

THE TEXTUAL BASIS OF THE PRESIDENT'S FOREIGN AFFAIRS POWER

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What I want to present here is, if not an alternative to Justice Robert Jackson's famous *Youngstown* framework,¹ at least a complement to that framework for approaching the President's foreign affairs power. My central proposition is that the eighteenth-century meaning of "executive" power included foreign affairs powers as well as the more familiar power to execute the law. Thus, Article II, Section 1 of the U.S. Constitution—which states that "the executive Power shall be vested in a President"—grants, in eighteenth-century terms, the power to execute the law plus foreign affairs powers. This is sometimes called Hamilton's vision of executive power, but its first reasoned exposition after the Constitution's ratification was actually made by Thomas Jefferson, and that is why I have called it the "Jeffersonian" executive power in prior articles.²

Jefferson wrote: "The Constitution . . . has declared that 'the Executive powers shall be vested in the President.' . . . The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate."³ Of course, Jefferson was not a Framers and he had at times some unusual constitutional ideas. So, why should we rely on him? I

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1. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–49 (1952) (Jackson, J., concurring).

2. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) [hereinafter Prakash & Ramsey, *Executive Power*]; Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005).

3. Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 PAPERS OF THOMAS JEFFERSON 378, 378–79 (Julian Boyd et al. eds., 1961); see also Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 38–40 (Harold C. Syrett ed., 1969) (providing Hamilton's similar explanation).

do not rely on him exclusively. I only say that if we are interested in what the Constitution meant to reasonable people at the time it was written, it is useful to explore what Jefferson suggested. Therefore, I will explain where I think Jefferson got his idea of executive power and then show why one can think the idea represents the Constitution's original meaning.

There are four basic steps in this argument. First, the key writers of the eighteenth century on whom the Framers relied, particularly Montesquieu and Blackstone, defined "executive" power to include foreign affairs powers. For example, Montesquieu wrote: "In every government, there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."⁴ In listing the "executive" powers "dependent on the law of nations," he included things like war and peace, ambassadors, defense, and national security.⁵ Modern experts on Montesquieu's philosophy conclude that Montesquieu "use[s] the term 'executive power' . . . to cover the function of the magistrates to make peace or war, send or receive embassies, establish the public security, and provide against invasions," and that "Montesquieu, like most writers of his time, was inclined to think of the executive branch of government as being concerned nearly entirely with foreign affairs."⁶ According to constitutional historian Francis Wormuth, "[t]he famous sixth chapter of Book XI of [Montesquieu's] *Spirit of the Laws* . . . recognizes . . . the executive power in foreign relations . . ."⁷

Similarly, Blackstone described the "executive" powers of the English monarch as encompassing the principal foreign af-

4. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (Hafner Publ'g Co. 1949) (1748).

5. *Id.*

6. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 95 (2d ed. 1998); W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 103 (1965).

7. FRANCIS D. WORMUTH, *THE ORIGINS OF MODERN CONSTITUTIONALISM* 195 (1949). Professor Martin Flaherty, who elsewhere is quite critical of the theory of executive foreign affairs power, has written that, "[a]ccording to Montesquieu, to whom [founding-era] Americans usually turned . . . executive authority included the power to make peace or war and to establish public security." Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1765 (1996). See generally Martin S. Flaherty, *The Most Dangerous Branch Abroad*, 30 *HARV. J.L. & PUB. POL'Y* 156 (2006) [hereinafter Flaherty, *Most Dangerous Branch Abroad*]; Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *MICH. L. REV.* 545 (2004).

fairs authorities, including ambassadors, treaties, war, and letters of marque and reprisal. These “foreign concerns,” Blackstone explained, are included within the powers “the exertion whereof consists the executive part of government.”⁸

This in itself does not prove how the Framers chose to organize their new government. It does suggest, though, that the vocabulary that they started with defined “executive” power to include foreign affairs powers. Montesquieu and Blackstone were by far the most widely read and influential political writers in America during the founding era, enjoying wide circulation and citation.⁹ Madison described Blackstone’s *Commentaries* as “a book which is in every man’s hand” and Montesquieu as “the oracle who is always consulted and cited” on separation of powers.¹⁰ Their use of words, especially words as central to the idea of separation of powers as “executive power,” was surely well-known to educated Americans.¹¹

8. WILLIAM BLACKSTONE, 1 COMMENTARIES *252–53, *257–58 (1765). To quote Professor Flaherty again: “Blackstone saw foreign affairs authority as quintessentially executive . . .” Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095, 2106 (1999); see also Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties*, 55 WASH. L. REV. 1, 75–77 (1979) (stating that Blackstone described the conduct of foreign affairs as an aspect of the executive part of government).

9. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) (discussing the influence of Montesquieu and Blackstone); DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 139–49 (1988) (examining the relative influence of Montesquieu and Blackstone on American political thought); FORREST McDONALD, *NOVUS ORDO SECLORUM* 54–96 (1985) (discussing Montesquieu’s influence). Blackstone was Americans’ “standard authorit[y]” on matters of English law, BAILYN, *supra*, at 31, and Americans “could recite the central points of Montesquieu’s doctrine as if it had been a catechism,” McDONALD, *supra*, at 81. Statistically, Montesquieu and Blackstone were the most cited secular writers in America during the period. LUTZ, *supra*, at 139–49.

10. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1382 (John P. Kaminski & Gaspare J. Saladino eds., 1993); THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., Signet 2003).

11. Other contemporary writers shared the terminology of Montesquieu and Blackstone. Thomas Rutherford wrote that “when we are speaking of external executive power, we are supposed to include under that head, not only what is properly called military power, but the power likewise of making war or peace, the power of engaging in alliances for an [i]ncrease of strength, either to carry on war or to secure peace, the power of entering into treaties, and of making leagues to restore peace . . . and the power of adjusting the rights of a nation in respect of navigation, trade, etc . . .” Ambassadors were part of “the rest of that branch of the executive power, which is external” and thus ambassadors were “under the regulation of the executive, as to the degree or extent of their power.” 2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 54–61 (1754). Jean De Lolme de-

The second step of the argument is to recognize that, in the period leading up to the drafting of the Constitution, American discourse itself associated “executive” power with foreign affairs power. For example, Theophilus Parsons’ influential pamphlet *The Essex Result*, drafted during the debate over the Massachusetts state constitution, adopted Montesquieu’s terms (and foreshadowed Jefferson and Hamilton) in observing:

The executive power is sometimes divided into the external executive, and internal executive. The former comprehends war, peace, the sending and receiving ambassadors, and whatever concerns the transactions of the state with any other independent state.

“The confederation of the United States of America,” *The Essex Result* continued, “hath lopped off this branch of the executive, and placed it in Congress.”¹² For this reason, the Congress (the sole branch of the national government prior to 1789), although it did not have much law execution power, was frequently called an “executive” body. According to Jack Rakove, a leading authority on the history of the founding period, Americans called the Continental Congress a “deliberating Executive assembly,” the “Supreme Executive,” or the “Supreme Executive Council.” He explains: “The idea that Congress was essentially an executive body persisted because its principal functions, war and diplomacy, were traditionally associated with the crown, whose executive, political prerogatives, [bore] a very striking resemblance to the powers of Congress.”¹³

scribed the monarch’s “executive” power to include serving as “the representative and the depository of all the power and collective majesty of the nation; he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace.” JEAN DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 70 (London, G. Wilkie 1816) (1775). Legal historian Arthur Bestor—no defender of presidential power—concludes that “[t]he term ‘executive power’ . . . was defined, in the constitutional traditions of most European countries, in such a way as to include the plenary power to decide, as well as to carry out, the foreign policy of the nation.” Bestor, *supra* note 8, at 77.

12. *The Essex Result*, in 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805*, at 480, 494 (Charles Hyneman & Donald Lutz eds., 1983). On the significance of the *Result*, see VILE, *supra* note 6, at 165–66; WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 91 (1980) (calling the *Result* “an essay in political theory and constitutional practice comparable to *The Federalist* in the sophistication of its argument (and in its political outlook).”).

13. JACK RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS* 383 (1979) (internal quotation omitted); see also Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 *PAPERS OF JAMES MADISON* 350–52 (William Hutchinson et al. eds.,

So, as the Framers entered the drafting convention in 1787, they had the idea that “executive” functions of government included foreign affairs powers as well as law execution powers. The initial Virginia Plan presented at the Convention’s outset would have allocated foreign affairs power almost in its entirety to the new executive branch. The Virginia Plan provided that “besides a general authority to execute the National laws” the new executive branch “ought to enjoy the Executive rights vested in [the Continental] Congress by the Confederation.”¹⁴ Those “Executive rights” were principally the powers of war and peace, and other related foreign affairs powers, as indicated by the vocabulary of Montesquieu, Blackstone, the *Essex Result*, and common usage during the Confederation period.

The delegates recognized that this language would include foreign affairs power, and some raised objections on that ground. In particular, the objecting delegates—rejecting English practice and Montesquieu’s model—did not want to give the President complete power over war and treaties.¹⁵ So they stripped out this language,¹⁶ and after trying various approaches, they came up with the language now contained in the Constitution. The President has a general executive power, which, to the delegates, included foreign affairs powers. He was subject, however, to the exceptions that were specifically written into the Constitution’s text—principally, limits on declaring war, making treaties, and making diplomatic appointments.¹⁷

1991) (writing that the state governors were of lesser importance because “all of the great powers which are properly executive [were] transferred to the Federal Government” by the Articles); JACK RAKOVE, *ORIGINAL MEANINGS* 253 (1996) (describing this letter and confirming that Madison meant by executive powers “the matters of war and diplomacy which were prerogatives of the British Crown.”).

14. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 21 (Max Farrand ed., 1937). Because the Virginia plan said that the new executive would have law execution power plus the *other* executive rights of the Continental Congress, it seems clear that it meant foreign affairs powers, as the delegates immediately recognized.

15. *Id.* at 64–67.

16. *Id.* at 67.

17. After eliminating the President’s general executive power altogether in response to the Virginia plan, delegates restored it in the Committee of Detail draft several months later, along with specific provisions that denied the President authority over war and treaty-making. Although the delegates surely still attached the same meaning to the phrase executive power as they had earlier (that is, that it included foreign affairs power), they accepted the Committee’s proposal without

The third step of the argument is that when George Washington became President after the ratification of the Constitution, he immediately took over control of foreign affairs. Without statutory authority, he exercised the foreign affairs functions of the nation that were not specifically mentioned in the Constitution—things like control and removal of diplomats, foreign communications, and formation of foreign policy. These powers had all been exercised by the Continental Congress under the Articles, but both Washington and the new Congress acted as if something in the Constitution had shifted them to the new office of the President.¹⁸

Fourth, when key statesmen of the time explained Washington's foreign affairs powers, they relied on the grant of executive power in Article II, Section 1. For example, Jefferson—as quoted earlier—argued that the “transaction of business with foreign nations” is “executive” and thus vested in the President by Article II, Section 1, except where the Constitution says otherwise. The quote is from a 1790 legal opinion explaining Washington's authority over U.S. diplomats, and says quite plainly that foreign affairs powers not individually mentioned in the Constitution—in that case, determining the rank and destination of diplomats—belong to the President.¹⁹ Hamilton,

material objection on this point, presumably because the Committee's draft no longer granted the President foreign affairs powers to which they had objected. See 2 *id.* at 143–53, 163–75.

As Professor Flaherty points out, Professor Rakove disagrees with this analysis. See Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 PERSP. IN AM. HIST. (n.s.) 233 (1984). But Rakove's description of the Convention does not take into account the extent to which “executive” had a settled meaning in 1787 (as his other work well demonstrates), and it especially fails to account for the phrasing of the Virginia plan and the delegates' response to it.

18. See H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* 34–94 (2002); Prakash & Ramsey, *Executive Power*, *supra* note 2, at 295–340. For example, Washington immediately took control of the Department of Foreign Affairs and its Secretary, John Jay, although Jay and the Department had answered to Congress before the Constitution; Washington took control of communications to and from foreign nations; he made decisions about sending and recalling U.S. diplomats, and about expelling foreign diplomats; and he determined the substance of U.S. foreign policy, most notably in the 1793 neutrality proclamation and its aftermath. None of these matters was authorized by statute, nor do they fit easily (or even uneasily) within the President's specific constitutional powers.

19. See Jefferson, *supra* note 3, at 378–80. Some members of Congress had proposed that the President be required to gain the advice and consent of the Senate in setting the rank and pay of diplomats; Washington thought this infringed his executive power, and Jefferson, then Secretary of State, agreed. On Jefferson's “broad statements regarding the executive nature of matters involving foreign

three years later in the *Pacificus* essays, made a parallel argument in defending President Washington's proclamation of neutrality. The power to establish the nation's foreign policy toward Britain and France, Hamilton argued, was part of the traditional "executive" power over foreign affairs and was not granted to any other branch by the Constitution; thus it was a presidential power, "vested" by Article II, Section 1.²⁰ These were not isolated or idiosyncratic arguments. Other prominent leaders, including James Madison, John Jay, Oliver Ellsworth, John Marshall, and Washington himself, similarly described foreign affairs power as "executive" power.²¹

It is not the case that all the Framers made this association. In particular, although Madison initially seemed to acknowledge the relationship between executive power and foreign affairs power, he later famously denied it in disputing Hamilton's *Pacificus*.²² But the weight of the evidence, both before and after ratification, seems clearly to favor including foreign affairs powers within the definition of "executive" powers. This seems

affairs," see DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 230–31 (1994).

20. See Hamilton, *supra* note 3, at 38–40. Washington had declared, on behalf of the United States and without consulting Congress, that the nation would give no assistance to either Britain or France, which were then at war.

21. John Marshall, Speech to Congress (Mar. 7, 1800), in 4 *PAPERS OF JOHN MARSHALL* 82, 104 (Charles T. Cullen ed., 1974) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations" because the President "possesses the whole executive power. He holds and directs the force of a nation. Of consequence any act to be performed by the force of a nation, is to be performed through him."); *id.* at 105 ("the executive" is "[t]he department . . . entrusted with the whole foreign intercourse of the nation . . ."); Letter from George Washington to Emperor of Morocco (Dec. 1, 1789), in 30 *THE WRITINGS OF GEORGE WASHINGTON* 474, 474–75 (John C. Fitzpatrick ed., 1939) (attributing power over diplomatic communication to his possessing "the supreme executive Authority"); 4 *THE DIARIES OF GEORGE WASHINGTON, 1748–1799*, at 122 (John C. Fitzpatrick ed., 1925) (noting that Jay and Madison agreed with the analysis in Jefferson's opinion that control over diplomats "being Executive [is] vested in the President by the Constitution"); 5 *ANNALS OF THE CONGRESS OF THE UNITED STATES* 32 (Joseph Gales ed., 1834) (recording Ellsworth's statement that, under the Constitution, communication with foreign powers "is positively placed in the hands of the Executive"); Letter from John Jay to Giuseppe Chiappe (Dec. 1, 1789), available at [http://memory.loc.gov/cgi-bin/ampage?collId=mgw2&fileName=gwpage028.db&rec=images 112-14](http://memory.loc.gov/cgi-bin/ampage?collId=mgw2&fileName=gwpage028.db&rec=images%20112-14) (explaining the new presidency's control of diplomatic communications because the President had "the great executive powers" previously "held and exercised by the Congress itself").

22. See James Madison, *Helvidius*, No. 1 (Aug. 24, 1793), in 15 *PAPERS OF JAMES MADISON* 66, 69 (Thomas A. Mason et al. eds., 1985).

particularly true when this reading is compared to alternative readings. Neither Madison, in his response to Hamilton, nor modern scholars have been able to offer a satisfactory alternative account of the text's foreign affairs powers. The power to control and recall U.S. diplomats, to communicate with foreign nations, and to establish foreign policy is not included within any other grant of power in the Constitution.²³ Yet surely the Framers—who were anxious to correct the Articles in the field of foreign affairs—did not simply forget to provide for such important foreign affairs powers in their new government. Once the Constitution was ratified, no one acted as if these powers were missing, or were allocated other than to the President. These mysteries are explained only if we give the Constitution its eighteenth century meaning, recognizing that “executive” power had two components: law execution and foreign affairs.²⁴

There is an intuitive response that this reading gives too much power to the President, more power than the Framers—who distrusted the executive power of George III—would have wanted, and surely more than they would have accepted with-

23. Professor Flaherty, for example, seems unable to provide a textual account for any of these powers. See Flaherty, *Most Dangerous Branch*, *supra* note 7, at 166–69.

24. Professor Flaherty, in his response and in his prior article with Professor Bradley, seems to misunderstand the nature of this argument. He describes it as an “essentialist” view of executive power, which he contrasts with a “functionalist” approach of allocating foreign affairs power according to one’s belief in the best structure of government. This is a red herring. To be clear, I do not doubt that the Framers, in allocating foreign affairs power, thought “functionally” about what system would work best. I do not contend that they thought foreign affairs power “essentially” or “inherently” had to go to a single chief magistrate. Professor Flaherty is surely right on both these points, but they prove far less than he supposes. My argument is only a definitional one: in the eighteenth century, the phrase “executive” power, in common usage in political writing, meant foreign affairs power, just as it also meant law execution power. That does not mean that it had to be allocated in full to a chief magistrate: the Framers were familiar with systems—including the Continental Congress and the Roman senate—where much of the foreign affairs power was exercised by an assembly. As the drafting debates and the text itself reveal, the Framers were not willing to give all “executive” foreign affairs power to the President. The Framers could have chosen not to give any executive power to the President, or they could have limited the President to law enforcement power (as the draft did for some time). This Article argues only that when the Framers decided (for functional reasons) to give the President “executive” power, they understood that word to carry its ordinary eighteenth-century meaning.

out objection or debate.²⁵ It is important to remember, however, that the “executive Power” conveyed by Article II, Section 1 is limited in two critical ways.

First, the core executive foreign affairs powers of declaring war, making treaties, and making diplomatic appointments—the powers that led the delegates to object to the Virginia Plan at the outset of the Convention²⁶—were given in whole or part to other branches. Thus, it is not the case that the executive power gives the President anything like the powers of a king. Jefferson, in his opinion, emphasized this point by saying that the executive foreign affairs power belongs to the President, except such portions that are specifically submitted to the Senate (and he would have added, had it been an issue, those given to Congress as a whole).²⁷

Second, under this reading, the President cannot exercise powers that were not called “executive” in the eighteenth cen-

25. There is also a textual response: The specific grants of power to the President contained in Article II, Sections 2 and 3, would be redundant if Article II, Section 1, is read to confer a general executive power. Most, if not all, powers listed in Sections 2 and 3 in fact fit comfortably with the general grant in Section 1: they either limit powers that would otherwise inhere completely in the President (as with treaty making and diplomatic appointments), or they clarify powers that were not clearly “executive” in the common definition or which were partly given to other branches. The Commander-in-Chief Clause, for example, confirms that the President has ultimate control of (and, thus, in effect, lawmaking authority over) the military, in spite of Congress’s Article I, Section 8, power to “make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. I, § 8, cl. 14. As Hamilton said of Article II, it would be inconsistent “with the rules of sound construction to consider [Article II’s] enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause . . . [T]he difficulty of a complete and perfect specification of all the cases of executive authority would naturally dictate the use of general terms—and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used.” Hamilton, *supra* note 3, at 39; see also AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 185 (2005) (arguing that Article II “appeared to vest a general residuum of ‘executive Power’ in the president”). For specific responses to claimed redundancies, see Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1.

The one apparently redundant foreign affairs power granted in Article II, Sections 2 and 3, is the power to receive ambassadors. While there may be explanations for it, the Constitution also may contain small redundancies, as Hamilton himself noted. See THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., Signet 2003) (commenting on Article II, Section 2’s Opinions Clause: “This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office.”).

26. See 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 14, at 64–67.

27. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) (defending substantial textual limits on the President’s war power).

tury, because that is the source of the President's foreign affairs power. So, for example, the President cannot make law (that is, alter individuals' legal rights and duties), even in support of foreign affairs objectives, as the Supreme Court rightly held in the *Youngstown* case, because the eighteenth-century meaning of "executive" powers did not extend so far.²⁸ Similarly, the President cannot insist on funding for executive branch activities on the basis of the executive power, again because the eighteenth-century definition provides no basis for giving it such a meaning.²⁹ Thus, the idea of executive foreign affairs power contained in Article II, Section 1 grants the President material independent power, but this power is not an open-ended or unlimited source of authority.

In conclusion, I might suggest a pragmatic argument for adopting this reading of executive power: using the eighteenth-century meaning today provides a rule of law in foreign affairs. When a presidential claim of power is advanced, we can ask, as Jefferson did: (1) whether the power is an "executive" power as it was understood in the eighteenth century, and (2) whether the Constitution by its text has given it to another branch? This framework will not answer all questions of foreign affairs, but it creates a place to start.³⁰

In contrast, approaches founded on a "living" or evolving Constitution seem bereft of a rule of law, especially in an area such as foreign affairs where Supreme Court decisions are rare

28. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952) (holding that President Truman's executive power did not allow him to seize private steel mills to assure supplies for the Korean War); Prakash & Ramsey, *Executive Power*, *supra* note 2, at 254-55, 340-46 (emphasizing this limitation). On the executive's (or monarch's) lack of lawmaking power, see BLACKSTONE, *supra* note 8, at *146, *270; 14 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 66-68 (1964). On the historical definition of legislative power, see Larry Alexander & Saikrishna Prakash, *Reports of the Delegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1305-1320 (2003). Thus, for example, it seems doubtful that the President can detain individuals within the United States for national security reasons without statutory authorization. See BLACKSTONE, *supra* note 8, at *136 (stating that the legislature, not the monarch, has power to suspend writ of habeas corpus); see also Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME. L. REV. 1299, 1317 (2004) (using similar reasoning to argue against executive emergency powers).

29. In England, Parliament controlled funding decisions (an allocation carried over into the Constitution's Article I, Section 9), and, more importantly, the Parliament used this power to influence and control "executive" foreign affairs policymaking. 10 HOLDSWORTH, *supra* note 28, at 589-90.

30. For some attempts to answer modern questions with this approach, see Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213 (2005).

and provides little to rely on, because there is no agreed upon way to decide how the Constitution evolves. Does it evolve in the direction the President's advisers would like for it to evolve, based on the new exigencies of the War on Terror? Or does it evolve in the direction some critics of presidential power would (for policy reasons) prefer? For an evolving Constitution in an area without much Supreme Court guidance, every dispute becomes one of policy, not of law.³¹

What I am suggesting is that we can maintain a rule of law in foreign affairs, as marked out by Jefferson, Hamilton, and Washington, by adhering to the eighteenth-century understanding of executive power. It gives the President some independent foreign affairs powers, but it does not, as many Presidents and their advisers would like, give unlimited power in matters touching foreign affairs.

31. This theme is developed in Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450 (2006) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005)).