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The Jerusalem Embassy Act

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Abstract

The Jerusalem Embassy Act of 1995 ("Act") was introduced to move the U.S. Embassy in Israel to Jerusalem. In addition to policy issues, which have been the subject of considerable debate, the Act raises interesting questions concerning the scope of congressional and executive authority in the conduct of foreign affairs, and the extent to which Congress can use its appropriations power to influence executive action in this area. President Clinton opposed the Dole-Kyl Bill on policy grounds and the Justice Department prepared a memorandum ("Memorandum") arguing that the Dole-Kyl Bill is unconstitutional. Essentially, the Memorandum argued that the Bill: (1) interfered with the President's power to conduct foreign affairs and make decisions pertaining to recognition, and (2) is an inappropriate exercise of Congress' appropriations power because it includes an unconstitutional condition. The issue is whether Congress can enact legislation that may effect U.S. foreign policy interests, and whether it can do so by use of the appropriations power. Long established practice, the writings of scholars and statesmen, and judicial decisions, all indicate that the answer to both is clearly yes.

THE JERUSALEM EMBASSY ACT

*Malvina Halberstam**

I. BACKGROUND

This year marks three thousand years since Jerusalem was first established as the capital of a Jewish state by King David. Although Jerusalem was captured by the Roman Empire some two thousand years ago and has been ruled by a number of states and empires since then, it has never been the capital of any other state.¹ It has had a Jewish majority since 1830 and was formally re-established as the capital of a Jewish state in 1950.² In a fitting tribute to the celebration of the 3000th anniversary, Senators Dole and Kyl introduced a Bill ("Dole-Kyl Bill") to move the U.S. Embassy in Israel to Jerusalem.³ The Dole-Kyl Bill was adopted, with some amendments, on October 24, 1995, by a vote of 93 to 5 in the Senate⁴ and a vote of 374 to 37 in the House of Representatives,⁵ and became law on November 8, 1995.⁶

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1. For a brief historical and legal survey of the status of Jerusalem since 1517, see THE JERUSALEM QUESTION AND ITS RESOLUTION: SELECTED DOCUMENTS, at xix-xxix (Ruth Lapidoth & Moshe Hirsch, eds. 1994); Ruth Lapidoth, *Jerusalem and the Peace Process*, 28 ISRAEL L. REV. 402 (1994).

2. Divrei Haknesset, 2d Sess., No. 11, at 603 (1950). The Knesset resolution adopted January 23, 1950, stated, "[w]ith the creation of a Jewish state, Jerusalem again became its capital." *Id.* David Ben Gurion, one of the founding fathers of Israel and its first Prime Minister, argued against the adoption of a proposed resolution declaring Jerusalem to be the capital of Israel, prospectively, and persuaded the Knesset to adopt the resolution quoted above, which confirmed Jerusalem as the eternal capital of Israel. Ben Gurion stated, "[f]or the State of Israel there has always been and always will be one capital only — Jerusalem the eternal. Thus it was 3,000 years ago — and thus it will be, we believe, until the end of time." JERUSALEM MINISTRY OF FOREIGN AFFAIRS, 1 ISRAEL'S FOREIGN RELATIONS: SELECTED DOCUMENTS, 1947-1974, at 226 (Meron Medzini ed., 1976) (citing Divrei Haknesset). See also Shlomo Slonim, *The United States and the Status of Jerusalem, 1947-1984*, 19 ISRAEL L. REV. 179 (1984).

3. S. 1322, 104th Cong., 1st Sess. (1995) (introduced on May 25, 1995).

4. 141 CONG. REC. D1242-02 (daily ed. Oct. 24, 1995).

5. 141 CONG. REC. H10680 (daily ed. Oct. 24, 1995).

6. Although the Congressional Record states that it was signed, see CONG. REC. D 1325 (daily ed. Nov. 8, 1995), that is apparently an error. After the bill was submitted to the President on October 26, 1995, he had 10 days, starting October 27, 1995, in which

The law, to be cited as the Jerusalem Embassy Act of 1995⁷ ("Act"), makes a number of findings, including that Jerusalem has been the capital of Israel since 1950⁸ and that the U.S. maintains its embassy in the functioning capital of every country except Israel.⁹ The Act declares it to be the policy of the United States that "Jerusalem shall remain an undivided city in which the rights of every ethnic and religious group are protected,"¹⁰ that "Jerusalem should be recognized as the capital of Israel,"¹¹ and "that the United States embassy in Israel should be established in Jerusalem no later than May 31, 1999."¹²

The Act provides that not less than US\$25 million in 1996 and US\$75 million in 1997, of the funds to be appropriated for Acquisition and Maintenance of Buildings Abroad for the State Department, shall be made available for the construction and other costs associated with the relocation of the U.S. Embassy in Israel to Jerusalem,¹³ and that not more than fifty percent of the funds appropriated in 1999 may be obligated until the Secretary of State determines and reports to Congress that the U.S. Embassy in Jerusalem has officially opened.¹⁴ The President may, however, suspend the fifty percent limitation for successive six month periods "if [he] determines and reports to Congress . . . that such suspension is necessary to protect the national security interests of the United States."¹⁵ It requires the Secretary of State to report to Congress within thirty days of the adoption of

to act on the legislation. Since he did not sign the bill within that period and Congress was in session, it automatically became law on November 8, 1995. See U.S. CONST. art. 1, § 7 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.")

7. Jerusalem Embassy Act of 1995, 104 Pub. L. No. 45, 109 Stat. 398 (1995).

8. *Id.* § 2(2).

9. *Id.* § 2(15).

10. *Id.* § 3(a)(1).

11. *Id.* § 3(a)(2).

12. *Id.* § 3(a)(3).

13. *Id.* §§ 4(a), 4(b).

14. *Id.* § 3(b).

15. *Id.* § 7(a)(2). This provision was not in the bill initially introduced by Senator Dole. Senator Dole agreed to add the waiver provision, requested by the White House, "despite having the votes to prevail," without it, in "the interest of getting the broadest possible support — we hope, even including the support of the White House." 141 CONG. REC. S15522, at 515527 (daily ed. Oct. 24, 1995) (statement of Sen. Robert Dole).

the Act on the State Department's plans to implement the Act,¹⁶ and every six months thereafter on the cost of implementing the various phases of the Act, and on the progress made towards opening the U.S. Embassy in Jerusalem.¹⁷

In addition to policy issues, which have been the subject of considerable debate,¹⁸ the Act raises interesting questions concerning the scope of congressional and executive authority in the conduct of foreign affairs, and the extent to which Congress can use its appropriations power to influence executive action in this area.

President Clinton opposed the Dole-Kyl Bill on policy grounds¹⁹ and the Justice Department prepared a memorandum ("Memorandum") arguing that the Dole-Kyl Bill is unconstitutional.²⁰ Essentially, the Memorandum argued that the Bill: (1) interfered with the President's power to conduct foreign affairs and make decisions pertaining to recognition, and (2) is an inappropriate exercise of Congress' appropriations power because it includes an unconstitutional condition.

II. THE FOREIGN AFFAIRS POWER

Contrary to popular impression, the U.S. Constitution does not vest the "foreign affairs" power in the President. It does not

16. *Id.* § 5.

17. *Id.* § (6).

18. Those who opposed the bill argued that it would undermine the "peace-process." See, e.g., Thomas L. Friedman, *Foreign Affairs, O Jerusalem*, N.Y. TIMES, May 14, 1995, at 15. However, the site of the proposed U.S. Embassy in Jerusalem (purchased by the United States years ago), is in the Western part of Jerusalem, which has been part of Israel since 1948. Moreover, as Douglas Feith has pointed out, refusal to move the Embassy would undermine the "peace-process" by falsely suggesting that sovereignty over Jerusalem might be negotiable. See Douglas J. Feith, *To Provide Peace, Move the Embassy*, N.Y. TIMES, May 29, 1995, at 21 ("The cause of peace will be served by whatever helps persuade Yasir Arafat that he will not get American support or Israeli consent to divide Jerusalem and establish part of it as the capital of a new Arab state.").

19. See, Thomas W. Lippman, *Dole Seeks to Make Jerusalem Home of U.S. Embassy in Israel*, WASH. POST, May 10, 1995, at A29; Hillel Kuttler, *Administration Fighting Dole Embassy Bill*, JERUSALEM POST, May 11, 1995, at 10.

20. Memorandum from Walter Dellinger, Assistant Attorney General, U.S. Dept. of Justice to Abner J. Mikva, Counsel to the President (May 16, 1995). Although the provision authorizing the President to postpone opening the embassy in Jerusalem by successive six month increments was added after the Justice Department issued its memorandum, and may have lessened the President's policy objections to it, the amendment has no bearing on the question of Congress's constitutional authority to legislate on this subject.

vest the "foreign affairs" power in any branch. Indeed, the Constitution makes no reference to "foreign affairs." The Constitution vests some powers that impact on foreign affairs in the President, others in the President and the Senate jointly, and still others in Congress. The Constitution provides that only the President "shall receive ambassadors." It also gives the President the power to appoint ambassadors, but only with the advice and consent of the Senate,²¹ and to make treaties, provided two-thirds of the Senate concurs.²² The Constitution gives Congress a number of powers affecting the conduct of foreign affairs including the power to "regulate commerce with foreign nations," to "establish uniform rules of naturalization," to "coin money and regulate the value of foreign coin," to "provide for the punishment of counterfeiters," to "define and punish piracies and felonies committed on the high seas, and offenses against the Law of Nations," to "declare war, grant letters of Marque and Reprisal, and make rules concerning capture on land and water," to "raise and support armies," and to "provide and maintain a navy."²³ In the words of one prominent commentator, "the Constitution . . . is an invitation to struggle for the privilege of directing American foreign policy."²⁴

If one looks at the Constitution's specific grants of power, Congress has by far the greater share. Nevertheless, it has long been recognized that the President has a special role in the conduct of foreign affairs. John Marshall stated, in a speech made while he was a member of the House of Representatives, "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."²⁵ Similarly, Jefferson stated, "the President [is the] only channel of communication between this country and foreign nations."²⁶ It should be noted, however, that both Marshall and Jefferson were speaking of *communication* with foreign nations, not of the power to *make* foreign policy.²⁷

21. U.S. CONST. art. II, § 2, cl. 2.

22. *Id.*

23. *Id.* art. I, § 8.

24. EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 201 (1984).

25. *Id.* at 207.

26. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 221 (1972) (quoting Thomas Jefferson).

27. *Id.* (emphasis added).

Probably the most comprehensive Supreme Court discussion of foreign affairs powers is Justice Sutherland's opinion in *United States v. Curtiss-Wright*.²⁸ In *Curtiss-Wright*, decided in 1936, the Court sustained a statute authorizing the President to order an embargo on arms to Bolivia,²⁹ a delegation of Congressional authority that would have been unacceptable at that time with respect to domestic regulation. Justice Sutherland discussed various bases for federal authority over foreign affairs, and argued that in foreign affairs, as distinct from domestic affairs, the authority of the Federal Government does not depend on a grant of power by the States.³⁰ Turning to the specific issue before the Court, the President's authority to declare an embargo, Justice Sutherland stated, "[w]e are dealing here not alone with an authority vested in the President by exercise of legislative power, but with such an authority plus the very delicate plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."³¹

The Constitution also makes no reference to recognition. The provision that the President "shall receive ambassadors," now considered the basis of the President's power over recognition, is included in Section 3 of Article II, listing what the President may or shall do, not in Section 2 of Article II, which lists "presidential powers."³² The power to receive ambassadors was described by Alexander Hamilton in the Pacificus-Helvidius debates as, "more a matter of dignity than of authority" and "a circumstance which will be without consequence in the administration of the government."³³ Historically, however, presidents have made decisions concerning recognition, starting with George Washington's recognition of the French Republic. In *United States v. Belmont*³⁴ and *United States v. Pink*,³⁵ the Supreme

28. 299 U.S. 304 (1936).

29. *Id.* at 332-33.

30. *Id.* at 318-19.

31. *Id.* at 320.

32. HENKIN, *supra* note 26, at 41 ("while appointing ambassadors and making treaties are described as presidential powers (Article II, section 2), receiving ambassadors is included in section 3 which only lists things the President 'may' and 'shall' do but does not speak in terms of power").

33. The Federalist No. 69 (Alexander Hamilton).

34. 301 U.S. 324 (1937).

35. 315 U.S. 203 (1942).

Court held that an executive agreement recognizing the Soviet Government and providing for the settlement of claims between the United States and the Soviet Union superseded inconsistent state law, implicitly accepting the executive's authority over recognition.³⁶

The Court's reference to the President's broad powers in foreign affairs in *Curtiss-Wright* and other cases cited in the Memorandum,³⁷ and the Court's implied acceptance of the executive's authority to recognize foreign governments in *Belmont* and *Pink*, were made in situations in which Congress either delegated authority to the executive or in which Congress was silent. None involved a conflict between Congress and the President.

The Supreme Court has never held that Congress could not exercise one of its constitutional powers because doing so would interfere with the President's powers over the conduct of foreign affairs.³⁸ The Court has held the converse: that Presidential action, which might have been constitutional if Congress had not acted, was unconstitutional because it was inconsistent with legislation enacted by Congress.³⁹ In *Youngstown Sheet and Tube v. Sawyer*,⁴⁰ the Court held that notwithstanding the President's constitutional power as Commander-in-Chief, President Truman's seizure of the steel mills during the Korean War to ensure that a threatened strike did not stop the production of steel needed for the conduct of war, was illegal because the seizure was inconsistent with the Taft-Hartley Act for resolving labor disputes.⁴¹ Justice Jackson, who had been President Franklin Delano Roosevelt's Attorney General and a strong proponent of broad executive authority, concurred in an opinion which has become the classic statement on the scope of executive-legislative power. He wrote:

A judge, like an executive adviser, may be surprised at the

36. *Belmont*, 301 U.S. at 330; *Pink*, 315 U.S. at 222-23.

37. See *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705-06 n.18 (1976); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (cited in Memorandum from Walter Dellinger, *supra* note 20).

38. In *United States v. Klein*, the Court made clear that legislation that impaired the effect of a Presidential pardon would be an unconstitutional infringement on the powers of the executive. 80 U.S. 128 (1872).

39. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 588 (1952).

40. 343 U.S. 579 (1952).

41. *Id.* at 587-89.

poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all the Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as

a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.⁴²

Jackson cited *Curtiss-Wright* as an example of the first class of cases, in which, he said, "we find the broadest statements of presidential power," and noted that "that case involved not the President's power to act without Congressional authority, but the question of his authority to act under and in accord with an Act of Congress."⁴³ He concluded, "[i]t was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress."⁴⁴

Although the Act does not explicitly require the President to relocate the U.S. Embassy to Jerusalem, the findings that Jerusalem is the capital of Israel and that Israel is the only state in which the United States does not have its embassy in the capital; the assertion that it is the policy of the United States that the embassy be in Jerusalem; the allocation of funds for the relocation and construction of an embassy in Jerusalem; the prohibition on the use of some of the funds appropriated to the State Department for the acquisition and maintenance of buildings abroad if the embassy is not opened by May 1999, clearly indicates the purpose of Congress to commence construction on the U.S. Embassy in Jerusalem no later than 1997 and to open the embassy no later than May 31, 1999. Under the Jackson analysis, were the President to take "measures incompatible with the ex-

42. *Id.* at 634-38.

43. *Id.* at 637.

44. *Id.* (emphasis added).

pressed or implied will of Congress,"⁴⁵ his power would be "at its lowest ebb."⁴⁶ He could "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁴⁷ Such exclusive presidential control could be sustained "only by disabling Congress from acting upon the subject."⁴⁸ As Jackson noted, "[p]residential claim to power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."⁴⁹ While the question has never been decided, it is unlikely that a court would hold that the President's authority to receive ambassadors—his power to appoint ambassadors requires the advice and consent of the Senate—minus the power of Congress under the Necessary and Proper Clause and the Spending Clause of the Constitution, is sufficient to sustain exclusive presidential control, disabling the Congress from acting upon the subject.

III. CONGRESSIONAL AUTHORITY UNDER THE NECESSARY AND PROPER AND SPENDING PROVISIONS OF THE CONSTITUTION

Both the necessary and proper clause⁵⁰ and the spending clause⁵¹ have been broadly interpreted to permit Congress to legislate on a wide scope of matters. The Necessary and Proper Clause authorizes Congress not only to make all laws necessary and proper to implement the enumerated powers of Congress, but all laws that shall be necessary and proper for carrying into execution all powers vested "*in the government of the United States or in any department or officer thereof.*"⁵² Thus, even if recognition is considered an executive power—on the basis of historical precedent, if not constitutional provision—Congress has the power under the Necessary and Proper Clause to enact legislation concerning the location and construction of U.S. embassies abroad.

Clearly, the Act is also a proper exercise of Congress' spend-

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 638.

49. *Id.*

50. U.S. CONST. art. I, § 8, cl. 18.

51. *Id.* art. I, § 8, cl. 1.

52. *Id.* art. 1, § 8, cl. 18 (emphasis added).

ing power. That the use of the spending power is not limited to those areas that Congress could otherwise regulate was made clear by the Supreme Court in *United States v. Butler*.⁵³ Justice Roberts, writing for the majority, stated:

[the first clause of article I Section 8] confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, *limited only by the requirement that it shall be exercised to provide for the general welfare of the United States*.⁵⁴

Admittedly, Congress cannot use the spending power to impose unconstitutional conditions. Thus, the Supreme Court has held that Congress cannot use the appropriations power to violate the Establishment Clause of the First Amendment,⁵⁵ the compensation clause in Article III,⁵⁶ or the prohibition on bills of attainder in Article I, Section 9.⁵⁷ The principle that has emerged from these cases is that Congress cannot use the spending power to achieve that which the Constitution prohibits. Appropriating funds for the relocation and construction of an embassy and limiting the expenditure of funds appropriated for the acquisition and maintenance of buildings abroad if construction is not started and completed on specified dates, do not violate any prohibition of the Constitution.

Butler, decided over half a century ago, is the only case in which the Court held a federal appropriation invalid because of the unconstitutionality of a condition that did not involve infringement of individual rights.⁵⁸ The majority in *Butler* took the position that Congress could not use federal funds to induce states to enact regulations that Congress could not enact under

53. 297 U.S. 1, 74 (1936).

54. *Id.* at 65-66 (emphasis added).

55. *Flast v. Cohen*, 392 U.S. 83 (1968).

56. *United States v. Will*, 449 U.S. 200 (1980).

57. *United States v. Lovett*, 328 U.S. 303 (1946). In *Lovett* Congress provided by an amendment in an appropriations bill that no salaries should be paid to certain individuals out of monies appropriated unless they were reappointed by the President with the advice and consent of the Senate. Although the persons who were denied compensation and the Solicitor General of the United States argued that the provision was an unconstitutional interference with the powers of the President to remove executive employees; *id.* at 304-05, the Court did not consider the question; it held that the provision constituted a bill of attainder. *Id.* at 315.

58. See Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 *Nw. U. L. Rev.* 293, 307 (1975).

its enumerated powers.⁵⁹ Within a year of that decision, the Court sustained conditional appropriations in areas outside the scope of Congress' enumerated powers.⁶⁰ Since then, Congress has enacted numerous statutes in which it used the spending power to achieve results that it could not have achieved by regulating the conduct directly.⁶¹ The Court has "never invalidated such an enactment."⁶²

Most recently, in *South Dakota v. Dole*,⁶³ the Supreme Court rejected a state argument that Congress could not use federal highway funding to achieve a national minimum drinking age because the Twenty-First Amendment gave the states the power to make that decision.⁶⁴ The Court stated:

[T]he 'independent constitutional bar' limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.⁶⁵

Moreover, in *Butler*, the Court held that Congress could not use the spending power to limit states' rights. The Court has never held that Congress cannot limit the proper exercise of power by another branch of the Federal Government by the use of its appropriations authority unless the matter falls within one

59. *Butler*, 297 U.S. at 78.

60. See *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvery v. Davis*, 301 U.S. 619 (1937).

61. See Lynn Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995). "Federal funds totalling billions of dollars each year contribute to an increasingly large portion of each State's revenue. And none of this money is offered to the states unconditionally." *Id.* at 1918.

62. *Id.* at 1924.

63. 483 U.S. 203 (1987).

64. *Id.*

65. *Id.* at 210.

of the enumerated powers of Congress. Such a holding would vitiate what has been considered one of the most important—if not the most important—of the checks and balances: Congress' power of the purse. As a recent U.S. District Court decision stated,

[t]hough the parameters of Congress' powers may be contested, Congress surely has a role to play in aspects of foreign affairs, as the Constitution expressly recognized and the Supreme Court of the United States has affirmed. The most prominent among these Congressional powers is of course the general appropriations power.⁶⁶

That Congress can use the spending power to limit the executive's constitutional powers is well established.⁶⁷ Consider, for example, the President's power as Commander-in-Chief. Although the Constitution provides that the President shall be Commander-in-Chief,⁶⁸ and the Supreme Court stated almost 150 years ago that that encompasses the power "to direct the movements of the naval and military forces at his command and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy,"⁶⁹ Congress has repeatedly used its funding power to limit military action by the President.⁷⁰ Indeed, in some of the cases involving challenges to the Vietnam War, courts have stated that Congress' failure to prohibit the President from using funds for the Vietnam conflict, or for certain aspects of it, constituted Congressional authorization for the action in question.⁷¹ If Congress can exercise its appropriations power to limit the President's power as Commander-in-Chief, a power specifically provided for in the Constitution, *a fortiori* it can exercise the appropriations power to limit the President's foreign affairs power, a power that is not ex-

66. *U.S. v. Oliver North*, 708 F. Supp. 380, 382, n. 3 (D.D.C. 1988).

67. See CORWIN, *supra* note 24, at 222 (noting that Congress can refuse to appropriate funds or enact inconsistent legislation).

68. U.S. CONST. art. II, § 2, cl. 1.

69. *Fleming v. Paye*, 50 U.S. (9 Hav.) 602, 615 (1850).

70. See L. Fisher, *How Tightly Can Congress Draw the Purse Strings*, 83 A.J.I.L. 758, 763 (1989).

71. See, e.g., *Holtzman v. Schlesinger*, 484 F. 2d 1307, 1313, 1314 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). See also JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993). "Congress had by then, by a number of appropriations measures, quite pointedly reiterated its authorization of the war." *Id.* at 33.

pressly vested in the President but implied from other powers and that is shared with Congress.

Since World War II, Congress has consistently used appropriations as a means of controlling some aspects of foreign policy.⁷² One prominent commentator characterized the assertion that Congress cannot control foreign affairs by withholding appropriations as "*the most startling constitutional claim emanating from the Iran contra hearings*".⁷³ Or, as another prominent publicist put it, assertions "that foreign affairs just aren't any of Congress's business . . . bear no relation to the language or purposes of the founding document, or the first century and a half of our history."⁷⁴

IV. CONCLUSION

Even strong proponents of broad executive power in foreign affairs agree that Congress can use the appropriations power to effect the conduct of foreign affairs. Thus, Secretary of State Kissinger conceded, following the President's confrontations with Congress during the Vietnam war:

The decade long struggle in this country over executive dominance in foreign affairs is over. The recognition that Congress is a coequal branch of government is the dominant fact of national politics today. The executive accepts that Congress must have both the sense and the reality of participation: foreign policy must be a shared enterprise.⁷⁵

Professor Louis Henkin, the Chief Reporter for the latest Restatement of U.S. Foreign Relations Law⁷⁶ and one of the leading authorities in the field stated, "Congress has insisted and presidents have reluctantly accepted that in foreign affairs as in domestic affairs, spending is expressly entrusted to Congress."⁷⁷

Whatever the respective powers of Congress and the President to decide whether to recognize a foreign state—a question on which the Constitution is silent and the Court has never ruled—that issue is not raised by the Jerusalem Embassy Act.

72. See Smith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1360.

73. Fisher, *supra* note 70, at 758.

74. Ely, *supra* note 71, at 62.

75. 72 DEP'T ST. BULL. 562 (1975).

76. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. (1987).

77. HENKIN, *supra* note 26, at 114.

The United States recognized Israel when it was established in 1948. It was the first state to do so. Rather, the issue is whether Congress can enact legislation that may effect U.S. foreign policy interests, and whether it can do so by use of the appropriations power. Long established practice, the writings of scholars and statesmen, and judicial decisions, all indicate that the answer to both is clearly yes.