127-28.

It was established in the nineteenth century[77] after much controversy that the appropriations power was distinct from the substantive legislative powers of Congress found in Article I, sections 8 and 9 of the Constitution, such as the power to regulate foreign and interstate commerce.[78] The consequences of the distinction between the appropriations power and substantive legislative powers have never been elaborated with respect to foreign affairs, and the clarity of the distinction remains uncertain today.[79] In brief, it has been held that while the substantive powers of Congress give it the power of direction,[80] and regulation, and jurisdiction,[81] the appropriations power confers no more than the power to "finance."[82] Although thus limited, it may very well be that the congressional appropriations power draws to itself and is based in part on substantive powers of Congress as well. Consequently, the appropriations bills of both House and Senate are today usually preceded by so-called authorization bills.[83] This is the case as to foreign aid.[84] These bills may contain provisions based on such substantive powers, as indeed may appropriations legislation, although limited in this respect by internal rules of the House and Senate.[85]

Whatever the appropriation power's precise nature, the essential

77. *See* Corwin—*Spending Power* 562.

78. "[T]he power of Congress to authorize expenditures of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." United States v. Butler, 297 U.S. 1, 66 (1936).

79. Arguably, the distinction reached its apogee years ago with respect to domestic affairs. *See generally* Corwin—*Spending Power.*

80. See note 89 *infra.* To be sure, the Congress has fewer such substantive powers with respect to foreign affairs. *Cf.* note 91 *infra* and accompanying text.

81. Corwin—*Spending Power* 562.

82. *See* United States v. Butler, 297 U.S. 1 (1936). Another limit on the appropriations power, although of no relevance to this article and of possibly little significance today, confines it to the application of funds "to matters of national as distinguished from local welfare." *Id.* at 67. It might be noted that as long ago as 1806 the Congress believed its powers ample enough to include "foreign aid" and appropriated $50,000 for the "wretched sufferers" of an earthquake in Caracas, Venezuela. Corwin—*Spending Power* 560.

83. United States v. Dickerson, 310 U.S. 554 (1940), makes the distinction between such "authorization" and "appropriations" legislation.

84. There are in fact annual authorization and appropriations acts which have given rise to what Senator Fulbright has called the "annual jeopardy" of aid.

85. Senate Rule XVI, ¶ 1 and House Rule XXI, ¶ 2, set out at *Hearings on Separation of Powers Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 85 (1967) [hereinafter cited as *Hearings on Separation of Powers*].

power that it gives Congress is, paradoxically, the power to withhold appropriations upon which the executive is dependent. "The authority of the Congress to make appropriations, within the framework of the Constitution, is plenary. The power to make appropriations carries with it the power to withhold or deny appropriations. That power has been exercised for generations. This is as fundamental as the Ten Commandments."[86] Although this position has not gone unchallenged,[87] it may be accepted for purposes of discussion. A question remains, however, as to the extent to which the "power to withhold or deny" appropriations entirely includes the lesser powers to prescribe conditions, limits, and the like on appropriations that are granted.

"Substantive" Powers of Congress

Program Powers. While the executive and other branches of government could not function very long without appropriations, it is also true that the domestic programs of the executive could not exist without the exercise of Congress's "program" power and the delegation of substantive power by the Congress:

> The determination of the functions and activities which the government shall carry on within the Constitution is a legislative matter and therefore the Presidcnt as general manager has no authority or power to determine functions or activities, except in so far as those powers are especially conferred upon him by the provisions of the Constitution . . . or by the delegation of administrative discretion to him by legislative action.[88]

Congress can also specify the detail of such programs and direct their execution to the extent that it chooses to do so,[89] although there

86. Lovett v. United States, 66 F. Supp. 142, 149 (Ct. Cl. 1945) (concurring opinion), *aff'd on other grounds,* 328 U.S. 303 (1946). The concurring opinion reiterated that "[t]he Congress has the sheer power to grant or withhold current appropriations . . . ." *Id.*

87. See note 198 *infra* and accompanying text.

88. L. MERIAM & L. SCHMECKEBREIR, REORGANIZATION OF THE NATIONAL GOVERNMENT: WHAT DOES IT INVOLVE? 125 (1939). Such delegations of authority have been called the Congress's "program" power, *id.*, and might be distinguisbed from otber legislative enactments such as criminal laws. As previously noted the executive has few independent substantive powers in the domestic area. See note 12 *supra* and accompanying text.

89. It has been suggested that, with respect to domestic matters, as distinguished from foreign and military matters, legislation can be written with any conditions the Congress wishes and with any degree of specificity. Memorandum of Eli Noblemen, Senate Committee on Expenditures in the Exeeutive Departments (Nov. 29, 1951), *reprinted in,* H.R. REP. No. 2456, 87th Cong., 2d Sess. 27 (1962); *see* CORWIN—PRESIDENT 120; *cf.* United States v. Klein, 80 U.S. (13 Wall.) 519, 523 (1871) (congressional control over delegated powers is limited only by "self-restraint"); *Hearings on Separation of Powers* 134 (Congress could "write infinite detail into legislation"), 248 (Prof. Bickel). *See generally* J. HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT 1952.

are practical limits on the power of Congress to so specify. Thus, it is usually impossible to draft legislation with sufficient specificity to cover every contingency, with the result that discretion must be left to the executive.[90]

Congress has substantive legislative powers with respect to certain areas of foreign affairs,[91] including such matters as trade,[92]

90. Freund suggested there is an irreducible executive discretion—unstandardized power—which he has described as "that residuum of government otherwise subject to law which cannot be reduced to rule." Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 670 (1915). This may be no more than a restatement of the drafting difficulties already averted to.

Another limitation on the power of the Congress to see that all its wishes are enforced arises from the sheer multiplicity of legislation. When it is realized that the amount of enacted legislation is vast and not always wholly consistent, the President, in taking care that "the laws be faithfully executed," will inevitably have to exercise discretion in picking and choosing among the statutes he will implement and the manner in which he will do so. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 700 (1952) (Vinson, J., dissenting); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 291 (1950). Finally, the President may not enforce laws which violate a specific injunction of the Constitution, for example, the fourteenth amendment. Kranz, *A 20th Century Emancipation Proclamation: Presidential Power Permits Withholding of Federal Funds from Segregated Institutions*, 11 AM. U.L. REV. 48 (1962); Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision Making*, 43 N.C.L. REV. 502 (1965).

Beyond these practical and other limits on the power of the Congress to direct the executive, is there a core area of substantive decisions with respect to domestic affairs that cannot be controlled by Congress? While some language of the courts, *e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Attorneys General, *e.g.*, Caleb Cushing, 7 OP. ATT'Y GEN. 186, (1855), and other executive officials, *e.g.*, Deputy Director Hughes of the Bureau of the Budget, *Hearings on Separation of Powers* 144, and writers, *e.g.*, CORWIN—PRESIDENT 81, may suggest there is, this is not established.

Such a doubtful proposition is not to be confused with another. Where legislation leaves discretion to the executive, as it almost invariably does, the exercise of such discretion is normally not subject to injunction. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867); Decatur v. Paulding, 39 U.S. (14 Pet.) 610 (1840). *But cf.* P. De Ronde & Co. v. United States Sugar Equalization Bd., 299 F. 659 (D. Del. 1924), *aff'd*, 7 F.2d 981 (3d Cir. 1925) (discretionary language regarding conferral of benefit on individuals construed as mandatory).

A final point may be noted. It has often been maintained that legislation should be "general," with its application to specific instances left to the executive. Possibly it is legislation applicable to the public, such as criminal legislation, rather than that applicable to the executive that is contemplated by persons maintaining this position. In any event, this ideal has not been reflected in constitutional limitation on the exercise of Congress's substantive or program powers delegating authority to the executive in the domestic area.

91. Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959).

92. U.S. CONST. art. 1, § 8, cl. 3 (Congress has power "[t]o regulate Commerce with foreign Nations . . . .").

tariffs,[93] immigration,[94] passports,[95] and neutrality,[96] derived wholly or in part from its power to regulate foreign commerce.[97] However, as will be shown there is a large range of foreign affairs—the "core area" of decisions[98]—over which Congress does not have substantive or program powers. Even the commerce-related substantive powers that Congress has may yield, in part, to Presidential power over a "core area" of foreign commerce.[99]

Powers Over Administrative Detail. Related to the congressional power to create programs is the power to specify many matters of administrative detail. These run the gamut from the establishment of agencies, offices, and positions,[100] through the control of many personnel matters,[101] to the disposition of property[102] and the specification of operating procedures.[103] Thus, it would appear that Congress's discretion is virtually unlimited in "prescribing the organization, procedure and business practices of an administrative agency";[104] although, as a practical matter, congressional control

93. The power to impose tariffs is based on the commerce power and the power to lay taxes. *Id.* cl. 1; *see* Field v. Clark, 143 U.S. 649 (1892).

94. U.S. CONST. art. 1, § 8, cl. 3.

95. *Id.* (Commerce Clause); *see* Aptheker v. Secretary of State, 378 U.S. 500, 518 (1964).

96. Neutrality legislation "regulating" commerce in the face of foreign wars is based on the commerce power and the power to declare war. *See* Garner, *Executive Discretion in the Conduct of Foreign Relations*, 31 AM. J. INT'L L. 289 (1937); Garner, *The United States Neutrality Act of 1937*, 31 AM. J. INT'L L. 385 (1937).

Other powers of Congress include various military and war powers, see note 110 *infra*, and its "money" powers, *e.g.*, U.S. CONST. art. 1, § 8, cls. 1, 2, 5; McDougal & Lans 586-88. *See also, e.g.*, powers to "define . . . Offenses against the Law of Nations," Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 972 (S.D.N.Y. 1965); U.S. CONST. art. I, § 8, cl. 10, and to "make Rules concerning Captures," *id.* cl. 11.

97. U.S. CONST. art. 1, § 8, cl. 3.

98. See notes 149-215 *infra* and accompanying text.

99. The possibility that the executive has exclusive powers even in the area of commerce is discussed at notes 139-48 *infra* and accompanying text. The existence of an independent treaty power over commerce has already been averted to. See note 56 *supra*.

100. U.S. CONST. art. 11, § 2, cl. 2 ("Officers . . . which shall be established by Law") and *id.* art. 1, § 8, cl. 18 ("Necessary and proper" Clause); CORWIN—PRESIDENT 70.

101. U.S. CONST. art. 11, § 2, cl. 2 ("Congress may by law vest the Appointment of such inferior Officers, as they think proper . . . .").

102. This authority has a special constitutional basis. *Id.* art. IV, § 3, cl. 2.

103. *Id.* art. 1, § 8, cl. 18 ("Necessary and proper" clause).

104. L. MERIAM & L. SCHMECKEBREIR, *supra* note 88, at 125. This kind of administrative detail, which may be common to both domestic and foreign programs, is to be distinguished from the "detail" of conduct and policy, which forms part of the core area of foreign affairs that is immune from congressional control. See note 187 *infra* and accompanying text. It is also to be distinguished from detailed financial terms to which appropriations may be subject.

over administration is limited by the President's removal power—a power extending to both domestic and foreign affairs.[105]

The extensiveness of these powers in the area of foreign affairs is not well defined.[106] Nevertheless, it is interesting to note that notwithstanding Congress's power to establish offices, the President also has asserted an independent power to do so and has created domestic commissions and offices[107] as well as diplomatic ones.[108] Indeed, prior to 1855 he created all ambassadorial positions without benefit of specific legislation.[109]

The Power to Declare War. It has been suggested that making the Congress the locus of the power to declare war[110]—along with giving the Senate a share in the treaty power—represents the principal innovation of the Constitution with respect to foreign affairs.[111] President Lincoln stated the reason for this innovation:

> Kings had always been involving and impoverishing their people in wars . . . . This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no man should hold the power of bringing this oppression upon us.[112]

105. *See, e.g.,* Myers v. United States, 272 U.S. 52 (1926). One authority has suggested that the removal power plus other powers of the President not subject to congressional control, whether as a constitutional or practical matter, give him the power of "unitary management" over the executive branch. *See* Grundstein, *supra* note 90, at 287. Whether this is so may be subject to some question. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 204 (4th ed. 1960); *cf.* CORWIN—PRESIDENT 81.

106. See notes 126-27 *infra* and accompanying text.

107. *See, e.g.,* CORWIN—PRESIDENT 71-72 & n.7.

108. See note 64 *supra.*

109. According to Senator Bibb such offices were "the offspring of the state of our relations with foreign nations, and must necessarily be governed by . . . rules [distinct from those that govern 'the internal system']." CORWIN—FOREIGN RELATIONS 53. Until 1855 Congress merely appropriated a lump sum for "the expenses of foreign intercourse." CORWIN—PRESIDENT 205. Again in the words of Senator Bibb: "Congress has always appropriated a gross sum for foreign intercourse, leaving the President to select the powers with whom we should be represented, unrestrained, except by the amount of the appropriation." CORWIN—FOREIGN RELATIONS 54; *cf.* 7 OP. ATT'Y GEN. 186, 217 (1855). Since 1855 Congress has enacted increasingly detailed legislation with respect to grades, qualifications of foreign service officers, and other aspects of administrative detail. *See* Myers v. United States, 272 U.S. 52 (1926). Today there is a large body of legislation on the matter. Foreign Service Act of 1946, 22 U.S.C. § 801 (1964). It may indeed be said that the President has "lost" some power in this area insofar as congressional control has been accepted. CORWIN—FOREIGN RELATIONS 66; CORWIN—PRESIDENT 206. In the United Kingdom the creation of offices is still largely a matter of executive power. CORWIN—PRESIDENT 69.

110. U.S. CONST. art. I, § 8, cl. 11. The Constitution also contains other provisions dealing especially with the military and war powers, including art. I, § 8, cls. 11-16 and art. II, § 2, cl. 1.

111. WRIGHT—FOREIGN RELATIONS 101, 125, 227, 252, 258, 284, 344, 368. *But cf. id.* at 362.

112. TAFT 29-30.

It is arguable, however, how real the possibility of a formal congressional declaration of war remains. As previously noted,[113] the President has the power, as chief diplomatist and Commander-in-Chief, to make war all but inevitable. The implications of *total* war in a formal declaration of war, issued in an era of limited warfare, must be considered.[114] President Nixon may have been correct when, as a private citizen, he said that "there will never be another declaration of war . . . that time is gone."[115] It is a matter of historic record that even in earlier eras the President in fact initiated, or strongly influenced the initiation of, all formal congressional declarations of war.[116] The considerations of democratic political philosophy reflected in the notion of the congressional declaration of war remain, however, and to these we shall briefly return later.[117]

The Treaty Power. The other principal innovation of the Constitution with respect to foreign affairs, the treaty power, has been discussed above,[118] and the erosion of the Senate's share in it noted.[119] The treaty power is continually cited as a basis for Senate participation in foreign affairs.[120]

THE RELATIONSHIP OF EXECUTIVE AND CONGRESSIONAL POWERS WITH RESPECT TO FOREIGN AFFAIRS: THE TRADITIONAL CORE AREA

To determine the nuances of what is "executive" and what is "legislative" power under the Constitution, one must look not to theories of "separation of powers," but rather to the continuing development of accommodations between the executive and the Congress. Given independent powers in the President and Congress, at least three possible relations between such powers suggest

113. See note 50 *supra.*

114. *1967 Hearings* 161-62.

115. Interview with Richard M. Nixon, WETA-TV, Washington, D.C., Nov. 27, 1967.

116. Garner, *Executive Discretion in the Conduct of Foreign Relations,* 31 AM. J. INT'L L. 289, 292 & n.9 (1937).

117. See Part II of this article.

118. See notes 55-65 *supra* and accompanying text. Secretary of State Hay thought the innovation, giving a relatively small number of men the power to frustrate the executive's foreign policy, the "irreparable mistake of the Constitutional Convention." McDougal & Lans 556 n.105. The shift from treaties to executive agreements has probably repaired the "mistake." See note 64 *supra* and accompanying text. The appointment power may also be noted as an innovation. See notes 100-02 *supra* and accompanying text.

119. See notes 57-60 *supra* and accompanying text. The protection of states' interests sought to be achieved by Senate participation in the treaty power will be considered in Part II of this article.

120. See Part II of this article.

themselves: (1) congressional control over executive power;[121] (2) "a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain";[122] and (3) "presidential control . . . [where] the Congress [is disabled by the courts] from acting upon the subject."[123]

Executive Power Subject to Congressional Control; Congressional Faits Accomplis

Independent executive power can only be subject to congressional control if the Congress in turn has independent powers. We have seen that although such congressional powers are limited with respect to foreign affairs, they exist to some undetermined extent with respect to administrative detail and foreign commerce; and it is in these areas that, to an extent probably less than the outer limits of Congress's independent powers, congressional legislation may control the executive. Thus, the Attorney General acknowledged that legislation with respect to the disposition of property somewhat limited President Roosevelt in the proposed exchange in 1940 of 50 destroyers and other property for 99-year leases to British bases.[124] So too, notwithstanding the President's powers as Commander-in-Chief, the Congress may prescribe rules for the payment of sailors.[125]

We have seen that the President not only appoints ambassadors and other emissaries, but that until 1855 he was deemed to create their offices.[126] Although he seems to have "lost" some of these powers, the President still determines when and where to dispatch emissaries, what their rank shall be, and the size of American embassies.[127]

121. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952); *cf.* United States v. Midwest Oil Co., 236 U.S. 459 (1915); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804). These cases indicate that the President has certain independent powers in the absence of legislation to the contrary and suggest that such powers may yield to such contrary legislation.

122. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

123. *Id.* at 637-38 (Jackson, J., concurring). *See also id.* at 597 (Frankfurter, J., concurring). "There has been no dispute that the President has certain constitutional powers not subject to the will of Congress or the Senate." Matthews 349.

124. Statutes barred the President from transferring certain mosquito boats. 39 OP. ATT'Y GEN. 484, 496 (1940). The provision of funds and services under foreign aid is rarely deemed to involve this disposition of property power.

125. United States v. Symonds, 120 U.S. 46 (1887).

126. See note 109 *supra* and accompanying text.

127. *See* A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* note 65, at 368, question 4(b); see note 109 *supra*; *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

Certain exercises of Congress's constitutional powers, for example, the commerce power, may control the executive. This situation is to be distinguished from that where Congress passes laws which it may lack the constitutional authority to pass, but to which the executive adheres inadvertently or for want of practical power to do otherwise. There are, arguably, a number of illustrations of this, a prominent one being the executive's compliance with many of the present restrictions in the foreign aid legislation, which this article maintains are unconstitutional. Occasionally such congressional *faits accomplis* are ignored, as, for example, in President Andrew Johnson's refusal to comply with the 1867 Tenure of Office Act, an Act which in retrospect seems clearly unconstitutional,[128] which almost brought about the President's impeachment.[129] Professor McDougal has said of one such possible congressional *fait accompli,*

> Moreover, if the subject of the agreement is a matter within the President's special constitutional competence—related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander-in-Chief—a realistic application of the separation of powers doctrine might in some situations appropriately permit the President to disregard the statute as an unconstitutional invasion of his own power.[130]

128. Myers v. United States, 272 U.S. 52, 167 (1926).

129. Another example is the Act of March 4, 1913, 22 U.S.C. § 1262 (1964), which provides: "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 President has of course ignored this statute on many occasions, including the Versailles Peace Conference. It has been said to be "an unconstitutional interference with the President's prerogatives. Since the United States participates in approximately three hundred international conferences each year, it is difficult to determine the extent to which attention has been paid to the act in recent years." Nobleman 155. See note 11 *supra.* It may not be clear to a President that the law that he proposes to ignore is unconstitutional—and possibly it does not matter to him. In this connection, it is interesting to note some views of President Roosevelt, stated in 1942, anticipating the possible failure of Congress to repeal certain legislation which he believed inhibited his wartime powers:

> In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility and I will act . . . . The responsibilities of the President in wartime to protect the Nation are very grave. This total war, with our fighting fronts all over the world, makes the use of Executive power far more essential than in any previous war . . . . I cannot tell what powers may have to be exercised in order to win this war.

HOUSE COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 15, n.81 (Comm. Print. 1957); *see* CORWIN—PRESIDENT 250-51. And compare Professor Harold Laski's remark that no democracy can "afford a scheme of government the basis of which is the inherent right of the legislature to paralyze the executive power." H. LASKI, THE AMERICAN PRESIDENCY 163 (1940).

130. McDougal & Lans 317.

The Twilight Zone: Concurrent Powers; Uncertain Distribution of Powers

Concurrent Powers. The President and the Senate, pursuant to independent powers such as the treaty,[131] appointment,[132] diplomatic,[133] and Commander-in-Chief powers,[134] may incur financial obligations. If such obligations pertain to the core area, presumably Congress is unable to limit the power to incur them.[135] Nevertheless, it is established that Congress is under no legal obligation to appropriate funds to satisfy these obligations;[136] similarly, it cannot be bound to exercise other independent powers such as the taxing power.[137] To be sure the President can, as we have seen, confront Congress with *faits accomplis* which, as a practical matter, give little choice but to appropriate, a dramatic example being Theodore Roosevelt's dispatch of the fleet halfway around the world and his subsequent request to Congress to bring it back.[138]

Uncertain Distribution. An example of powers whose distribution might be considered "uncertain" are some of those concerning foreign commerce. The Constitution gives Congress the power to regulate such commerce.[139] On the other hand, we have noted that the treaty power extends to the subject[140] and that the President himself has independent powers with respect to it. *United States v. Curtiss-Wright Export Corp.*,[141] the most explicit

131. See notes 55-65 *supra* and accompanying text.

132. CORWIN—FOREIGN RELATIONS 68; 7 OP. ATT'Y GEN. 186, 209 (1855).

133. See note 109 *supra*.

134. For example, an obligation of two million dollars was incurred by President Lincoln during the Civil War without prior congressional authorization or appropriation. *See* L. WILMERDING, THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES 14 (1943). *See also* CORWIN—PRESIDENT 119-69 & n.44.

135. See notes 151-192 *infra* and accompanying text.

136. *But cf.* note 198 *infra*.

137. *Cf.* Letter from Leonard C. Meeker to Senator J. William Fulbright, Feb. 24, 1965 (reprinted in A. CHAYES, T. ERLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS at 359 (1968)).

138. See note 46 *supra*. The President in the past often incurred obligations under his military powers although there had been no prior appropriations. *See generally* L. WILMERDING *supra* note 134, at 77-98.

139. U.S. CONST. art. 1, § 8, cl. 3.

140. See note 56 *supra*.

141. 299 U.S. 304 (1936). The executive has justified its participation in the international antidumping code as "pursuant to the President's constitutional authority to conduct foreign relations—and not under the Trade Expansion Act of 1962 or any other piece of legislation." *Hearings on the International Antidumping Code Before the Senate Comm. on Finance*, 90th Cong., 2d Sess. 13 (1968).

declaration of independent executive powers in foreign affairs, dealt with an embargo, in part at least a matter of foreign commerce.[142] It has probably never been possible to keep matters of commerce entirely separate from diplomatic and military matters;[143] certainly the two often blend today.[144]

Discussions at the Constitutional Convention apparently contemplated that the operations of the related export clause[145] would yield to the war powers of the President.[146] It also seems clear that the President's exclusive powers of negotiation extend to the commerce area and that only the executive negotiates trade agreements and treaties.[147] Whether there is an area of substantive

142. The power to impose embargoes may also derive in part from Commander-in-Chief and diplomatic powers, as well as the commerce power. United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955), may raise some question about the existence of independent foreign commerce powers in the President. The court of appeals held that the President could not enter into an effective executive agreement with respect to the import of potatoes from Canada not previously authorized by—and indeed apparently inconsistent with—prior congressional legislation. The Supreme Court, in affirming the judgment, did not reach the ground on which the court of appeals affirmed the district court's decision. *See generally* Sutherland, *The Bricker Amendment, Executive Agreements and Imported Potatoes,* 67 HARV. L. REV. 281, 288 (1953). It is significant that the Supreme Court reached the same result as the district court, which assumed the President had the power to make an effective agreement. 348 U.S. at 300. The Court of Claims in South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622, 634 n.16 (Ct. Cl. 1964), *cert. denied,* 379 U.S. 964 (1965), suggested that the Supreme Court had thus "neutralized" the court of appeals. To be sure, the agreement may very well not have dealt with a matter of such foreign policy importance as to quality for the core area. See notes 151-91 *infra* and accompanying text.

143. It should be noted, however, that at the time of the 1787 Constitutional Convention the foreign affairs activities of the British executive and the parliamentary control of commerce were distinct. WRIGHT—FOREIGN RELATIONS 143 n.25.

144. Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 110 (1948) ("Legislative and Executive powers are pooled obviously to the end that commercial, strategic, and diplomatic interests of the country may be coordinated . . . ."); South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied,* 379 U.S. 964 (1965); Star-Kist Foods, Inc. v. United States, 275 F.2d 472 (C.C.P.A. 1959); *cf.* the "regulation" of commerce by neutrality legislation versus President's determination of neutrality, note 96 *supra* and accompanying text.

145. U.S. CONST. art. I, § 10, cl. 2.

146. Note, *Constitutionality of Export Controls,* 76 YALE L.J. 200, 208 (1966), *citing* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 361-62 (1937).

147. A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* note 65, at 307 *et seq.* (discussing the 1965 United States-Canadian Automotive Products Agreement). The fact that Congress has powers in the area of commerce that it does not have elsewhere is reflected in the Trade Expansion Act of 1962, § 243, 19 U.S.C. § 1873 (1964) which provides for the inclusion of Senators and Congressmen in trade agreement negotiation delegations.

The relationship of treaties and congressional statutes, a much discussed matter, has only a tangential bearing on the subject of this article. It is held that under the United States

foreign commerce decisions over which the President has exclusive powers is not clear, and it may be that matters deemed to fall under the President's exclusive powers, although touching on commerce, would not be characterized as such.[148]

Exclusive Executive Powers Not Subject to Congressional Control: The Traditional Core Area

That the President has certain "plenary and exclusive power[s]"[149] over foreign affairs is accepted.[150] The exact substantive area of decisions subject to such exclusive powers and the exact nature of congressional control from which such area is free, require some exploration.

The Substantive Area of Decisions. The area of substantive foreign affairs decisions traditionally considered free of congressional control—the traditional core area—consists of a wide range of diplomatic functions and those functions of the Commander-in-Chief power as have foreign affairs importance.[151]

Constitution, art. VI, cl. 2 (the Supremacy Clause) the latter in time of a treaty or statute will prevail if such a congressional purpose is clearly expressed. Cook v. United States, 288 U.S. 102, 120 (1933); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 145 (1965). However, the courts have stated explicitly that later legislation will prevail over a treaty only if the legislation is "within the powers of Congress." Head Money Cases, 112 U.S. 580, 598 (1884); Taylor v. Morton, 23 F. Cas. 784 (No. 13,799) (C.C.D. Mass. 1855), *aff'd*, 67 U.S. (2 Black) 481 (1862). Thus, the "later in time" principle does not bear on the core area which this article maintains to be immune from congressional control. See notes 151-91 *infra* and accompanying text. Compare the relationship of congressional legislation and a subsequent executive agreement which is normally said *not* to prevail. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 144 (1965); *see* RESTATEMENT OF FOREIGN RELATIONS LAW § 147, comment b (Proposed Official Draft, May 3, 1962); *see also* Watts v. United States, 1 Wash. Terr. 288 (1870). In *Watts* the court refused to find invalid an executive agreement which was inconsistent with prior legislation. The executive agreement appeared to be based in part on the Commander-in-Chief and diplomatic powers. However, the court's forbearance may be explained on grounds of the political question doctrine.

148. See the discussion of United States v. Guy W. Capps, Inc. at note 142 *supra*, and questions of neutrality at note 96 *supra*.

149. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). ("the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . .").

150. Many cases assume the President has exclusive powers over foreign affairs. *See, e.g.*, Powell v. McCormack, 395 F.2d 577, 592 (D.C. Cir. 1968); Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 973-74 (S.D.N.Y. 1965); *cf.* the dicta of Justices Jackson ("a President whose conduct of foreign affairs is so largely uncontrolled"), Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952), and Frankfurter ("his vast share of responsibility for the conduct of our foreign relations"), *id.* at 610.

151. There are many Commander-in-Chief functions with foreign affairs importance, including problems of status of forces, and armistices, see note 33 *supra* and accompanying

Among the principal exclusive powers of the President is the power to recognize foreign governments and states: "The authority to extend recognition to states and to governments is included in the power of the President to conduct the foreign relations of the United States."[152] This is no mere mechanical power. "[It] . . . is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition."[153] While it has sometimes been suggested that the executive is to be guided by considerations of international law in deciding whether or not to withhold recognition, this has meant little in actual practice.[154] A colloquy between then Undersecretary of State Katzenbach and Senator Mundt leaves little doubt that executive discretion in this area is free of congressional control.

> *Undersecretary Katzenbach:* Or to take another example, there are obviously commitments of the Nation, national commitments, involved in the recognition of a foreign state or the recognition of a foreign government . . . . These are matters which traditionally have been exclusively Executive.
>
> *Senator Mundt:* . . . I think there has never been, certainly recently, any effort on the part of Congress to deny or inhibit or curtail in any way those decisions . . . .[155]

Many episodes make clear that Congress can neither direct the executive to recognize a government nor prevent it from doing so.[156]

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text. Moreover, the Commander-in-Chief function generally provides a useful analogy for analysis of the foreign affairs functions. It does so in part because it often involves the collective interests of the nation in the international order, as does the diplomatic function. This analysis is further considered in Part II.

152. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 106(2) (1965); *see* United States v. Pink, 315 U.S. 203, 229, 240-41 (1942). *See also* The Maret, 145 F.2d 431 (3d Cir. 1944) ("Nonrecognition of a foreign sovereign . . . [is] as essential a part of the power confided by the Constitution to the Executive for the conduct of foreign affairs as recognition."). The President also has the power to recognize insurgency, belligerency, and the like. *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863); Wright, *The Power to Declare Neutrality under American Laws,* 34 AM. J. INT'L L. 302, 309 (1940) (quoting John Quincy Adams, as Secretary of State, Jan. 1, 1819).

153. United States v. Pink, 315 U.S. 203, 229 (1942).

154. President Wilson, for example, avowed his intention to utilize the power to achieve political ends and it has been stated that "the downfall of Huerta [in 1915] was due directly to President Wilson's refusal to recognize him as the defacto government of Mexico." CORWIN—FOREIGN RELATIONS 83.

155. *1967 Hearings* 148. And Mr. Garner has written, "In this connection reference may be made to the power of the President in respect to the recognition of foreign states, governments and belligerent powers—a full and completely uncontrolled discretion." Garner, *supra* note 116, at 291.

156. There are several historic episodes involving congressional efforts to direct the

An illustration of the latter occurred in 1864 when Congress resolved that it was inappropriate for the government to continue to recognize Maximilian's government in Mexico. Secretary of State Seward, however, informed the French Government that "this is a . . . purely Executive question, and the decision of it constitutionally belongs . . . to the President . . . ."[157]

Closely related to the power of recognition is the power[158] to commence, maintain, and sever[159] diplomatic relations. The power is exclusively the President's; the Congress cannot prevent such relations or the sending of diplomatic representatives. Thus, in 1876, President Grant successfully protested against inclusion in the Diplomatic Appropriations Act of a directive that he notify certain diplomatic and consular officers to "close their offices."[160] An effort to delete funds for a minister to Mexico in 1842 had been defeated for similar reasons, it being noted by Congressman Pickens that the "Executive . . . was constitutionally charged with [the matter]."[161]

Again, in 1940, there were congressionally-initiated attempts to sever diplomatic relations with the Soviet Union by withholding funds for the United States ambassador and the American Embassy in Moscow. Both attempts were defeated. During the course of debate, Congressman McCormack, who made the initial proposal, stated: "True, the question of diplomatic relationship in itself rests with the executive branch of the Government, but under the Constitution we have the power of expressing our own views as a body when appropriation bills are under consideration."[162] Congressman Celler replied: "If such a motion as the gentleman

President to recognize a government. All were defeated. Principal attempts include Henry Clay's effort to have the government recognize Argentina in 1818, and the efforts to recognize an independent Texas in 1832 and an independent Cuba in 1897. Nobleman 150-52; CORWIN—PRESIDENT 186-90.

157. CORWIN—FOREIGN RELATIONS 42.

158. This power, like the recognition power, is sometimes said to derive technically from the power to receive and dispatch ambassadors and other emissaries; *cf.* text at note 17 *supra.*

159. It has been suggested that President Wilson's severance of diplomatic relations with Germany on February 3, 1917, made the United States' entry into World War I all but inevitable. J. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 32 & n.37 (1920); *cf.* withdrawal of ambassadors from Germany and Italy by President Roosevelt prior to our entry into World War II. McDougal & Lans 604. A congressional declaration of war would of course lead to a severance of relations. In practice, however, this latter step is usually taken by the executive well before war commences, and in any case the executive usually controls the declaration of war as well. See note 116 *supra* and accompanying text.

160. CORWIN—PRESIDENT Ch. VI, n.46.

161. Nobleman 151-52.

162. *Id.* at 157.

from Massachusetts presents could prevail, then what would be the use of a State Department? Let the Appropriation Committee carry on our foreign affairs."[163]

Nor can Congress direct that such relations be commenced[164] or specify the ranks of our representatives.[165] The President, in effect, has exclusive power to control and make policy with respect to the *existence* of our relations with foreign governments.

The President also has the exclusive power to decide the *content* and *mode* of our relations with foreign countries and to conduct the same. Thus, he alone decides whether or not to undertake negotiations, whether it be of a treaty or an executive agreement.[166] The remarks of Benjamin Curtis, a former Associate Justice of the Supreme Court, in defense of President Andrew Johnson at his trial for impeachment, are revealing:

> Suppose a law should provide that the President of the United States should not make a treaty with England or with any other country? It would be a plain infraction of his constitutional power, and if an occasion arose when such a treaty was in his judgment expedient and necessary it would be his duty to make it; and the fact that it should be declared to be a high misdemeanor if he made it would no more relieve him from the responsibility of acting through the fear of that law than he would be relieved of that responsibility by a bribe not to act.[167]

The President has sole power to determine whether or not an agreement or treaty should be finally concluded, even though the Senate has already ratified it.[168] And, while the law with respect to the termination of treaties is in a "somewhat confused state,"[169] it seems clear that the Congress cannot direct the President to terminate one.[170]

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163. *Id.*

164. McDougal & Lans 604.

165. 7 OP. ATT'Y GEN. 186, 217 (1855).

166. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 307 (1829); CORWIN—PRESIDENT 211-12. We have seen that the President has freedom to decide which it will be. See note 65 *supra* and accompanying text. Of course a treaty, to be effective, requires Senate consent, and certain executive agreements require congressional legislation.

167. P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW 19 (1954). Similarly, the President decides whether or not the government will be represented at a conference, which may be thought of as no more than the *occasion* for discussion or negotiations. See note 129 *supra.*

168. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 307 (1829); CORWIN—PRESIDENT 211-12.

169. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 330 (1943).

170. President Wilson refused to terminate certain treaties although directed to do so by the Merchant Marine (Jones) Act of 1920, § 34, 41 Stat. 988, 1007 (1920); *see* McDougal &

The executive alone transacts the nation's day-to-day foreign affairs. Thomas Jefferson, then Secretary of State, stated that the "transaction of business with foreign nations is Executive altogether."[171] It is the executive which receives and dispatches emissaries[172] and communicates with other nations. As stated by John Marshall: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[173] Moreover, the President "alone negotiates."[174] Thus, in *Curtiss-Wright* the Supreme Court noted that "into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it," a fact equally true of treaties and executive agreements.[175] It is the President who makes protests[176] and espouses

Lans 347; Reeves, *The Jones Act and the Denunciation of Treaties,* 15 AM. J. INT'L L. 33, 36 (1921). Interestingly, the treaties were in the commerce area, perhaps suggesting that the President has asserted a right not to terminate agreements which do not otherwise fall within the core area. If the agreement deals with the core area it seems clear that Congress cannot direct its termination. So, President Lincoln and his Secretary of State, Seward, ignored congressional directions to terminate the Rush-Bagot agreement (an executive agreement). McDougal & Lans 337 n.131 & 346-47. *See* Reeves, *supra*, at 35-36. Speaking of this episode McDougal and Lans suggest that an agreement will not be terminated by a statute if it "invades the President's independent constitutional powers." McDougal & Lans 346; *cf. id.* at 338. Of course a President may choose to comply with a direction to terminate a treaty, Van der Weyde v. Ocean Transport Co., 297 U.S. 114 (1936).

171. He stated more fully: "The transaction of businesss with foreign nations is Executive altogether. It belongs, then, to the head of that department except as to sucb portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly." 3 THE WRITINGS OF THOMAS JEFFERSON 16 (Definitive ed. 1907).

172. See note 17 *supra* and accompanying text.

173. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); *cf.* Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); United States v. Belmont, 301 U.S. 324, 330 (1937); United States v. Pink, 315 U.S. 203, 229 (1924); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803); THE FEDERALIST NOS. 64 (A. Hamilton) and 75 (J. Jay).

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

175. *Id.* The Senate Foreign Relations Committee reported to the Senate on February 15, 1816, that "the interference of the Senate in the direction of foreign negotiations [was] calculated to diminish [the] . . . responsibility [of the President to the Constitution as sole organ] and thereby to impair the best security for the national safety . . . ." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). And Congress is without power to give the executive instructions as to negotiations. See note 206 *infra*. The immunity of the negotiating process is such that the President need not divulge information with respect to pending negotiations either to the House of Representatives, United States v. Curtiss-Wright Export Corp., *supra*, or to his partner in the treaty power, the Senate, CORWIN—PRESIDENT 182 & n.41. Although the Senate does not participate in the negotiation of treaties, "the President occasionally does include individual Senators in the negotiation stages." C. Zinn, The Role of the Congress in Foreign Affairs, Jan. 1967 (paper prepared for the United States Group of the Inter-Parliamentary Union). Thus Senators have been included in United States

and settles claims on behalf of United States nationals. The "power to remove such obstacles to full recognition as settlement of claims of our nationals certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.'"[177] The President also decides upon reprisals,[178] actions which may involve the exercise of the Commander-in-Chief function.[179]

Notwithstanding the administrative detail powers of Congress,[180] at least the State Department, if not other executive agencies concerned with foreign affairs,[181] has avoided much congressional control: "It is the department which from the beginning the Senate has never assumed the right to control or direct, except as to clearly defined matters relating to duties imposed by Statute and not connected with the conduct of foreign affairs."[182] Professor Berdahl adds: "The Department of State has generally been recognized as . . . being more directly subject to the control of the President than any other department."[183] A principal consequence of this special status has been a freedom of control with respect to the disclosure of information.[184]

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delegations to negotiate such important treaties as the Bretton Woods Agreement and the Act of Chapultepec, McDougal & Lans 553 & n.94; the United Nations Charter, Zinn, *supra* at 5; and the Japanese Peace Treaty, M. JEWELL, SENATORIAL POLITICS AND FOREIGN POLICY 136 (1962).

176. WRIGHT—FOREIGN RELATIONS 264. *But cf.* 22 U.S.C. § 1732 (1964) ("the President shall forthwith demand the release of such citizen 'unjustly deprived of his liberty' by a foreign government").

177. United States v. Pink, 315 U.S. 203, 229 (1942). "That the President's control of foreign relations includes the settlement of claims is indisputable." *Id.* at 240 (Frankfurther, J., concurring); *cf.* La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899) (disposition of proceeds).

178. WRIGHT—FOREIGN RELATIONS 294; McDougal & Lans 604; *cf.* Mathews 110 (recall of ambassador as form of retaliation).

179. The extent to which reprisals, involving force, remain lawfully available to a state under the United Nations Charter is problematical. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 413 (1968).

180. See notes 100-05 *supra* and accompanying text.

181. "The statutory authority of the State Department and that of the other departments and agencies in the conduct of foreign affairs is markedly different. The role of the State Department has never been prescribed by the Congress." COMM'N ON THE ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T; TASK FORCE REPORT ON FOREIGN AFFAIRS 57 (1949); *cf.* FAA § 622(a) ("Nothing contained in this Act shall be construed to infringe upon the powers or functions of the Secretary of State").

182. 40 CONG. REC. 2140 (1906), *quoted in* WRIGHT—FOREIGN RELATIONS 322.

183. J. BERDAHL, *supra* note 159, at 25.

184. In the words of Senator Spooner:

> We direct all of the other heads of departments to transmit to the Senate designated

Congress cannot take away this power to conduct foreign affairs; this notion has been brought out by the courts with respect to an analogous area over which the President has exclusive powers, the Commander-in-Chief function: "[While] Congress may increase the Army, or reduce the Army, or abolish it altogether . . . as long as we have a military force Congress cannot take away from the President the supreme command."[185] The President, as Commander-in-Chief, has sole charge of the day-to-day conduct of military affairs in theaters of battle, and Congress cannot control it.

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.[186]

The traditional core area is seen, therefore, to embrace the power both to conduct foreign affairs and make policy.[187] More specifically,

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papers or information. We do not address directions to the Secretary of State, nor do we direct requests, even to the Secretary of State. We direct requests to the real head of that department, the President of the United States, and, as a matter of courtesy, we add the qualifying words: "If in his judgment it is not incompatible with the public interest". WRIGHT—FOREIGN RELATIONS 322.

Cf. the immunity of the executive negotiating process from disclosure, note 175 *supra.*

185. Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897). In the words of Justice Jackson, the President's position as Commander-in-Chief is, "something more than an empty title." Youngstown Sheet & Tube Co. v. Sawyer, 342 U.S. 579, 641 (1950) (concurring).

186. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866). Compare Senator Root's objection to a proposed amendment to the Army appropriations bill of 1912, which would have limited stationing troops to the United States, as an encroachment upon the President's Commander-in-Chief powers. The amendment was defeated. Nobleman 154. However, a rider to the Defense Appropriations Act of 1970 limited use of combat troops in Laos and Thailand. 1970 U.S. CODE CONG. & ADMIN. NEWS xxix (Feb. 20, 1970). There have been subsequent suggestions to extend this to include Cambodia.

187. CORWIN—PRESIDENT 181. The Constitutional line between exclusive executive power and congressional power is to be distinguished from a line that Senator Fulbright has drawn. He has indicated that "it is important . . . to distinguish clearly between two kinds of power, that pertaining to the shaping of foreign policy, to its direction and purpose and philosophy, and that pertaining to the day-to-day conduct of foreign policy." Statement of Senator Fulbright in *Hearings on Separation of Powers* 43. *Compare:*

> The criteria of responsible and constructive debate are restraint in matters of detail and the day-to-day conduct of foreign policy, combined with diligence and energy in discussing the values, direction and purpose of American foreign policy. Just as it is

the traditional core would seem to embrace *all* diplomatic and Commander-in-Chief foreign affairs decisions, except for the following particular classes:[188]

(1) Certain matters affecting foreign commerce, including such derived matters as immigration and passports;

(2) Certain matters of administrative detail;

(3) The withholding of appropriations altogether;[189]

(4) Declarations of war;[190]

(5) Senate advice and consent to treaties and appointments.

Thus, the Constitution, as it has developed, has struck a balance. On one side is exclusive executive power with respect to foreign affairs; on the other, congressional participation.[191]

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an excess of democracy when Congress is overly aggressive in attempting to supervise the conduct of policy, it is a failure of democracy when it fails to participate actively in determining policy objectives and in the making of significant decisions. *Id.* at 44.

Senator Fulbright recognized, however, that there is an "overlap in practice between the shaping and conduct of policy."

> Foreign aid provides the closest thing we have to an annual occasion for a general review of American foreign policy. It provides the opportunity for airing grievances, some having to do with economic development, most of them not, and for the discussion of matters of detail which in many cases would be better left to specialists in the field. It also provides the occasion for a discussion of more fundamental questions, pertaining to America's role in the world, to the areas that fall within and those which exceed its proper responsibilities.
>
> . . . .
>
> Here, however, we encounter the overlap in practice between the shaping and conduct of policy and, in order to exert our influence on the one, where it is desirable, we have also had to exert it on the other, where it is not. Were the Executive more responsive to our general recommendations—as expressed in committee reports, conditional proscriptions, and general legislative history—it would be possible for us to be more restrained in our specific restrictions. *Id.*

How may the Senator's dividing line be reconciled with that of the Constitution? Possibly the Senator is not talking about the Constitutional division, but rather one he believes more desirable? Possibly the answer lies in semantics. The Senator's detail—which he leaves to the executive—may indeed include policy forming powers, specifically with respect to foreign aid. Or, it is possible that Senator Fulbright is in error as to the historically established line.

188. Compare the observation of Thomas Jefferson, note 171 *supra.*

189. The military appropriations and establishment powers should also be considered in this connection.

190. The dividing line between this congressional power and the powers of the Commander-in-Chief is a vexed subject. *See* 81 HARV. L. REV., *supra* note 7.

191. This area of exclusive foreign affairs powers is to be distinguished from exclusive domestic executive powers: the removal power and its possible corollary unitary management, executive secrecy, executive immunity from congressional and committee "veto," and the free exercise of such discretion as Congress leaves to it under statutes. "Domestic" may be a misnomer, as some of these powers undoubtedly also apply to foreign affairs. The executive has long asserted the power to withhold documents from Congress in the name of executive

The Nature of the Congressional Controls from which the Traditional Core Area Is Immune. We have seen that Congress is without substantive power to prevent or direct executive decisions within the traditional core area of foreign affairs. We have also seen that the appropriations power is not a directing power, even with respect to domestic affairs. A dramatic illustration of the generally recognized incapacity of Congress to direct the President in the core area is the so-called RS-70 episode.[192] In 1962 the House Armed

secrecy, and the Congress has to some extent acknowledged this power. *See* Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question,* 66 YALE L.J. 477 (1957); Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960,* 29 GEO. WASH. L. REV. 623, 827 (1961); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers,* 20 U. PITT. L. REV. 755, 771 (1959). ("To admit that . . . what Congress creates it may control . . . would be to emasculate the separation of powers").

The executive position, in which Congress has largely acquiesced, is that it has power to make day-to-day decisions with respect to particular matters, such as the making of a loan, a grant or a contract, the decision to build a project or close a base, or a personnel decision—once the authority to do so has been delegated by legislation—without obtaining subsequent approval from the Congress or any of its committees. This requirement has been called a "committee veto" or "coming into agreement" with a committee. Address by Assistant Attorney General Doub, Encroachments By the Congress Upon the Powers of the Executive 9, June 15, 1959. The President has on occasions vetoed legislation with such provisions; in more recent years he has at times approved the legislation but indicated he will treat the provision in question as unconstitutional. Attorneys General have supported this approach. The matter is explored in Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees,* 66 HARV. L. REV. 569 (1953); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?* 41 CALIF. L. REV. 568 (1953). President Wilson's statement in a 1920 veto message concerning "coming into agreement" requirements, suggests the line between the executive and the legislature in the area of delegated legislative power:

> The Congress has the power and the right to grant or deny an appropriation or to enact or to refuse to enact a law; but once an appropriation is made or a law is passed, the appropriation should be administered or the law executed by the executive branch of the Government. In no other way can the Government be efficiently managed or responsibility definitely fixed. The Congress has the right to confer upon its committees full authority for purposes of investigation and the accumulation of information for its guidance, but I do not concede the right, and certainly not the wisdom, of the Congress of endowing a committee of either House or a joint Committee of both Houses with Power to prescribe regulations under which executive departments may operate. *Hearings on Separation of Power* 203.

192. The illustration is taken from the military area. The selection of a weapons system is assumed to be in the core area. *Hearings on Separation of Powers* 40 (Senator Stennis: "I feel like in choice of weapons that Congress has the power to decide what certain weapons will be as between weapons. Frankly, I lean somewhat to the idea the Commander-in-Chief has that power under military advice.").

Congressman Bass, during the debate on the RS-70, stated: "It is inconceivable to me that Congress should tell a Commander-in-Chief what weapons system to develop any more than

Services Committee intended that the President be "directed, ordered, mandated, and required"[193] to build certain planes.[194] The measure was finally changed to an "authorization."[195] Congressman Ford, during the debate on the original RS-70 measure, in addition to noting that it created practical inflexibility in the management of the RS-70 program and usurped the authority of the appropriations committee, stated that it would have been "an unconstitutional invasion of the responsibilities of the Chief Executive" and "would have invaded the responsibilities and jurisdiction of the Commander in Chief . . . ."[196] An earlier episode involved the foreign aid program. In 1950 Congress sought to direct the President to make a loan to Spain. Then, too, the President treated the direction as an authorization.[197]

It is when substantive and appropriations powers are linked that matters become more complicated, because of the usually undoubted power of Congress to withhold appropriations.[198] At what point does legitimate withholding cross the line and become illegitimate

it should tell a general in the field which weapons to fire." 108 CONG. REC. 4719 (1962). *See generally* CORWIN—PRESIDENT Ch. VI & n.7.

193. H.R. REP. No. 1406, 87th Cong., 2d Sess. 9 (1962).

194. *Id.*

195. No doubt it is practically impossible for Congress to force the President to build weapons he believes it inadvisable to build; President Truman refused to build 20 B-52's he was "authorized" to build. CORWIN—PRESIDENT 137. Former Secretary of Defense Robert McNamara has stated that developments have shown the RS-70 to have been an unsound project. R. MCNAMARA, THE ESSENCE OF SECURITY 92 (1968).

196. 108 CONG. REC. 4714 (1962).

197. Nobleman 161. To be distinguished from executive decisions in the core area which ean not be directed are other decisions—possibly "ministerial"—whieh ean. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 118 (1838).

198. See notes 86-87 *supra* and accompanying text. While the absolute diseretion of the British House of Commons seems clear, McGuire, *The New Deal and the Public Money*, 23 GEO. L.J. 155, 157 (1935), and the colonial legislatures similarly asserted this right from the beginning, *id.* at 158-61, some seem to have argued that the Constitution has limited this discretion. In Lovett v. United States, 66 F. Supp. 142, 152 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946), Judge Madden, concurring, stated "Congress might refuse to raise or appropriate money to pay the President . . . . But . . . [this action] would not be taken pursuant to the Constitution, but would be . . . [an act] of subversion and revolution, the exereise of mere physical power, not lawful authority." So too Congressman Bayard remarked in 1837:

> Let it be imagined that this country has a misunderstanding with a foreign power, and that the executive should appoint a minister, but the house, in the plenitude of its power, should refuse an appropriation. . . . Would not the house have contravened the constitution by taking from the president the power which, by it, is placed in him? It clearly would. CORWIN—PRESIDENT Ch. 1V n.64.

As a praetical matter, however, it is not clear how the power of Congress not to appropriate could be denied.

control? It seems clear that the availability of appropriations cannot be conditioned on compliance with directions or prohibitions that Congress could not legislate directly; it may not withhold funds for failure of such compliance. Arguably, "[i]f the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy."[199] It has been further asserted that:

> The argument that since Congress must provide funds if the President is to enter into effective loan agreements with foreign nations, it may subject the President's authority to prior Congressional approval is spurious. The circumstance that Congress may deny funds does not, of course, authorize it to engraft an unconstitutional condition on the grant of authority to commit such funds . . . . The problem of intrusion into executive functions in impermissible ways is not so easily avoided.[200]

Such unconstitutional limitations can take many forms. For example, as previously discussed Congress sought to sever relations with Russia by withholding funds for the staffing and maintenance of the American Embassy.[201] Presumably conditions which provided for a withdrawal of all funds from the State Department or merely all funds to support our Embassy in Russia, unless the President withdrew recognition of Russia, would also be invalid. The crux is that the core area may not be in any way trespassed upon by appropriations conditioned in the manner discussed. Such a trespass on the removal power by an appropriations provision was condemned by Judge Madden of the Court of Claims in *Lovett v. United States*:[202] "I do not think . . . that the power of the purse

199. 41 OP. ATT'Y GEN. 233 (1955) (statement of Attorney General Herbert Brownell, Jr.). In 1955 Congress attached a condition to a Department of Defense Appropriations Act which reserved to the Appropriations Committees of the House and Senate the right to disapprove contracts entered into by the Secretary of Defense. The quoted statement was in an opinion advising the President that the provision was in violation of the constitutional principle of separation of powers.

The same argument was quoted by Attorney General William Rogers in an opinion to President Eisenhower with respect to the question of executive secrecy involving the International Cooperation Administration, an earlier foreign aid agency. *Id.* at 529 (1960). Part II will discuss the issue in more detail.

200. Letter from Nicholas de B. Katzenbach to Theodore Tannenwald, Jr., Aug. 23, 1961. United States v. Butler, 297 U.S. 1, 74 (1935) ("An affirmance of the authority of Congress . . . to condition the expenditure of an appropriation [upon the teaching of certain subversive doctrines] would tend to nullify all constitutional limitations upon legislative power"); *cf.* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1596-98 (1960).

201. See text accompanying notes 162-63 *supra*.

202. 66 F. Supp. 142 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946). The court's opinion, however, avoided the issue of whether Congress had the constitutional power. *Id.* at 148.

may be constitutionally exercised to produce an unconstitutional result such as a . . . trespass upon the constitutional functions of another branch of the Government."[203] Justice Frankfurter echoed this sentiment in his concurring opinion in the Supreme Court's decision in *Lovett* when he spoke of the "grave consititutional" issue that would be raised by an attempted invasion of the removal power by means of the appropriations power.[204]

There have been many historical episodes in which the question of unconstitutional limitations has arisen. Probably none has elicited a clearer statement of the issue with respect to foreign affairs than the attempt by Congress to instruct our delegates to an 1826 conference in Panama by means of a rider to a bill appropriating funds for such delegates' attendance. This attempt was termed "unprecedented"[205] by Daniel Webster, and was, in his opinion, unconstitutional, as it was the legislators taking the proper responsibility from the Executive and exercising

> a power which, from its nature, belongs to the Executive, and not to us. It was prescribing, by the House, the instructions for a Minister abroad. It was nugatory, as it attached conditions which might be complied with, or might not. And lastly, if the gentlemen thought it important to express the sense of the House on these subjects, . . . the regular and customary way was by resolution. . . . [W]e must make the appropriation without conditions, or refuse it. The President has laid the case before us. If our opinion of the character of the meeting, or its objects, led us to withhold the appropriation, we had the power to do so. If we had not so much confidence in the Executive, as to render us willing to trust to the constitutional exercise of the Executive power, we have power to refuse the money. It is a direct question of aye or no. If the Ministers . . . may not be trusted to act, like other Ministers, under the instructions of the Executive, they ought not to go at all.[206]

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203. *Id.* at 152 (concurring).

204. United States v. Lovett, 328 U.S. 303, 329 (1946).

205. 9 ABRIDGMENT OF THE DEBATES OF CONGRESS 94 (T. Benton compiler 1858), *quoted in* Nobleman 150. The rider was defeated and the funds appropriated but the delegates were delayed too long by the debate over tbe rider to attend the conference. Nobleman 150. Then Congressman Martin Van Buren similarly confirmed that Congress lacked the substantive power to give the executive instructions in the matter. Compare the "unquestionably unconstitutional" rider by which President Andrew Johnson's powers as Commander-in-Chief were partially transferred to General Grant, CORWIN—PRESIDENT 463 n. 89, and the statement by President Buchanan that the designation in an 1860 appropriations bill of one Captain Meigs to supervise certain military construction would be construed as a mere preference as it would otherwise be an unconstitutional interference with Commander-in-Chief powers. *Id.* 402 n.64.

206. 9 ABRIDGMENT OF THE DEBATES OF CONGRESS 94-95 (T. Benton compiler 1858), *quoted in* Nobleman 150.

Congressman Findley has acknowledged Congress's awareness of the difficulty with such conditions:

> . . . I am very concerned about the long-term effect of the nuclear proliferation treaty, and at one point I attempted to use the power of the purse in the House to shut off the salaries of any State Department personnel who might use their official time to advance that treaty.
>
> . . . I must add my amendment did not get very far. The House is reluctant to use the power of the purse in specific matters like this.[207]

What these conditions do is apply pressure on the executive to do something—or refrain from doing something—or lose appropriations. Such pressure is constitutionally objectionable.[208] There is a set of legislative provisions which raises more difficult questions than "conditions," and they arise, again, from the power to withhold appropriations. Congress can withhold appropriations from an entire program;[209] can it withhold them from increasingly small segments of a program based on the President's independent powers? Congressman McCormack has said that Congress has the power "not to appropriate money for any particular purpose."[210] This may be true in the sense that Congress cannot be forced to appropriate funds; yet Congress cannot use this power to prevent the President from recognizing a state or government, dispatching an emissary to it, or specifying the rank of such emissary.[211] In this respect, consider the statement of Senator Borah:

> Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it. But the Congress could not, through the powers of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find . . . .[212]

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207. *1967 Hearings* 235-36.

208. *Cf.* United States v. Butler, 297 U.S. 1, 70-71 (1936) ("The taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere."). Whether such pressure is necessarily less objectionable if the conditions are waivable is not clear. This question will be considered in Part II in connection with particular restrictions on foreign aid.

209. See note 191 *supra.*

210. 86 CONG. REC. 1173 (1940).

211. See notes 152-61 *supra* and accompanying text. *See also* L. WILMERDING, *supra* note 134, who reports many instances of the executive applying military appropriations to purposes other than those specified on the ground that the appropriations legislation did not meet executive requirements. These latter instances may represent no more than a species of executive *fait accompli.* See note 46 *supra* and accompanying text.

212. CORWIN—PRESIDENT 403 n.64.

At what point is the President's "command" of the foreign aid program "infringed"? Can Congress constitutionally divide the appropriations into categories of aid, as it has in fact often done, limiting the amount for each? Can it "itemize" or earmark appropriations, saying that so much shall be used for one country and so much for another, or not at all? Congressman Mann believed this could, in effect, be done. As he once phrased it, with respect to an appropriation for the Army, "Our power to limit appropriations is so conclusive that we can say that no money shall be given in this bill except to red-headed men . . . ."[213] Yet if such itemization of State Department appropriations were permitted, Congress might specify the countries where the United States was to maintain embassies, or the ranks of American emissaries—things over which Congress has no power.[214] Thus, itemization seems too "nice" a way for Congress to avoid the strictures of the Constitution.[215]

There are, of course, many ways, short of the kind of statutory controls which this article maintains are proscribed, by which Congress can check and balance the executive, even with respect to the core area. These devices include: (1) various indirect means of persuasion or compulsion and other private communications; (2) clearances with key legislators and understandings which may or may not be binding; (3) committee reports; (4) reports which the executive can be required to make; (5) annual hearings with respect to legislation and appropriations; (6) investigations which, although in theory subject to a limitation that they be for a "legislative purpose," can be a real source of pressure on the executive; (7) annual appropriations, short term authorizations, and fiscal year funds; (8) sense of Congress provisions, resolutions, and similar "advice"; (9) the force of public opinion, the consensus building process, and the prospect of elections; (10) the President's "conscience" and "his sense of self-restraint," possibly the most

213. N.Y. Times, Mar. 23, 1922, at 17, col. 2.

214. See note 211 *supra* and accompanying text.

215. One is reminded of the words of James Madison:

> The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not infrequently a question of real nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere. THE FEDERALIST No. 48, at 334 (Cooke ed. 1961) (J. Madison).

significant controls; and ultimately, (11) the "scarecrow" of impeachment.

The congressional restraint required for the proper application of statutory controls, as well as these other devices, will be a topic of consideration in Part II,[216] where the general constitutional standards controlling foreign affairs will be applied to foreign aid.

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216. Part II will appear in the June 1970 issue of the *Journal*.