

Thomas Jefferson to George Washington, April 24, 1790, Opinion on Right of Senate to Negate Diplomatic Grades Specified by President, with Copy, from the Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

OPINION ON THE POWERS OF THE SENATE J. MSS.

[April 24, 1790.]

Opinion on the Question whether the Senate has the right to negative the grade of persons appointed by the Executive to fill Foreign Missions.

The constitution having declared, that the president “shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers, and consuls,” the president desires my opinion whether the senate has a right to negative the grade he may think it expedient to use in a foreign mission, as well as the person to be appointed.

I think the senate has no right to negative the grade.

The constitution has divided the powers of government into three branches, legislative, executive, and judiciary, lodging each with a distant magistracy. The legislative it has given completely to the senate and house of representatives; it has declared that “the executive powers shall be vested in the president,” submitting only special articles of it to a negative by the senate; and it has vested the judiciary power in the courts of justice, with certain exceptions also in favor of the senate.

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The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly; the constitution itself, indeed, has taken care to circumscribe this one within very strict limits; for it gives the nomination of the foreign agent to the presi-

-dent, the appointment to him and the senate jointly, and the commissioning to the president.

This analysis calls our attention to the strict import of each term. To nominate must be to propose; appointment seems the only act of the will which constitutes or makes the agent; and the commission is the public evidence of it. But there are still other acts previous to these, not specially enumerated in the constitution,—to wit, 1. The destination of a mission to the particular country where the public service calls for it, and, 2. The character or grade to be employed in it. The natural order of all these is, 1. destination, 2. grade, 3. nomination, 4. appointment, 5. commission. If appointment does not comprehend the neighboring acts of nomination or commission, (and the constitution says it shall not, by giving them exclusively to the president) still less can it pretend to comprehend those previous and more remote of destination and grade. The constitution, analyzing the three last, shows they do not comprehend the two first. The fourth is the only one it submits to the senate, shaping it into a right to say that “A or B is unfit to be appointed.” Now, this cannot comprehend a right to say that “A or B is indeed fit to be appointed, but the grade fixed on it is not the fit one to employ,” or “our connections with the country of his destination are not such as to call for any mission.” The senate is not supposed by the constitution to be acquaint-

-ed with the concerns of the executive department. It was not intended that these should be communicated to them; nor can they, therefore, be qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade, more or

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less marked, which special and secret circumstances may call for. All this is left to the president; they are only to see that no unfit person be employed.

It may be objected, that the senate may, by continual negatives on the person, do what amounts to a negative on the grade, and so indirectly defeat this right of the president; but this would be a breach of trust, an abuse of the power confided to the senate, of which that body cannot be supposed capable. So, the president has a power to convoke the legislature, and the senate might defeat that power, by refusing to come. This equally amounts to a negative on the power of convoking, yet nobody will say they possess such a negative, or would be capable of usurping it by such oblique means. If the constitution had meant to give the senate a negative on the grade or destination, as well as the person, it would have said so in direct terms, and not left it to be effected by a sidewind. It could never mean to give them the use of one power through the abuse of another.