

THE POLITICS OF EXECUTIVE PRIVILEGE

Louis Fisher

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2004
Louis Fisher
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Fisher, Louis

The politics of executive privilege / by Louis Fisher

p. cm.

Includes bibliographical references and index.

ISBN 0-89089-416-7 (paperback)

ISBN 0-89089-541-4 (hardcover)

1. Executive privilege (Government information—United States. 2. Executive power—United States. 3. Legislative power—United States. 4. Separation of powers—United States. I. Title.

JK468.S4F57 2003
352.23'5'0973—dc22

2003060238

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Cover art by Scot C. McBroom for the Historic American Buildings Survey, National Parks Service. Library of Congress call number HABS, DC, WASH, 134-1.

Printed in the United States of America

THE APPROPRIATIONS POWER

Presidents may decide to surrender documents—even sensitive or confidential—as the price for obtaining funds for programs considered important to the executive branch. This congressional leverage appears in a number of early executive-legislative confrontations, when lawmakers flexed their muscles in exercising the traditional power of the purse. Acting out of an abundance of caution, Presidents may decide to share treaty documents with the House in order to obtain funds to implement a treaty. Administrations can also act recklessly by ignoring prohibitions in appropriations bills, as with funding the Contras during the Reagan years. To conceal such activities, executive officials may decide to testify falsely and either withhold documents or doctor them. Finally, although the administration may treat the carrying out of statutory programs as purely an executive power, congressional committees are often included in administrative decisions because they are key to authorizing and appropriating funds. In sharing those decisions, committee members will have access to the documents they need.

Power of the Purse

The framers were familiar with efforts by English kings to rely on extra-parliamentary sources of revenue for their military expeditions and other activities. Some of the payments came from foreign governments. Because of those transgressions, England lurched into a civil war and Charles I lost both his office and his head.¹ The rise of democratic government is directly traceable to legislative control over all expenditures.

The U.S. Constitution attempted to avoid the British history of civil war and bloodshed by vesting the power of the purse squarely in Congress. Under

1. Paul Einzig, *The Control of the Purse* 57–62, 100–06 (1959).

Article I, Section 9, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” In Federalist No. 48, James Madison explained that “the legislative department alone has access to the pockets of the people.” The power of the purse, he said in Federalist No. 58, represents the “most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”

Warm-Up Debates in 1789

One of the first responsibilities awaiting Congress in 1789 was the creation of the executive departments. The Departments of Foreign Affairs and War were recognized as executive in nature and assigned directly to the President. Those departmental heads were under no obligation to come before Congress and present reports. No such deference was extended to the Secretary of the Treasury. It was proposed on June 25, 1789, that the Secretary not only digest plans for the improvement and management of the revenue but also *report* them. Some lawmakers objected to this opportunity for executive influence over Congress, but Benjamin Goodhue saw no grounds for concern:

We certainly carry our dignity to the extreme, when we refuse to receive information from any but ourselves. It must be admitted, that the Secretary of the Treasury will, from the nature of his office, be better acquainted with the subject of improving the revenue or curtailing expense, than any other person; if he is thus capable of affording useful information, shall we reckon it hazardous to receive it?²

Thomas Fitzsimons of Pennsylvania suggested that the bill be amended by striking out the word “report” and inserting prepare in its place. The bill enacted into law reflected that change: “...it shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue, and the public expenditures....” However, he was also required to “make report, and give information to either branch of the legislature, in person or in writing (as he may be required), re-

2. 1 Annals of Cong. 594 (June 25, 1789).

specting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office.”³

Although the Senate is the only legislative chamber with an express role in treaty-making, most treaties require appropriations and it is through that process that the House is able to insist on documents from the executive branch. The first such debate occurred on August 11, 1789, when the House took up a bill to provide expenses for Indian treaties. Rep. Theodore Sedgwick, a Federalist from Massachusetts, “thought it a dangerous doctrine to be established, that the House had any authority to intervene in the management of treaties.”⁴ To Sedgwick, the Constitution gave the treaty power solely to the President and the Senate.

Rep. John Page of Virginia, who would join forces with the Jeffersonian Democrats, disagreed. Members of the House “had a right to say what money should be expended in this way. They had a right to say whether they would grant any or not; otherwise the President and Senate might do as they pleased with respect to negotiations, and call upon the House in all cases to defray their expense.”⁵ With regard to the Indian treaty, how much should the House appropriate? As was the custom at that time, the funding bill contained a blank. The first motion was to fill the blank with \$41,000. Rep. Thomas Sumter, a South Carolinian Democrat, objected that the House had “no data to govern them in making the provisions; consequently, gentlemen were to judge from their own opinions what would be a proper sum.” He suggested \$16,000.⁶

If data was lacking, the House could have requested additional documentation from President Washington, or the administration—aware of concern in the House—could have volunteered the information. Rep. Abraham Baldwin, a Federalist from Georgia, said he had seen an estimate that mentioned two sums that justified the full \$41,000: \$25,000 for the Creeks, and \$16,000 for the Wabash Indians.⁷ The House vote on the \$41,000 failed, 23 to 24. James Madison then moved to fill the blank with \$40,000, “which was a round sum.” His motion was agreed to, 28 to 23.⁸ The reduction was fairly insignificant, but the House had sent an important signal: On treaty matters it would not roll over and passively endorse whatever the President and the Senate agreed to.

3. 1 Stat. 65, §2 (1789).

4. 1 Annals of Cong. 690 (August 11, 1789).

5. *Id.* at 691.

6. *Id.* at 698.

7. *Id.* at 701.

8. *Id.* at 703.

Treaty Disputes, 1791–96

President George Washington inherited the noxious American practice of paying annual bribes (“tributes”) to four countries in North Africa: Morocco, Algiers, Tunis, and Tripoli. The United States made regular payments to allow American merchant vessels to operate in those waters without interference.⁹ Those countries also held a number of American seamen in prison. Washington knew that whatever he wanted to do in this area required support from the House of Representatives.

Algerine Treaty

President Washington told the Senate on February 22, 1791, that he would “take measures for the ransom of our citizens in captivity in Algiers, in conformity with your resolution of advice in the first instance, *so soon as the moneys necessary shall be appropriated by the Legislature*, and shall be in readiness.”¹⁰ The Senate was not happy about including the House as a participant in the treaty process.¹¹

On March 11, 1792, Secretary of State Thomas Jefferson offered advice to Washington on whether he should make a treaty with the Algerines “on the single vote of the Senate, without taking that of the Representatives.”¹² Jefferson, who generally defended executive prerogatives, did not seek refuge behind narrow legal reasoning and argue that the House had no constitutional role in the treaty-making process. He analyzed the issue pragmatically: “We must go to Algiers with cash in our hands. Where shall we get it? By loan? By converting money now in the treasury?”¹³ He reasoned that a loan might be obtained on presidential authority, “but as this could not be repaid without a subsequent act of legislature, the Representatives might refuse it. So if money in the treasury be converted, they may refuse to sanction it.”¹⁴

Next, Jefferson said that just as Senators “expect to be consulted beforehand” about a pending treaty, if Representatives need to fund a treaty “why

9. Gerhard Casper, *Separating Power: Essays on the Founding Period* 45–50 (1997); Louis Fisher, *Presidential War Power* 24 (1995).

10. 1 *American State Papers: Foreign Relations* 128 (1833) (emphasis added).

11. Roy Swanstrom, “The United States Senate, 1789–1801,” S. Doc. No. 64, 87th Cong., 1st Sess. 120 (1961).

12. “The Anas,” 1 *Writings of Thomas Jefferson* 294 (Bergh ed. 1903).

13. *Id.*

14. *Id.*

should not they expect to be consulted in like manner, when the case admits?"¹⁵ Here Jefferson distinguished between the President's latitude in entering into treaties that can be implemented without appropriations (self-executing treaties) and those that are dead in the water unless Congress decides to provide funds:

A treaty is a law of the land. But prudence will point out this difference to be attended to in making them; viz. where a treaty contains such articles only as will go into execution of themselves, or be carried into execution by the judges, they may be safely made; but where there are articles which require a law to be passed afterwards by the legislature, great caution is requisite.¹⁶

After advising "against hazarding this transaction without the sanction of both Houses," Jefferson said that the President concurred.¹⁷ Having resolved a potential collision between the President and the House, Jefferson now learned about a dispute between the Senate and the House. He found out that the Senate was willing to pay an annual tribute to Algiers "to redeem our captives," but was "unwilling to have the lower House applied to previously to furnish the money; they wished the President to take the money from the treasury, or open a loan for it."¹⁸ Jefferson said that Senators feared that if the President consulted the House on one occasion, this "would give them a handle always to claim it, and would let them into a participation of the power of making treaties, which the Constitution had given exclusively to the President and Senate."¹⁹

Senators tried to bolster their prerogative with another argument, but this one backfired. If the House voted for a particular sum, Senators warned, "it would not be a secret."²⁰ Washington decided against trying to circumvent the House by making a loan. Moreover, he "had no confidence in the secrecy of the Senate, and did not choose to take money from the Treasury or to borrow."²¹ Washington did not like having to persuade the House to fund a treaty that he thought it should support as a constitutional duty,²² but Jefferson ad-

15. *Id.*

16. *Id.*

17. *Id.* at 295.

18. *Id.* at 305.

19. *Id.* at 305–06.

20. *Id.* at 306.

21. *Id.*

22. *Id.*

vised that “wherever the agency of either, or both Houses would be requisite subsequent to a treaty, to carry it into effect, it would be prudent to consult them previously, if the occasion admitted.”²³ Advance consultation with the House was necessary, “especially in the case of money, as they held the purse strings, and would be jealous of them.”²⁴

Washington followed Jefferson’s advice. In a message to Congress on December 16, 1793, regarding a treaty with Morocco for the payment of ransom and establishing peace with Algiers, Washington forwarded to both the Senate and the House communications and confidential letters that he asked the lawmakers to keep secret.²⁵ Throughout the process of treaty-making with Algiers, whatever information Washington “sent to the Senate he submitted also to the Representatives.”²⁶ Later that month, the House went into secret session to debate the treaty, clearing the chamber “of all persons but the members and clerk.”²⁷ Some members objected that “secrecy in a Republican Government wounds the majesty of the sovereign people,” but in reply to such arguments it was said that

because this Government is Republican, it will not be pretended that it can have no secrets. The PRESIDENT OF THE UNITED STATES is the depository of secret transactions; his duty may lead him to delegate those secrets to the members of the House, and the success, safety, and energy of the Government may depend on keeping those secrets inviolably.²⁸

Lawmakers argued that the public had “interests as well as rights,” and it was the duty of Congress “to take every possible measure to promote those interests.”²⁹ Discussing secret matters publicly “was the ready way to sacrifice the public interest, and to deprive the Government of all foreign information.”³⁰ The galleries were cleared. For several days the House debated, in secret, the confidential documents that Washington had entrusted to them.³¹ With this close cooperation between Washington and the House, Congress authorized

23. *Id.* at 307.

24. *Id.*

25. 4 *Annals of Cong.* 20–21 (1793).

26. Ralston Hayden, *The Senate and Treaties, 1789–1817*, at 52 (1920).

27. 4 *Annals of Cong.* 150.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 151–55.

and funded the treaty with Algiers.³² The treaty included an annual amount to be paid to the Dey of Algiers.³³

Jay Treaty

Having worked closely with both Houses on the Algerine Treaty, President Washington pursued an entirely different strategy with the Jay Treaty. In his long and honorable career, his conduct on the Jay treaty marked a rare occasion where a public statement by Washington could be called trite and disingenuous. He now argued that (1) the House could not be trusted with secret communications and (2) treaty-making—within the legislative branch—lay solely with the Senate. On March 1, 1796, he advised Congress that the Jay Treaty had been ratified.³⁴ The House had to decide whether to pass the necessary legislation to put the treaty into effect.

The treaty was controversial in many respects. First, a number of lawmakers had objected to the nomination of Chief Justice John Jay to negotiate the treaty. They said it would have been better for someone within the administration to handle the matter, instead of delegating the task to a special envoy outside the executive branch. Also, the treaty might come to Jay later for judicial consideration.³⁵ Second, Jay decided to depart from his instructions and agree to various restrictions on American commerce.³⁶ With its express constitutional responsibilities over foreign commerce, the House had a right to take a close look. A rejected Senate resolution stated that the treaty “asserts a power in the President and Senate, to control, and even annihilate the constitutional right of the Congress of the United States over their commercial intercourse with foreign nations.”³⁷ Third, the Senate ratified the treaty by a bare minimum, voting along party lines to produce the required two-thirds majority, 20 to 10.

Alexander Hamilton advised Washington not to release the treaty instructions to the House, describing the instructions as “in general a crude mass” that would do “no credit to the administration.”³⁸ Washington knew his po-

32. 8 Stat. 133 (1795); see Casper, *Separating Power*, at 51–65.

33. 8 Stat. 136 (Art. XXII).

34. *Annals of Cong.*, 4th Cong., 1st Sess. 394 (Mar. 1, 1796).

35. Hayden, *The Senate and Treaties*, at 69–70.

36. Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 85 (1976).

37. Hayden, *The Senate and Treaties*, at 82n.

38. *Id.* at 90.

litical footing was precarious. In a letter to Hamilton, he said that “at present the cry against the Treaty is like that against a mad-dog; and every one, in a manner, seems engaged in running it down.”³⁹ Washington acted not on constitutional principles but on a political calculation. Withholding the documents from the House, he knew, would enrage some members. Releasing the documents, he feared, might make matters worse. He decided to take a chance: Keep the documents from the House and see what happened. If the votes went against him, he could always take the next step and negotiate a settlement with members of the House.

Rep. Edward Livingston took the lead in requesting documents from the administration, stating that “it was very desirable, therefore, that every document which might tend to throw light on the subject should be before the House.”⁴⁰ He offered a resolution that President Washington “be requested to lay before this House a copy of the instructions given to the Minister of the United States who negotiated the Treaty with Great Britain, . . . together with the correspondence and other documents relative to the said Treaty.”⁴¹ Recognizing that some of the negotiations might be unfinished, he modified his resolution by adding this language: “Excepting such of said papers as any existing negotiation may render improper to be disclosed.”⁴² Addressing the role of the House in the treaty process, Livingston cautioned that the House possessed “a discretionary power of carrying the Treaty into effect, or refusing it their sanction.”⁴³ Without the papers, the House might decide to retaliate by refusing the funds needed to implement the treaty. Rep. Albert Gallatin agreed that the House did not have to acquiesce in decisions reached by the President and the Senate if a treaty encroached upon powers expressly reserved to the House, such as the regulation of trade.⁴⁴

After weeks of debate, the House supported the Livingston resolution by a margin of 62 to 37.⁴⁵ Some of the documents had already been shared with the House. Livingston, as chairman of the House Committee on American Seamen, “together with the whole committee, had been allowed access to these papers, and had inspected them. The same privilege, he doubted not, would be given to any member of the House who would request it.”⁴⁶ During this

39. 34 *The Writings of George Washington* 262.

40. *Annals of Cong.*, 4th Cong., 1st Sess., at 400.

41. *Id.* at 400–41.

42. *Id.* at 426.

43. *Id.* at 427–28.

44. *Id.* at 437, 466–74.

45. *Id.* at 759.

46. *Id.* at 461 (remarks of Rep. Harper).

same period Congress had passed legislation to provide for the relief and protection of American seamen, many of whom had been impressed by Great Britain.⁴⁷ One member of the House said that with respect to the papers on the Jay Treaty, “he did not think there were any secrets in them. He believed he had seen them all.”⁴⁸ He remarked that “[f]or the space of ten weeks any member of that House might have seen them.”⁴⁹ Another member of the House noted that his colleagues could have walked over to the office of the Secretary of the Senate to see the papers, but why, he said, “depend upon the courtesy of the Clerk for information which might as well be obtained in a more direct channel?”⁵⁰

Madison, who voted for Livingston’s resolution, elaborated on his own views regarding executive-legislative struggles over information. He began by avowing his intent to proceed “with the utmost respect to the decorum and dignity of the House, with a proper delicacy to the other departments of Government, and, at the same time, with fidelity and responsibility, for our constituents.”⁵¹ However, he wanted the resolution drafted in such a form “as not to bear even the appearance of encroaching on the Constitutional rights of the Executive.”⁵² Livingston’s amendment to the resolution, Madison felt, went a long way toward removing constitutional objections.⁵³ Madison proposed the following language to further ease the tensions between the branches: “Except so much of said papers as, in his judgment, it may not be consistent with the interest of the United States, at this time, to disclose.”⁵⁴ Madison’s amendment failed, 37 to 47.⁵⁵

In denying the House access to documents, Washington cited a number of reasons, including the need for caution and secrecy in foreign negotiations, as well as the exclusive role of the Senate to participate as a member of the legislative branch in treaty matters.⁵⁶ He reasoned that the only ground on which the House might request documents regarding treaty instructions and negotiations would be impeachment, “which the resolution has not expressed.”⁵⁷

47. *Id.* at 802–20.

48. *Id.* at 642 (remarks of Rep. Williams).

49. *Id.*

50. *Id.* at 588 (remarks of Rep. Freeman).

51. *Id.* at 437.

52. *Id.* at 438.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 759.

57. *Id.* at 760.

His decision to withhold documents from the House was not an exercise of executive privilege, because he acknowledged that “all the papers affecting the negotiation with Great Britain were laid before the Senate, when the Treaty itself was communicated for their consideration and advice.”⁵⁸

Washington’s message to the House is unpersuasive on several grounds. First, members of the House were not requesting documents as part of the treaty process. They did not need the President to tell them the Constitution excludes the House from treaty-making. They knew that. But the treaty process was complete; the Jay Treaty had been negotiated, approved by the Senate, and ratified. The House was now requesting documents as part of the *post-treaty* process: the appropriation of funds needed to implement the treaty. The House had a right to whatever papers it needed to make an informed legislative judgment. Washington seemed to understand that right. A letter from Hamilton to Washington implies that Washington had initially considered giving the House access to the papers it requested:

The course you suggest has some obvious advantages & merits careful consideration. I am not however without fears that there are things in the *instructions* to Mr. Jay which good policy, considering the matter *externally* as well as *internally*, would render it inexpedient to communicate. This I shall ascertain to day. A middle course is under consideration—that of not communicating the papers to the house but of declaring that the Secretary of State is directed to permit them to be *read* by the *members individually*.⁵⁹

In other words, because Washington seemed prepared to submit the papers to the House, Hamilton was offering an intermediate position of retaining the papers in the custody of the Secretary of State while allowing members of the House to come and read them in his presence. The editor of Hamilton’s papers reported that, in an unfound letter to Hamilton, Washington “apparently suggested that he planned to comply with the request in Livingston’s resolution.”⁶⁰

Hamilton, no longer in the administration, later advised President Washington to deny the House the documents it requested on the Jay Treaty. He thought that production of the papers “cannot fail to start [a] new and unpleasant Game—it will be fatal to the Negotiating Power of the Government

58. *Id.* at 761.

59. Letter from Hamilton to Washington (March 24, 1796), in 20 *The Papers of Alexander Hamilton* 81–82 (Syrett ed. 1974) (emphasis in original).

60. Editor’s Introductory note to letter from Hamilton to Washington (March 7, 1796), *id.* at 66.

if it is to be a matter of course for a call of either House of Congress to bring forth all the communication however confidential.”⁶¹ Having taken a hard line, Hamilton cautioned Washington not to appear too abrupt or imperious when communicating to the House: “[A] too peremptory and unqualified refusal might be liable to just criticism.”⁶²

Shortly after Washington’s message to the House on the papers, Rep. Thomas Blount introduced two resolutions (both adopted 57 to 35), stating that although the House of Representatives had no role in making treaties,

... when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or in expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.⁶³

Madison, supporting the Blount resolutions, said that the House “must have a right, in all cases, to ask for information which might assist their deliberations on the subjects submitted to them by the Constitution; being responsible, nevertheless, for the propriety of their measures.”⁶⁴ Madison was “as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time.”⁶⁵ Yet he expressed some misgivings about Washington’s premise that the papers were not related to any objective of the House:

[The rationale] implied that the Executive was not only to judge of the proper objects and functions of the Executive department, but, also, of the objects and functions of the House. He was not only to decide how far the Executive trust would permit a disclosure of information, but how far the Legislative trust could derive advantage from it. It belonged, he said, to each department to judge for itself. If the Executive conceived that, in relation to his own department,

61. Letter from Hamilton to Washington (March 7, 1796), *id.* at 68.

62. *Id.* at 69.

63. *Annals of Cong.*, 4th Cong., 1st Sess. 771 (1796). For the votes, see *id.* at 782–83.

64. *Id.* at 773.

65. *Id.*

papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department. If the papers could be communicated without injury to the objects of his department, he ought not to refuse them as irrelative to the objects of the House of Representatives; because the House was, in such cases, the only proper judge of its own objects.⁶⁶

The House had driven home its point: If a treaty entered into by the President and the Senate required legislation and appropriations to be carried out, the House would be strongly positioned to insist on whatever papers and documentation it needed to judge the merits of the treaty. Denied such information, it could threaten to block implementation. It might easily tell the President: “Sorry, but without additional documents supplied by you, we have inadequate grounds to pass the necessary legislation.”

Precisely those conditions prevailed in 1796 because President Washington needed the support of both Houses to pass an appropriation of \$90,000 to implement the Jay Treaty.⁶⁷ Rep. Samuel Maclay lamented the situation, noting that members of the House, having been denied the papers they requested, “were left to take their measures in the dark; or, in other words, they were called upon to act without information.”⁶⁸ He proposed the following preamble and resolution:

The House...are of opinion that [the treaty] is in many respects highly injurious to the interests of the United States; yet, were they possessed of any information which could justify the great sacrifices contained in the Treaty, their sincere desire to cherish harmony and amicable intercourse with all nations, and their earnest wish to cooperate in hastening a final adjustment of the differences subsisting between the United States and Great Britain, might have induced them to waive their objection to the Treaty;... Therefore,

Resolved, That, under the circumstances aforesaid, and with such information as the House possess, it is not expedient at this time to concur in passing the laws necessary for carrying the said Treaty into effect.⁶⁹

The House never voted on Maclay’s language. After a lengthy debate, the bill to appropriate funds to implement the treaty passed by the narrow mar-

66. Id.

67. Id. at 991.

68. Id. at 970.

69. Id. at 970–71.

gin of 51 to 48.⁷⁰ James Madison voted against the bill. An earlier test vote showed the House divided 49 to 49, with the Speaker willing to break the tie to support the treaty.⁷¹ The appropriation was enacted into law.⁷² Given the closeness of the vote, had the opposition maintained a narrow margin, it seems reasonable that President Washington would have shared with the House—or with a few selected opponents—the documents needed to swing some votes.

Louisiana Purchase

In 1803, the Jefferson administration entered into discussions with France to purchase territory in the south. Starting with a provisional appropriation of \$2 million from Congress to be applied toward the purchase of New Orleans and the Floridas, his negotiators reached agreement to buy the whole of the Louisiana Territory. The purchase would extend the country west of the Mississippi River to the Rocky Mountains, doubling its size. The vast size of the territory convinced Jefferson that he needed the support of both Houses to implement the treaty: “This treaty must of course be laid before both Houses, because both have important functions to exercise respecting it.”⁷³ The executive officials who negotiated the terms, Jefferson said, “have done an act beyond the Constitution.”⁷⁴ Because Congress would have to “ratify and pay for it,”⁷⁵ support would be needed from the House of Representatives.

Legal issues were further complicated by the fact that the Constitution does not explain how the government may annex new territory.⁷⁶ In his past public statements, Jefferson had argued strongly in favor of a strict interpretation of the Constitution. Was it necessary to amend the Constitutional to allow for what was not expressly authorized? Jefferson decided against an amendment.

70. *Id.* at 1291.

71. *Id.* at 1280.

72. 1 Stat. 459 (1796).

73. Letter from Jefferson to Thomas Breckenridge, August 12, 1803; 10 *The Writings of Thomas Jefferson* 410 (Bergh ed. 1907).

74. *Id.* at 411.

75. *Id.*

76. Art. IV, §3, seems to give that authority to both Houses by empowering Congress “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”

As he ventured to Levi Lincoln, his Attorney General, the “less that is said about any constitutional difficulties, the better.”⁷⁷

Jefferson sent copies of the ratified treaty to both Houses, explaining: “You will observe that some important conditions can not be carried into execution but with the aid of the Legislature, and that time presses a decision on them without delay.”⁷⁸ The House debated at length a resolution asking Jefferson to submit certain papers and documents relating to the treaty.⁷⁹ Some portions of the resolution were adopted, others rejected. The resolution as a whole went down to defeat, 57 to 59.⁸⁰ With or without the resolution, there is little doubt that the administration was willing to provide the House with whatever documents it needed to support the treaty. The House subsequently joined the Senate in passing legislation to enable Jefferson to take possession of the Louisiana Territory.⁸¹

House Participation in Treaty Power

Having established its constitutional position with the Jay Treaty and the Louisiana Purchase, the House continued to insist on its right to deny funding for treaties it opposed. Debate on a commercial treaty with Great Britain in 1816 featured lengthy discussion of the types of treaties that invaded House prerogatives. Rep. John Forsyth (D-Ga.) issued this warning: “take from Congress the regulation of commerce and give it to the treaty-making power, and you entirely exclude from that important power all that branch of the Government which represents the people directly.”⁸² Each time members of the House made this argument credibly, they increased their chances of gaining access to treaty documents that the administration had shared with the Senate.

Two of the treaties fought out on this battleground were the Gadsden purchase treaty with Mexico in 1853 and the Alaskan purchase treaty with Russia in 1867. The first agreed to pay Mexico \$10,000,000 for territory that now

77. 10 *The Writings of Thomas Jefferson* 417 (letter from Jefferson to Attorney General Levi Lincoln, August 30, 1803).

78. 1 *Richardson* 362–63; see also *Annals of Cong.*, 8th Cong., 1st Sess. 18, 382 (1803).

79. *Annals of Cong.*, 8th Cong., 1st Sess. 385 (1803).

80. *Id.* at 385–419.

81. 2 *Stat.* 245, 247 (1803).

82. *Annals of Cong.* 14th Cong., 1st Sess. 480 (1816).

forms the southern parts of New Mexico and Arizona.⁸³ A year later, Congress appropriated the funds to implement the treaty.⁸⁴ The second offered Russia \$7,200,000 for the land that is now Alaska.⁸⁵ Some lawmakers denied that Congress, after a treaty has been ratified by the Senate, was obliged “to make an appropriation to execute it as it is to provide for the payment of the salaries of the judges and President, or to vote money to pay an acknowledged debt.”⁸⁶ During floor debate, some members insisted that the House could refuse funds for treaties it objected to.⁸⁷ The following provision failed by the narrow margin of 78 to 80:

Provided, That no purchase in behalf of the United States of any foreign territory shall be hereafter made until after provision by law for its payment; and it is hereby declared that the powers vested by the Constitution in the President and Senate to enter into treaties with foreign Governments do not include the power to complete the purchase of foreign territory before the necessary appropriation shall be made therefor by act of Congress.⁸⁸

The House supported the appropriation of \$7,200,000, voting 113 to 43.⁸⁹ The appropriations statute, however, carried this warning: “whereas said stipulations [regarding rights and immunities of the inhabitants of the territory] cannot be carried into full force and effect except by legislation to which the consent of both houses of Congress is necessary.”⁹⁰ Had members of the House concluded that the funds needed for the Gadsden or Alaskan territories were excessive, they could have voted down the appropriation and forced the treaty negotiators to begin again.

House leverage is particularly strong when treaties attempt to change tariffs and duties, because that power is vested expressly in both Houses of Congress. For example, a commercial reciprocity treaty with the Hawaiian Islands in 1875 established new schedules for duties on various goods and articles. To respect the constitutional prerogatives of the House, the treaty specified that it would take effect only after a law “to carry it into operation shall have been

83. 10 Stat. 1031 (1853).

84. 10 Stat. 301, ch. 71 (1854).

85. 15 Stat. 539, 543 (Art. VI) (1867).

86. H. Rept. No. 37, 40th Cong., 2d Sess. 45 (1868).

87. Cong. Globe, 40th Cong., 2d Sess. 4053 (1868).

88. *Id.* at 4055.

89. *Id.*

90. 15 Stat. 198, ch. 247 (1868).

passed by the Congress of the United States.”⁹¹ In 1880, the House declared that the negotiation of a commercial treaty that fixes the rates of duty to be imposed on foreign imports would be “an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives.”⁹² Three years later a commercial treaty with Mexico contained language making its validity dependent on action by both Houses of Congress.⁹³ Although subsequent treaties extended the time available for congressional approval, the House did not support the treaty and it was not implemented.⁹⁴

During this period, the House also challenged the Senate’s monopoly over Indian treaties. Article I, Section 8, of the Constitution empowers Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” For nearly a century Congress treated the tribes as independent nations, subject to the treaty-making power of the President and the Senate. The House began to voice strong opposition to this practice. In 1869, when the Senate inserted funds in a bill to fulfill treaties it had ratified with the Indians, the House withheld its support. The session expired without an appropriation for the Indian Office. Finally, a bill enacted in 1871 contained this language: “*Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”⁹⁵

In 1880, the House declared that the negotiation of a commercial treaty, fixing the rates of duty to be imposed on foreign imports, would be “an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives.”⁹⁶ A commercial treaty with Mexico in 1883 contained a clause making its validity dependent on action by both Houses. The House did not support the treaty and it did not take effect.⁹⁷

91. 19 Stat. 627 (Art. V) (1875).

92. 2 Hinds’ Precedents §1524.

93. 24 Stat. 975, 983 (Art. VIII) (1883).

94. 25 Stat. 1370, 1371 (1885); 2 Hinds’ Precedents §§1526–28. For studies that explore the role of the House in implementing treaties, see Chalfant Robinson, “The Treaty-Making Power of the House of Representatives,” 12 Yale Rev. 191 (1903), and Ivan M. Stone, “The House of Representatives and the Treaty-Making Power,” 17 Ky. L. J. 216 (1929).

95. 16 Stat. 566 (1871). See also U.S. Department of the Interior, Federal Indian Law 138–214 (1958).

96. 2 Hinds’ Precedents §1524.

97. 24 Stat. 975 (1883); 25 Stat. 1370 (1885); 24 Stat. 1018 (1886); and 2 Hinds’ Precedents §§1526–28.

The House continues to make its will felt in treaty matters. Although the Ford administration believed it could enter into an executive agreement with regard to military bases in Spain, the Senate insisted it be done by treaty.⁹⁸ The administration conceded that point, but then ran into trouble when members of both the House and the Senate objected to language in the treaty that appeared to make appropriations mandatory over a five-year period. The administration also maintained that the treaty constituted an *authorization* to have funds appropriated, thus threatening to bypass the jurisdiction of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. The Senate Resolution of Advice and Consent contained a declaration that the sums referred to in the Spanish treaty “shall be made available for obligation through the normal procedures of the Congress, including the process of prior authorization and annual appropriations.”⁹⁹ This guaranteed congressional involvement for the authorizing and appropriating committees of *both* Houses. Congress enacted legislation in 1976 to authorize the appropriation of funds needed to implement the treaty.¹⁰⁰ If in considering this legislation the authorizing and appropriating committees in the House wanted additional documents, the executive branch was in no position to withhold the information by claiming that the treaty power is reserved to the President and the Senate.

The Spanish Bases Treaty was replaced by an executive agreement in 1982. The agreement stipulates that the supply of defense articles and services are subject to “the annual authorizations and appropriations contained in the United States security assistance legislation.” Although the agreement promised support “in the highest amounts, the most favorable terms, and the widest variety of forces,” it also conditioned such support on what “may be lawful and feasible.”¹⁰¹ In short, U.S. officials could negotiate whatever they liked; what Spain actually received depended on action by both Houses.

There are no clear guidelines on the types of national policy that must be included only in a treaty and not in a statute. After the Senate failed to support a treaty for the annexation of Texas, President John Tyler advised the House that the power of Congress is “fully competent in some other form of

98. Louis Fisher, *Constitutional Conflicts between Congress and the President* 239 (1997).

99. S. Rept. No. 94-941, 94th Cong., 2d Sess. 2 (1976).

100. 90 Stat. 765, § 507 (1976); 90 Stat. 2498 (1976).

101. “Agreement on Friendship, Defense, and Cooperation Between the United States of America and the Kingdom of Spain,” Complementary Agreement Three, Article 2 (signed July 2, 1982).

proceeding to accomplish everything that a formal ratification of the treaty could have accomplished.”¹⁰² He gave the House the rejected treaty “together with all the correspondence and documents which have heretofore been submitted to the Senate in its executive sessions.”¹⁰³ The papers embraced not only the series made public by order of the Senate, “but others from which the veil of secrecy has not been removed by that body, but which I deem to be essential to a just appreciation of the entire question.”¹⁰⁴ The joint resolution for annexing Texas to the United States passed Congress and became law.¹⁰⁵

The coequal role of the House in international agreements was evident in 1994 when President Bill Clinton submitted the Uruguay Round Agreements to Congress as a bill rather than as a treaty. The purpose of the bill was to implement the worldwide General Agreements on Tariffs and Trade (GATT). Although Laurence H. Tribe testified that the proposal had such impact on federalism that it required presentation as a treaty rather than a bill,¹⁰⁶ the subject matter of NAFTA and GATT—international trade—was certainly within the jurisdiction of Congress as a whole to “regulate Commerce with foreign Nations,”¹⁰⁷ and therefore merited action by both Houses through the regular statutory process. The bill was enacted into law on December 8, 1993.¹⁰⁸

In 2001, the Eleventh Circuit ruled that the issue of whether NAFTA was a “treaty” requiring Senate ratification pursuant to the Treaty Clause, or could instead be enacted as a statute, represented a nonjusticiable political question.¹⁰⁹ It found that the Treaty Clause failed to “outline the circumstances, if any, under which its procedures must be adhered to when approving international commercial treaties.”¹¹⁰

102. 5 Richardson 2176.

103. *Id.*

104. *Id.*

105. 5 Stat. 797 (1845). For other joint resolutions used to accomplish a public policy that had failed through the treaty process, see Louis Fisher, *Constitutional Conflicts between Congress and the President* 238 (4th ed. 1997).

106. “S. 2467, GATT Implementing Legislation,” hearings before the Senate Committee on Commerce, Science, and Transportation, 103d Cong., 2d Sess. 302–12 (1994).

107. Bruce Ackerman and David Golove, “Is NAFTA Constitutional?,” 108 *Harv. L. Rev.* 799 (1995); Laurence H. Tribe, “Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation,” 108 *Harv. L. Rev.* 1223 (1995).

108. 107 Stat. 2057 (1993).

109. *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001), cert. denied, sub nom. *United Steelworkers of America, AFL-CIO, et al.*, 534 U.S. 1039 (2001).

110. 242 F.3d at 1315.

Funding the Contras

Beginning in 1982, Congress adopted a variety of statutory directives to restrict the Reagan administration's assistance to the Contra forces, which executive officials hoped would overthrow the Sandinista government in Nicaragua. Over the years, Congress learned that the administration continued to pursue its policy in Central America.¹¹¹ Finally, on October 12, 1984, Congress adopted strict language intended to prohibit all executive assistance of any kind to support the Contras. The all-embracing language of the Boland Amendment appeared to prevent further circumventions by executive officials:

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.¹¹²

Congress constructed this tortured language because the administration had demonstrated a willingness to exploit every possible loophole. It was the intention of Congress in 1984 to close them all. Once the Iran-Contra scandal became public in 1986, some executive officials used the excuse that they found the statutory restrictions too confusing or inconsistent. Senator Christopher Dodd (D-Conn.) suspected early in 1985 that the administration might seek ways of continuing assistance to the Contras. During Senate hearings, he said there had been rumors or newspaper stories that the administration might try to fund the Contras "through private parties or through funneling funds through friendly third nations, or possibly through a new category of assistance and asking the Congress to fund the program openly."¹¹³ Ambassador Langhorne Motley, appearing as the administration's spokesman, assured Dodd that the executive branch understood the meaning of the Boland Amendment and had no intention of trying to evade it with tricks: "Nobody is trying to play games with you or any other Member of Congress. That res-

111. Louis Fisher, "How Tightly Can Congress Draw the Purse Strings?," 83 *Am. J. Int'l L.* 758 (1989).

112. 98 Stat. 1837, 1935, §8066(a) (1984).

113. "Security and Development Assistance," hearings before the Senate Committee on Foreign Relations, 99th Cong., 1st Sess. 908 (1985).

olution stands, and it will continue to stand; and it says no direct or indirect. And that is pretty plain English; it does not have to be written by any bright, young lawyers. And we are going to continue to comply with that.”¹¹⁴

Motley provided similar assurances to the House Committee on Appropriations on April 18, 1985, testifying that the administration would not attempt to solicit funds from outside sources to assist the Contras.¹¹⁵ When President Ronald Reagan signed the continuing resolution that contained the strict language of the Boland Amendment, he did not issue a statement claiming that Congress had overstepped its powers and that the administration would pursue its course in Nicaragua. The Attorney General did not challenge the constitutionality of the Boland Amendment. The Office of Legal Counsel in the Justice Department did not conclude in any internal memorandum that the amendment was invalid or nonbinding.

Nevertheless, at the very moment that Motley testified before two congressional committees and offered his assurances, executive officials were actively soliciting funds from private parties and from foreign governments to assist the Contras. Instead of overthrowing the Sandinista regime, the administration almost overthrew itself. As explained in the next chapter, President Reagan waived all claims to executive privilege to avoid the risk of impeachment.

Legislative Vetoes

When executive agencies are required to submit certain programs or policies to designated committees for approval, the committees have strong grounds for insisting on documents. These committee vetoes date back to the period just after the Civil War. Legislation in 1867 placed the following restriction on appropriations for public buildings and grounds: “To pay for completing the repairs and furnishing the executive mansion, thirty-five thousand dollars: *Provided*, That no further payments shall be made on any accounts for repairs and furnishing the executive mansion until such accounts shall have been submitted to a joint committee of Congress, and approved by such committee.”¹¹⁶

At various times, Presidents challenged the constitutionality of these committee vetoes. In 1920, President Woodrow Wilson vetoed a bill because it provided that no government publication could be printed, issued, or discontin-

114. *Id.* at 910.

115. “Department of Defense Appropriations for 1986 (Part 2),” hearings before the House Committee on Appropriations, 99th Cong., 1st Sess. 1092 (1985).

116. 14 Stat. 469 (1867).

ued unless authorized under regulations prescribed by the Joint Committee on Printing. Wilson said that Congress had no right to endow a joint committee or a committee of either House “with power to prescribe ‘regulations’ under which executive departments may operate.”¹¹⁷ In 1933, Attorney General William Mitchell regarded as unconstitutional a bill that authorized the Joint Committee on Internal Revenue Taxation to make the final decision on any tax refund in excess of \$20,000.¹¹⁸ The joint committee presently conducts a review (in effect a veto) of tax refunds that exceed \$2,000,000.¹¹⁹

During World War II, a number of committee vetoes emerged to take care of emergency conditions. Because of the volume of wartime construction it became impractical to follow the customary practice of having Congress authorize each defense installation or public works project. Beginning with an informal system in 1942, all proposals for acquisition of land and leases were submitted in advance to the Naval Affairs Committees for their approval. On the basis of that informal understanding, Congress agreed to pass general authorization statutes in lump sum without specifying the particular projects. Two years later Congress converted that informal practice to a statutory requirement. Additional “coming into agreement” provisions were added in 1949 and 1951, requiring the approval of the Armed Services Committees for acquisition of land and real estate transactions.¹²⁰

Beginning with President Truman, the executive branch began to object to these committee vetoes, often threatening not to abide by them. In 1955, Attorney General Herbert Brownell protested that the committee veto represented an unconstitutional infringement of executive duties.¹²¹ Congress turned to other procedures that yielded precisely the same control. A bill was drafted to prohibit appropriations for certain real estate transactions unless the Public Works Committees first approved the contracts. President Dwight D. Eisenhower signed the bill after Brownell assured him that this procedure—based on the authorization-appropriation distinction within the legislative process—was within Congress’s power.¹²² The form had changed; the committee veto remained.

117. H. Doc. No. 764, 66th Cong., 2d Sess. 2 (1920).

118. 37 Op. Att’y Gen. 56 (1933).

119. 26 U.S.C. §6405(a) (2000).

120. Virginia A. McMurtry, “Legislative Vetoes Relating to Public Works and Buildings,” in “Studies on the Legislative Veto,” House Committee on Rules, 96th Cong., 2d Sess. 432–514 (1980).

121. 41 Op. Att’y Gen. 230 (1955), reprinted in 60 Dick. L. Rev. See also 41 Op. Att’y Gen. 300 (1957).

122. Joseph P. Harris, *Congressional Control of Administration* 230–31 (1964).

In *INS v. Chadha* (1983), the Supreme Court supposedly struck down all legislative vetoes as unconstitutional. The Court declared that legislative vetoes—committee vetoes, one-House vetoes, or two-House vetoes—were invalid because Congress could control the executive branch only by respecting two constitutional principles: bicameralism (action by both chambers) and the Presentation Clause (submitting all legislative measures to the President for his signature or veto).¹²³ Three years later, in the Gramm-Rudman case, the Court again insisted that Congress could not intrude upon executive powers: “once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.”¹²⁴

The Court’s static theory of government was too much at odds with the practices developed over a period of decades by the political branches. Neither agency officials nor lawmakers wanted the stilted model announced by the Court. Congress continued to enact committee vetoes in the years following *Chadha*, and agencies continued to comply with requirements to seek the approval of legislative panels, usually the Appropriations Committees. Agencies tolerate this procedure because with it they receive the flexibility and discretion they need to make adjustments in the middle of a fiscal year.¹²⁵

The foothold given to Congress through the appropriations power to seek and obtain agency documents applies also to two other central powers assigned to the legislative branch: the impeachment power and the power over appointments. Those powers, discussed in the next two chapters, offer multiple opportunities for Congress to gain access to sensitive documents from the President and executive agencies.

123. 462 U.S. 919 (1983).

124. *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986).

125. For the continuation of committee vetoes after *Chadha*, see Louis Fisher, “The Legislative Veto: Invalidated, It Survives,” 56 *Law and Contemp. Prob.* 273 (1993).