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THE MOST DANGEROUS BRANCH ABROAD

MARTIN S. FLAHERTY*

INTRODUCTION

Let me start by pledging allegiance, at least for the purposes of this exchange, to several principles of constitutional interpretation that I suspect command widespread support among a group of Federalist Society members such as this. First, I proceed on the premise that the basic interpretive methodology applied to constitutional foreign affairs questions should be the same as to domestic affairs. I therefore decline the invitation to indulge in what has been termed “foreign affairs exceptionalism.”¹ Second, and perhaps with greater personal pain, I decline the invitation to indulge in any number of progressive, avant-garde, or unconventional constitutional theories, regardless of what merit they may otherwise have. Thus, I will not defend my positions based upon unconventional views about constitutional higher lawmaking,² representation reinforcement or other process-based theories,³ morally inflected interpretivism,⁴ or natural

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1. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096–97 (1999).

2. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (arguing that “We the People of the United States” adopt higher constitutional law during “constitutional moments” in a manner that may or may not comport with previously specified procedures for higher lawmaking).

3. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that judicial review is at its most legitimate when it seeks to correct a breakdown in the democratic process); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (contending that constitutional interpretation is best left to the legislative process).

4. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* (1986) (advocating reliance on moral theory as a means to derive interpretations that best fit and justify our constitutional commitments); LAWRENCE G. SAGER, *JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004) (arguing for constitutional interpretations that reflect fundamental justice).

law.⁵ Rather, I proceed based upon good old Federalist Society-style text, history (in the sense of original understanding and ongoing custom), and structure.⁶ However conventional, this hoary methodology compels only one conclusion: rejection of even the laudably moderate version of the executive foreign affairs authority theory espoused by Professor Ramsey.

In Professor Ramsey's view, the term "executive Power" in Article II includes at least some residual foreign affairs authority.⁷ Therefore, according to Professor Ramsey, the default position under the Constitution is that the text does not allocate a foreign affairs power within the government, it falls, without more, to the President.⁸ Elsewhere, Professor Curtis Bradley and I have termed this position the "Vesting Clause Thesis," or more broadly, "executive essentialism,"⁹ because it is premised on the view that a general foreign affairs power is an essential, inherent component of the "executive Power" and that the Executive Vesting Clause allocates this subcategory of executive authority to "a President of the United States of America."¹⁰

Now, there are stronger and softer versions of this view. Used in the wrong hands—such as those of John Yoo—the Vesting Clause Thesis, in its most potent form, could be applied not just to supplement presidential power in areas in which there is no clear grant of authority to the other branches, but as a way to foil attempts by Congress to exercise even clearly specified authority in "executive foreign affairs" areas. Accordingly, Professor Yoo has argued that the Executive's foreign affairs power is not merely residual but, in broadly defined areas, nothing short of exclusive.¹¹ It therefore follows that the President's general executive foreign affairs authority provides one basis for the Executive to ignore conflicting federal statutes—even and including, to take one notorious exam-

5. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (espousing natural law as a basis for interpretation of constitutional rights).

6. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

7. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234–35 (2001).

8. See *id.*

9. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546, 551–52 (2004).

10. U.S. CONST. art. II, § 1, cl. 1.

11. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

ple, acts of Congress prohibiting torture¹²—should the President deem that mistreatment of detainees might yield valuable information in the “Global War on Terrorism.”¹³ Professor Ramsey does not go that far, and I commend him for that. Indeed, his full theory puts forward a robust vision of what legislative power in the foreign affairs domain is, and further provides that Congress should generally prevail when acting in its domain.¹⁴ Indeed, the irony in all of this is that doctrinally, Professor Ramsey and I actually are not that far apart.

Yet, even in its kinder, gentler form, the Vesting Clause Thesis cannot and should not pass constitutional muster. As argued below, the thesis fails on the grounds that conventional methods of constitutional interpretation do not sustain it. Ordinarily, that would be reason enough to oppose what would prove to be a fairly radical constitutional innovation. Executive power essentialism, however, presents a further set of practical considerations that counsel its rejection. Simply put, it offers a simple rhetorical trope so powerful that it can and does fall into the wrong hands too readily. The Vesting Clause Thesis creates an asymmetry in constitutional interpretation whereby, at least in foreign affairs, Congress has to point to specific powers to justify its exercise of authority while the President does not. As a practical matter, this asymmetry invites and facilitates genuine abuses of executive authority, which already enjoys a comparative advantage of energy, focus, and information in foreign affairs as it is. The notion of residual executive foreign affairs authority is at once wrong in law and dangerous in practice.

Happily, these same factors that counsel against executive essentialism point to an alternative approach. Call it “interpretive symmetry.” Unpacked, interpretive symmetry means simply that all “political” branches—the President, Congress, and for that matter, the courts—have to resort to conventional methods of constitutional interpretation to justify their exercise of power. In the present discussion, the critical point is that interpretive symmetry applies as fully in foreign relations law as it does in its domestic counterpart. This means that with regard

12. 18 U.S.C. §§ 2340–2340B (2006).

13. See Memorandum from Jay S. Bybee, Assistant Att’y Gen. for the Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

14. See Prakash & Ramsey, *supra* note 7, at 235.

to foreign affairs, the text enunciates but does not exhaust important divisions of power. Envision separation of powers, domestic or foreign, inked in at the top in a non-comprehensive fashion. This hardly resolves innumerable, more specific, inter-branch turf battles. This brute textual fact in turn means that many, if not most, constitutional questions in this area will be left to be resolved by history, in the sense of original understanding, or ongoing custom, the “gloss” on the text that subsequent practice yields.¹⁵ Yet even here, many questions lack adequate guidance. Ultimately, one may have no choice but to fall back on structural or purposive approaches. As applied, an approach based on interpretive symmetry may be neither simple nor elegant. Nevertheless, in contrast to executive power essentialism, it does boast the advantage of legitimacy.

I.

Under conventional, or for that matter many unconventional, interpretive principles, text remains the starting point for determining legitimate constitutional meaning. This brings me to my first objection to the Vesting Clause Thesis: the term “executive” simply cannot bear the massive weight that Professor Ramsey would have it bear. For starters, consider Samuel Johnson’s *Dictionary*, though this already crosses from textualism to originalism. In Johnson’s *Dictionary*, as in modern dictionaries, “execute” does not refer to a general foreign affairs authority. Then, as now, “execute” means to implement and render effective the laws.¹⁶ For this reason alone, it necessarily falls to specific constitutional clauses to allocate foreign affairs authority. As Professor Bradley and I have argued, exactly such reliance was the dominant approach at the Founding.¹⁷

Second, as has often been pointed out, there are counter-texts—specific grants of authority in Article II that would make no sense, or at the very least would be redundant, if the Executive Vesting Clause conveys foreign affairs authority en masse. Why have a Commander-in-Chief Clause?¹⁸ Why have an

15. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

16. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (photo. reprint 2001) (1755).

17. Bradley & Flaherty, *supra* note 9, at 592–687.

18. U.S. CONST. art. II, § 2, cl. 1.

Opinions Clause?¹⁹ Why have an Ambassador Receipt Clause?²⁰ Moreover, why have a Treaty Clause and an Appointments Clause written the way they are: in terms of grants of power to the President, rather than as exceptions to a foreign affairs authority on behalf of the Senate or Congress?²¹ So the answer cannot lie in the text. At best, the text is simply inconclusive.

II.

The answer, therefore, ostensibly comes from history. On the essentialist view, the eighteenth-century world understood executive power to encompass much more than mere law implementation. And whatever else counted as part of the “much more,” the argument continues, foreign affairs authority was almost universally taken to be a component of executive power. Is this version of the history correct?

Getting the history right is often an elusive quest, especially in constitutional controversies that have endured for centuries. As Justice Jackson famously stated, in the realm of foreign relations law no less, often the historical sources are “almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”²² But not here. There is very, little evidence to support the proposition that eighteenth-century Americans generally—or even occasionally—believed that executive power equaled foreign affairs power.

Asserting this proposition, however, brings up a problem about getting this history right, which is that it usually entails exhaustive research, exhaustively presented.²³ A debate format, however, is not ideal when questions of law turn on historical rigor. A few representative sound bytes must suffice.

The first sound byte is a stark fact. Examine the four volumes of Farrand’s *Records of the Federal Convention*,²⁴ the twenty or so volumes of the *Documentary History of the Ratification of the Con-*

19. *Id.*

20. U.S. CONST. art. II, § 3.

21. U.S. CONST. art. II, § 2, cl. 2.

22. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

23. Cf. Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

24. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966).

stitution,²⁵ and the debates of the First Congress. Take a step back and read the texts and interpretations of the sixteen state constitutions drafted between 1766 and 1787, many of which had executive power clauses. For the truly stout of heart, examine all the sources in the 690 footnotes that Professor Bradley and I compiled.²⁶ In those sources you will find no instance of anyone asserting that any version of an “executive authority vesting clause” or other general grant of executive power, without more, also entails general foreign affairs authority—not one.²⁷ With a minor precursor,²⁸ the first time one sees this “executive essentialism” argument in any unambiguous fashion is in Alexander Hamilton’s *Pacificus* essays, and then only en route to arguments that rely on more specific textual grants.²⁹

Nor, countering Professor Ramsey’s own principal sound bite,³⁰ did Thomas Jefferson adopt the “executive power equals foreign affairs power” thesis. No doubt, the new Secretary of State in a memorandum to his immediate superior, the Chief Executive, stated that “[t]he transaction of business with foreign nations is Executive altogether” and that exceptions “are

25. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen et al. eds., 1976–2005).

26. Bradley & Flaherty, *supra* note 9.

27. Or at least none that Professor Bradley and I could find in a fairly careful review. Given thousands of pages of documents, the possibility always exists that other examples might be found asserting that a general grant of executive power entails a general grant of authority over foreign affairs. Our point, however, would remain that such statements would be rare to the point of being idiosyncratic when compared to the prevailing practice of reliance on specific texts to assert discrete powers.

28. The precursor is Rep. Egbert Benson of New York, who served in the first Congress and opposed any role for the Senate in apportioning diplomatic salaries, stating that it would be wrong to blend the President and the Senate “in the exercise of an authority not jointly vested in them by the constitution,” and “in any business whatever of an executive nature.” 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 81 (Helen E. Veit et al. eds., 1994). Benson’s unusual and unremarked upon statement stands in stark contrast to the norm followed by other participants in the congressional debate, which was to rely on specific constitutional texts or powers in arguing on either side of the matter. See Bradley & Flaherty, *supra* note 9, at 648–55.

29. Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33 (Harold C. Syrett et al. eds., 1969) [hereinafter *Pacificus No. 1*]; Bradley & Flaherty, *supra* note 9, at 680–82.

30. Michael D. Ramsey, *The Textual Basis of the President’s Foreign Affairs Power*, 30 HARV. J.L. & PUB. POL’Y 141 (2006).

to be construed strictly.”³¹ Yet, Jefferson’s statement supports the Vesting Clause Thesis only if it is overread. First, the context of Jefferson’s reference to the “transaction of business” is almost certainly a reference to negotiations and other diplomatic communications, given that his memorandum addresses questions about diplomatic salaries and assignments. Second, Jefferson quickly unpacks the point by citing the President’s specific powers in nominating, appointing, and commissioning diplomatic officers.³² Third, Jefferson’s opinion earlier refers to all three general grants of power to the three branches in essentialist terms, which, if taken literally, would also render superfluous the specific grants of legislative powers in Article I, Section 8.³³ Fourth, to compound the confusion, this same passage refers not to executive *power*, but misquotes Article II to say *powers*, which indicates a conception of more specific grants consistent with his later citations concerning the President’s control of diplomats.³⁴ Add all this up, include Jefferson’s general tendencies as a constitutional gadfly, and the bottom line is clear: read this passage from Jefferson’s memorandum cautiously and avoid making grandiose claims on its behalf.³⁵

A third and final sound byte comes from an amicus brief in *Hamdan v. Rumsfeld*³⁶ that Jack Rakove, on whom Professor Ramsey relies,³⁷ sent to me. At the risk of a Woody Allen-Marshall McLuhan moment, the Professor Rakove of the brief does not exactly square with the Rakove portrayed by Professor Ramsey. Professor Rakove was joined on the brief by a true hall of fame roster of constitutional historians on the late eighteenth century. As I flipped through it, I came to a passage on page twenty:

31. Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 378–80 (Julian P. Boyd et al. eds., 1961) [hereinafter Jefferson Opinion]; see also Bradley & Flaherty, *supra* note 9, at 654.

32. Jefferson Opinion, *supra* note 31, at 379.

33. Jefferson begins by asserting that “[t]he Constitution has divided the powers of the government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy.” *Id.* at 378–79.

34. According to the Jefferson Opinion, the Constitution declares that the “Executive powers shall be vested in the President.” *Id.* at 378 (emphasis added); cf. U.S. CONST. art. 2, § 1 (“The executive Power shall be vested in a President of the United States of America.”) (emphasis added).

35. See Bradley & Flaherty, *supra* note 9, at 654–55.

36. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

37. Prakash & Ramsey, *supra* note 7, at 252 n.87, 271 n.169.

The Framers *did not design the Vesting Clause of Article II as a plenary grant of unspecified executive powers*. Their allocation of military and diplomatic powers between the branches expanded upon British practice in limiting executive authority. Their understandings are reflected in the [C]onvention proceedings, in the constitutional texts, and in the debates surrounding ratification.³⁸

The lack of any sources on point, Jefferson properly read, the leading experts in the field: each of these supports the proposition that the term “executive power” simply did not convey any notion of general authority over foreign affairs. Together with the infamous nearly 700 footnotes that Professor Bradley and I compiled, they also help explain *why* this conclusion follows. At least three sets of reasons undercut assertions of executive essentialism in general, and the Vesting Clause Thesis in particular: (1) the contemporary novelty of separation of powers theory; (2) the corresponding disagreement on the doctrine beyond its general purposes and formalist core; and (3) the obvious persistence of disagreement on the doctrine, as revealed by a balanced review of practices in the early republic.

Consider first the relative novelty of the doctrine. A thorough look at the relevant primary and secondary sources demonstrates that separation of powers, despite ancient antecedents, remained a relatively new and underdeveloped doctrine during the late Seventeenth and early Eighteenth Centuries. Separation of powers was something political thinkers in the English-speaking world, as well as Western Europe, were working through.

For instance, John Locke had a tripartite system, but his troika of powers did not include judicial power.³⁹ Rather, it included something he termed the “federative power,” which was foreign affairs power.⁴⁰ Yet he did not equate federative power with executive authority. To the contrary, he specifically distinguished federative from executive power, and each of these from their legislative sibling.⁴¹ To be sure, Locke did say that federative and executive authority are “always almost

38. Brief for Jack N. Rakove & Fred Anderson et al. as Amici Curiae Supporting Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (emphasis added).

39. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 382–84 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

40. *Id.*

41. *Id.* at 383–84.

united.”⁴² This unity, however, followed not because executive and foreign affairs authority are essentially the same, but from the functional reason that federative power “is much less capable to be directed by antecedent, standing, positive Laws.”⁴³ To invoke Professor Rakove once more, Locke believed that the federative power ordinarily, but not necessarily, should fall to the executive “on considerations of prudence, convenience, and efficiency, not right.”⁴⁴

Montesquieu came far closer to endorsing executive essentialism than Locke. Yet if he is the best that proponents of the Vesting Clause Thesis can do, they should not claim victory just yet. Without delving into all the footnotes, Montesquieu put forward two classifications, only one of which Professor Ramsey quotes.⁴⁵ The one quoted by Professor Ramsey sets out three classes of power: the legislative, the executive in respect of the law of nations, and the executive in respect of domestic civil law.⁴⁶ No sooner did Montesquieu do this, however, than he re-labeled the third form of authority “judicial” and refers to the second as simply “the executive power of the state,” which would have the paradoxical effect of leaving out of the definition the core meaning on which nearly everyone agrees: to execute domestic laws.⁴⁷ To make matters more confusing, Montesquieu’s later references to executive power speak mainly to law implementation and drop any mention of foreign affairs.⁴⁸ So much for the clarity of a framework for later generations.

Things only became mixed up with later thinkers. Blackstone provided executive essentialists with material help because he wrote primarily in English mixed-government terms, making references to separation of powers only in passing.⁴⁹ That means his tripartite framework—monarchy, aristocracy, and democracy—consists of governmental archetypes keyed to social class rather than governmental functions.⁵⁰ Aside from

42. *Id.* at 382–84.

43. *Id.* at 383–84.

44. Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, in 1 *PERSP. AM. HIST.* 233, 261 (1984). For a more extended analysis, see Bradley and Flaherty, *supra* note 9, at 560–61.

45. Ramsey, *supra* note 30, at 142.

46. 1 *BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS* 151 (Thomas Nugent trans., Hafner Publ’g Co. 1949) (1751).

47. *Id.*

48. See, e.g., *id.* at 152.

49. See Bradley & Flaherty, *supra* note 9, at 561–62.

50. See *id.*

scattered general references, Blackstone spoke of the king's various powers as a function of his prerogative, not executive, authority.⁵¹

Thomas Rutherforth, a lesser-known thinker on whom Professors Ramsey and Prakash rely, helped further beat a horse that should by now be well and truly deceased. Stray quotations of Rutherforth appear to lend support to executive essentialism.⁵² Once one starts wading through Rutherforth's oeuvre, however, it emerges that he boils the world down to *two* government powers: the executive and legislative, with no mention at all of judicial or federative.⁵³ If one goes a little deeper, it turns out that Rutherforth believes that such powers as making peace, making treaties, and making alliances "seem, in their own nature, to be parts rather of the *legislative* than the *executive* power."⁵⁴

My second point follows closely: The relative novelty of separation of powers doctrine has led to enduring disagreement over its specifics. Even as Americans came to embrace the now familiar tripartite version, disagreement prevailed outside the core meanings of legislative as promulgating laws, executive as implementing them, and adjudicative as resolving disputes within them. Throughout the founding period, dramatic differences emerged over the nature and placement of specific powers such as the treaty power, the war power, the removal power, and the extent of each branch's control over the military. Such specific differences were most clearly evident in the fifteen early state constitutions.⁵⁵ As a threshold matter, the first of these constitutions mainly created weak executives who were subordinate to the legislature. Only when experience showed the problems with such setups did reform toward more powerful executives result—a development that indicates that the founding generation cared more about pragmatic flexibility than essentialist categories.⁵⁶

51. *See id.*

52. *See, e.g.,* Ramsey, *supra* note 30, at 143 n.11.

53. 2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 50–74 (3d ed., Whitehall 1799) (1756). Rutherforth saw the judicial power as an "internal or civil branch of [the] executive power." *Id.* at 59.

54. *Id.* at 64 (emphasis added); *see also* Bradley & Flaherty, *supra* note 9, at 565–66.

55. Bradley & Flaherty, *supra* note 9, at 571–78.

56. *See id.*

Even within the template of generally weak executives, no two were precisely alike. To take one example, the states typically did make their governors commanders in chief of state militias. In some states, however, governors could assume command outright. In other states, governors could assume command subject to prior approval of an executive council. In other states, governors could assume command only after the legislature signed off. More strikingly, many early state constitutions vested the appointment of military officers not in the governor outright, but either subject to legislative approval, or in the legislature itself, or even in individual militia companies.⁵⁷

If disagreement prevailed from the bottom up, it also was evident from the top down. At the Federal Convention alone, many different laundry lists of executive power appeared. Early discussion on Madison's original Virginia Plan stressed that executive authority should not extend to war and peace, and still less should track the list of prerogative powers associated with the British monarch.⁵⁸ The New Jersey Plan, largely the work of William Patterson, proposed an even narrower set of executive powers: executing federal law, appointing federal officers not otherwise provided for, and directing military operations.⁵⁹ In stark contrast, Hamilton's near-royalist plan would have granted the President the power to execute laws, to veto bills with no provision for override, to make treaties, to appoint exclusively certain high federal officers, and to pardon.⁶⁰ Only after all this did the Committee of Detail, under the leadership of James Wilson, set out yet another, more detailed list, which not only enumerated executive powers, but also carefully allocated each of the foreign affairs powers previously discussed at the Convention among the three branches.⁶¹

57. *See id.* at 581–82.

58. *See id.* at 592–94.

59. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 24, at 244; *see also* Bradley & Flaherty, *supra* note 9, at 595–96.

60. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 24, at 292; *see also* Bradley & Flaherty, *supra* note 9, at 596–97.

61. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 24, at 185–86; *see also* Bradley & Flaherty, *supra* note 9, at 598–99.

In none of these, or other, proposals⁶² and examples⁶³ is there the slightest indication that the term “executive” stood as a proxy for some widely understood set of residual powers, still less a residuum of foreign affairs authority. To the contrary, the one thing that these and other enumerations had in common was that, however different, each of these plans sought to determine which specific powers fell underneath the executive rubric, rather than presume what the rubric automatically entailed.

The Framers’ reliance on specific functionalism rather than general essentialism brings me to point three. Separation of powers may have been novel, and it may have been underdeveloped, but neither observation says much about what the eighteenth-century thinkers *did* think the doctrine entailed. The answer lies precisely in pragmatic, functional arguments about where powers would be best placed and exercised, rather than any sort of global, essentialist deduction.

This functionalist approach goes back to the foundational theorists, where abstraction might seem the order of the day. Recall that Locke, for example, first defined the federative power as entailing certain foreign affairs functions and next indicated that they should ordinarily be assigned to the executive for pragmatic reasons.⁶⁴ Likewise, aside from a few general references to executive power, Blackstone not only speaks in terms of prerogative authority, but also spells out a specific array of functions. In the foreign affairs realm, the short list commonly includes the powers over peace, war, and treaties.⁶⁵

The American Framers followed the functional approach to an even greater extent than the theorists on which they relied. The Framers simply did not accept the essential argument that executive authority automatically encompasses any particular power other than law execution. Rather, they argued about

62. At least one additional plan, with its own distinctive executive, was put forward by Charles Pinckney of South Carolina. See 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 24, at 606; see also Bradley & Flaherty, *supra* note 9, at 597–98.

63. The point about the allocation of specific powers likewise applies to the Articles of Confederation, which assigned specific foreign affairs powers to the national government. It is worth noting that, given the absence of a formal executive, the Articles at no point classify any of these powers as “executive.” See Bradley & Flaherty, *supra* note 9, at 585–91.

64. LOCKE, *supra* note 39, at 383–84.

65. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *249 (photo. reprint 1966) (1765).

where particular powers such as the Declare War Power, the Treaty Power, or the Receive Ambassadors Power (effectively the power to recognize foreign governments) should be placed, given the likely strengths and weaknesses of the legislative, executive, or even, in certain instances, the judicial branches.⁶⁶ In the important and comprehensive Virginia ratification debates, for example, virtually all discussion centered on particular clauses and powers: the treaty-making power above all, but also the powers to execute laws and to act as commander-in-chief of the armed forces. In stark contrast, references to executive power as a general matter were few and far between and, when they did occur, typically betrayed disagreement about what the abstract term specifically entailed.⁶⁷

In looking over the 700 or so footnotes that Professor Bradley and I compiled, I would say that the ratio is something like twenty-five to one between individuals talking about specific powers in pragmatic terms and the isolated instances in which they said this power or that power is essentially executive. Even then, for every type of essentialist argument, one finds people on the other side saying that there is no grant of power in the Constitution that is not specifically expressed. In this informal tally, the weight of the evidence against the essentialist position is simply overwhelming.

Actual practice in the early republic lends further support to the foregoing conclusions. Those who argue for some sort of residual executive authority maintain that nothing else can account for the successful assertions of foreign affairs power by our nation's first President. George Washington's supervision of the Secretary of State, his control of the diplomatic corps, and his issuance of the Neutrality Proclamation, the argument continues, are each illegitimate without resort to a founding-era consensus that Article II's apparent grant of executive authority necessarily entailed control over foreign affairs absent some textual grant elsewhere.⁶⁸ For anyone open to seeing it, the actual course of foreign policy debate in the early republic suggests precisely the opposite conclusion. The founding generation's efforts to work through the Constitution's allocations of foreign affairs powers resulted in a twofold pattern. On one side, many of the Washington administration's foreign policy

66. See Bradley & Flaherty, *supra* note 9, at 592–602.

67. See *id.* at 604–12.

68. See Prakash & Ramsey, *supra* note 7, at 298–311.

initiatives met with little or no controversy. These initiatives typically occurred in areas in which the Founders' views on separation of powers were well established, agreed upon, and—not coincidentally—fairly related to specific textual grants. On the other side are foreign policy initiatives that produced substantial debate both inside and outside the administration. These instances, not surprisingly, occurred in areas where there was no clear governing text and no established founding-era consensus. Not only did executive essentialism fail to resolve such debates, the concept, even at this late date, still rarely appeared.

For good reason, those assertions of foreign affairs authority that failed to generate controversy strike us today as almost trivial. They were not seen as much more than trivialities at the time, precisely because they were plausibly tethered to specific texts as generally understood in the eighteenth century. The President ordering the Secretary of State to report to him simply does not generate controversy.⁶⁹ Nor do presidential orders assigning diplomats to their posts.⁷⁰ Likewise, even presidential assertion of power to recognize the legitimate representative of France prompts no outcry.⁷¹ Why not? The answer does not come from the idea that executive power *is* foreign affairs power. Again, the crucial factor was the existence of specific constitutional clauses that plausibly accounted for the assertion of executive power. The Opinions Clause⁷² provides a ready source of authority for presidential supervision of a cabinet officer. Similarly, the Appointments Clause,⁷³ which empowers the President to nominate diplomats, would seem to entail a corollary power of assigning those diplomats whom he has named to specific postings. As for recognition of a foreign state, the power of receiving ambassadors, granted in the clause

69. The initial basis for Washington's authority over Jefferson came in the Foreign Affairs Act of 1789, which itself delegated to the President specific powers that tracked discrete foreign affairs grants in the Constitution. See Bradley & Flaherty, *supra* note 9, at 642–44.

70. See *id.* at 645–48.

71. This issue arose with respect to the conduct of "Citizen" Edmond Genet, the notorious ambassador from revolutionary France. Genet's outrageous conduct did provoke significant political debate, but the debate centered on the question whether President Washington *should* receive him as France's legitimate representative; little controversy arose over the question whether Washington *could* do so. See *id.* at 664–79.

72. U.S. CONST. art. II, § 2, cl. 1.

73. *Id.* cl. 2.

known by that name,⁷⁴ was, at least since Blackstone, seen as the source of that particular authority. It is a strange theory of constitutional interpretation that would reject reliance on any of these specific texts as too strained, only to rush to reliance on the cryptic Executive Vesting Clause to account for any and all assertions of any and all foreign affairs powers.

Only where specific text clearly runs out—and with it, the widespread founding-era agreement necessary to generate such text—does constitutional controversy boil over. One of the earliest such examples arose as the first Congress considered whether it could limit the President’s authority to remove the proposed Secretary of State. The question produced an epic debate, which in large part reflected the Constitution’s failure to address the issue expressly, which in turn reflected a previous lack of consideration or agreement on the matter at the Convention or during ratification.⁷⁵ Nor have two hundred years completely clarified the issue, as the Supreme Court has variously denied and accepted limitations on presidential removal authority at different times and in different contexts.⁷⁶ Ordinarily, the first Congress’s various views on removal would be reason enough to doubt any widespread agreement on a residual executive authority either in general or as a justification for the President’s sole power to remove. Yet, to make matters worse, debate pro and con proceeded with reference to specific clauses and policy concerns, not overarching theories of what executive power either automatically included or did not include.⁷⁷

A similar pattern occurs with another epic debate, this time confined exclusively to foreign relations, which centered on Washington’s Neutrality Proclamation of 1793. After thorough debate within the cabinet, President Washington declared that the United States would not take sides in the ongoing war be-

74. *Id.* § 3.

75. See Bradley & Flaherty, *supra* note 9, at 656–64.

76. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding for-cause limitations on presidential removal of the special prosecutor notwithstanding the traditional conception of prosecutors as core executive officials); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (upholding for-cause limitations on presidential removal of heads of independent agencies); *Myers v. United States* 272 U.S. 52 (1926) (invalidating limitations on presidential removal of executive officials). For a discussion of removal authority in the broader context of the comparative indeterminacy of separation of powers, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1835–36 (1996).

77. See Bradley & Flaherty, *supra* note 9, at 656–64.

tween France and the United Kingdom and its allies.⁷⁸ Controversy erupted, not only on policy grounds, but also on two legal issues. First, was United States neutrality consistent with its treaty commitments to France? Second, and relevant here, did the President have the authority to declare the nation to be at peace without congressional authorization?⁷⁹

Once more, the two sides of the debate primarily relied on specific clauses rather than essentialist generalities. This reliance on specific clauses applied even to the greatest exchange to result from the matter, the *Pacificus-Helvidius* debates, which pitted Alexander Hamilton, arguing in favor of the President's power, against James Madison, arguing against executive power. Make no mistake: Hamilton as *Pacificus* does clearly articulate the Vesting Clause Thesis in support of the President's action.⁸⁰ Far from reflecting a general consensus on the matter, however, Hamilton read in context cuts exactly the other way for several reasons. First, Hamilton's articulation of the Vesting Clause Thesis is the first time, as far as Professor Bradley and I could tell, that this argument appeared in American constitutional thought in even a modestly coherent and sustained fashion. Second, Hamilton himself was among the most staunchly pro-executive of all the Founders, and his views met with opposition from other leading Founders of similar rank, not least among them Madison and Jefferson. Third, and perhaps most important, Hamilton's reliance on the Vesting Clause is neither extended nor exclusive. To the contrary, no sooner does Hamilton float his general argument about executive power than he immediately turns to specific clauses. Among other things, Hamilton argues that the Take Care Clause empowers the President to interpret and implement the nation's treaty commitments and that the Receive Ambassadors Clause accords a similar power.⁸¹

Madison's own performance as *Helvidius* further belies any consensus on a residual foreign affairs authority, albeit in a paradoxical manner. In contrast to the prevailing American approach, Madison himself indulges in essentialist arguments to argue his case. For Madison, however, the foreign affairs power of declaring war—and so declaring peace by proclaiming neutrality—is *legislative* in nature and thus beyond the

78. *Id.* at 664–76.

79. *Id.*

80. *Pacificus No. 1*, *supra* note 29, at 39.

81. *Id.* at 41–43; *see also* Bradley & Flaherty, *supra* note 9, at 679–81.

scope of the President's power.⁸² Of course, even this argument is obviously tied to the Declare War Clause in which the Founders lodged the war power in Congress rather than following the British model. In addition, to the extent Madison's argument is essentialist, it repeats a minor theme seen throughout the founding period—categorical arguments about which discrete foreign affairs powers were, by their nature, executive or legislative yielded more disagreement than clarity.

So as a matter of history, executive power essentialism, the Vesting Clause Thesis, residual foreign affairs authority, or whatever other name is given to this principle fails to find firm footing. If one wishes to argue that there is, at most, a modicum of historical pedigree to this notion, I will accept it, though only so long as one stresses that "modicum" means a handful of statements out of thousands. But that is not exactly an originalist argument. To say that a particular position has some historical pedigree is far different from demonstrating that it amounted to the common understanding in the eighteenth century, or that it was so understood by political thinkers or even by average citizens to any significant degree. If text fails to support the residual executive power thesis, history dramatically undercuts it.

III.

Nor, briefly, does structure provide genuine guidance. In their purest form, arguments based upon the assignment of the three basic government powers to the three principal government departments are little more than conclusory once one ventures beyond the cores of the respective powers. Sole removal authority, for example, does not necessarily follow from a grant of power to execute the laws. This analytic truism is one reason why debate on removal authority continues to endure two centuries after the Founding.⁸³

More promisingly, the structure of separation of powers does suggest various basic purposes that may offer assistance. Of these, two basic goals are usually inferred. Allocating different powers to discrete branches most famously serves the purpose of preventing the tyrannical accretion of power in any one set of

82. *Helvidius No. 1* (Aug. 24, 1793), reprinted in 15 *THE PAPERS OF JAMES MADISON* 67–69 (Thomas A. Mason et al. eds., 1985); see also Bradley & Flaherty, *supra* note 9, at 683–86.

83. See *supra* note 76 and accompanying text.

hands. At the same time, separation also addresses the need for governmental efficiency and energy through specialization. These structural inferences would be powerful enough in their own right. As it happens, history confirms that the Founding generation shared a genuine consensus that separation of powers should further these basic purpose; however, much agreement may have broken down with regard to specific applications.⁸⁴

Approaching questions of foreign affairs authority in light of these basic structural functions, at worst, yields no consistent winner among the three branches and, at best, indicates that the President will not prevail as often as one might suppose. If the White House's response to 9/11 shows anything, it is that concern about accretion of too much power in the Executive Branch is hardly trivial. Rather, such concerns have been sufficiently salient that no less than the Rehnquist⁸⁵ and now the Roberts⁸⁶ Courts have consistently rejected presidential overreaching. Conversely, the need to address the specter of terrorism does, at first glance, suggest the need for the type of "secrecy and dispatch" historically associated with the Executive. Still, it is hardly clear that vesting extraordinary powers in the Executive would not give executive officers the incentive to: (1) rush to conclusions based on little evidence; (2) focus on readily detainable individuals rather than undertaking more difficult and comprehensive intelligence; and (3) cut legal corners in a way that diminishes the United States's standing, and therefore its effectiveness, abroad. Putting questions about liberty entirely to one side, another question remains: is national security served by having an essentially unaccountable Executive?

CONCLUSION

In the end, text, history, and structure do not provide specific answers so much as they point to a method—and a symmetrical one at that. For any particular foreign affairs question, one

84. I have set out the historical basis for such a functional approach at length in *The Most Dangerous Branch*, *supra* note 76, especially at 1766–71. Along with the functions of balanced power to prevent tyranny and a desire for efficiency, I further identify what I term "joint accountability," basically meaning that outside the core of each power, involvement of the other branches enhances government accountability to the public. I defer discussion of how this purpose relates to foreign affairs debates to another time.

85. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

86. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

must first examine the specific textual provisions found in Articles I and II, and elsewhere. If text does not control, then one should see if history resolves the matter, as is generally accepted to be the case with the Declare War Power.⁸⁷ If that tack yields no satisfactory answer, then one should seek out ongoing custom or tradition, much as Justice Jackson advocated.⁸⁸ If that does not work, then one should seek an answer in a more general, purposive approach. Sometimes the answers will cut in the President's way, sometimes towards Congress. But nothing in the text, history, or structure indicates that either the executive or legislative branch is the presumptive winner in this case.

87. See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

88. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).