

## A NON-ORIGINALIST SEPARATION OF POWERS

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## INTRODUCTION

Since the end of World War II, some of the United States Supreme Court's most important constitutional law cases have focused on the appropriate relationships between and among the three branches of the federal government.<sup>1</sup> Although the phrase "separation of powers" is not in the constitutional text, the Supreme Court has played a pivotal role in ensuring that the framers' desire for a government of checks and balances is fulfilled. In most of these disputes, however, the Constitution's text and original meaning played, at most, a marginal role in the Court's decisions. Given the academic focus, some might say obsession, with "originalism," as well as President Trump's promise to only appoint originalist judges,<sup>2</sup> the absence of textual and originalist analysis in the Court's separation-of-powers decisions suggests that originalism, at least in this area of the law, is more illusion than substance.

This article argues that the Court is right to focus on factors other than text and original meaning when deciding cases implicating the allocation of powers among the three branches of the federal government. The executive branch has changed so dramatically since the founding that there is little wisdom from 1787 that can help judges resolve most separation-of-powers problems today.

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1. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 659–60 (1988); *INS v. Chadha*, 462 U.S. 919, 923 (1983); *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 582 (1952).

2. See Ben Kamisar & Lydia Wheeler, *Trump Soothes the Right with List of Supreme Court Picks*, THE HILL (May 18, 2016, 8:04 PM EDT), <http://thehill.com/blogs/ballot-box/presidential-races/280381-trump-unveils-list-of-11-potential-supreme-court-nominees>.

## I. STEEL SEIZURE

In 1950, President Harry Truman ordered the United States military into an armed conflict to support South Korea and oppose North Korea. This “police action,” as it was called at the time,<sup>3</sup> involved a major military conflict without congressional authorization (as seemingly required by Article I, Section 8).<sup>4</sup> Subsequently, Congress passed statutory initiatives supporting and funding the troops although it never passed a formal Declaration of War.<sup>5</sup>

In 1952, a national steel strike loomed. After attempts to resolve the conflict failed, Truman issued Executive Order 10340 (“Executive Order”) directing the Secretary of Commerce to seize privately owned steel mills and keep them operating.<sup>6</sup> This Executive Order was drafted as a “military imperative.”<sup>7</sup> The Executive Order emphasized that (1) “American fighting men . . . are now engaged in deadly combat with the forces of aggression in Korea”; (2) needed weapons and materials “are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials”; and (3) a steel strike “would immediately jeopardize and imperil our national defense . . . and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field.”<sup>8</sup>

The Supreme Court expedited its hearing in the case after a lower court enjoined the Executive Order.<sup>9</sup> The Justices allocated a whopping five hours for the oral arguments.<sup>10</sup> The Solicitor General of the United States, arguing on the President’s behalf, passionately stated that the country was at war (even if undeclared),

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3. *The Korean War: “Police Action,” 1950–1953*, NAT’L ENDOWMENT FOR THE HUMANITIES: EDSITEMENT!, <https://edsitement.neh.gov/lesson-plan/korean-war-police-action-1950-1953> (last visited Feb. 12, 2018).

4. See U.S. CONST. art. I, § 8, cl. 11; Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 64 (2002).

5. Devins & Fisher, *supra* note 4, at 64.

6. *Id.* at 64–65.

7. *Id.* at 65.

8. Exec. Order No. 10,340, 3 C.F.R. 65 (Supp. 1952).

9. Joshua Waimberg, *Youngstown Steel: The Supreme Court Stands Up to the President*, NAT’L CONST. CTR.: CONST. DAILY (Nov. 16, 2015), <https://constitutioncenter.org/blog/youngstown-steel-the-supreme-court-stands-up-to-the-president>.

10. *Id.*

and the President was attempting to prevent a “national catastrophe.”<sup>11</sup>

Truman argued that he had the legal authority to seize the mills under his Article II powers as Commander-in-Chief, the President’s inherent executive authority, and the executive’s powers to deal with an emergency.<sup>12</sup> The steel mill owners answered that there was no dire need for the seizure, and that Truman should have used the national labor laws to deal with the strike instead of seizing private property.<sup>13</sup>

Just over two weeks after hearing the case, the Justices issued their opinions holding that the President lacked authority to take over the steel mills.<sup>14</sup> Justice Black wrote the Court’s opinion, but there were five separate concurring opinions.<sup>15</sup> Three Justices dissented.<sup>16</sup> Parsing all six of the Justices’ separate opinions holding that Truman acted illegally shows general agreement among the Justices that the Executive Order constituted lawmaking, which is the sole province of the Congress;<sup>17</sup> that the President does not have inherent executive powers other than those specifically enumerated in Article II;<sup>18</sup> that the President’s Commander-in-Chief authority did not extend outside the “theater of war”;<sup>19</sup> and that the President’s emergency powers, if any, did not reach this particular crisis.<sup>20</sup>

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11. Joshua Korman, *Youngstown Sheet & Tube Co. v. Sawyer: Reevaluating Presidential Power*, ROBERT H. JACKSON CTR. 1, 7–8 (2007), [https://www.roberthjackson.org/wp-content/uploads/migrated-files/article-calendar-files/korman\\_primer.pdf](https://www.roberthjackson.org/wp-content/uploads/migrated-files/article-calendar-files/korman_primer.pdf).

12. *Steel Seizure*, 343 U.S. 579, 582, 584 (1952).

13. *See id.*; Brief for Plaintiff Companies, Petitioners in No. 744 and Respondents in No. 745 at 16–17, 19–24, *Steel Seizure*, 343 U.S. 579 (Nos. 744 & 745).

14. *Steel Seizure*, 343 U.S. at 579, 587–89.

15. *Id.* at 582; *id.* at 593 (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring); *id.* at 634 (Jackson, J., concurring); *id.* at 655 (Burton, J., concurring); *id.* at 660 (Clark, J., concurring).

16. *Id.* at 667 (Vinson, C.J., Reed & Minton, JJ., dissenting).

17. *Id.* at 587–88 (majority opinion); *id.* at 602, 609 (Frankfurter, J., concurring); *id.* at 630–31 (Douglas, J., concurring); *id.* at 639 (Jackson, J., concurring); *id.* at 659–60 (Burton, J., concurring); *id.* at 662 (Clark, J., concurring).

18. *Id.* at 587 (majority opinion); *id.* at 610 (Frankfurter, J., concurring); *id.* at 632–33 (Douglas, J., concurring); *id.* at 640–41 (Jackson, J., concurring); *id.* at 659–60 (Burton, J., concurring); *id.* at 661–62 (Clark, J., concurring).

19. *Id.* at 587 (majority opinion); *id.* at 632 (Douglas, J., concurring); *id.* at 645 (Jackson, J., concurring); *id.* at 660 (Burton, J., concurring); *id.* at 665–66 (Clark, J., concurring).

20. *Id.* at 585–86 (majority opinion); *id.* at 602, 614 (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring); *id.* at 653 (Jackson, J., concurring); *id.* at 659–60 (Burton, J., concurring); *id.* at 662–65 (Clark, J., concurring).

The three dissenting Justices argued that Congress had explicitly authorized the Korean military actions through statutes funding it;<sup>21</sup> that the President had authority to seize the mills because of his obligation to faithfully execute those laws;<sup>22</sup> and that the President needed to protect our troops under his Commander-in-Chief powers.<sup>23</sup> The dissent also noted that Truman said he would rescind the Executive Order if Congress asked him to, reducing fears of executive tyranny.<sup>24</sup>

Justice Jackson's concurring opinion is the one that has stood the test of time. He set up the now-classic framework for evaluating executive branch authority. If the President acts with Congress's permission, there is a strong presumption in favor of the President; if he acts in direct opposition to Congress, there is a strong presumption against his action; and if Congress is silent, the decision will "depend on the imperatives of events and contemporary imponderables."<sup>25</sup> Jackson decided that Truman's Executive Order directly contravened the federal labor laws (a controversial opinion given that those laws were silent on the issue) and that the President did not have any statutory or constitutional authority to seize private property.<sup>26</sup>

The Court's *Steel Seizure* decision was a dramatic, powerful exercise of judicial review. The President argued that there was a military emergency and that, absent his actions, our troops would face imminent danger.<sup>27</sup> Truman agreed to abide by any congressional action reducing the risk of runaway presidential power.<sup>28</sup> Nevertheless, the Court overturned the Executive Order.<sup>29</sup> Two leading scholars on separation of powers have observed that the fact "the Justices went so decisively against presidential power, in the middle of a war, came as a surprise to many."<sup>30</sup> The scholars also noted: "After all, the Court was comprised of Roosevelt and Truman appointees and 'the entire decisional trend for fifteen

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21. *Id.* at 670–72 (Vinson, C.J., dissenting).

22. *Id.* at 709–10.

23. *Id.* at 678–80.

24. *Id.* at 701.

25. *Id.* at 635–37 (Jackson, J., concurring).

26. *Id.* at 638–39, 655.

27. *Id.* at 582–83 (majority opinion).

28. *Id.* at 677 (Vinson, C.J., dissenting).

29. *Id.* at 589 (majority opinion).

30. Devins & Fisher, *supra* note 4, at 71.

years . . . had been in the direction of the aggrandizement of the powers of the president.”<sup>31</sup>

The implications of *Steel Seizure* for constitutional law and judicial review are many. For the purposes of this article, however, there is one major aspect of the decision that is of overriding importance. In one of the most important judicial decisions in American history overriding a presidential exercise of power (in time of war no less), there is little originalist discussion in the opinions making up the majority’s view that the President acted unlawfully. One scholar has argued that “in [*Steel Seizure*’s] shadow, there is exceedingly little room for foreign affairs originalism in *any* form.”<sup>32</sup> Another commentator has stated that Justice Jackson’s concurrence, the most important of the six opinions in the case, is “among the most anti-originalist opinions in the modern canon.”<sup>33</sup> There is strong evidence for this conclusion in Justice Jackson’s now-famous rejection of a historical approach to the issue before the Court:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.<sup>34</sup>

As Professor Stephen Vladeck points out, Jackson’s opinion was later adopted by the Supreme Court as “‘the accepted framework for evaluating executive action in this area.’ Thus, the methodology adopted by the Supreme Court to resolve separation-of-powers conflicts, particularly in cases implicating ‘foreign affairs,’ was one hostile to originalism in both its conceptualization and its implementation.”<sup>35</sup>

When invalidating what the President thought was an essential reaction to a military emergency, the Supreme Court did not pause to reflect on the Constitution’s original meaning even after fifteen

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31. *Id.* (quoting WILLIAM H. REHNQUIST, *THE SUPREME COURT* 171 (2001)).

32. Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown’s Shadow*, 53 ST. LOUIS U.L.J. 29, 31 (2008).

33. Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 L. & CONTEMP. PROBS. 169, 172 (2004).

34. *Steel Seizure*, 343 U.S. at 634–35 (Jackson, J., concurring).

35. Vladeck, *supra* note 32, at 35 (quoting *Medellin v. Texas*, 552 U.S. 491, 524 (2008)).

years of deferential judicial review in most other areas of constitutional law. The modern framework for evaluating separation-of-powers cases was born in a case overtly hostile to originalist analysis.

## II. THE ADMINISTRATIVE STATE AND ORIGINALISM

Our current administrative state, where executive agencies like the Environmental Protection Agency and the Department of Health and Human Services, and so-called independent agencies such as the Federal Election Commission, wield so much authority, would have been completely unknown to the founding fathers. As late as 1933, prior to the New Deal, there were less than twenty federal agencies.<sup>36</sup> Today, there are hundreds.<sup>37</sup> Virtually all areas of American life are governed by administrative regulations not explicitly approved by Congress. As Philip Hamburger, among others, has argued, the rise of these agencies, coupled with Supreme Court decisions legitimizing their broad powers, has allowed them to occupy “a sort of juridical monad that can interpret, execute, and legislate its statutory norms and facts in clear violation of the principle of the separation of powers.”<sup>38</sup> Whether or not we can justify this fundamental shift in power from Congress to the executive through living constitutionalism, the twin realities are that we are not going to go back to the pre-administrative state (though there may be occasional slides), and, more importantly, new questions of separation of powers must be analyzed through a realistic lens of our current governmental system that no one living in 1787 could possibly have anticipated.

The problems with applying originalist analysis in separation-of-powers cases were highlighted in the 1980s when the Justices decided a series of important cases in which the Court had to resolve the constitutionality of important new aspects of our federal regulatory practice designed to address different features of our sprawling federal government.<sup>39</sup> In none of these cases did the

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36. Gerardo Muñoz, *A Constitutional Absolutism? On Philip Hamburger's The Administrative Threat*, INFRAPOLITICAL DECONSTRUCTION (June 30, 2017), <https://infrapolitica.wordpress.com/2017/06/30/a-constitutional-absolutism-on-philip-hamburgers-the-administrative-threat-by-gerardo-munoz/>.

37. *Id.* (citing JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 100 (1938)).

38. *Id.*

39. *See Morrison v. Olson*, 487 U.S. 654 (1988); *INS v. Chadha*, 462 U.S. 919 (1983).

Court devote much time to the original meaning of the various constitutional provisions at issue, and for good reason.

For example, in *INS v. Chadha*, the Court had to decide the constitutionality of a law that allowed one branch of Congress to veto a decision by the United States Attorney General to suspend the deportation of an alien who stayed past the time allowed by his visa.<sup>40</sup> The statute giving the President that discretion went through the constitutionally required process of bicameralism (both houses of Congress must approve a bill) and presentment (all bills must be signed by the President or his veto must be overruled by two-thirds of both houses).<sup>41</sup> The executive branch argued that if Congress wanted to overrule the President's deportation decision, it had to do so through bicameralism and presentment despite the authority given to one house of Congress in the original and validly enacted immigration law.<sup>42</sup> Congress's primary response to that argument was that, in the new administrative state, the executive routinely makes law through delegated authority from Congress.<sup>43</sup> Thus, one house's authority to veto the suspension of a deportation was also constitutional. Although the facts of *Chadha* were relatively narrow, Congress had placed legislative vetoes in over two hundred laws as a way of controlling executive branch discretion, so the stakes of the case were extremely high.<sup>44</sup>

The Court ruled that the legislative veto was unconstitutional because it violated the separation of powers.<sup>45</sup> Although the majority opinion cited originalist evidence to support the general importance of bicameralism and presentment,<sup>46</sup> the Justices placed no reliance on original meaning for the conclusion that the legislative veto was different in substance from other examples of valid lawmaking that do not have to go through bicameralism and presentment. This absence of originalist authority makes sense because the purpose of the legislative veto was to fix a problem (executive branch lawmaking) that barely existed prior to the 1930s.

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40. *Chadha*, 462 U.S. at 923.

41. *Id.* at 942 n.13, 945–46 (citing U.S. CONST. art. I, § 7).

42. *Id.* at 954–57.

43. *See id.* at 953 n.16 (citing Brief for Petitioner at 40, *Chadha*, 462 U.S. 919 (No. 80-2170)).

44. *See id.* at 967 (White, J., dissenting).

45. *Id.* at 959 (majority opinion).

46. *See id.* at 946–51.

The constitutional pros and cons of that veto could not be addressed through an originalist approach. As Justice White explained in his dissent:

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies. . . . The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy.<sup>47</sup>

No amount of historical study, analysis, or investigation into original meaning could have led to a persuasive conclusion about the constitutional validity of the legislative veto, which is probably why the Court did not go down that path (it relied exclusively on an unpersuasive, rigid, textual formalism). How can the world of 1787 possibly help us solve a problem that the people at the time did not contemplate?

This is not to say that historical practices and the actions of the three branches of the federal government over the course of time are not highly relevant to the Justices' considerations in separation-of-powers cases. But the job of reviewing more than two hundred years of congressional, executive, and judicial reflections and actions regarding hard separation-of-powers issues is hardly an originalist task given how inevitable a role judicial subjectivity (and modern considerations and balancing) must play in that difficult enterprise.

The Court in *Morrison v. Olson*<sup>48</sup> also eschewed an originalist analysis when upholding the authority of an Independent Counsel to investigate and prosecute federal crimes allegedly committed by high-ranking executive branch officials.<sup>49</sup> The first issue the Court tackled was whether the Independent Counsel was a "principal officer" who had to be nominated by the President and confirmed by

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47. *Id.* at 967–68 (White, J., dissenting).

48. 487 U.S. 654 (1988).

49. *Id.* at 671, 674, 696–97.



the Senate or an “inferior officer” who could be appointed by the “Courts of Law” under Article II.<sup>50</sup> The Independent Counsel was appointed by a three-judge panel of the United States Court of Appeals for the District of Columbia.<sup>51</sup> Justice William Rehnquist, a self-described originalist,<sup>52</sup> began the discussion of this issue by saying that the “line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.”<sup>53</sup> The Court then decided that the Independent Counsel was an inferior officer without offering a single piece of originalist evidence to support that proposition.<sup>54</sup>

The *Morrison* Court also had to decide whether Congress could constitutionally give Article III judges administrative responsibilities related to the Independent Counsel,<sup>55</sup> whether limiting the firing of the Counsel to “good cause” unduly limited the President’s authority,<sup>56</sup> and whether the act as a whole violated the separation of powers.<sup>57</sup> The Court ruled in favor of the law on all three questions with barely a whisper about original meaning.<sup>58</sup> Eventually, in the wake of Ken Starr’s investigation of President Clinton, the *Morrison* decision would be criticized by many scholars who believe Justice Scalia’s dissent was correct.<sup>59</sup> But most of the objections are based on policy, not originalist, grounds.<sup>60</sup>

In addition to *Chadha* and *Morrison*, the Court in the 1980s and 1990s decided several other major separation-of-powers cases. In

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50. U.S. CONST. art. II, § 2, cl. 2; *Morrison*, 487 U.S. at 670–71.

51. *Morrison*, 487 U.S. at 661 n.3, 667.

52. See *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

53. *Morrison*, 487 U.S. at 671.

54. See *id.* at 672–74.

55. *Id.* at 677–85.

56. *Id.* at 685–93.

57. *Id.* at 693–96.

58. *Id.* at 684–85, 691–93, 696–97. The Court did use some originalist analysis to rebut the argument that the Constitution forbids interbranch appointments, but the gist of the Court’s rationale was that the text of Article II expressly allows such appointments. See *id.* at 674–77.

59. See, e.g., Terry Eastland, *Scalia’s Finest Opinion*, WKLY. STANDARD (Mar. 11, 2016, 12:40 AM), <http://www.weeklystandard.com/scalias-finest-opinion/article/2001510>; Adrian Vermeule, *Morrison v. Olson Is Bad Law*, LAWFARE (June 9, 2017, 8:14 PM), <https://www.lawfareblog.com/morrison-v-olson-bad-law>.

60. See Linda Greenhouse, *Blank Check; Ethics in Government: The Price of Good Intentions*, N.Y. TIMES (Feb. 1, 1998), <http://www.nytimes.com/1998/02/01/weekinreview/blank-check-ethics-in-government-the-price-of-good-intentions.html>.

*Mistretta v. United States*, the Court upheld a sentencing commission that included Article III judges;<sup>61</sup> in *Bowsher v. Synar*, the Court struck down a deficit control statute because it allowed Congress to fire a quasi-executive officer;<sup>62</sup> and in *Clinton v. City of New York*, the Court invalidated the Line Item Veto Act because the law unlawfully allowed the President to cancel parts of laws as opposed to vetoing the entire law.<sup>63</sup> These were all important exercises of judicial review, and two of the decisions struck down federal laws designed to deal with the serious problem of the huge national deficit.<sup>64</sup> In none of these cases did the Justices support their ultimate resolutions with significant originalist evidence.

Perhaps the most blatant example of the Court ignoring originalism during this time is Justice Scalia's majority opinion in *Lujan v. Defenders of Wildlife*.<sup>65</sup> The issue in *Lujan* was whether Congress could authorize a citizens' suit against the executive branch for failing to comply with the procedural requirements of the Endangered Species Act.<sup>66</sup> There were two adverse parties arguing over something real, but Scalia found that the plaintiffs lacked standing under Article III's case-or-controversy requirement because they did not suffer the requisite personal injury, even though Congress explicitly authorized the suit.<sup>67</sup> There is not a syllable in the opinion about Article III's original meaning. For the Court to invalidate Congress's efforts to ensure the President executes the law faithfully without any historical evaluation by the Justices of that power is another sign of how little the Court cares about originalism in separation-of-powers cases.

The Court's most recent separation-of-powers cases, *NLRB v. Noel Canning*<sup>68</sup> and *Zivotofsky v. Kerry*,<sup>69</sup> also mostly ignored originalist evidence. The issue in *Noel Canning* was the meaning

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61. 488 U.S. 361, 412 (1989).

62. 478 U.S. 714, 736 (1986).

63. 524 U.S. 417, 448–49 (1998).

64. *Clinton v. City of New York* invalidated the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, which permitted the President to cancel any dollar amount of discretionary budget, any item of new direct spending, or any limited tax benefit. *Clinton v. City of New York*, 524 U.S. at 448. *Bowsher v. Synar* invalidated the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, which permitted the Comptroller General to act in the deficit reduction process. *Bowsher*, 478 U.S. at 733–34.

65. 504 U.S. 555, 557 (1992).

66. *See id.* at 557–58.

67. *See id.* at 573–74, 577–78.

68. 573 U.S. \_\_\_, 134 S. Ct. 2550 (2014).

69. 576 U.S. \_\_\_, 135 S. Ct. 2076 (2015).

of the Recess Appointments Clause which allows the President “to fill up all Vacancies that may happen during the Recess of the Senate.”<sup>70</sup> The plaintiff challenged the appointment of several members of the National Labor Relations Board who received their positions during a time when the Senate was taking “brief recesses” but also held pro forma sessions twice a week where no business was conducted.<sup>71</sup> *Noel Canning* marked the first time the Court interpreted the Recess Appointments Clause.<sup>72</sup>

The Court held that the appointments were invalid because the President’s power to make recess appointments requires (absent extraordinary circumstances) at least a ten-day recess and that pro forma sessions conducted by the Senate to prevent recess appointments could do so.<sup>73</sup> Although the Court did discuss originalist materials more than in the other cases described above, the Court relied mostly on the practices of Congress and the President from the founding to the present. In the majority opinion, Justice Breyer wrote the following about separation-of-powers cases:

[W]e put significant weight upon historical practice. . . . “Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions” regulating the relationship between Congress and the President.

. . . . [T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.<sup>74</sup>

The Court went on to say that “[t]here is a great deal of history to consider here.”<sup>75</sup> The bulk of the Court’s lengthy analysis described, summarized, and analyzed presidential recess appointments throughout American history.<sup>76</sup> While Justice Scalia criticized the majority for adopting an “adverse-possession theory of executive power,”<sup>77</sup> Justice Breyer believed he was simply interpreting “the Constitution in light of its text, purposes, and ‘our

70. U.S. CONST. art. II, § 2, cl. 3; *Noel Canning*, 573 U.S. at \_\_\_, 134 S. Ct. at 2556.

71. *Noel Canning*, 573 U.S. at \_\_\_, 134 S. Ct. at 2557.

72. *Id.* at \_\_\_, 134 S. Ct. at 2560.

73. *Id.* at \_\_\_, 134 S. Ct. at 2567, 2574, 2578.

74. *Id.* at \_\_\_, 134 S. Ct. at 2559–60 (emphasis omitted) (citations omitted) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

75. *Id.* at \_\_\_, 134 S. Ct. at 2560.

76. *See id.* at \_\_\_, 134 S. Ct. at 2562–64, 2567.

77. *Id.* at \_\_\_, 134 S. Ct. at 2617 (Scalia, J., dissenting).

whole experience' as a Nation. . . . [by] look[ing] to the actual practice of Government to inform our interpretation."<sup>78</sup> Once again, the Court majority eschewed an originalist methodology for a more "all-things-considered" approach to a major separation-of-powers case.

The Court used a similar technique in *Zivotofsky*, where the Court had to decide on the validity of a federal statute requiring the State Department to stamp an American citizen's passport with the word "Israel" if he was born in Jerusalem.<sup>79</sup> The Department alleged that the President has exclusive power to recognize foreign countries, and the law unduly interfered with that power.<sup>80</sup> Although the Court did cite originalist sources to support its conclusion that the President's power to recognize foreign countries is exclusive,<sup>81</sup> when it came time to resolve the question whether the law at issue infringed that power, the Court left originalism far behind.

In both *Noel Canning* and *Zivotofsky*, the Court emphasized prior political practices over original meaning—an approach sanctioned by several of the opinions in *Steel Seizure*, and other major separation-of-powers cases. As one commentator has noted, "there can be no doubt that as a descriptive matter, historical practice is often central to the Court's decision-making in separation-of-powers cases."<sup>82</sup> Given the two-hundred-plus year history of our country, and the constant give and take between the three branches of the federal government, if prior practice is going to play the "central" role in separation-of-powers cases, then originalist sources will rarely play a significant role, just as Justice Jackson suggested in his famous *Steel Seizure* concurrence.<sup>83</sup> And, as the next part argues, this is exactly how it ought to be.

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78. *Id.* at \_\_, 134 S. Ct. at 2578 (majority opinion) (citations omitted) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

79. *Zivotofsky v. Kerry*, 576 U.S. \_\_, \_\_, 135 S. Ct. 2076, 2081 (2015).

80. *Id.* at \_\_, 135 S. Ct. at 2084.

81. *Id.* at \_\_, 135 S. Ct. at 2085–87.

82. Brianne J. Gorod, *Originalism and Historical Practice in Separation-of-Powers Cases*, 66 SYRACUSE L. REV. 41, 42 (2016).

83. See *supra* text accompanying notes 25–35.

## III. ORIGINALISM AND SEPARATION OF POWERS

The difficulty of applying original meaning to modern separation-of-powers issues can be further illustrated by examining two important contemporary problems. First, may the President lawfully execute an American citizen who is likely a dangerous terrorist living in a foreign country without any judicial due process? Second, what are the permissible grounds of impeachment for a President? The resolution of these questions, whether by judges, scholars, or politicians, simply cannot be substantially aided by canvassing 1787 sources and materials.

The Constitution provides in Article III that “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury,”<sup>84</sup> and in the Sixth Amendment that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”<sup>85</sup> There is a disagreement among the Justices whether the right to a jury trial is a group or individual right.<sup>86</sup> But either way, someone accused of a crime in this country is entitled to a jury if she so desires.<sup>87</sup> Of course, this right has never extended to American citizens fighting against this country on the battlefield when soldiers must act in self-defense.<sup>88</sup> Additionally, the Supreme Court has allowed military courts, not juries, to try United States citizens accused of being enemy combatants.<sup>89</sup>

In September 2011, President Obama used a drone strike to execute a known American citizen terrorist who was having lunch in Yemen.<sup>90</sup> No court or judicial tribunal had convicted the alleged terrorist of violating any laws.<sup>91</sup> This assassination raised difficult questions concerning due process, the right to a trial by jury, and

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84. U.S. CONST. art. III, § 2, cl. 3.

85. *Id.* amend. VI.

86. Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 400 (2009).

87. U.S. CONST. amend. VI.

88. *See Applicability of Sixth Amendment Guarantees to Military Proceedings*, 14 CATH. LAW. 73, 73–75 (1968).

89. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 522–23 (2004).

90. Glenn Greenwald, *Chilling Legal Memo from Obama DOJ Justifies Assassination of US Citizens*, GUARDIAN (Feb. 5, 2013, 10:56 EST), <https://www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo>.

91. Michael Martinez, *U.S. Drone Killing of American al-Awlaki Prompts Legal, Moral Debate*, CNN (Sept. 30, 2011, 10:22 PM ET), <http://www.cnn.com/2011/09/30/politics/targeting-us-citizens/index.html>.

the on-going war on terrorism.<sup>92</sup> Should a court ever be asked to rule on the constitutionality of the President killing American citizens without due process, it is most unlikely the original meaning of the Constitution would or should play an important role in that determination.

Whether or not one believes we are in a permanent state of war because of terrorism threats post 9/11, there can be little doubt that the ability of terrorists to cause widespread damage to this country is completely different than any similar threats in 1787. The detonation of one weapon of mass destruction or the use of poisonous gas could kill millions of people in New York, Los Angeles, or other major cities in ways completely unknown to the ratifiers of our Constitution. On the other hand, the “most extremist power any political leader can assert is the power to target his own citizens for execution without any charges or due process, far from any battlefield.”<sup>93</sup> The balance to be struck between stopping terrorists from causing widespread damage and giving the President the power to decide unilaterally whether an American citizen lives or dies cannot be struck by consulting the world of 1787, when the threat of mass destruction caused by a single person’s acts did not exist. The original meaning of the Constitution simply will not help resolve this difficult and important problem concerning the proper authority of the President of the United States. A judge faced with such a case would have to look elsewhere.

Article II, Section 4 of the Constitution provides that “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>94</sup> It is widely accepted that “[t]here is no authoritative pronouncement, other than the text of the Constitution itself, regarding what constitutes an impeachable offense, and what meaning to accord to the phrase ‘other high Crimes and Misdemeanors.’”<sup>95</sup> What is fairly well-accepted, however, is that as applied to the President, the founding fathers expected the impeachment clause to only apply to

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92. *See id.*; Greenwald, *supra* note 90.

93. Greenwald, *supra* note 90.

94. U.S. CONST. art. II, § 4.

95. Stephen B. Presser, *Standards for Impeachment*, HERITAGE.ORG: THE HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/articles/2/essays/100/standards-for-impeachment> (last visited Feb. 12, 2018).

serious misbehavior or crimes, and that the clause was a vital component of our system of checks and balances.<sup>96</sup>

Should Congress try to impeach a President for misbehavior that is not clearly a “high crime or misdemeanor,” how helpful would evidence of original meaning be for judges or politicians trying to answer the question?<sup>97</sup> The problem with any such evidence would be the recognition that the President of the United States plays a much different role in domestic and world politics today than the President of 1787. He is far more powerful, has much more of a bully pulpit, can wield far more military power (in a matter of seconds), and engages in much more lawmaking than the founding fathers could have ever conceived. The stakes of the impeachment process have changed dramatically since 1787 given the enlarged role the President plays in our scheme of government compared to the one the founding fathers envisioned. Since what constitutes an impeachable offense is directly relevant to the appropriate role of the President, we must decide for ourselves what types of behavior can justify removing the President from office, and not rely on what people who lived hundreds of years ago thought about this question.

These two examples of hypothetical separation-of-powers issues, just like the ones implicated by the real cases discussed in Part II of this article, raise questions about the President’s lawful authority in 2018, not 1787. The founders made many assumptions when they designed the plan of the federal government and the relationship between Congress and the President that are no longer true today. Among these are that senators would be elected by state legislatures (a decision overturned by the Seventeenth Amendment);<sup>98</sup> that political parties would not play a major role in our system of government;<sup>99</sup> that Congress would be the primary lawmaker;<sup>100</sup> and that Congress would decide when our military would be used overseas as reflected in Article I, Section 8.<sup>101</sup> Additionally, major media and technological changes concerning the weapons of

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96. *See id.*

97. It is likely the Supreme Court would find any such issue to be non-justiciable though, should the Congress act completely irresponsibly; the Justices might as well step into the breach.

98. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

99. CHARLES E. MERRIAM, *THE WRITTEN CONSTITUTION AND THE UNWRITTEN ATTITUDE* 62 (1931).

100. U.S. CONST. art. I, § 1.

101. *Id.* art. I, § 8.

war have focused much more power in the executive than the founders anticipated. The only originalist question that makes sense in most separation-of-powers cases is to ask what the original meaning of the text would have been in 1787 if the founders had known about these and many other changes. But, once the inquiry is phrased in that manner, one must take a position on the many legal and political developments that have taken place since 1787. When doing so, judges will inevitably have to select how to evaluate and characterize those events and what principles to deduce from them. As Terrance Sandalow once wrote, “Choice from among the various alternative [principles] is inescapable, and through that choice contemporary values are given expression.”<sup>102</sup> Similarly, Judge Richard Posner has said in a slightly different, but related context:

What would the framers of the [Fourth Amendment] have thought about [n]ational security surveillance of people’s emails[?] That is a meaningless question. It is not an interpretive question, it is a creative question. . . . The [Constitution] cannot resolve it . . . by thinking about the intentions, the notes of the constitutional convention, [or] other sources from the 18th century. This seems to be the standard problem for judges . . . It is not interpretation, it is just trying to find . . . a solution to a question that has not been solved by the legislature.<sup>103</sup>

The President today exercises power, and controls the military, in ways that the founding fathers never imagined. The checks and balances they designed for that government may or may not be helpful to today’s realities. Where the Constitution is clear, such as that the President must be at least thirty-five years of age, courts must as a matter of judicial duty enforce that command. Such rules are rare, however, and almost never lead to litigation. The constitutional text at issue in cases like *Chadha*, *Bowsher*, and *Noel Canning* reveal little about how to solve modern problems. Therefore, the Court has done the right thing by mostly ignoring

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102. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 112–13 (2011) (alterations in original) (quoting Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1061–62 (1981)).

103. Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176, 178 (2016) (quoting Judge Richard Posner, as transcribed in Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSH BLACKMAN’S BLOG (Nov. 6, 2015), <http://joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent/>).



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or minimizing the role originalism plays in the resolution of cases implicating the relationship between Congress and the President. The answers to those cases must lie in today's facts and values, not the long-ago world of 1787.

#### CONCLUSION

There will be many difficult separation-of-powers cases for the Justices to consider in the coming years. Depending on political events and Court decisions, the presidency may continue to gain power, or maybe Congress or the Court will finally try to rein in the President's authority. The political events and court decisions relevant to that back and forth will be far more important to the Justices' hard decisions than the original meaning of text written over two hundred years ago. When the proper allocation of powers among the three branches of the federal government is at issue, the Court must take and consider our government as it operates today, not as it may have existed in some long ago and very different country.