

## **Contested Ground: Presidential Power and the Constitution**

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As the title indicates, this is a book about the constitutional powers of the Presidents and their limits. The plan is for a short book aimed at the general reader (thus, few if any footnotes, informal tone, etc.) I would like the book to be useful for readers regardless of their political stance or viewpoint on executive power.

The book begins by laying some foundations, explaining the history leading up to Article II of the Constitution; the language of Article II; and the current battle over the “unitary executive” theory. Many issues that arose in the early years continue to percolate today. These issues include the degree of presidential control over the Executive Branch, Presidential autonomy in foreign affairs, the President’s power to take military actions, and the President’s power to respond to unexpected emergencies. These issues occupy the middle portion of the book. The final part of the book discusses the constitutional checks on presidential power. Constitutional law also limits presidential power in several ways. Courts may intervene either to prevent the President from straying outside of the powers granted by Article III, or to enforce the restrictions that the Bill of Rights places on all governmental powers. Judicial efforts to limit presidential powers encounter constitutional issues of their own, involving matters such as executive privilege, presidential immunity from damages, and possible limits on criminal prosecution of a president. Congress also has the ability to impose checks on the President, such as use of the power of the purse, congressional investigations, and ultimately the power of impeachment. These also raise constitutional issues.

The following three short chapters will form the basis of my presentation. They will come immediately after the Introduction. They cover the creation and early history of the Presidency, competing models of the Presidency, and presidential power over foreign affairs. I should stress that my conclusions are tentative and may shift as I continue to delve into the literature.

## Chapter 2

### Origins

In thinking about the creation and early implementation of the Constitution, it is important to keep in mind that the U.S. was a far different place when the Constitution was framed and first put into effect. Only five cities had more than 10,00 inhabitants. New York City, the largest, had a population of 30,000, about the same as Fairbanks, Alaska today. Washington, D.C. did not even exist. Virginia, the state with the largest population, had about as many people as El Paso, Texas has today. In some ways, the closest analogy to the U.S. of that time period is present day New Zealand, which is heavily agrarian like 1790s America, has a population a bit bigger than the U.S. had then, and is also remote from the main centers of global power.

Early American governments were also different than today. After independence, Americans seemed to have developed an allergy to strong executives. The early state constitutions put the state legislature in the spotlight, with effective control over feeble governors. State legislatures were considered the repositories of democratic government, directly representing the sovereign people. In contrast, the executive branch was considered a dangerous staging point for potential tyrants. The Framers of the Constitution chose not to follow the early state constitutions. Like some of the most revised constitutions more recently adopted by some states, they created a more powerful Chief Executive who was less dependent on the legislature. There is considerable dispute about just how much stronger and more independent they intended to make the President, but agreement that they did plan for a stronger executive. That vision was fleshed out in the early years of the new Republic under the early Presidents. To understand the modern presidency, we must begin with this formative period.

The creation of the presidency was part of the larger project of designing a government strong enough to deal with nationwide problems, yet not so strong as to threaten individual liberty. It was not easy to fashion the government of a republic, particularly one as large as the United States was even at that time. During the creation of the Constitution, much of the discussion revolved around federalism, the relationship of the states and the Union. That's not surprising, since the fundamental goal of the Constitution was to transform that relationship. Connected with this was the question of how the new government would connect with the people themselves, and more broadly how to make it strong enough to accomplish its mission without becoming a threat to liberty.

Creating the executive branch involved its own set of issues. There were few models of executives either in democracies or in other types of governments without monarchs. In the late eighteenth century, the world, or at least what Americans considered the "civilized world," was run by monarchs. That was not a model the Framers wanted to emulate, but neither did they like the minimalist executive branch of the early state constitutions. There was a general desire to give the executive branch some degree of independence from the legislature and of course to ensure that it was able to perform its role effectively. How to do so was more puzzling, and it took a considerable amount of time to settle this and to determine the division of authority between the President and the Senate.

When the new government finally took office in 1789, Congress and the President both had to do additional work in figuring out to make the constitutional scheme operational. It's enlightening to see that much that we take for granted about the role of the Presidency did not seem at all obvious when the Constitutional Convention met two years earlier or even in the

early years of the government. Some of those issues were settled at the Convention or in the government's start-up phase; others remain fiercely debated even today.

If the goal is to understand what the language of the Constitution meant when it was drafted, evidence from that period of time is obviously crucial. Originalists believe that the primary (perhaps exclusive) driver of constitutional law should be historical meaning. For them, the materials we are about to discuss are central to resolving disputes about constitutional interpretation. Non-originalists think that the clock did not stop when the required nine states ratified the Constitution so it could go into effect. The non-originalists would give greater weight to the way the Presidency has evolved over time, taking into account the fundamental values underlying the Constitution. But for virtually all non-originalists, the views of the Framers remain important though not decisive. Either way, the history of the 1780s and 1790s carries special weight in analyzing issues about the Presidency. Besides, as to many issues, there is relatively little Supreme Court precedent, so evidence of the original understanding is all the more valuable as a guide.

As with any story, the beginning point is a bit arbitrary. In designing and launching the government, the Framers were heirs to ideas and practices that were rooted in history. Even the British monarchy, the national executive most familiar to Americans, had evolved over centuries as a result of constant back and forth with Parliament, while meanwhile creating a substantial administrative apparatus. And the Framers themselves looked back even further, with the ancient Roman Republic frequently on their minds. But rather than begin two thousand years ago, let's start with the run-up to the Constitutional Convention.

### ***The Constitutional Convention***

The Philadelphia Convention that produced our Constitution was the outgrowth of a decade of discontent with the existing framework of government. The year after declaring independence, the Continental Congress had produced the Articles of Confederation. As the name indicated, the Articles envisioned a federation between the states rather than a true national government. Under the Articles, Congress had control of foreign affairs and waging war. Its domestic powers, however, were very weak, and its only way of obtaining money or enforcing its directives was through the states. There was no executive branch. Congress was unable to repay money borrowed to finance the war for independence or soldiers' pensions, while trade suffered from trade barriers enacted by individual states. There was also considerable discontent about state governments. Many people — in particular, those with property and wealth — worried that populist measures threatened their existing rights.

These problems created a sense of crisis. Some historians contend that the actual circumstances facing the country did not really pose a crisis. The economy was not doing badly; the country was at peace; and more or less the same people were generally leading state governments as before. The feeling of crisis was nevertheless widespread. It may have been due in part to foreboding over whether the government was strong enough to deal with future issues. But it owed even more to the failure of "republican" state governments to live up to the high expectation of the Revolutionary War period. The states were run by legislatures that were directly responsive to the public, yet the results were disappointing and too often economically destabilizing. And the national Congress was stymied by the need for unanimity and the absence of any way of obtaining its own financing and implementing its own laws. It had to rely on the states both for funding and for enforcement of its dictates.

Apart from what some considered irresponsible legislatures, the state governments tended to have very weak governors, in reaction to the excesses of the royal governors under the British regime. Most were elected by the state legislature and had limited powers and were required to consult executive councils before acting. New York was the major exception. The New York governor held office for three years, unlike the short terms elsewhere, was not saddled with the duty of consulting a council except in appointing judges, and was elected by the public rather than the legislature. He belonged to a council of revision that had the power to overturn legislative enactments. The New York model proved influential elsewhere, such as in the 1784 Constitution adopted in Massachusetts. Opponents of that model considered it undemocratic and threatening to liberty.

In 1786, delegates of five states met in Annapolis and called for a constitutional convention. That convention convened in Philadelphia on May 14, 1787. Although one often hears about the “long hot summer” during which the delegates met, the weather was actually fairly mild. Madison, who had more of a role in designing the Constitution than anyone else, had spent months preparing for the Convention with research into modern and historical confederacies. By the time of the Convention, he had become a fan of national power, though his views were to change quickly after the new government was actually launched.

The discussion of the presidency at the Constitutional Convention was primarily focused on structural issues: whether to have a single head of the executive branch or divided control by several leaders; how and by whom the President would be chosen; and how the President could be removed. The Convention apparently had great difficulties with these issues, as shown by a number of inconclusive discussions and votes before they finally came to a resolution. More time was spent on these matters than on precisely delineating the powers of the office.

There were a number of reasons for the Convention’s difficulties. One was the problem of working out the relationship between the President and the Congress, particularly the Senate. And it was no easy matter to make the Executive Branch powerful and independent enough to be effective without making it powerful enough to threaten tyranny. Another problem was the lack of good models to draw on — there were the governorships of the states, which mostly weren’t considered very successful; the English Monarchy, which as a monarchy was a debatable model for a republic; Renaissance city-states such as Florence and Venice, and the ancient Roman Republic. The position that would become known as Prime Minister in England had not jelled yet, though in retrospect it was already starting to emerge, along with the Parliamentary system of government that is now so common among democracies.

The Articles of Confederation had not provided for an executive branch at all. Instead, all power was reposed in the Congress. In practice, this didn’t work very well since it was impossible for Congress to keep track of all the details of governing or to engage in day-to-day decision-making. Congress ultimately created four offices to implement policy. The heads of two of these offices were particularly vigorous. Robert Morris became superintendent of the office of finance but got into trouble when he attempted to manipulate government finances in order to force Congress to adopt his policies. John Jay was the head of the office of foreign affairs. He got pushback from Southern states for his proposal that Congress pursue a commercial treaty with Spain at the expense of demanding navigation rights on the Mississippi.

Apart from these models, good or bad, there were also some well-regarded theoretical discussions of the separation of powers by political philosophers John Locke and Charles-Louis

de Secondat, Baron de La Brède et de Montesquieu, better known as “Montesquieu.” The extent to which their theories were embraced by the drafters remains controversial. Some scholars see their definitions of executive power as crucial to understanding the Constitution; others see them as peripheral. I’ll have more to say about the political philosophers later.

As late as two years before the Convention, James Madison was unsure whether the President should be elected by a direct vote of the people and whether the President should stand alone or only be the leader of an executive council. Near the beginning of the Convention, he and other Virginians presented a blueprint that provided the starting point for later discussions at the Convention. It called for election of the President by Congress for a fixed term. The President would have “general authority to execute the National laws” and would have “the Executive rights vested in Congress by the Confederation,” whatever those might be. The President would also be part of a Council of Revision that would have power to veto laws passed by Congress.

When the subject of executive power came up at the Convention, there were concerns about the extent of the President’s powers in the Virginia blueprint. One delegate feared that the President’s powers “might extend to peace & war & c., which would render the Executive a Monarchy, of the worst kind, to wit, an elective one.” There was a motion to make the Executive a single person, which was attacked as “the foetus of monarchy” and an imitation of British royalty. The response was to distinguish the King’s role as an executive implementing laws enacted by Parliament and the King’s prerogative, a set of powers giving the King independent authority in a number of areas, including treaties and war making. The Convention then endorsed the idea of election by Congress of a single Executive. The Council of Revision was rejected, largely because of concern that it would compromise the independence of the courts because of the plan for judges to serve on the Council.

In July, the discussion again turned to the executive branch. The Convention went around in circles. Various methods of electing the President, such as direct popular vote and the electoral college, came up for discussion. Direct popular vote had two major defects: few people were likely to be well-known across the whole country, so voters would be ill-informed, and a popular vote would give too much authority to Northern whites at the expense of Southern ones. There were also doubts about the ability of the voters to judge the character of presidential candidates. One delegate said that it would be “as unnatural to refer the choice of a proper character for Chief Magistrate to the people, as it would, to refer a trial of colours to a blind man.” There was also great debate about the President’s term of office and eligibility for reelection. The Council of Revision idea was again debated and again rejected.

When a Committee on Detail was appointed to put together a comprehensive draft of the Constitution based on all the discussions, the Senate was given the power to make treaties, appoint Ambassadors and Judges, and decide disputes between states over boundaries. The first two functions ultimately went to the President subject to Senate approval, while disputes between states ultimately were assigned to the Supreme Court. Later in the Convention, rather than Congress having the power to “make” war, it was given the power to “declare” war. Many trees have been felled by arguments over the meaning of the few short lines about this decision in Madison’s notes of the proceedings. In chapter 3, you’ll have the chance to read those notes for yourself and form your own conclusion.

In late August, a committee was appointed to deal with the unresolved questions before the Convention. It came out in favor of the Electoral College, with the Senate to decide between the

top candidates if no one had a majority of electoral votes. This was soon switched to the House rather than the Senate, for fear that the Senate's role in selecting the President, combined with its power over appointments and treaties, would give it too much power. The Committee also recommended that appointments be made by the President with the advice and consent of the Senate.

Several things stand out from the debates over the Presidency. First, there was little discussion of some key issues we'd like answered today. No one explicitly addressed the line between the President's power as command-in-chief and Congress's power to declare war. No one addressed the extent of the President's role in foreign policy outside of treaties and the appointment of ambassadors. It would have been nice, for instance, if they had added language to the Constitution saying exactly when (if ever) the President could order the use of armed force without prior Congressional authorization. One reason for the Constitution's failure to address this issue directly may have been that the U.S. was not a major military or economic power, so its international clout was limited in any event. There was some discussion but no clear-cut resolution of other issues, such as exactly what "high crimes and misdemeanors" meant. So we are left to puzzle over the meaning of a handful of remarks on these issues as we search for enlightenment. If we were able to ask them, perhaps the Framers would have said that the answers to some of these questions were too obvious to require discussion, or perhaps they would have said that they had enough trouble agreeing on a framework for government without trying settle every single future issue—so please get off their backs! In any event, there was enough uncertainty about many of these issues to fuel another two centuries of debate.

Second, it was plain that the delegates at the Convention did not foresee that the election of the President would become the fulcrum of American politics. Their thinking about relationships between branches was more fixated on concerns a President might commit coups in order to establish a monarchy, or that Senators form cabals to take over the government's operation. They generally failed to realize how much ability the President would have to seize the initiative and set the national agenda, instead worrying endlessly about how to protect the executive branch from being pulled into the "vortex" of legislative power. This reflected their experience under the post-Independence state governments, where the legislatures often seemed to monopolize power.

The most notorious failure in political foresight was the Framers' failure to imagine the rise of political parties. In fairness, the process had not really begun in the States yet. It actually had begun in England, but what was not yet clear was that parties would become a permanent, institutional feature of government. This meant that interaction between the President and Congress, and between the federal government and the states, would be shaped by party divisions that cut across all of those institutions. Thus, many of the institutional design decisions by the Framers were made under mistaken assumptions. It did not occur to them that Presidents, members of Congress, and even state governments might all line up on the same side, simply because they were part of the same political party. And if they had known, they probably would have been horrified.

For better or worse, the Convention finished its work in the middle of September 1787. In sending the Constitution off to Congress for transmission to the states, the Convention unanimously endorsed what amounts to a cover letter signed by George Washington on behalf of the entire Convention. Unlike the records of what was said during the Convention, which were secret, the letter was public and reflected the views of the group as a whole. Although it is quite

short, it contains some clues as to how they saw the product of their work. They explained the goal described the goal that “the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union. “But,” the letter continued, “the impropriety of delegating such extensive trust to one body of men is evident - Hence results the necessity of a different organization.” Thus, they wanted a stronger national government, one in which the corresponding executive and judicial authority were “fully and effectually vested.” But they thought it was dangerous to put powers such as the authority to make war, peace, and treaties — into the hands of one body (or, presumably, any single person). Consequently, they divided power and created checks and balances. We’ll spend most of the rest of the book on arguments about how the Constitution manages this task.

All this would have remained purely academic unless the Constitution was actually adopted, something the Convention itself had no power to do. For the new government to go into effect, it would have to be ratified by conventions in nine states, with the delegates elected by the people of the state. It was not at all obvious that the ratification effort would succeed. The Constitution seems like an inevitability now, but it did not seem so then.

### *Ratification Debates*

Ratification by the State of New York was crucial if the new government was to be launched successfully. Its geographic location, its population, and its economic significance made it indispensable to a successful new government. A series of newspaper essays signed as “A Federalist” took on a systematic defense of the new Constitution. For that reason, they became known as the Federalist Papers. It was common at the time for essays of this kind to be written under a pseudonym. Besides the “Federalist,” the debate over ratification features other important works by “Cato,” the “Federal Farmer,” and others.

The authors of the Federalist Papers, as it turned out, were Alexander Hamilton and James Madison, with a small assist from John Jay. Madison would become a leader in Congress and then President; Jay would become the first Chief Justice; and Hamilton would essentially found the U.S. financial system as the first Treasury Secretary. (Unlike the others, he would also become the subject of a hit Broadway musical.) These three were also key in founding what became our first political parties, the Federalists and the Democratic-Republicans. After much morphing, these parties provided the seeds for today’s Republican and Democratic parties. The Federalist Papers have become canonical texts in American constitutional law, partly because of their role in ratification but mostly because of their scope and clarity — and also because of the stature of their authors. I’ll be referring to them repeatedly in the chapters ahead.

Federalist Papers 67 to 77 dealt with the Chief Executive. They were written by Hamilton, who had been enthusiastic enough about executive power to have proposed a limited monarchy at the Convention. The Federalist Papers reflect that enthusiasm. In Federalist 70, he extolled the importance of energetic execution of policy: “A government ill executed, whatever it may be in theory, must be, in practice, a bad government.” To be effective and energetic the executive needed “unity, duration; an adequate provision for its support; competent powers” — all of which, he said, the Constitution provided.

In particular, energy in the executive (something Hamilton himself had in abundance) was crucial to successful government. Hamilton called it “a leading character in the definition of good government.” He went on to say that an energetic executive “is essential to the protection

of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and highhanded combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”

Hamilton then defended the Presidency against possible criticisms. He explained the need for a single chief executive rather than a committee on the basis of the need for energetic government: “Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.” Nor should the idea of a single chief executive be rejected because of its association with George III. Federalist 69 argued that it was unfair to compare the proposed presidency with the English Monarchy because many of the traditional royal prerogatives were subject to Senate approval (like making treaties), transferred to Congress (like coining money), or forbidden outright (like granting titles of nobility). Instead, he argued the governorship of New York was a more accurate comparison, no doubt a comparison designed to appeal to his New York audience.

While extolling the potential for energetic executive action, Hamilton was also at pains to explain the existence of checks on executive power. For instance, in Federalist 72, Hamilton explained what he thought at the time to be a beneficial feature of the Constitution. Apparently assuming that Presidents could not routinely discharge government officials, he argued that the ability of top officials to stay in place across presidential administrations would provide a much needed stability to the government. In Federalist 77, he reinforced that view with the claim that Senate consent would be required to remove top officials as well as appointing them. (He was later to have second thoughts on the subject.) In Federalist 73, he portrayed the veto as largely a way of getting Congress to give further consideration to legislation, underplaying its potential for decisively killing legislative efforts.

In Federalist 72, Hamilton turned to the role of the Senate in the international sphere. Critics claimed that giving the Senate a role in treaty-making improperly involved the legislature in the exercise of executive power, a violation of the separation of powers. Hamilton argued, however, that it was arbitrary to classify treaty-making as either purely executive or legislative. If anything, treaties were more legislative than executive because they created general rules governing future behavior. Yet they were not entirely legislative either, because they created contracts between sovereigns, not ordinary laws binding on citizens. Thus, the power to make treaties seemingly “formed a separate department, and to belong, properly, neither to the legislature nor to the executive.” As a practical matter, negotiating the treaties fit best with the executive branch, but “the vast importance of the trust, and the operation of the treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.”

A similar issue had been addressed in an earlier installment of the Federalist papers. Federalist 47 attempted to rebut the claim that the Constitution intermixed the powers of creating, executing, and interpreting the laws and thereby violated the maxim that allowing one branch to exercise these multiple powers was the essence of tyranny. Madison replied that this maxim was only true where all the powers of one branch were under the control of another, which was not true of the Constitution. It did not apply where there was more limited mixture of powers. In Federalist 48, Madison spoke about the risk that the legislature would sweep all the



power of government into its own orbit, making it necessary to ensure the President's independence through separate election, salary protections, and so forth.

Overall, the defenders of the Constitution were more focused on issues other than the presidency, which was not surprising given that the Constitution proposed to revolutionize the relationship between Congress and the states. The presidency was also a bit of a side issue for opponents of the Constitution, with much more attention being paid to the overall power and accountability of the federal government. Perhaps this represented a failure of imagination. Surely opponents of the Constitution would have had more to say on the subject if they had recognized that the president would someday control the most formidable branch of government.

Nevertheless, while the critics' emphasis was elsewhere, there were some discussions of presidential power by opponents. The Anti-Federalists, who were opposed to ratification of the Constitution, were divided about the presidency, some thinking the President would be too strong and others too weak. Some were worried that a weak president would be susceptible to "intrigues" by foreign powers. George Mason, an eminent lawyer who had been at the Convention but refused to sign the final document, worried about the absence of a Council to advise the President and provide political support in confronting Congress. Thus, the President would be surrounded only by what we now call "yes men" or become a tool of the Senate. Alternatively, the President's advisors would be the members of the cabinet, which Mason considered "the worst and most dangerous of all ingredients for such a Council in a free country." Mason's concern about the excessive power of the aristocratic Senate was shared by some other anti-Federalists. Because treaties would be the "supreme law of the land," the Senate and President could engage in lawmaking while leaving the House, which represented the people, with no voice. These critics were worried that the President-Senate axis might end up dominating the government. This proved to be a chimera. If anything, the Senate's longer terms of office have probably made it at least as likely as the House to push back against the President.

Other anti-Federalists were worried that the President would be too strong rather than too weak. One opponent of the Constitution worried that a strong, ambitious President would reduce members of Congress to "his sycophants and flatterers," while a weak President would be a "minion of the aristocrats, doing according to their will and pleasure, and confirming every law they think proper to make." Writing under the name of Cato, another prominent anti-Federalist asked, "[W]herein does this president, invested with his powers and prerogatives, essentially differ from the king of great-Britain (save as to name, the creation of nobility and some unmaterial incidents)?" Indeed, rather than leave office quietly, there was the worry that a President might use the military to overturn the Constitution and become a monarch.

Despite opposition, the Constitution did win ratification. As expected, George Washington was elected as the first President. Washington was not a man of letters like Jefferson, a constitutional theoretician like Madison, or a brilliant advocate and organizer like Hamilton. But he was an effective leader, listening carefully to the views of others but then decisive in making choices. He was also perhaps the one person in the country who would have been trusted so universally as the first holder of the office. Although he was not a brilliant intellect, he was deeply respected by others such as Hamilton.

He and the newly elected Congress were faced with the task of translating the Constitution's generalities into concrete actions. The views of the First Congress are often given special weight

today, in part because its membership was so distinguished, including twenty who were at the Constitutional Convention, and in part because it did so much to establish the framework of the government, from the internal operations of Congress and executive branch to the federal judicial system. Congress and the President had their work cut out for them.

### **Presidential Power in the Early Republic**

Despite all the worries about its new powers, the early federal government was a mere shadow of today's federal government. By the middle of the 1790s the government had grown, boasting \$6 million in tax revenue (ten times that of all the states combined). The headquarters of the War Department —the equivalent of today's Pentagon— had a staff consisting of an accountant, fourteen clerks, and two messengers. The State Department staff was even smaller: seven clerks (one of whom ran the patent office) and a messenger. (But of course, the polymath Thomas Jefferson was Secretary of State, which perhaps counted for more than one full-time employee.) The Continental Army and Navy had been basically disbanded at the end of the American Revolution, though state militias still remained. The military was slowly and fitfully restored, but at the start of the War of 1812, the Army and Navy combined had under thirteen thousand men. In thinking about the early Republic, it's important again to visualize something more comparable to today's New Zealand, rather than something like today's global colossus.

Despite this smaller scale, establishing a new government was no easy matter. When Washington took office as the first President, it was unclear just how the power of the presidency would be implemented. The discussions prior to ratification did not provide obvious answers to just how the presidency would work. Perhaps the perceived need for this clarity was reduced by the expectation that Washington would be the first occupant of the office, given his enormous public stature.

After the new government was launched, it became clear that there were a number of constitutional questions on which the supporters of the Constitution were unclear or in disagreement. Perhaps this reflects the fickleness of the political mind; perhaps it reflects that the Constitution's supporters had never had a clear shared understanding in the first place. We look today to the Federalist Papers for guidance, but even its authors did not always agree later about the interpretation of the Constitution. Within a few years, a major dispute broke out about the scope of presidential power. Like many disputes to follow, this one found Hamilton on one side with Jefferson and Madison on the other. Indeed, they increasingly found themselves divided on many questions, presaging the rise of the first recognized political parties, the Federalists on Hamilton's side, and the Democratic Republicans on Jefferson and Madison's.

The dispute about presidential power arose because of the war between France and England in the aftermath of the French Revolution. Those two countries were the Great Powers of the era, like the U.S. and the Soviet Union in the Twentieth Century. Everyone agreed that the United States, then a very weak power, needed to stay out of the conflict, just as a present-day country like New Zealand would greatly prefer not to be caught in the middle of hostilities between China and the U.S. The question was how to do so.

In an effort to keep the U.S. from being embroiled in the conflict, Washington issued the 1793 Neutrality Proclamation, which declared the nation to be a neutral party and prohibited certain conduct by Americans, such as trade in contraband with either side. Despite the fact that Congress had never passed a statute criminalizing such behavior, the Proclamation warned that Americans would be subject to "punishment or forfeiture," including criminal prosecution, if

they violated the rules governing neutrals under international law. It is not clear whether he thought the crime would be defined by the courts, which were still in the business of creating “common law crimes” at that time, or by Congress, or even by force of his proclamation itself. Everyone shared the goal of staying out of the war, but some thought that just as Congress had the power to declare a state of war, it must have the power to declare a state of neutrality rather than the President.

Hamilton once again stepped forward as the defender of executive power. He wrote a series of anonymous publications under the name “Pacificus” defending the President’s action. In the part of his argument that over time has received the most attention, Hamilton maintained that the President has broad powers beyond the explicit grants in Sections 2 and 3 of Article II. According to Hamilton, the President’s power over foreign affairs is limited only by express constitutional language such as the clause giving the Senate a role in making treaties. Specifically, he relied on the Vesting Clause of Article II, which says that the executive power is vested in the President. The question is what did the Constitution mean by executive powers? In the views of Hamilton/Pacificus, the clause gives the President powers beyond simply implementing the laws, and the specific presidential powers listed in the Constitution are merely illustrations of this broader power. Since the nation’s executive power was vested in the President, Hamilton reasoned, Washington’s authority to issue the Proclamation was unquestionable. Hamilton’s argument was the first clear formulation of what has become known as the “unitary executive” theory, which we will be examining in several later chapters. In addition to this more famous argument, Hamilton also argued that the President is responsible for executing the laws—not just domestic laws, but also “the Law of Nations” (as international law was then called).

At Jefferson’s urgent behest, James Madison responded to Hamilton in another series of anonymous pamphlets under the name “Helvidius.” He argued that executive authority must “presuppose the existence of laws to be executed,” and these laws can be made only by the legislative branch. He also accused Pacificus of deriving his vision of the President from the powers of the English King, insisting that the Framers of the Constitution had rejected this vision of arbitrary executive power. Madison apparently was not entirely happy with his own response, though scholars have conflicting views about why. He may have wished he’d come up with better arguments or that he’d refused to engage, or perhaps he had second thoughts about the validity of his position. In any event, whatever consensus that Madison and Hamilton may once have had about presidential power was clearly becoming frayed only a few short years after the Constitution went into effect.

This dispute between Madison and Hamilton was by no means the only issue about presidential power to emerge in the early years of the Republic. Given that the Constitution was brand new, questions about how to interpret it were constantly arising. After all, there were no precedents from the courts or past experience to use for guidance on constitutional issues. The First Congress devoted considerable time to constitutional issues, including those relating to its own powers and the President’s. Much of what it did can be seen as filling in the details of the broad outlines that emerged from the Constitutional Convention.

One symbolic but significant issue was what to call the President. Some favored “Excellency” or “Highness,” lest foreigners think that the President was akin to the presiding officer of many other organizations. But Madison, who by then was sitting in the House, insisted that “President of the United States” was a sufficient title, arguing that other titles would smack

of royalty. This again reflects the desire of the Framers to distinguish the Presidency from the still despised King. Though not a man insensitive to his personal dignity, Washington seemed happy with the choice. The nomenclature indicated that the President was merely the citizen who at any given time was holding a specific government office, not someone who had somehow been lifted to a higher personal status.

One early constitutional debate in Congress was over the power to remove executive officers who had been confirmed by the State. Views in Congress were divided, with some viewing the removal power as residing in the President regardless of what Congress said, some thinking they could only be removed by impeachment, and others thinking that the consent of the Senate would be required for presidential removal as well as appointment. We will return to this episode later in the book, since it has received a lot of attention in connection with modern disputes about the President's control over the cabinet and bureaucracy.

Another relevant issue was how much power Congress could delegate to the Administration. The First Congress did so quite broadly with regard to patents (inventions "sufficiently useful or important"), in governance of the territories, and in establishing the new seat of government in the District of Columbia (somewhere between the eastern Branch of the Potomac and Connoghochegue creek). On the other hand, the Second Congress specified postal rates and the locations of postal roads, leaving little leeway to the executive branch regarding these details.

In terms of the Senate's role more broadly, Washington initially took the Senate's constitutional right to provide "advice and consent" to treaties literally, seeking the Senate's views in person about a new treaty. The Federalist Papers actually do suggest that the Senate was supposed to play that role. But Washington was so unhappy with the ensuing discussion that he left in a huff and never came back, though he did sometimes engage in other forms of consultation. On other occasions, Washington requested the Senate's advice on the meaning of an existing treaty and on what steps he should take if it proved impossible to settle a dispute with Britain over a boundary issue through negotiation. It was not just the Senate alone that took a hand in foreign affairs. In 1793, both branches of Congress took it upon themselves to cancel a treaty with France through ordinary legislation rather than assuming only the President could do so. We will return to these issues in chapter 4.

As I mentioned earlier, the U.S. military was almost nonexistent when Washington took office. In the summer of 1789, he informed Congress that there were 672 troops remaining, and he asked for congressional authorization for the Army in order to protect the frontier. Washington also asked certain individuals to act as informal representatives to foreign governments until such time as ambassadors could be chosen and confirmed by the Senate, again taking the initiative during the transition period rather than leaving things to Congress.

Washington clearly established a strong role for the President. Given that he was by far the best known and most trusted individual nationally, he naturally became a focal point for government decisions. It is also clear that the drafters and ratifiers of the Constitution wanted a chief executive who would be more powerful than most of the state governors had been. The question of just how much stronger is one that will occupy us for the next several chapters.

In this chapter, we've touched on some of these disputes. They remain with us today: Does the President have the power to renounce treaties on his own? Can the President order military actions without congressional consent? In running the government, are there any limits on the President's power to fire officials for whatever reason? Does the President have emergency

powers outside of any statute? These aren't merely academic questions, as is known to anyone who even dips into the news from time to time. We'll spend much of the book trying to sort through the arguments that have figured in these sometimes bitter debates.

### **Bibliographic Note for Chapter 2**

For now at least, the definitive history of the time between the Declaration and the Constitution seems to be Gordon S. Wood's *The Creation of the American Republic, 1776-1787* (1998). Equally useful on the post-constitutional period is his *Empire of Liberty, A History of the Early Republic, 1789-1815* (2009). David Currie provides a lively, if opinionated, guide to Congress's struggles to interpret the Constitution in *The Constitution and the Courts: The Federalist Period, 1789-1801* (1997). For a more detailed description of the debates at the Constitutional Convention and during ratification, along with excerpts from Madison's notes and other documents, see Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution* 115–63 (3d ed. 2013). Jack Rakove's *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996), provides a concise and perceptive analysis of the Convention's proceedings. The full text of the Federalist Papers can be found on the congress.gov site. For an extensive analysis of the Hamilton-Madison dispute over the Neutrality Proclamation, see Martin S. Flaherty, "The Story of the Neutrality Controversy: Struggling Over Presidential Power Outside the Courts," in Christopher H. Schroeder & Curtis A. Bradley, *Presidential Power Stories* 21–52 (2009). Finally, on the Washington letter accompanying the Constitution, see my article, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 *Michigan Law Review* 614 (1995).

## Chapter 3

### Two Models of the Presidency

Before we take a deeper dive into specific issues relating to presidential power, it seems like a good idea to get an overview of the main lines of division between different perspectives. Today, constitutional debates over the Presidency often invoke two very different models of presidential power. There are quite a few nuances and considerable disagreements even between people who adopt the same model. But the two models tug in very different directions and call for different emphases in analyzing the issues.

One of these models has become known as the unitary executive theory. This view deemphasizes the specific grants of power to the President in the Constitution, and places much more emphasis on the first sentence of Article II, which vests the executive power in the President. At the least, the unitary executive theory holds that the President has inherent constitutional power to appoint any officer charged with executing the laws, to remove such officers at will, and to direct their decisions. In a nutshell, under this theory, every other executive officer is simply an alter ego of the President. This theory has been championed by conservatives like Justice Scalia in recent years, and not surprisingly has also found favor with Presidents of all political orientations. Believers in the unitary executive theory often find the Vesting Clause significant in other ways. Many of them, though not all, believe that it also empowers the President with a free hand in dealing with foreign countries, including use of the military as needed, and over national security more generally. The basic vision is to stake out an area of inherent presidential power and build a tall wall around that area to protect it from interference from Congress, the courts, and the states. The overriding metaphor is the separation of powers.

The other model tends to think more in terms of checks and balances among branches rather than walls between them. From that point of view, the task is not to give each branch complete autonomy within its domain but rather to strike a balance between the need for vigorous government and preventing any one branch from getting out of control. Those taking this viewpoint often tend to look for workable accommodations between the branches and to speak about protecting the core functions of each branch. For instance, although agreeing that the President needs substantial control over the executive branch, which often means the power to fire officials at will, “checks and balances” theorists are also willing to allow Congress to temper the Presidential removal power when there seem to be persuasive practical reasons for giving an official more job security. The epitome of this general approach is the *Steel Seizure* case, which will be discussed at length later in the chapter. This approach doesn’t come with a label, but it could be called pragmatic or functionalist since it emphasizes the importance of practical experience and effective democratic governance.

I should also mention a third model, which isn’t heard of as often these days as the other two. This is the congressional supremacy view, which is in some ways the mirror image of the unitary executive theory. It basically limits the President to whatever powers Congress chooses to provide, apart from the few specific powers granted in Article II, which are read very narrowly. On the other hand, congressional powers are read very broadly under this view. In particular, this model places heavy emphasis on Congress’s power to make laws that are “necessary and proper” for carrying out its own powers and those of the other branches of government. We will see aspects of this model popping up from time to time. The reasons it is

not a more important aspect of public debates probably have something to do with the relative reticence that Congress itself has generally shown in asserting its prerogatives since World War II. To make things worse in terms of fighting for its own prerogatives, Congress has seemed especially dysfunctional in recent years, which makes it hard to muster a lot of confidence in the idea that it should take a dominant role. Thus, the congressional supremacy model seems currently dormant, leaving most of the debate to take place between the unitary and functional approaches.

Those two approaches differ not only in their conclusions but in their methods of analysis. Unitary executive advocates think that the original understanding of the Constitution provides clear answers to most questions about presidential power. By and large, they consider themselves to be “originalists,” giving the original understanding the dominant role in constitutional interpretation. Functionalists find the text of the Constitution and the historical evidence far less clear, though they do emphasize the functionalist perspectives taken by Framers. That leaves them to place more emphasis on what they see as the desire of the Framers for energetic but responsible government. They also tend to think that, in general, the original understanding of Constitutional provisions is only one factor to be considered in interpreting the Constitution, but not the only one. Thus, they tend to favor the idea of a living Constitution whose meaning evolves over time. Because of the importance of this disagreement over the role of history, I’ll start with a brief discussion of originalism since it is such an important part of the clash between these two models.

### ***The Debate Over Originalism***

The debate over originalism has raged for more than forty years since the theory was full embraced by conservatives, and it shows no signs of abating. I will try to give a quick overview of the arguments on both sides of this debate. Given the amount of intellectual firepower invested in this debate, the arguments on both sides have become too complex to discuss in any great depth. My discussion will undoubtedly strike participants in the debate as shallow and unconvincing. But doing justice to the nuances would require a book of its own.

Originalists contend that their approach provides a principled basis for constitutional interpretation, eliminating or at least curtailing judicial discretion. They view non-originalist theories as too formless to keep judges from simply imposing their personal perspectives at the expense of the democratic process. In the view of originalists, that kind of judicial policymaking happened all too often during the mid-Twentieth Century in cases involving the rights of criminal defendants, religious freedom, abortion, and federal power. They often lambast these opinions as generally lacking any foundation in historical evidence of the Framers’ understanding of the Constitution. Justice Scalia was especially insistent about the need for originalism to curb judicial activism. In his view, only originalism had any prospect of keeping judges on the correct side of the law/politics divide. Originalists also argue that originalism is required because the Constitution gains its legitimacy from its ratification by the People two centuries ago, so their understanding of its meaning at the time is necessarily controlling. And they argue that intent is the usual basis for interpreting legal documents, and that in any event originalism has been the main instrument of constitutional interpretation outside of mid-century liberal activism.

Reliance on original intent came under heavy fire. It isn’t easy to establish what the delegates at the Constitutional Convention thought about many issues. There are significant gaps

in the historical record, and different historians tend to interpret the record differently. In addition, there is no reason to think that all of the supporters of the Constitution had the same expectations about how it would be applied. As we will see in the next few chapters, Madison and Hamilton famously disagreed with each other and sometimes their earlier selves about the scope of congressional and executive power in the original Constitution. It is hard to know how to attribute an “intent” to a diverse group of individuals who may not always have agreed.

In response to these concerns about the difficulty of reconstructing the original intent, many originalists have switched their focus from “original intent” to “original understanding. Put another way, they deemphasized the authors of the Constitution in favor of its audience at the time by equating constitutional meaning with the interpretation of a contemporary reasonable. This move to audience understanding opens an array of questions about the background knowledge of the reasonable reader and the methods of interpretation this reader would have applied. There might be a temptation to attribute to this hypothetical reasonable reader the views of the practitioner of originalism. There is also the concern that the distinction in principle between original intent and original meaning tends to collapse in practice given the tendency of originalists to offer up the views of especially prominent Founders (such as Madison, Hamilton, and Jefferson) as evidence of the original meaning.

Thus, originalists agree that interpretation should be based on the “original \_\_\_\_\_,” though they may disagree about precisely how to fill in the blank. Originalists also differ in the degree of generality they seek in interpreting constitutional provisions. For instance, the Eighth Amendment bans “cruel and unusual” punishments. One might interpret this provision on the basis of the specific punishments that were (and were not) deemed cruel and unusual in 1791, when the amendment was ratified. Or one might find evidence of a broader desire to ban rarely imposed punishments that violate norms against cruelty at the time of interpretation, given that what is regarded as cruel and unusual obviously changes over time.

As the “level of generality” increases, the line between originalism and the “living Constitution” begins to blur; at the extreme, it is hard to tell the difference. The liberals of the mid-century Warren Court believed they were implementing the values enshrined in the Constitution, even if sometimes in ways that the Framers did not anticipate or might have rejected. For instance, they held that Congress lacked the power to establish racially segregated schools in the District of Columbia, although the Framers (or ratifiers) of the Constitution and the Bill of Rights would have been unlikely to agree. But for some originalists, that understanding by the Framers would be less significant than the Constitution’s broader vision of government.

The differences between these types of originalism may matter in terms of arguments over presidential powers. Consider the fraught issue of the President’s power to use military force without congressional authorization. It is quite unclear what the members of the Philadelphia Convention intended on this issue because our record of the discussion is brief and confusing. (It does seem clear, however, that they expected the President to respond to sudden attacks without waiting for Congress.) It is fairly easy to find statements during and after ratification that gave the President considerable military initiative. But these statements do not directly speak to the meaning of specific clauses in the Constitution, and evidence about those clauses often points in the opposite direction.



Despite their differences, originalists are in agreement that the original intent or meaning trumps other approaches to constitutional interpretation (except, perhaps, firmly settled precedent) whenever the original history can be discerned with sufficient specificity to resolve the question at issue. As Justice Scalia once wrote, the “Great Divide with regard to constitutional interpretation is not that between framers’ intent and objective meaning, but rather that between original meaning (whether derived from framers’ intent or not) and current meaning.”

Regardless of its particular form, originalism has received a barrage of criticism. To begin with, critics have argued that originalism failed as an effort to justify the power of judges to declare laws unconstitutional. The originalist argument was that although laws come out of the democratic process, the Constitution itself has an even higher democratic pedigree because it was adopted by a supermajority of Americans. The response is that the ratification of the Constitution was not completely democratic in terms of our current norms. After all, when the Constitution was adopted, women could not vote and a substantial portion of the population consisted of slaves. Even apart from questions that arise because of limitations on who could vote during the Framing period, it remains unclear that a restriction on the current democratic majority can gain legitimacy solely from the fact of its enactment by a much earlier, long-dead majority that purported to insulate its own values and preferences from simple majoritarian change. (This, to repeat, is often called the “dead hand” objection.) One pillar of support for a legal regime can be the legitimacy of the process of adoption, but it is less clear that this can function effectively as the only support without taking into account other motivations for public acceptance.

Critics have also challenged the originalist claim of reducing judicial discretion and thereby depoliticizing constitutional law. These critics question whether historical events yield readily ascertainable interpretations or whether original meanings of constitutional texts were clear-cut. They also question whether lawyers and judges possess the training and historical knowledge needed for expert judgment about long-ago periods of time.

Finally, critics have argued that originalism fails to accurately describe the American constitutional tradition. Modern non-originalist opinions by the Supreme Court have banned racial segregation, provided legal protection to advocacy by dissidents, limited discrimination against women and sexual orientation minorities, and allowed federal regulation of matters such as employment discrimination, environmental pollution, and organized crime. Critics have portrayed originalism as a threat to re-impose an archaic legal order to the detriment of equality values, civil liberties, and a modern, integrated economy and society.

In response, some originalists have attempted to demonstrate that these decisions actually are consistent with the original understanding. Resort to higher levels of generality is one way to square originalism with modern-day decisions that have established principles with deep public appeal. As an example, consider the issue of segregated schools. We might look at whether people at the time specifically thought that various constitutional provisions banned segregated schools. Or we might consider the question at a more abstract level, asking about what concepts of equality, fairness, and citizenship were viewed as inherent in the Constitution’s language.

A tension between constitutional meaning and present-day values is inherent in the nature of originalism, and it limits the ability of originalist scholars to collapse the distance between the two. Without some distinction between current-day understanding and original meaning, originalism would be indistinguishable from the “living Constitution” approach that it rejects.

However we fill in the blank in the “original \_\_\_”, whether with intent, understanding or something else, the word “original” highlights that it is not the present but the past which is in control.

Another problem originalists face is what to do when the history does not establish a clear answer to their questions. One possible solution is to establish presumptions that take over, such a presumption that the President can act independently of Congress except where the meaning is clearly to the contrary. (Or, of course, one might establish the contrary presumption). Another option favored by some originalists emphasizes the idea of “constitutional construction” as an enterprise distinct from constitutional interpretation. According to these originalists, interpretation focuses on the original meaning of the constitutional text, but construction does not; construction kicks in when original meaning runs out. The so-called construction zone of these new originalists is a space in which other tools of constitutional law can operate. As an example, consider the President’s power as Commander in Chief. An originalist might interpret this power to include all the powers properly belonging to a military commander, but then turn to non-originalist reasoning to decide whether that description properly applies to the use of drones.

One problem originalists face is what to do about Supreme Court decisions they consider wrong on originalist grounds. A few originalists, such as Justice Clarence Thomas, simply think those decisions should be overruled as soon as possible. But most think that it is important to give weight to judicial precedents, as has been the practice in the Anglo-American legal tradition. Just how much weight precedents should have is something originalists disagree about it.

It is only fair to explain my own view about originalism. I have to confess that I’ve never been able to quite get my mind around the idea that the meaning of the Constitution was fixed for all time on the day that the ninth state ratified. This is partly because I believe that the historical record is more complex and ambiguous than many originalists seem to think. But it is also partly because deciding tough issues on the basis of history, without considering the lessons of later history and present realities, just seems to me like a strange way to run a government. In a law review article, I wouldn’t put my conclusions this bluntly or simplistically, but readers of this book don’t need all the nuances. Still, like nearly all non-originalists, I think that the history of the Framing period is always relevant to constitutional disputes and sometimes deserves heavy weight. That’s why I co-authored a book about constitutional history that features long excerpts from the convention debates and the ratification arguments.

I do realize that many smart people disagree with me about the originalism issue, and the issues are far more complex than the previous paragraph suggests. It is possible that my views are simply a product of the era in which I learned constitutional law, when the dominant view embraced the idea of a living Constitution. Or my views may be a product of ideology, since many of today’s originalists are more conservative than I am. (It seems to me, however, that this is something of a historical accident. A half-century ago, the leading originalist was Justice Hugo Black, one of the leading liberals on the Warren Court.) All I can say is that I’ve thought about these issues for many years and continue to hold these views.

In any event, you don’t have to agree with me about originalism for purposes of this book. The meaning of history is rarely indisputable, so even originalists can reach very different conclusions. In what remains of the book, I will try to be even-handed in giving an account of the relevant history. Like almost everyone else who writes about constitutional law, I do consider

the views of the Framers to be very important, just not quite as decisive as originalists believe. If you think I'm wrong about that, you're welcome to give the historical discussions in later chapters as much weight as you find appropriate. Correspondingly, you're welcome to give less weight to Supreme Court decisions, although if you're like most originalists, you won't brush them aside completely. In short, the dispute between originalists and non-originalists is frequently a matter of emphasis, even though legal scholars including me have tended to emphasize the theoretical differences over the practical overlap.

### *The Unitary Executive Theory*

The term "unitary executive theory" is shorthand for a cluster of views about presidential power. Strictly speaking, advocating a unitary executive is merely a rejection of the idea that Congress can delegate some government decisions to individuals who are not *completely* controlled by the President. Thus, it's a theory about the chain-of-command within the government. It would probably be best if the term had been limited to that single issue.

If adopted, the unitary executive theory would mean some fairly sweeping changes in the way modern government has functioned. For over a century, enforcement of some laws has been given to independent agencies like the Federal Trade Commission (FTC), the Federal Election Commission (FEC), or the Securities and Exchange Commission (SEC). The heads of these commissions have been appointed by the President, but the President needs to show "good cause" to remove them before their terms are up. Modern practice includes not only a variety of independent federal agencies like those mentioned above, but also a range of other mechanisms to ensure limit political influence over the operation of the bureaucracy, such as civil service protections, inspectors general, and voluntary state enforcement of federal law. A later chapter will discuss the ongoing debate about the extent of the President's control over the Executive Branch. As we will see in a later chapter, the Supreme Court these days seems increasingly sympathetic to the unitary executive vision of Presidential control over the Executive Branch, though it remains to be seen just how far the Court will go.

Beyond the issue of the President's control over the bureaucracy, the term "unitary executive" is often used more broadly to refer to arguments for inherent presidential authority more generally, not just inherent authority to direct executive-branch officials. One reason is that these broader theories view certain government powers as requiring unified implementation, not just the power to administer the government. Here, the "unitary" concept really means something like, "exercised by a single President rather than a President plus members of Congress plus judges." Another reason is that many of the arguments for these broader claims overlap the argument for the narrower one about the structure of the Executive Branch.

All of the variants of the unitary theory can be seen as relying on three major arguments: the constitutional text, the original understanding, and subsequent practice. We'll be returning to the unitary executive theory throughout the book, so you should get a better understanding of the theory as we go along. But here is a brief orientation to these three arguments and some common counter-arguments.

In terms of the constitutional text, the theory relies first and foremost on the Vesting Clause. Unitary executive theorists argue that this clause places the executive power in the President, not in some more diffuse body. This understanding of the Vesting Clause is reinforced by the Take Care Clause, which makes the President personally responsible for the "faithful execution" of the laws. By "vesting" the "executive power" in the President, so the argument goes, the

Constitution makes it clear that only the President and subordinates can execute the laws. For advocates of the broader theory, the same language gives the President broad powers over foreign relations and use of the military, which are said to be inherently executive.

Critics of the unitary theory do not view the Vesting Clause as a substantive grant of power but rather as descriptive of the general nature of the office. They note that other parts of Article II speak of duties or powers of other officers, implying that the President does not hold all executive power in his or her own hands. In the critics' view, the Take Care Clause requires the President to do his or her best to ensure that the laws are faithfully executed but does not imply that the President is responsible for all decisions made throughout the Executive Branch. And the Take Care Clause may actually impose limitations on the President's control of subordinates in some circumstances, in cases where presidential control might actually undermine the proper execution of the laws. Critics also emphasize that the Necessary and Proper Clause gives Congress the power to pass not only laws necessary and proper to the exercise of its own powers, but also to the powers vested in the other branches of the federal government. The upshot is that they agree that the President must have considerable control over the executive branch, but not necessarily the absolute control advocated by the unitary theory. In terms of the broader argument about the Vesting Clause, they believe that the President's power over foreign relations and military matters must be linked to the more specific grants of power in Article II, such as the power to act as Commander-in-Chief.

Advocates of the unitary executive theory also point to a considerable body of evidence before and during the drafting and ratification of the Constitution. Well-known political theorists such as John Locke and Montesquieu wrote of the importance of separating the legislative and executive powers to avoid tyranny. Some opponents of the Constitution advocated an executive council to restrain and counsel the President; supporters pointed to the need for a single head of the Executive Branch to obtain vigorous action as well as accountability. In addition, certain essays in the Federalist Papers, particularly Federalist No. 70 (which we have discussed earlier), stress the need for an energetic executive. The ratification debates also contained expressions of the importance of the Take Care Clause to ensure the vigorous enforcement of federal law.

Critics of the unitary executive theory point to other historical evidence bearing on the role of the President. Essentially, they accuse unitary theorists of cherry-picking statements that give a false picture of clarity and consensus rather than portraying the more complex and conflicted process of decision making. Critics instead see considerable dispute and uncertainty at the Constitutional Convention about the meaning of the separation of powers. For instance, Madison proposed a Council of Revision that combined executive and judicial functions. Rather than reflecting a clear theoretical understanding of the separation of powers, debates turned on more functionalist considerations. During ratification, according to the critics, the supporters of the Constitution pointed to the need for unity at the top of the executive branch, but did not further argue that all officials must be at the beck and call of the chief executive in order to ensure effective government. Indeed, at the time of the Founding, a variety of public and private actors enforced federal law.

Advocates of the unitary theory also rely on post-ratification history to confirm their position. Much of this history concerns actions and statements by early Presidents, who asserted the power to direct a variety of other Executive Branch officials. Congress was divided on the issue, but many members did believe that the President had the constitutional power to remove Executive Branch officers, though quite a few others disagreed. Once again, critics contest the

evidence. They point to the laws establishing the Treasury Department and the Comptroller General as instances in which Congress took pains to establish the duties of offices independently of the President and in which Congress viewed these offices as enjoying a special relationship with its own activities. Madison seemed to think that officers performing more judicial functions should be shielded from removal. Although the statute establishing the Post Office originally provided that it would operate under the direction of the President, this language was removed almost immediately when the law was amended.

As we observed earlier, none of these arguments and counter-arguments have gone uncontested. We do not expect the debate among legal scholars and historians to be settled any time soon. Today's increasingly conservative Court may well come to embrace the unitary executive theory in one form or another. But as we will see, the Court has overall taken a different approach.

In terms of the broader claims for presidential power, the record of the past century or so is conflicted. Presidents have definitely dominated the national security sphere for the past century or more, frequently giving little heed to whatever prerogatives Congress might claim. But these Presidential assertions of power have not gone undisputed, and from time to time Congress has successfully pushed back. These issues will form the basis of later chapters.

The mirror image of the unitary executive theory is what has been called the Whig theory of the presidency. This theory was espoused by the Whig Party from the time of Andrew Jackson until it later fragmented, with many Northern members forming the core of the new Republican Party. The Whig theory is based on congressional supremacy. Congress sets policy and structures the government, while the President is merely Congress's agent in carrying out its decisions. This theory was born in reaction to Jackson — whom the Whigs called “King Andrew” because of his penchant for unilateral executive action. The Whig theory came close to describing the operations of the government during the time between Lincoln and Teddy Roosevelt, although Presidents were probably never actually as weak as the theory suggested. Even a President subordinate to Congress is still a very powerful individual.

As we will see, the Supreme Court has taken a middle ground between the unitary theory and the Whigs. It has often been broadly supportive of Presidential power, but it has been more concerned about checks and balances than many unitary theorists. The resulting legal doctrines have not been as crisp and clear as they would be if the Court had fully bought into either of the two more purist approaches. So far, however, the Court has preferred to play the role of referee between Congress and the President rather than giving either branch complete dominance.

The phrase “wall of separation” is usually used in speaking about religion and government in the context of the Establishment Clause. But it would also be an apt metaphor for unitary executive theorists. They view the government as divided into three walled kingdoms — executive, legislative, and judicial — each with complete power within its own kingdom. There are only small number of doorways between the kingdoms that allow one to intrude on the affairs of another. A different metaphor — “checks and balances” characterizes an alternative vision of the relationship between the branches. It emphasizes the ability of the branches to prevent abuses of power by each other, though it also leaves room for considerable cooperation between the branches. Indeed, if the three branches were constantly at war, little would ever be accomplished. This more functional vision has heavily influenced the modern Supreme Court.

### **The *Steel Seizure* Approach to Presidential Power**

The leading case today on presidential power is *Youngstown Steel & Tube Co. v. Sawyer* (better known as the *Steel Seizure Case*). The case arose during the Korean War. As we will discuss in Chapter 5, this war was begun without any formal approval from Congress. When a labor dispute threatened to close American steel mills, President Harry Truman concluded that such a closure would cripple the U.S. war effort. Consequently, he ordered the steel mills to be seized by the government. You may be picturing tanks and armed troops descending on the steel mills, but the seizure basically meant that notices about the takeover were posted in the mills and that the government could set wages and prices. The steel companies continued to operate the mills under protest and challenged the seizure as unconstitutional.

Truman was a Democrat, and every member of the Court had been appointed by him or Franklin Delano Roosevelt, his Democratic predecessor. Several had been political allies or had served under one President or the other. One might have expected that the Court would rule in Truman's favor. The majority opinion was written by Justice Hugo Black, who had attained his position by being a ferociously loyal Democratic Senator. His dissenting opinions in free speech cases had made him a liberal icon. But in a bluntly worded opinion, he rebuffed Truman's action.

Before deciding constitutional issues, the Supreme Court typically considers whether there is a non-constitutional basis, such as a federal statute, that would decide a case. Justice Black began by asking whether Congress had authorized Truman's action. He observed that while two statutes did allow the President to seize property under certain circumstances, neither of them was applicable, and that Congress had provided other mechanisms for dealing with labor disputes. Thus, any justification for Truman's action would have to come directly from the Constitution rather than any authority delegated by Congress.

Black then turned to the potential sources of constitutional authorization for the seizure. Justice Black dismissed the argument that the seizure was an exercise of the President's power as commander-in-chief: "we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." Similarly, he was unwilling to rely on the President's executive power as a source of authority. "In the framework of the Constitution," he said, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Rather, Congress has the law-making power, and the Constitution "did not subject this law-making power of Congress to presidential or military supervision or control." Finally, Justice Black found it irrelevant that previous Presidents had sometimes seized property without statutory authority in wartime or emergencies, for "even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or in any Department or Officer thereof.'" Because in his view the seizure lacked either congressional or constitutional authorization, Justice Black concluded that it was unconstitutional.

Although it was joined by four other Justices, making it the official majority opinion, the authoritativeness of Justice Black's opinion was undercut by the concurring opinions of those Justices, three of which deviated from his reasoning and considered the seizure invalid because it was at odds with congressional policy. Instead of Justice Black's opinion, the more nuanced concurring opinion of Justice Robert Jackson has come to be seen as the authoritative statement of the law. Justice Jackson's opinion is especially interesting because, as Attorney General for President Roosevelt, he had endorsed strong executive action, including one industry seizure that

the government cited in defense of the steel seizure. He had also gone out on a limb to support some of FDR's actions in the run-up to World War II.

Justice Jackson pooh-poohed the possibility of defining presidential power based on the original understanding. In his view, “[j]ust 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.” The inability to find clear historical answers was not for lack of trying, he contended, for “[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.” Rather than focusing on original intent, he thought, it was more important to view the issue of presidential power in the context of the working relationships between the branches of government, as they had struggled with the problems of governance over the years. Or, as put more eloquently by Justice Jackson, “[w]hile 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.”

With this idea in mind, Justice Jackson divided issues of presidential power into three categories. The first category strongly favors the President. In this first category, Congress has authorized the presidential action at issue, and the President's powers are at their maximum, because the President exercises the combined powers of both branches. In the second category, Congress is silent, but the President claims independent authority. Here, past practice can be important. In this category, outcomes are more doubtful. According to Justice Jackson, “[w]hen 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.” Consequently, “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.” Justice Jackson found it difficult to prescribe rules for this category, believing that “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” In the third and final category, the President acts in the face of a congressional prohibition, and here “his power is at its lowest ebb.” The President's “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.”

Justice Jackson placed President Truman's steel seizure in the third category because Congress had not left property seizures as open territory, but had provided for its use in some circumstances that were not present and by implication banned it elsewhere. This left only the third category, in which presidential actions are subject to the most stringent scrutiny. He rejected the argument that the Vesting Clause gave the President unlimited powers: “The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.”

Justice Jackson also rejected other possible sources of presidential power. He thought the Commander-in-Chief Clause inapplicable, seeing “indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants.” Finally, Justice Jackson rejected the government's reliance on the Take Care Clause, which he viewed as extending

presidential power as far as there is law to enforce, while the Due Process Clause means that government power extends no further than law exists to authorize it. Finding no explicit grant of power to the President that might override congressional disapproval, Jackson held the seizure unconstitutional.

The *Steel Seizure Case* shows that exercises of presidential power are on strongest ground when they trace to some grant of authority, either in a specific clause in the Constitution or in a statute enacted by Congress. Relatedly, the case establishes what can be called the fundamental principle of congressional priority—that with defined exceptions, the law maker (Congress) gets to control the law enforcer (the President).

The status of Justice Jackson’s opinion as authoritative was cemented three decades later by *Dames & Moore v. Regan*. This opinion was written by Justice William Rehnquist, who perhaps not coincidentally, had been a law clerk for Justice Jackson the year the *Steel Seizure Case* was decided. *Dames & Moore* arose from the seizure of the American embassy in Tehran by Iranian students, who were generally thought to be acting on behalf of the anti-American government. President Ronald Reagan negotiated an agreement with the Iranian government for the release of the hostages. In return for their release, the United States agreed to release Iranian funds in America, suspend all legal actions in U.S. courts against the government of Iran, and refer all claims against Iran to an international tribunal. The major constitutional dispute involved the suspension of litigation in the U.S. courts. Although no statute directly authorized the suspension, the Court concluded that the case fell in Justice Jackson’s first category, given a long practice of presidential settlement of private claims against foreign governments and congressional legislation implementing these settlements. The Court also made it clear that *Steel Seizure* provided the appropriate framework for analysis, though not a rigid set of rules.

The *Steel Seizure* framework sees congressional and presidential powers as overlapping and sometimes unclear. When Congress and the President work together, their powers reinforce each other. But when they conflict, it is Congress that prevails unless it is impairing the President’s core powers. This is quite a different way of thinking about power than the wall of separation. Both visions claim to embody the rule of law and democratic accountability, but in different ways. We will see this conflict again and again during this book, starting with a look at disputes over the President’s control of foreign affairs in the next chapter.

### **Bibliographic Notes for Chapter 3.**

The amount of scholarship about originalism is voluminous. For arguments in favor of originalism, see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012); Robert H. Bork, *The Tempting of America: The Political Seduction of Law* (1990). Some recent elaborations on originalist theory are offered in Randy E. Barnett and Evan D. Bernick, “The Letter and the Spirit: A Unified Theory of Originalism,” 107 *Georgetown Law Journal* 1 (2018); William Baude and Stephen E. Sachs, “Grounding Originalism,” 113 *Northwestern University Law Review* 1455 (2019). In his book *Living Originalism* (2011), Jack Balkin offers a rare liberal approach to originalism, though his theory is not terribly far removed from the “living Constitution” approach in some ways. On the critical side, see Frank B. Cross, *The Failed Promise of Originalism* (2013); David A. Strauss, *The Living Constitution* (2010); and Mitchell Berman, “Originalism Is Bunk,” 84 *NYU Law Review* 1 (2009).



Fascinating background on the two main cases discussed in this chapter can be found in two contributions to Christopher H. Schroeder and Curtis A. Bradley, *Presidential Power Stories* (2009): Patricia L. Bellia's "The Story of the Steel Seizure Case," and Harold H. Bruff's, "The Story of Dames & Moore: Resolution of an International Crisis by Executive Agreement."

## Chapter 4

### The President and Foreign Affairs

War and foreign affairs, the subjects of the next two chapters, overlap in many ways. Both involve national security. And with the exception of the Civil War, military hostilities have always involved foreign actors. Thus, warfare, diplomacy, and treaties are all connected. So are the presidential and congressional powers relating to those issues. It's not surprising that the Framers of the Constitution often lumped both subjects together as "the powers of war and peace." But trying to cover war and foreign affairs in two chapters is hard enough: there is more than enough for a separate book on each subject. Trying to cover everything in a single chapter would be completely unmanageable.

I'll begin with foreign affairs — meaning everything about our relationship with foreign countries outside the use of armed force. This includes diplomacy but also other activities such as intelligence gathering. When Presidents are frustrated by the difficulty of dealing with Congress and statutes limiting their domestic policies, it is not uncommon for them to meet with foreign leaders abroad or announce a bold new foreign policy. Dealing with foreign powers can be a relief after the frustrations of domestic politics. As early as George Washington, Presidents have taken the initiative in this area and have done their best to relegate Congress and the courts to the sidelines.

As always, we should start with text of the Constitution. Article II provides the President with three powers specifically relating to foreign affairs: the power to receive foreign ambassadors, the power to appointment U.S. ambassadors, and the power to make treaties. The latter two powers require the advice and consent of the Senate. Presidents have built their control over foreign affairs on a generous interpretation of these powers, buttressed by a suite of other arguments.

While these clauses could be read narrowly to make the President the mouthpiece of Congress, it is not unreasonable to argue that they give the President control of diplomacy, meaning all formal communications with foreign governments including treaty negotiations. In the arena of foreign affairs, Presidents also have relied on the general "executive power" they claim under the Vesting Clause. And from the beginning, they have pointed to a functional justification: dealing with foreign countries involves the kind of decisiveness, secrecy, and information available only to the Executive Branch. They can also point to the history of presidential dominance of foreign affairs as an accepted feature of American government.

The Constitutional text does not give Presidents the only role in dealing with other countries. While Presidents have exercised broad discretion in foreign affairs, Congress also has important foreign affairs powers. The Senate must approve treaties and the appointment of ambassadors. Historically, the power to approval treaties has included the power to add "reservations," in effect exceptions and conditions on ratification. Thus, unlike the President's power to approve or veto legislation, which is limited to a simple yes or no, the Senate plays a more active role in formulating international commitments. The Commerce Clause gives Congress the power to regulate international trade, not just commerce among the states. Congress also has power to punish "Offences against the Law of Nations." Congress can intervene in foreign affairs using other powers, such as conducting oversight hearings and refusing to appropriate funds for some

activity abroad that the President wants to pursue. Even state governments can enter into “compacts and agreements” (but not “treaties”) with foreign powers, so long as Congress consents. These various powers can be used to initiate policy or counter presidential initiatives. Of course, they can also be used — and frequently are used — to delegate additional authority to the President beyond that which the Constitution conveys directly.

There are many question in this area that have never been addressed by the courts, leaving Congress and President to fight things out. Courts are wary of intervening in the area of foreign affairs. They often say that these cases present “political questions” over which they have no jurisdiction, meaning that the issues are relegated to the “political” branches of government to work out. Advocates on both side have, over the course of two centuries, evolved their own batteries of arguments based on the constitutional text and structure, evidence of the original understanding, whatever caselaw does exist, and historical practice, sometimes augmented by arguments about likely consequences. The Executive Branch has been especially assiduous in marshaling legal arguments. Opinions by the Attorney General or in more recent years the Office of Legal Counsel in the White House now constitute a formidable body of “precedents” that Presidents can cite. Congress has been less systematic about making its arguments, but it does not lack for advocates. With the courts often refusing to act as referees, there is no outside party to rule on the strength of these arguments.

One of the dividing lines in this debate is whether the Vesting Clause gives the President ultimate control of foreign affairs. Although all supporters of the unitary executive theory agree that the Vesting Clause gives the President inherent “executive” powers, they don’t all agree on whether this include foreign affairs. Functionalists agree that the President has broad foreign affairs powers, but they don’t find the source of those powers in the Vesting Clause. They are more inclined to give broad interpretations of specific grants of power, such as the President’s power to receive foreign ambassadors and appoint American ones. Or else they simply fall back on pragmatism and historical practice, as opposed to the constitutional text. In looking at the allocation of powers over foreign affairs, it makes sense to begin with the Vesting Clause, and then turn to the functionalist approach, which the Supreme Court seems inclined to use in these case in the form of the *Steel Seizure* test.

In this chapter, I will focus primarily on diplomacy and non-military options available to the President. However, there is one important issue that is common to both the military and foreign affairs authority: the claim that the Vesting Clause gives the President sweeping exclusive powers in these domains. To avoid duplication between these two chapters, I’ll discuss the Vesting Clause argument here as it applies both to war and foreign relations.

Although government lawyers and respected scholars have made the Vesting Clause argument, it has had only a modicum of support from the Supreme Court. Instead, the Court has taken a more measured view of presidential power. That view has nevertheless resulted in substantial victories for the Executive Branch. It differs from the argument based on the Vesting Clause in several ways. It gives more weight to the specific grants of power to the President and Congress; it accepts that there is a substantial gray area in which the allocation of power is unsettled; and it also gives weight to the accommodations worked out by the other two branches within that gray area. In other words, it looks much like the *Steel Seizure* approach of Justice Jackson.

### **Residual Powers and the Vesting Clause**

There are several possible interpretations of the Vesting Clause. The first is that it does nothing more than designate the President as the person in charge of the Executive Branch, without saying what powers go along with that position. That makes it much like the Vesting Clause in Article III of the Constitution, which vests “judicial power” in the federal courts, while Article III then goes on to delimit that power by defining the jurisdiction of those courts. The second view of the Vesting Clause is that it does bestow power on the President to execute the laws, but not any additional power to act independently of Congressional directives. I’ll defer discussion of those two positions until we get to the chapter on the President as Chief Administrator. In terms of foreign affairs and warfare, it is the third interpretation that is most relevant. Under this view, the Vesting Clause gives the President complete power over foreign affairs, including the use of force, except where the Constitution explicitly gives power to Congress or requires the President to have Senate approval. This interpretation takes the Vesting Clause to its broadest possible sweep.

The question of whether the Vesting Clause gives the President residual powers, akin to the prerogative powers of the Eighteenth Century English King, is hotly contested. And no wonder, because this interpretation could give the President inherent power to engage in a suite of actions without Congressional authorization: attacking other countries, intelligence and covert activities, preventing foreigners from entering the country or deporting them for security reasons, and so forth. Naturally, this interpretation is congenial to Presidents. The debate over this interpretation has been mostly waged in terms of the original understanding.

If this seems like a purely academic debate, it has also had real-world consequences. The George W. Bush Administration used this argument as the basis for a secret surveillance program, involving interception of data from electronic communications on a vast scale. The Administration claimed that the President had authority under the Vesting Clause to create this program as part of his inherent power over national security. A federal statute called FISA seems to prohibit this type of surveillance without a warrant. But in the Administration’s view, the Vesting Clause trumped the statute — Congress simply had no power to interfere with any program instituted by the President to protect national security. This broad claim turned out to be more sweeping than the Bush Administration later proved willing to defend. But the Vesting Clause remains an important part of constitutional argument about foreign affairs law.

Despite the claims of advocates on both sides, there is ammunition for both sides of the debate in the historical record. Hundreds of pages and thousands of footnotes have been written that do battle over the historical record. The debate is not easy to untangle. The debate is made more complex because there is more than one pathway to concluding that the President has broad power over some particular issue. One is to find the power in the Vesting Clause. Another is to give broad readings to the President’s specific powers relating to foreign affairs and to the President’s duty to “take care that the laws be faithfully executed.” Moreover, there’s also a distinction between saying that the President has the power to do something in the *absence* of any statute and saying the President has the power to do something *despite* any statute. During the drafting and ratification of the Constitution, speakers often had no reason to focus on these fine points. Even when they did, advocates of presidential power felt free to mix and match whatever arguments supported a particular presidential action.

In looking at the historical record, both sides of the Vesting Clause debate find themselves having to explain away certain aspects of the constitutional text. For the Vesting Clause advocates, the problem is that parts of Article II seem superfluous if they are right. If the Vesting

Clause already gives the President control of foreign affairs and the military, why does Article II go on to say the President will receive ambassadors and be commander-in-chief of the military? Supporters of the Vesting Clause argument basically respond by saying that these specific powers were only included to provide emphasis. Their opponents have their own textual embarrassments. One is the Vesting Clause itself, which does seem to be phrased as if it were a grant of power, more so than the similar clauses in other parts of the Constitution applying to Congress and the courts. The response is that we shouldn't read too much into minor differences in wording. The other textual embarrassment is that, unless the Vesting Clause covers foreign affairs, there may be activities that may fall in the cracks between congressional and presidential powers, leaving no one who can exercise them. Between war and peaceful diplomacy are a range of other activities that a government can engage in. These activities can only be squeezed within the specific grants of power to the President and Congress by giving those grants very expansive readings. The alternative is to argue that any additional foreign affairs powers were not directly assigned by the constitutional text but instead must be assigned on functional grounds to Congress or the President. That's not necessarily a terrible argument, but it's not the argument you would most want to rely on. The upshot is that both sides can find support in the constitutional text but have some problems to deal with. That makes the resort to the original understanding especially important.

The core historical argument in favor of residual power goes something like this. Influential thinkers like John Locke and Montaigne had viewed power of relations with other countries as either separate from "executive" power but associated with it in practice, or else as an integral part of the role of chief executive. Everyone during ratification agreed that direct control of foreign affairs by Congress was unworkable. It was understood that the need for speed, secrecy, and unified action were better suited to a single officer like the President than to Congress. Moreover, the Washington Administration took vigorous initiatives in this area, indicative of a shared belief that the President had inherent authority over foreign affairs. In light of this historical background, we should read the historical materials with a presumption that the President was meant to possess this set of residual powers except when specific constitutional provisions dictate otherwise.

The core argument for the other side is also straightforward: In term of the drafting and ratification of the Constitution, it is hard to find anyone who explicitly argues that the President has residual powers of this kind. In fact, it's not clear that anybody said "the Vesting Clause gives the President complete control over maintaining peaceful relations or starting wars." It is easy, on the other hand, to find statements vehemently denying that the President would be anything like the still-hated English Monarch, as well as statements asserting that the powers of war and peace were not the President's (or at least not the President's alone). If the clear meaning of the Vesting Clause had been to give the President such unchecked powers, such as the power to start wars without congressional approval, it surely seems that someone would have said so explicitly. They certainly spent enough time talking about far less weighty issues.

Keeping these clashing views in mind in mind, we should take a look at some of the specific evidence cited by residual-power advocates as support. First come the views of Locke and Montaigne. Locke provides only ambiguous support. He actually distinguished between what he called the executive power, the power to carry out the laws, and federative power, which includes everything to do with foreign nations. He did say, however, that in practice they were often found in the hands of the same person for practical reasons. Montaigne didn't draw this

distinction, but his general discussion of executive powers wasn't especially clear. It's also unclear just how much the Founding generation was familiar with this aspect of Locke and Montaigne's theories.

Blackstone, a legal luminary whose work was familiar to the Framers, also attached foreign affairs and war powers to the King, but viewed them as "prerogative powers" — special authority attached to the monarch — rather than part of the King's executive power to implement the laws. This makes it somewhat unclear whether a grant of "executive power" to the President included these powers. Other prerogative powers were expressly dealt with in the Constitution — for instance, granting titles of nobility was forbidden and the powers to mint money and declare war were given to Congress. But what happened to any remaining prerogative powers was not specified, at least not unless you think the Vesting Clause carried an unmistakable (but largely unspoken) message to that effect.

In reading these authors, it is sometimes hard to distinguish between assertions about the inherent nature of executive power and practical policy arguments for associating the two. This is an important distinction, because if the term "executive power" necessarily included foreign affairs powers, then the Vesting Clause explicitly gave them to the President. But if the argument is just one about good constitutional design, we still have to decide whether the Constitution followed that design advice.

Even if the term "executive power" was not understood to include foreign affairs, the Framers arguably did assume the two were connected when they explicitly gave the President executive power. But that claim isn't as powerful as saying that the term "executive power" was understood to *necessarily* include foreign relations power. If my wife asks me to pick up whatever "groceries" we need, it's not unreasonable to assume that includes other things commonly sold at grocery stores, but that doesn't mean that light bulbs are a kind of grocery. Nor does it mean by implication she meant me to pick up lightbulbs at a hardware store. It's not illogical to call light bulbs a non-grocery item sold at grocery stores. It's also not necessarily illogical to say that foreign affairs powers are a kind of non-executive power often given to a country's chief executive. But that's not the same as saying it actually *is* an executive power.

The same problem comes up with other historical evidence: It's not always clear whether the speaker was explaining the term "executive power" or making inferences about other powers that seemed associated with the President merely by implication. The powers to appoint ambassadors and make treaties with Senate consent, and to receive foreign ambassadors, could be read broadly to encompass full control of all formal interactions with foreign powers. And the Commander-in-Chief power could be read to give the President wide latitude in military matters, a question we return to in the next chapter. So except when historical figures were being careful to cite constitutional chapter and verse, their assertions or conduct relating to the President's constitutional authority might reflect views about the Vesting Clause, or they might reflect views about other clauses — or they might reflect general impressions not tied to any specific constitutional language.

Early practice under the Constitution also has some ambiguities. Congress acknowledged that it was up to the President to determine what diplomatic officers to appoint, though he lacked authority over how much to pay them. After an early effort to get formal advice from the Senate about a treaty proved frustrating, Washington gave up on that practice and negotiated on his own. On the other hand, under Adams, Congress exerted a good deal of authority over

relationships with France. It successfully demanded copies of diplomatic communications with France (the famous “XYZ” letters), based on a claim that the power to declare war included the power to obtain relevant information. Congress declared that an existing treaty with France was no longer in effect. And in the Alien and Sedition Acts, Congress authorized deportation of aliens and restrictions on speech that it felt threatened national security, without any qualms that these were Presidential prerogatives.

A key piece of evidence is the Hamilton-Jefferson debate over Washington’s neutrality declaration, which was mentioned in chapter 2. In at least one respect, this debate strongly supports the residual power theory. Hamilton states it in unequivocal terms, perhaps for the first time ever, and Vesting Clause advocates have made much of this fact. But the other side has counter-arguments. Hamilton did not rely solely on this argument, but spent much of his time on other defenses of Washington’s action. The primary one was that Washington wasn’t changing the legal status of the U.S. with regard to the French or English belligerent powers, he was merely stating the fact that the U.S. had not joined the conflict and was therefore neutral. Moreover, while Hamilton was a weighty constitutional analyst, so was Madison, who rejected the residual power thesis. And finally, all this was during the heat of political battle, when neither man was offering disinterested opinions about the law.

All this is just the tip of the iceberg in terms of the historical debate. But the fact that the debate has continued this long is an indication that it is possible to interpret the evidence in more than one way. It’s not impossible to support the Vesting Clause based on the historical record, nor is it impossible to reject it. If one approaches the record with a strong presumption that foreign affairs *has to be* the President’s domain, confirming evidence can be stitched together. But there’s also substantial evidence for giving Congress a greater voice than that.

Later, I’ll discuss the argument that the Vesting Clause has something to say about the President’s control over the rest of the Executive Branch. That argument seems stronger to me. But in my view, the argument that the clause gives the President virtually unlimited power over foreign affairs and the military is hard to sustain. The Framers were too much at pains to disclaim any resemblance of the Presidency and to the British monarchy. Plainly, the public would have been repelled by the argument that the President inherited the King’s royal prerogatives. And the whole thrust of the Constitution was to divide between different political actors the “powers of war and peace” — control of military force and foreign relations — rather than reposing them in a single institution.

There are people who have devoted much of their scholarly careers to this debate. I am not one of them, so my view should be taken with a grain of thought. But the claim of presidential supremacy across the field of foreign affairs seems like an extraordinary claim to me, given that it creates such a broad swathe of unchecked power. Extraordinary claims require extraordinary evidence. After all, under this view, the President would have the unchecked right to break treaties, impose sanctions, and even use military force, with only narrow exceptions. Yet the Framers feared the abuse of power and were well aware of the grave consequences of such actions for the nation. Assuming they meant to write the President a blank check thus seems at odds with the general tone of Founding-era thought. If that *was* the original understanding of the Vesting Clause regarding foreign affairs, it is very hard to understand why this would not have been discussed loudly and often. Yet there is little evidence of such claims by either the defenders or the opponents of the Constitution. This doesn’t mean that the Framers intended the

President to play second-fiddle to Congress in terms of foreign affairs, but it makes it hard to believe that they intended to leave Congress virtually impotent.

Since I am not an originalist, this view of the historical record isn't necessarily decisive for me. Practical considerations and historical practice both support a strong Presidential role in these domains. So do the specific powers given the President relating to diplomacy. Moreover, even if Congress is thought to have ultimate power in this area, it isn't unreasonable to think that Congress has implicitly given the President a relatively free hand in the meantime. If nothing else, the President is the person in charge of managing the government, and it is often reasonable to assume that the manager is in charge of handling whatever crises comes up on a day-to-day basis in the absence of instructions to the contrary. Or to put it another way, to the extent that certain types of presidential actions have become customary, you might expect Congress to speak up if it had a problem with them.

### **The Supreme Court and Foreign Affairs Powers**

The Supreme Court has never relied on the Vesting Clause argument in a foreign affairs case. This is not to say that the Court has rejected a strong role for the President in foreign affairs. But although the Court didn't rely on the Vesting Clause argument, one opinion's language evokes presidential supremacy in this domain. That case is *United States v. Curtiss-Wright Export Corporation*.<sup>1</sup>

If there is one case that Presidents most love to cite in arguments about foreign affairs powers, it is *Curtiss-Wright*. This 1930s case grew out of a war in South America that had produced increasing bloodshed. Congress passed a law giving the President the power to ban exports of weapons to either side if doing so would help bring the war to a close. The President issued such a ban, and the defendant blatantly violated it, claiming it involved an unconstitutional delegation of power to the President. Although the *Steel Seizure Case* was still some years in the future, the Court rejected this argument on grounds that we can now see as referring to category one of Justice Jackson's classification scheme. The Court emphasized the breadth of presidential power where Congress has authorized an action in the foreign sphere and where the President also has independent authority.

The Court's opinion was written by Justice George Sutherland, one of the leading conservatives on the New Deal Court. The language of the opinion went well beyond the facts of the case. The Court first stated that the foreign affairs power, unlike domestic legislative power, was already vested in the Union prior to the adoption of the Constitution as an aspect of national sovereignty.<sup>2</sup> The Court then argued that this inherent power was then inherited by the President. "Not only ...is the federal power over external affairs in origin and essential character different from that over internal affairs," the Court said, "but participation in the exercise of the power is significantly limited." Consequently, "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."<sup>3</sup> Conceptually, this argument is different from the Vesting Clause claim we've just considered — it relies on the general nature of the federal government rather than any specific clause. But the practical implications seem very much the same.

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<sup>1</sup> 299 U.S. 304 (1936).

<sup>2</sup> *Id.* at 318.

<sup>3</sup> *Id.* at 319.



In addition to this theoretical argument, the Court relied on practical considerations, such as the need for secrecy in the conduct of diplomacy and the President's access to confidential information.<sup>4</sup> "In short," the Court wrote, "we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."<sup>5</sup>

The *Curtiss-Wright* theory of inherent foreign affairs powers, derived outside the power grants in the Constitution, has not been repeated in later opinions. This is perhaps because such a theory is in serious tension with the foundational idea of a national government of limited, enumerated powers. Historians have not been particularly kind to Justice Sutherland's history. But lawyers for the Executive Branch never tire of quoting the language about presidential supremacy in foreign affairs.

Cases since *Curtiss-Wright* have focused more on specific constitutional grants of power to the President and on the evolving practice under the Constitution. Thus, the more recent cases have more in common with the *Steel Seizure* models of the Presidency than with the free-wheeling presidential powers portrayed by Justice Sutherland. But this does not mean that the President must always give way before Congress.

*Zivotovsky v. Kerry (Zivotovsky II)*<sup>6</sup> exemplifies the approach taken in later decisions. The parents of a child who had been born in Jerusalem wanted his passport to identify this city as part of Israel. At the time, longstanding U.S. foreign policy was not to classify the city as part of any country so as to avoid taking sides in the conflict between Israelis and Palestinians, both of whom claim Jerusalem as their capitol. Notwithstanding this executive branch policy, Congress passed a statute allowing individuals born in Jerusalem to have Israel listed as the location of their birth. The Court viewed this as a "category three" situation under the *Steel Seizure Case*. Those are cases where Congress and the President are in conflict. Quoting this decision, the Court said that "[t]o succeed in this third category, the President's asserted power must be both 'exclusive' and 'conclusive' on the issue."<sup>7</sup>

The Court held that this was one of those rare instances in which the stringent category-three test was satisfied. It reasoned that Article II powers, such as the power to receive ambassadors, carry with them exclusive presidential control over the recognition of foreign governments, because recognition of a foreign government involves not only accepting the government as legitimate but also determining its boundaries. The Court further reasoned that passports are communications between the United States and foreign governments, and thus are also under presidential control. The Court thought these conclusions were confirmed by past practice, inasmuch as "the President since the founding has exercised this unilateral power to recognize new [nation] states—and the Court has endorsed the practice."<sup>8</sup> Interestingly, although he often championed presidential power, Justice Scalia argued for a narrower view of executive authority in *Zivotovsky*. "Recognition," he said, "is a type of legal act, not a type of statement."<sup>9</sup> In his view, it was "a leap worthy of the Mad Hatter to go from exclusive authority over making legal commitments about sovereignty to exclusive authority over making statements or issuing

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<sup>4</sup> *See id.*

<sup>5</sup> *Id.* at 319–20.

<sup>6</sup> 576 U.S. \_\_\_, 135 S. Ct. 2076 (2015).

<sup>7</sup> *Id.* at 2084.

<sup>8</sup> *Id.* at 2086.

<sup>9</sup> *Id.* at 2121.

documents about national borders.”<sup>10</sup> “The Court,” he added, “may as well jump from power over issuing declaratory judgments to a monopoly on writing law-review articles.”<sup>11</sup>

Overall, *Zivotovsky* was a narrow win for the President. The Court did not speak in sweeping terms about the President’s power over our relationships with foreign countries. Instead, it relied on the long-standing tradition that the power to receive ambassadors includes the power to determine whether they represent legitimate governments and on the President’s control of official communications with other countries. Passports can be regarded as communications from the U.S. government. Presidents engage in many other activities involving foreign nations such as managing and sometimes ending foreign aid, control of the CIA and other intelligence agencies, protecting the nation’s borders. *Curtis-Wright* could be read to give the President free rein over all these activities, but *Zivotovsky* conspicuously steers clear of any broad endorsement of presidential autonomy in foreign affairs.

The Court’s reluctance to give Presidents a blank check also figured in *Medellín v. Texas*.<sup>12</sup> The background of this case is complex. Under the Vienna Convention on Consular Relations, the United States and other countries have agreed to give each other’s citizens the right to contact their countries’ consuls (local diplomatic representatives) when arrested. Some U.S. states did not comply with this requirement. Mexico filed a case against the United States in the International Court of Justice (ICJ) in the Hague, which ruled that the United States was in violation and that certain individuals convicted without having been allowed to contact their consuls were entitled to reconsideration of their convictions, regardless of whether they had raised this objection at trial. One of these individuals then attempted to have his conviction vacated. The United States had agreed to submit to the jurisdiction of the ICJ in another treaty. The Supreme Court held that this second treaty was not self-executing, meaning that, until implemented through legislation, it could not be directly enforced by federal or state courts.

Perhaps anticipating this problem, President George W. Bush had issued a memorandum stating that the United States “would ‘discharge its international obligations’ . . . ‘by having State courts give effect to the decision.’ ”<sup>13</sup> The federal government argued that this memorandum was binding on state courts. In an opinion by Chief Justice John Roberts, the Court rejected this assertion of presidential authority. Because a non-self-executing treaty is intended to have no domestic legal effect until implemented through legislation, a presidential edict to give it domestic legal effect falls into category 3 of the *Steel Seizure* trichotomy. Unlike the President’s power to settle foreign claims, the Chief Justice wrote, “the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a presidential directive issued to state courts, much less one that reaches deep into the heart of the State’s police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.”<sup>14</sup>

*Medellín* makes it clear that Justice Jackson’s concurrence in the *Steel Seizure Case* is firmly established law. *Medellín* also reflects the Court’s attentiveness to historical practice in this area, although the Court is always careful to note that past practice would not validate clearly unconstitutional conduct. Both of these aspects of the doctrine reflect a judicial recognition that

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 552 U.S. 491 (2008).

<sup>13</sup> *Id.* at 503.

<sup>14</sup> *Id.* at 532.

disputes over the boundaries between Congress and the President are primarily resolved between these two branches through the political process.

### **B. Executive Agreements**

Article II empowers the President to make treaties, but only with the consent of the Senate. Presidents make agreements with foreign countries all the time, however, without ever submitting them to the Senate for approval. The closest thing to a textual hook for this practice is the Compact Clause of Article I, Section 10. This Clause requires congressional consent for any state to “enter into any Agreement or Compact with another State, or with a foreign power.” States are forbidden, however, from entering treaties with foreign powers by earlier language in Section 10. The implication is that an “Agreement or Compact” is different from a treaty, since states can enter into them but not into treaties. This does not necessarily mean that the President also has the power to enter into these lesser agreements with foreign powers, but it does mean that if the President does so, Senate consent is not required. And given the President’s leading role in foreign affairs and the states’ minimal role, it would seem odd to say that states but not the President can enter into some types of agreements with foreign countries. After all, the President at least represents the entire country.

*United States v. Belmont*<sup>15</sup> arose from President Franklin D. Roosevelt’s decision to give diplomatic recognition to the Soviet Union in the 1930s. The Soviets had seized Russian corporations after the Russian Revolution, and an American bank held funds of these companies. Because the Soviet government had taken over the corporations, it demanded that the funds be paid to them. The Soviets agreed to assign their claims against these Americans to the U.S. government. The Court’s opinion does not explain the purpose of this assignment, but it had the effect of keeping the Soviets out of the U.S. courts. It also left the U.S. government holding money that the Soviets might want to use as an offset against their own debts to U.S. citizens and companies. This assignment was part of a larger effort to resolve all claims and counterclaims between the two countries. When the U.S. government sued the bank to recover some of the money that was allegedly owed to the corporation, the lower courts held that giving effect in this way to the Soviet seizure of private property violated the state’s public policy.

In an opinion by Justice Sutherland, the Court emphasized the President’s role as the sole international representative of the United States as well as the established practice of entering into executive agreements. As Justice Sutherland said, “an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations.”<sup>16</sup> Consequently, the Court held that the Executive Agreement was valid and that any state policy to the contrary violated the Supremacy Clause, which provides that federal laws trump state laws.

*United States v. Pink*<sup>17</sup> arose from the same agreement with the Soviet Union. *Pink* involved a dispute between the federal government and the State of New York over the assets of a Russian insurance company that remained in the hands of New York insurance authorities after all outstanding insurance claims by U.S. citizens had been paid. The Court emphasized both the President’s power to make such executive agreements and the dangers posed by state interference. For in this matter involving “an exclusive federal function,” the Court reasoned,

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<sup>15</sup> 301 U.S. 324 (1937).

<sup>16</sup> *Id.* at 330–31.

<sup>17</sup> 315 U.S. 203 (1942).

U.S. foreign policy might be thwarted if “state laws and policies did not yield before the exercise of the external powers of the United States”; indeed, the “nation as a whole would be held to answer if a State created difficulties with a foreign power.”<sup>18</sup>

In *Dames & Moore v. Regan*,<sup>19</sup> which I discussed earlier, the Court upheld another executive agreement in the context of the Iranian hostage crisis arising out of the seizure of the U.S. embassy in Tehran in 1979. Recall that when President Ronald Reagan took office, he negotiated an agreement to free the hostages. In return, the U.S. agreed to terminate all attachments (i.e., court orders freezing assets) against Iranian government property such as its U.S. bank accounts, and to suspend all domestic legal actions by Americans against Iran, which would then be arbitrated by a special international tribunal. The Court upheld the agreement. It concluded that the termination of the attachments had been directly authorized by Congress, placing it in category one of Justice Jackson’s *Steel Seizure Case* trichotomy. Even though no statute authorized the suspension of the domestic lawsuits, the Court interpreted two statutes as signaling general approval of a broad presidential role in dealing with claims against foreign countries. The Court also found evidence of tacit congressional approval in a long history of claims settlement by Presidents. Thus, “in light of the fact that Congress may be considered to have consented to the President’s action in suspending claims, we cannot say that action exceeded the President’s powers.”<sup>20</sup>

If executive agreements have the same legal force as treaties in preempting state law, you may wonder where the distinction lies and why Presidents ever bother submitting treaties to the Senate. As to the first question, there is no real guidance from the Supreme Court. The cases discussed above could be interpreted narrowly, to include only agreements made in connection with giving formal recognition to a foreign government or in areas like settling claims where there is a very long-standing practice. But these cases could also be read much more broadly. The State Department has developed a set of criteria that it weighs in deciding whether Senate approval is required, based on factors such as past practice for similar agreements, the length of the agreement, and whether congressional implementation will be required. But in practice this is likely to mean that the decision to submit an agreement to the Senate will often be based either on a desire to give greater reassurance to other treaty signatories through the formality of Senate ratification, or on congressional pushback against the use of an executive agreement. Given that many agreements require at least some congressional implementation, if only in the form of funding, Presidents may be reluctant to use executive agreements if the Senate insists on playing its role in the treaty-making process.

The Paris Agreement to limit carbon emissions is an interesting case in point. Other nations wanted this agreement to be a formal treaty. The Obama Administration said that this would be unacceptable: if the Agreement was binding under international law, it was too important to be an executive agreement. Thus, it would have to be submitted to the Senate, which clearly would not have produced the required two-thirds vote. For that reason, the only legally binding portions of the Paris Agreement relate to procedures, monitoring, and verification — but not to the emissions limitations themselves, which were considered only to be “political commitments,” not legally binding. The Obama Administration’s view was that provisions that were legally binding were minor enough to be adopted through an executive agreement. Notably, when

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<sup>18</sup> *Id.* at 232–33.

<sup>19</sup> 453 U.S. 654 (1981).

<sup>20</sup> *Id.* at 686.

President Trump announced his decision to withdraw from the Agreement, he undertook to comply with the withdrawal procedure provided by the Agreement itself.

There is a third form of international agreement that has been particularly common recently, the executive-congressional agreement. Such agreements are negotiated by the President but then enacted as statutes by Congress using one of its Article I powers, such as the power to regulate interstate or international commerce. Since many agreements do involve matters within Congress's legislative powers, this mechanism can potentially replace many Senate-confirmed treaties. It is unclear whether there are any matters reserved to the treaty power (excluding the House and requiring a Senate supermajority) or whether executive-congressional agreements can be revoked unilaterally by the President. Except to the extent that such a law delegates the power to withdraw to the President, it is hard to see how the President could do so unilaterally. The Constitution gives Congress, not the President, the power to pass and repeal statutes.

The President's legal power to terminate an executive agreement seems obvious: live by the sword of presidential prerogative, die by the same sword. It is less clear whether the President can renounce a formal treaty unilaterally. This issue came before the Court in *Goldwater v. Carter*,<sup>21</sup> but only one Justice actually took a position on the President's power to terminate treaties. That Justice would have upheld the treaty abrogation in this particular case as incidental to the government's recognition of a different government as legitimate.<sup>22</sup> The other Justices dodged the issue on various procedural grounds. So in practice, the answer to this question has been given by constitutional politics rather than judge-made constitutional law, at least as of yet. Historical practice has been ambiguous. Congress has also abrogated some treaties by statute. Its power to do so seems not to have been seriously questioned, which suggests that any such power is shared or perhaps exclusively held by Congress. Absent any judicial check, Presidents take the position that they are free to revoke treaties. But the question of who has the power to declare a treaty at an end still has to be considered unsettled.

As I will discuss in a later chapter, the Supreme Court has often done in other cases what it did in *Goldwater*: refuse on jurisdictional grounds to decide important disputes about the limits of Presidential power. This is particularly true in the area of foreign affairs, where the Court feels especially cautious about intervening. That's one reason there are so many unsettled issues in this area.

As we have seen, presidential power in foreign affairs is controversial. But that is nothing compared to the controversy over the President's war-making powers. That topic is the subject of the next chapter.

#### **Bibliographic Notes to Chapter 4**

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<sup>21</sup> 444 U.S. 996 (1979).

<sup>22</sup> See *id.* at 1007.

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