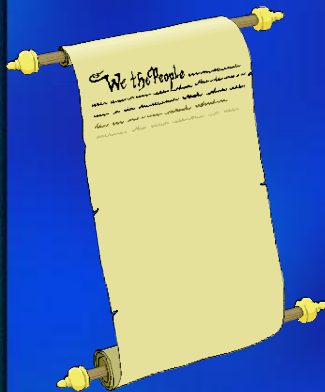


9/11 and the Legal Landscape: A Decade Later

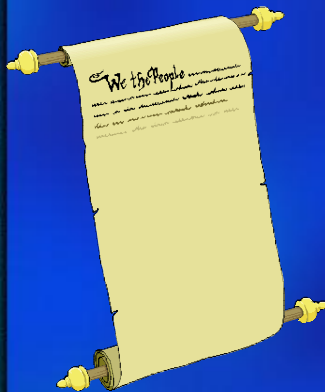
Rethinking executive power and counterterrorism



Prof. Robert F. Turner, SJD
Center for National Security Law
University of Virginia School of Law
February 4, 2011

9/11 and the Legal Landscape: A Decade Later

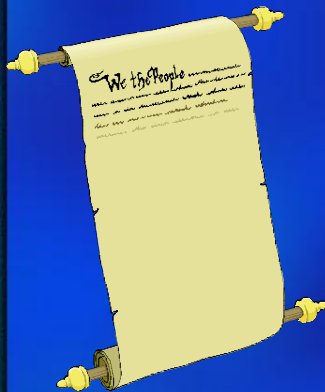
X Rethinking executive power and counterterrorism



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9/11 and the Legal Landscape: A Decade Later

OLD thinking executive power and counterterrorism



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University of Virginia School of Law
February 4, 2011

Time is limited, so
FASTEN YOUR SEAT BELTS



Time is limited, so
FASTEN YOUR SEAT BELTS

We have a lot of ground to cover, and I'm going to go quickly to leave time for questions.

My Goal

Rather than speculating about what “executive power” ought to entail, I’m going to discuss how it was understood by the Founding Fathers and their successors prior to the Vietnam War.

My Goal

Rather than speculating about what “executive power” ought to entail, I’m going to discuss how it was **understood by the Founding Fathers** and their successors prior to the Vietnam War. The **evidence** is **abundant** and the **meaning clear**.

My Goal

I wrote my 1700-page SJD doctoral dissertation on this basic issue many years ago.

My Goal



I wrote my 1700-page SJD doctoral dissertation on this basic issue many years ago.

It is as if America suffered a **hard-drive crash** during the heated debates over the Vietnam War, and we have forgotten this part of our history.

Congressional Power

I'm not going to focus heavily on the constitutional grants of power to Congress, but some of them are **very** important and establish limits on "executive power."

Congressional Power

I'm not going to focus heavily on the constitutional grants of power to Congress, but some of them are **very** important and establish limits on "executive power."

We can discuss them during **Q&A** if you like.

Correcting a Modern Myth

How many times have we heard it said that in a democracy every governmental power must be “**checked**”; and, when a President claims he has “independent” Executive power Congress can’t control, he is claiming the powers of a monarch like **King George III**?

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Some believe that there must be something in the White House water -- President Obama is using “**signing statements**” to refuse to obey statutes and making “**executive power**” claims Candidate Obama once denounced.

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Have we forgotten
Marbury v. Madison?



Does the President Have Any “Unchecked” Powers?
Marbury v. Madison (Marshall, C.J.)

“By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which **he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still **there exists, and can exist, no power to control that discretion.****”



Does the President Have Any “Unchecked” Powers?
Marbury v. Madison (Marshall, C.J.)

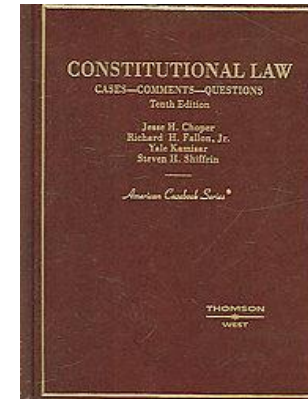


“The subjects are political. They respect the nation, not individual rights, and **being entrusted to the executive, the decision of the executive is conclusive**. The application of this remark will be perceived by adverting to the **act of congress for establishing the department of foreign affairs**. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. . . . **The acts of such an officer, as an officer, can never be examinable by the courts.**”

- *Marbury v. Madison* (Marshall, C.J.)

Does the President Have Any “Unchecked” Powers?
Marbury v. Madison (Marshall, C.J.)

Sadly, this language is sometimes left out of Constitutional Law casebooks.



Textual Source of the President's

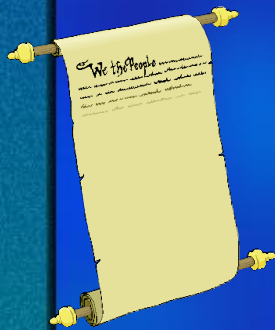
BREAKING THE CODE:

Where in the Constitution do we find a grant of foreign affairs power to the President?

Textual Source of the President's Authority Over Foreign Affairs

“The executive Power
shall be vested in a
President of the United
States of America.”

- U.S. Const., **Art. II, Sec. 1.**



Words Sometimes Change Their Meaning Over Centuries

“awful Constitution”

“executive power”

Words Sometimes Change Their

Definition of **AWFUL**

1

: inspiring awe

2

: filled with awe . . .

b : deeply respectful or reverential

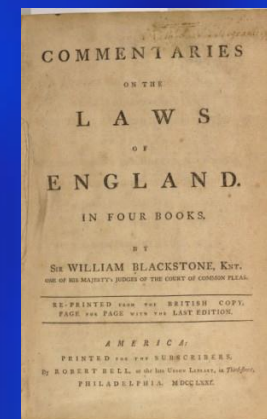
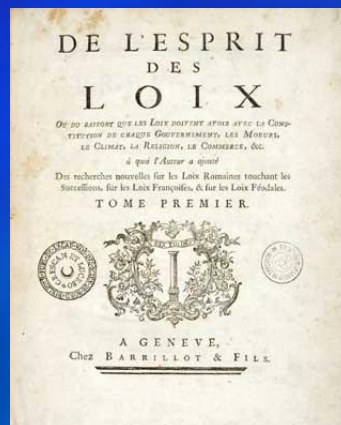
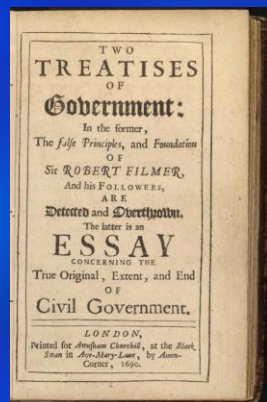
3

: extremely disagreeable or objectionable

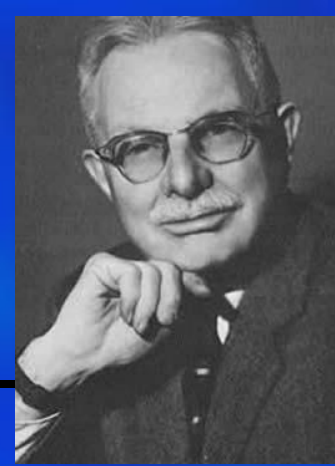
<http://www.merriam-webster.com/dictionary/awful>

The Framers' s Understanding of "Executive Power"

Locke, Montesquieu, Blackstone, and other theorists of the time included within the "executive" power the control over foreign affairs.



Professor Quincy Wright



“The need of concentration of power for the successful conduct of foreign affairs was dwelt upon in the works of John Locke, Montesquieu, and Blackstone, the political Bibles of the constitutional fathers.”

Quincy Wright,
The Control of American Foreign Relations 363 (1922).



Princeton Prof. Edward Corwin on Executive Prerogative

“The fact is that what the Framers had in mind was . . . the ‘balanced constitution’ of **Locke**, **Montesquieu**, and **Blackstone**, which carried with it the idea of a *divided initiative in the matter of legislation and a broad range of **autonomous executive power or ‘prerogative.’**”*

Edward S. Corwin, *The President: Office and Powers*
14-15 (4th Rev. ed. 1957) (emphasis in original).

Did the Constitution Give the President any “Prerogatives”?

James Wilson remarked on June 1, 1787, at the Philadelphia Convention that he “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers.”

Did the Constitution Give the

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There were several such anti-Executive statements made on June 1st, at the very beginning of the Constitutional Convention.

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There were several such anti-Executive statements made on June 1st, at the very beginning of the Constitutional Convention.

But **opinions** changed in the following months.

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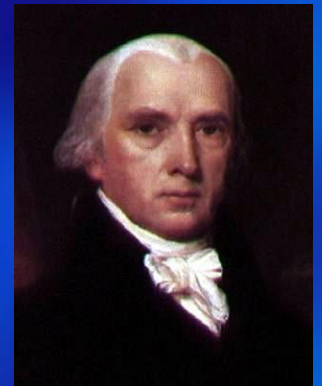
Did the Constitution Give the President any “Prerogatives”?

In *Federalist* No. 47, Madison wrote:

“The entire legislature,
again, can exercise no
executive prerogative . . .

”

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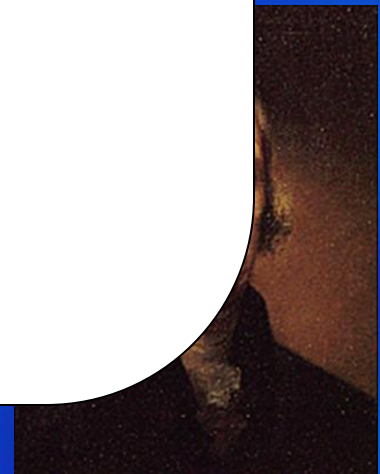
Prof. Lou Henkin on “Executive Power”



“The **executive power** . . .
was not defined because it
was well understood by the
Framers raised on **Locke**,
Montesquieu and
Blackstone.”

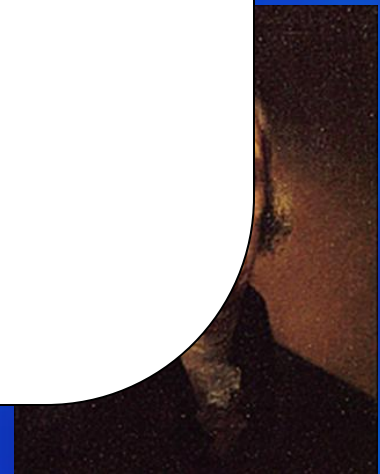
- *Foreign Affairs and the Constitution* 43 (1972).

**How do we know the
Founding Fathers
accepted this theory of
“Executive Power”?**



How do we know the
Founding Fathers
accepted this theory of
“Executive Power”?

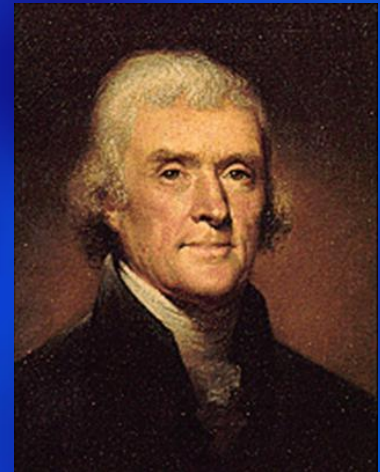
**Because they
told us so.**



Thomas Jefferson

Memorandum to President Washington (April 1790)

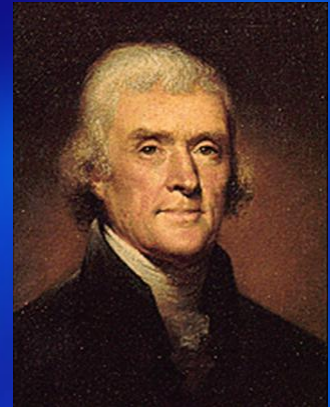
“The Constitution has declared that ‘**the Executive power** shall be vested in the President,’ submitting only special articles of it to a negative by the Senate



Thomas Jefferson

Memorandum to President Washington (April 1790)

“The transaction of business with foreign nations is **executive** altogether; it belongs, then to the head of that department , except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.”

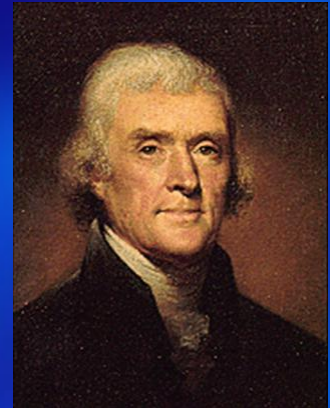


Thomas Jefferson

Memorandum to President Washington (April 1790)

“The senate is not supposed by the constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them”

3 The Writings of Thomas Jefferson 16, 17
(Mem. ed. 1903).



Thomas Jefferson

Memorandum to President Washington (April 1790)

“

It is noteworthy that in his initial draft of this memo, Jefferson wrote that the Senate was not supposed to be acquainted with the “**secrets**” of the Executive branch.

Washington, Madison, and Chief Justice Jay on the Scope of “Executive Power” (1790)

“Tuesday, 27th [April 1790]. Had some conversation with Mr. **Madison** on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. **Jay’s** and Mr. **Jefferson’s**—to wit—that **they have no Constitutional right to interfere** with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, **all the rest being Executive and vested in the President by the Constitution.**”

- 4 *Diaries of George Washington* 122 (Regents’ Ed. 1925).

Alexander Hamilton on “Executive Power” (1793)



“[A]s the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are **exceptions** out of the general “**executive power**” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.”

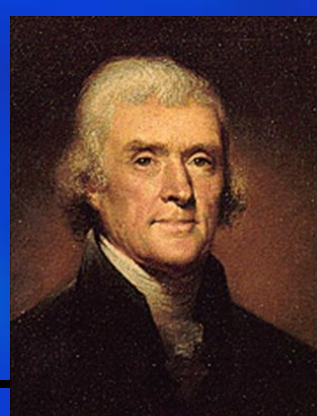
15 *The Papers of Alexander Hamilton* 39
(Harold C. Syrett ed., 1969).

Supporters of Idea that the “Executive Power” Clause Gave President Control of Foreign Affairs

- First President (also President of Constitutional Convention)
- First and Third Chief Justices
- Heads of both political parties (G.W. & T.J.)
- All three authors of the *Federalist Papers*
- Congress (as we will see).

Yet modern casebooks seldom even *mention* this clause as a possible source of presidential power.

Thomas Jefferson on Appropriations
letter to Secretary of the Treasury Albert Gallatin
(19 February 1804)



The Constitution has made the Executive the organ for managing our intercourse with foreign nations....

From the origin of the present government to this day . . . it has been the uniform opinion and practice that **the whole foreign fund was placed by the Legislature on the footing of a contingent fund**, in which they undertake no specifications, but **leave the whole to the discretion of the President.**

- *11 Writings of Thomas Jefferson* 5, 9, 10 (Mem. ed. 1903).

First Appropriations Bill for Foreign Intercourse (1 July 1790)

“[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually...”

U.S. Statutes at Large, vol. 1, p. 129 (1790).

Article I, Section 9, of the Constitution requires that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. ...”

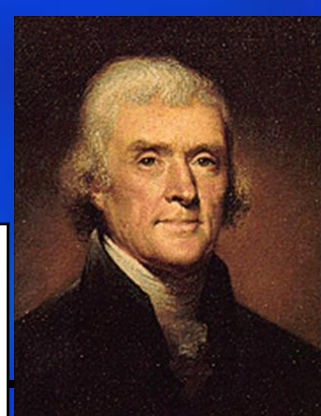
Thomas Jefferson on Appropriations

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Thus, early Congresses clearly shared this view that foreign policy was a presidential responsibility under the Constitution.

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- 11 *Writings of Thomas Jefferson* 5, 9, 10 (Mem. ed. 1903).

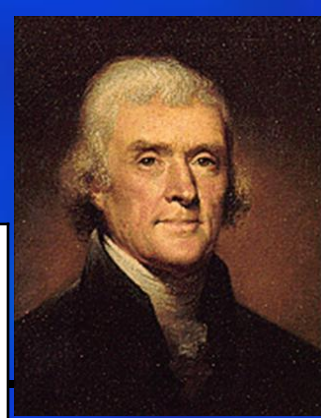
Thomas Jefferson on Appropriations

letter

And let's not forget the
Supreme Court



discretion of the President.



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- 11 Writings of Thomas Jefferson 5, 9, 10 (Mem. ed. 1903).

United States v. Curtiss-Wright Export Corp.
on Limits to Congressional Power (1936)

“Not only, as we have shown, is the **federal power over external affairs** in origin and essential character different from that over internal affairs, but **participation in the exercise of the power is significantly limited**. In 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. He makes treaties with the advice and consent of the Senate; but he alone negotiates. **Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.**”



Executive Control of Foreign Affairs

Haig v. Agee, 453 U.S. 280, 293-94 (1981)

“The Court also has recognized ‘the generally accepted view that foreign policy was the province and responsibility of the Executive.’ ”

Force Short of War

(United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990)).

“The United States frequently employs Armed Forces outside this country—over 200 times in our history for the protection of American citizens or national security.”

This broad consensus prevailed in all three branches until about the time of the debate over the Vietnam War.

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SFRC Chairman J. William Fulbright on Executive Preeminence in Foreign Policy (1959)

“The pre-eminent responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs ‘which the Constitution does not vest elsewhere in clear terms.’ ”

SFRC Chairman J. William Fulbright

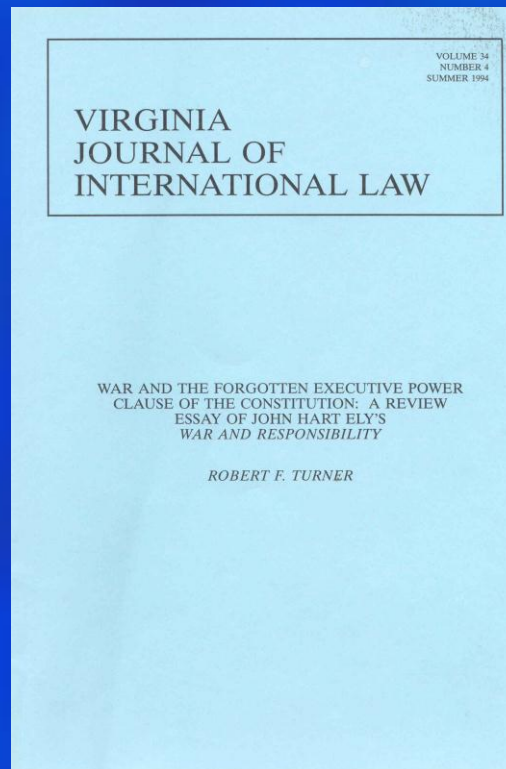
on Executive Preeminence in Foreign

“The pre-eminent responsibility for the formulation of foreign policy is clear and unambiguous, as Alexander Hamilton has, as Alexander Hamilton powers in international affairs. The Constitution does not vest elsewhere in clear terms.”

Note Senator Fulbright acknowledges President control over the **making** of foreign policy as well as its implementation.



Additional Reading



34 Va. J. Int' l L. 903 (1994).

The “Power of the Purse”

Does Legislative Control Over Appropriations Give Congress Constitutional Authority to Usurp Presidential Powers?

United States v. Klein

80 U.S. (13 Wall.) 128, 145, 147-48 (1872)

“The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus **infringing the constitutional power of the Executive** It is the intention of the Constitution that each of the great coordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit. . . . Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration.”

United States v. Lovett

328 U.S. 303, 313, 315, (1946)

“We...cannot conclude, as [Counsel for Congress] urges, that [the section] is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure’s constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress had final say....We hold that [the section] falls precisely within the category of congressional actions which the Constitution barred by providing that ‘No Bill of Attainder or ex post facto Law shall be passed’ ”

United States v. Lovett

328 U.S. 303, 313, 315, (1946)

“As an aside, in signing this bill FDR issued a “**signing statement**” declaring that this section was unconstitutional and would not bind the Executive or Judicial branches.

United States v. Lovett

328 U.S. 303, 313, 315, (1946)

“ Jefferson’s 1801 declaration that he would not enforce the unconstitutional Alien and Sedition Laws was of a similar character, except the laws were enacted under Adams.

Clear and Present Danger

The modern practice of using “conditions” on appropriations bills to exercise control of powers vested elsewhere in the Constitution is a threat to the core doctrine of Separation of Powers. If Congress can seize the Commander-in-Chief power, it can destroy the Judicial power too

Supreme Court Neutralization Act of 2008

(not yet introduced)

Be it hereby enacted, that...

No funds appropriated by this or any other act shall be available to finance the operations of the Supreme Court, other than to pay the salaries of the Justices, if the Court holds any statute or part of a statute enacted by Congress to be unconstitutional.

Could the Power of Judicial Review Survive Such a Statute?

(Unlike the Commander-in-Chief Power, Judicial Review is an implied power not mentioned in the Constitution.)

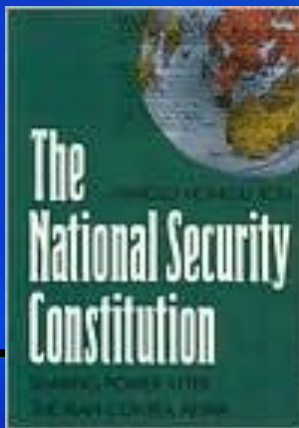
For slides & further information

[http://www.virginia.edu/
cnsl/bio/turner.html](http://www.virginia.edu/cnsl/bio/turner.html)

(Also click on “**Congressional
Testimony**”)

I look forward to taking questions





Prof. Harold Koh's Dichotomy

(Now Dean of Yale Law School)

Must we choose between
Curtiss-Wright and *Youngstown*?

Harold Koh on Allocation of Powers

The National Security Constitution 67, 75, 118 (1990)

One cannot read the Constitution without being struck by its astonishing brevity regarding the allocation of foreign affairs authorities among the branches. **Nowhere does the Constitution use the words “foreign affairs” or “national security.”** . . .

[T]he first three articles of the Constitution expressly divided foreign affairs powers among the three branches of government, with Congress, not the president, being granted the dominant role . . .

Article I gives Congress almost all of the enumerated powers over foreign affairs and Article II gives the president almost none of them”

Prof. Harold Koh

On *Youngstown* and *Curtiss-Wright*

The National Security Constitution 108, 211-12 (1990)

Jackson's *Youngstown* concurrence squarely rejected the *Curtiss-Wright* vision . . .

Although in the early years of the Republic, all three branches condoned a de facto transformation of the original National Security Constitution from a scheme of congressional primacy to one of executive primacy, they never rejected the concept of power sharing and institutional participation . . .

Prof. Harold Koh

On *Youngstown* and *Curtiss-Wright*

The National Security Constitution 108, 211-12 (1990)

In 1936, *Curtiss-Wright*'s dicta boldly asserted the alternative vision of unfettered presidential management. But even as the Cold War raged, the 1947 National Security Act, *Youngstown*, and finally the post-Vietnam era framework statutes (e.g., War Powers Resolution) definitively rejected that vision as America's constitutional model for dealing with the outside world. Vietnam (and Watergate, as well, to the extent that it arose from Vietnam) then taught that even in a nuclear age, America would not conduct globalism at the price of constitutionalism. It is therefore ironic that the *Curtiss-Wright* model should now resurface

Harold and I are old friends,
but this book is silly.



Prof. Harold Koh on “Right Wing” Revisionism

Critics on the right, in contrast, argue that to preserve our activist foreign policy, we must revise constitutionalism, abandoning the *Youngstown* vision in favor of *Curtiss-Wright*. Yet because many of these same critics also espouse the constitutional jurisprudence of original intent, they are forced to engage in revisionist history to contend that the Framers did not originally draft the Constitution to promote congressional dominance in foreign affairs.

See, e.g., Turner “Separation of Powers in Foreign Policy: The Theoretical Underpinnings,” 11 *Geo. Mason U.L. Rev.* 114, 116 (1988) [quotation omitted]. See also, . . . J. Moore, *Government under Law and Covert Operations* (1980) . . .

Prof. Harold Koh on “Right Wing” Revisionism

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See, e.g., **Turner** “Separation of Powers in Foreign Policy: The Theoretical Underpinnings,” 11 *Geo. Mason U.L. Rev.* 114, 116 (1988) [quotation omitted]. See also, . . . **J. Moore**, *Government under Law and Covert Operations* (1980) . . .

Youngstown was not a
“foreign affairs” case

Youngstown Was a Fifth Amendment **Domestic** Case

“No person shall . . . be deprived of . . . **property**, without the due process of law; nor shall **private property** be taken for public use without just compensation.”

- U.S. Const. Amendment V.

Youngstown Sheet & Tube Co. v. Sawyer as a Domestic Affairs Case

[majority opinion by **Justice Black**]

“The order cannot properly be sustained as an exercise of the President’s military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here.

Youngstown Sheet & Tube Co. v. Sawyer as a Domestic Affairs Case

[majority opinion by **Justice Black**]

“Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces had 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.”

343 U.S. 579

(1952)

Youngstown Sheet & Tube Co. v. Sawyer - I ("Steel Seizure Case") 343 U.S. 579 (1952)

[Justice Jackson Concurring]

[N]o doctrine that the Court could promulgate would seem to be more sinister and alarming than that a President **whose conduct of foreign affairs is so largely uncontrolled, and often is even unknown**, can vastly enlarge his mastery over the **internal affairs** of the country by his own commitment of the Nation's armed forces to some foreign adventure.

. . .

That military powers of the Commander in Chief were not to supersede representative government of **internal affairs** seems obvious from the Constitution and from elementary American history. . . . Such a limitation [the Third Amendment] on the command power, written at a time when the militia rather than a standing army was contemplated as a military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of **domestic policy**

[continued on next slide . .]

Youngstown Sheet & Tube Co. v. Sawyer - II (“Steel Seizure Case”) 343 U.S. 579 (1952)

[. . . Continued from previous slide.]

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain **his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society**. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. . . . What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to **seize person or property** because they are important or even essential for the military or naval establishment.

Youngstown Sheet & Tube Co. v. Sawyer - III ("Steel Seizure Case") 343 U.S. 579 (1952)

[. . . Continued from previous slide.]

The silliness of Prof. Koh's position is apparent from reading Jackson's **footnote 2** in his concurring opinion in *Youngstown*, which cites *Curtiss-Wright* and remarks:

“That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories”

Did Jackson Intend to Overturn *Curtiss-Wright*?

Just two years before *Youngstown*, Jackson relied on *Curtiss-Wright* in *Eisentrager* for the proposition that the President “is **exclusively responsible**” for the “conduct of diplomacy and foreign affairs”

Prof. Louis Henkin

On “Steel Seizure Case” as a Domestic Affairs Decision

Youngstown has not been considered a “foreign affairs case.” The President claimed to be acting within ‘the aggregate of his constitutional powers,’ but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power, and even the dissenting justices invoked only incidentally that power or the fact that the steel strike threatened important American foreign policy interests.

Foreign Affairs and the Constitution 341 n.11.

Justice Rehnquist on the “Steel Seizure Case”

Goldwater v. Carter 444 U.S. 996 (1979)

(concurring, joined by Chief Justice Burger and two other members of the Court)

The present case differs in several important respects from *Youngstown* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President’s authority under his war powers to seize the Nation’s steel industry, an action of profound and demonstrable **domestic** impact. . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is “**entirely external to the United States, and [falls] within the category of foreign affairs.**”

“The Founding Fathers
were very concerned
about constraining the
powers of Congress.

tyranny.”

Experience with Legislative Tyranny (1776-1787)

Charles Thach, *The Creation of the Presidency 1775-1789* at 52 (1922)

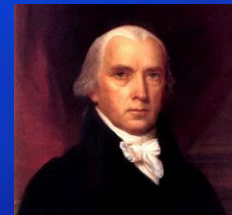
State experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers. **The idea, more than once utilized as the basis of the explanation of Article II of the Constitution, that the jealousy of kingship was a controlling force in the Federal Convention, is far, very far, from the truth.** The majority of the delegates brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that, if their new plan should succeed, it was necessary for them to put forth their best efforts to secure a strong, albeit safe, national executive.

Experience with Legislative Tyranny (1776-1787)

Charles Thach, *The Creation of the Presidency 1775-1789* at 52 (1922)

Madison expressed the general conservative view when he declared on the Convention floor:

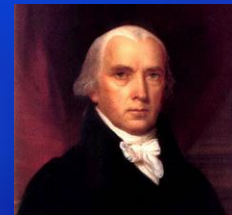
Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent. If no effective check be devised for restraining the instability and encroachment of the latter, a revolution of some kind or the other would be inevitable.



FEDERALIST # 47

On Separation of Powers and Tyranny

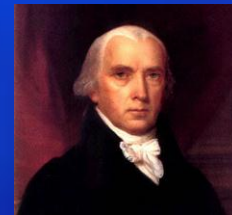
“The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”



FEDERALIST # 47

On Separation of Powers and Tyranny

“Will it be sufficient to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these **parchment barriers** against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American Constitutions.



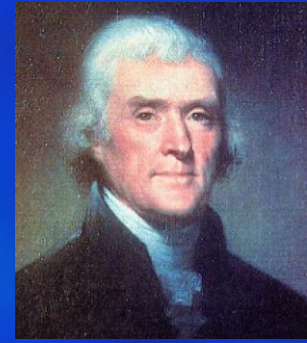
FEDERALIST # 47

On Separation of Powers and Tyranny

“The **legislative department** is every where extending the sphere of its activity, and drawing all power into its impetuous vortex. . . . The founders of our republics . . . seem never to have recollected **the danger from legislative usurpations**; which by assembling all power in the same hands, must lead to the same **tyranny** as is threatened by executive usurpations.”

- *Federalist* No. 47 (Madison).

Thomas Jefferson



Eleven days after the new Constitution went into effect, Jefferson wrote to Madison: “The executive, in our governments is not the sole, it is scarcely the principal object of my jealousy. *The tyranny of the legislatures* is the most formidable dread at present”

Jefferson to Madison, March 15, 1789,
in 14 PAPERS OF THOMAS JEFFERSON 659

The Supreme Court on the Framers' Fear of Legislative Tyranny

“[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”

—*Buckley v. Valeo*, 424 U.S. 1, 129 (1976).