

PRESIDENTIAL RESIDUAL POWER IN FOREIGN AFFAIRS

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INTRODUCTION

As with other branches of government, the President has access to a combination of enumerated and implied powers. At times, Presidents have claimed “inherent” powers, but those assertions have been repudiated by both the Supreme Court and Congress. In *Zivotofsky v. Kerry*, Justice Clarence Thomas referred to another source of presidential power: a “residual foreign affairs power.”¹ This article analyzes the origin and legitimacy of presidential residual powers, a term that has at least six different meanings.

Another issue: did some Justices in *Youngstown Company v. Sawyer*² endorse residual power for the President?³ How did presidential power in external affairs expand because of erroneous dicta in the 1936 *Curtiss-Wright* case?⁴ Why did it take seventy-nine years for the Court to make a partial correction in *Zivotofsky*? What are the risks to constitutional government in attributing to the President a source of independent power that is subject to multiple and erroneous interpretations? Given the need to search for residual power in precedents established centuries ago, how likely can scholars and the judiciary conduct that analysis in a persuasive manner consistent with constitutional principles?

In his opinion in *Zivotofsky*, Justice Thomas begins by saying that the Constitution allocates the powers over foreign affairs in two ways: “First, it expressly identifies certain foreign affairs powers and vests them in particular branches, either individually or jointly. Second, it vests the residual foreign affairs powers of the Federal Government—*i.e.*, those not specifically enumerated in the Constitution—in the President by way of Article II’s Vesting Clause.”⁵ Justice Thomas does not define residual power. Instead, he relies on an article by Saikrishna Prakash and Michael Ramsey published in the *Yale Law Journal* in 2001,⁶ a work he cites twelve times.⁷

In a possible reference to residual powers, Justice Thomas states that the Framers “understood the ‘executive Power’ vested by Article II to include those foreign affairs powers not otherwise allocated in the

¹ 135 S. Ct. 2076, 2096–97 (2015) (Thomas, J., concurring).

² See generally 343 U.S. 569 (1952).

³ See *infra* Section IX.

⁴ See *infra* Section VI.

⁵ *Zivotofsky*, 135 S. Ct. at 2096–97. See also *infra* Section VI.

⁶ See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

⁷ See *Zivotofsky*, 135 S. Ct. at 2097–2107.

Constitution.”⁸ He said that precedents during the Washington administration, including the Proclamation of Neutrality, “confirm that Article II’s Vesting Clause was originally understood to include a grant of residual foreign affairs power to the Executive.”⁹ However, as explained in Section V, jurors refused to convict individuals prosecuted under the proclamation, insisting that criminal law in the United States must be made by Congress, not the President.¹⁰

To Justice Thomas, the statutory issue of passports in *Zivotofsky* “implicates the President’s residual foreign affairs power.”¹¹ Passport regulation “falls squarely within his residual foreign affairs power.”¹² However, he then states that the passport issue can be “constitutionally applied to consular reports of birth abroad because those documents do not fall within the President’s foreign affairs authority but do fall within Congress’ enumerated powers over naturalization.”¹³ He adds: “[T]he President has the power to regulate passports under his residual foreign affairs powers does not, however, end the matter, for Congress has repeatedly legislated on the subject of passports.”¹⁴

In analyzing the conflict between presidential and congressional powers over passports, Justice Thomas sides with executive authority in this manner: “The Constitution contains no Passport Clause, nor does it explicitly vest Congress with ‘plenary authority over passports.’ Because our Government is one of enumerated powers, ‘Congress has no power to act unless the Constitution authorizes it to do so.’”¹⁵ However, as explained in the next section, the three branches of government have never been limited to enumerated powers—they have access to both enumerated and implied powers.¹⁶ Furthermore, if government were one of enumerated powers, the President could not have access to residual powers.

Justice Thomas turned to Locke, Blackstone, and Montesquieu to help define the scope of presidential power.¹⁷ Initially, he claimed that their

⁸ *Id.* at 2099.

⁹ *Id.* at 2101.

¹⁰ *See infra* note 129, at 88–89.

¹¹ *Zivotofsky*, 135 S. Ct. at 2101.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 2103.

¹⁵ *Id.* (quoting *U.S. v. Comstock*, 560 U.S. 126, 159 (2010) (Thomas, J., dissenting)).

¹⁶ *See infra* Section I.

¹⁷ *See Zivotofsky*, 135 S. Ct. at 2098.

understanding “prevailed in America,”¹⁸ but clearly the Framers rejected the British model that vested all external affairs in the Executive.¹⁹ As Justice Thomas noted, the Constitution “specifies a number of foreign affairs powers and divides them between the political branches”—both the President and Congress.²⁰ In his dissent, Justice Antonin Scalia concluded that the assignment of “residual powers” to the President produces “a presidency more reminiscent of George III than George Washington.”²¹

I. IMPLIED AND INHERENT POWERS

At the outset, it is helpful to distinguish between two terms: implied and inherent. Implied powers are those that can be drawn reasonably from express powers. For example, Article I of the Constitution vests in Congress “All legislative Powers herein granted.”²² In order to legislate in an informed manner, Congress has the implied power to investigate, hold hearings, and issue subpoenas for witnesses and documents. Article II vests the “executive Power” in the President²³ and directs the President to “take Care that the Laws be faithfully executed.”²⁴ If the head of an executive department is unable to carry out a statutory function or refuses to do so, the President has an implied power to remove that individual.²⁵ Implied powers are therefore anchored in the Constitution. Those interpretations of congressional and presidential implied powers were understood at the beginning of the national government in 1789.²⁶

Inherent powers, by definition, are not drawn from express powers. As the word suggests, those powers “inhere” in a person or an office. *Black’s Law Dictionary* has defined inherent powers in this manner: “An authority possessed without its being derived from another . . . powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants.”²⁷ As a concept, inherent power is clearly set apart from express and implied powers. Inherent powers invite claims of power that have no limits, other than those voluntarily accepted by the

¹⁸ *Id.*

¹⁹ See *infra* Section II.

²⁰ *Zivotofsky*, 135 S. Ct. at 2097.

²¹ *Id.* at 2126.

²² See U.S. CONST. art. I, § 1.

²³ See U.S. CONST. art. II, § 1, cl. 1.

²⁴ See U.S. CONST. art. II, § 3.

²⁵ See LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 84–91 (1st ed. 2015).

²⁶ *Id.* at 59–60.

²⁷ BLACK’S LAW DICTIONARY 703 (5th ed. 1979).

President. What “inheres” in the President? Nebulous words and concepts invite political abuse and unconstitutional actions. They threaten individual liberties.²⁸ The same risk applies to efforts that attribute to the President “residual” power.

Presidents who assert inherent powers move the nation from one of limited powers to boundless and ill-defined authority, undermining republican government, the doctrine of separation of powers, and the system of checks and balances. Three Presidents on four occasions claimed the right to exercise inherent powers: Truman seizing steel mills in 1952 to prosecute the war in Korea, Nixon impounding appropriated funds, Nixon conducting warrantless domestic surveillance, and Bush II creating military tribunals without first seeking and obtaining authority from Congress. On all four occasions those assertions of inherent powers were struck down by the legislative and judicial branches.²⁹

II. RESIDUAL POWERS

In their *Yale Law Journal* article, Saikrishna Prakash and Michael Ramsey state that scholars who write about foreign affairs “share one trait: They have given up on the Constitution.”³⁰ Scholarly studies reach out to “extratextual sources: practice, convenience, necessity, national security, international relations law and theory, inherent rights of sovereignty, and so forth.”³¹ To return the focus to the Constitution, Prakash and Ramsey conclude that the text itself supplies four basic principles: “First, and most importantly, the President enjoys a ‘residual’ foreign affairs power under Article II, Section 1’s grant of ‘the executive Power.’”³² The “executive Power” is textual, but how do we define it? What sources should guide us? Prakash and Ramsey turn first to “the works of leading political writers known to the constitutional generation, such as Locke, Montesquieu, and Blackstone,” including their views on foreign affairs powers.³³ Further: “By using a common phrase infused with that meaning, the Constitution

²⁸ See Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRES. STUD. Q. 1, 2 (2007).

²⁹ See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 18, 236–37, 290, 304–05 (6th ed. 2014); LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA’S FREEDOMS 172, 194–95 (2008). See also *id.* at 288–90 (discussing warrantless domestic surveillance during the Nixon administration which was struck down by the Supreme Court in 1972).

³⁰ Prakash & Ramsey, *supra* note 6, at 233.

³¹ *Id.*

³² *Id.* at 234.

³³ *Id.*

establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power.”³⁴

By seeking guidance from tradition and eighteenth-century precedents, Prakash and Ramsey build a model of residual authority that promotes presidential power over Congress. Looking back to that period, there are simply more precedents for executive control of foreign affairs than legislative examples. Even so, prior to the U.S. Constitution there are important turning points that strengthen the case for legislative power in foreign affairs. As Robert Reinstein noted, abuse of the royal prerogative in the seventeenth century “led to the enactment of statutes by which Parliament attempted proscriptively to control the aggrandizement of executive power and prevent future abuses.”³⁵

Although Prakash and Ramsey fault scholars who depend on sources outside the constitutional text, including practice, they begin their own analysis by relying on an extratextual source: tradition. Moreover, they also explore the extent to which the Framers depended on Locke, Montesquieu, and Blackstone. To justify their reliance on tradition, they say that words, including those in Article II, “have no meaning in a vacuum, shorn of their context. To discern that context, one must look outside the text.”³⁶ Prakash and Ramsey explain that their “textual theory is not just an extended citation to the Constitution’s text.”³⁷ Their goal “is to try to make sense of the Constitution’s text as it would have been understood in the Founding era.”³⁸ More specifically, the bulk of their discussion “is directed toward establishing an eighteenth-century meaning of executive power.”³⁹ Throughout their article, they describe their approach as purely textual, but “to give a complete reading one must identify somewhere in the text a ‘residual’ power that encompasses foreign affairs powers not specifically apportioned.”⁴⁰

Prakash and Ramsey acknowledge that the Framers did not adopt the British model that allocates all external affairs to the Executive.⁴¹ Instead, the President’s executive power “over foreign affairs is limited by specific allocations of foreign affairs power to other entities—such as the allocation

³⁴ *Id.*

³⁵ Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 271 (2009).

³⁶ Prakash & Ramsey, *supra* note 6, at 234 n.1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 258.

⁴¹ *Id.* at 281–82.

of the power to declare war to Congress. Thus, the President has a circumscribed version of the traditional executive power over foreign affairs.⁴² As they point out, notwithstanding the traditional understanding of executive power, the President “cannot regulate international commerce or grant letters of marque and reprisal.”⁴³ In other articles, separately published, Prakash and Ramsey explain how the “Declare War Clause” limits presidential power.⁴⁴

After setting forth their objectives, Prakash and Ramsey conclude that their framework “reveals that there are no gaps in the Constitution’s allocation of foreign affairs powers” and that the Constitution’s text “supplies a sound, comprehensive framework of foreign affairs powers without appeal to amorphous and disputed extratextual sources.”⁴⁵ Several questions arise. First, will they be able to define “residual” in a way that is not amorphous? Second, they say their framework “is the correct interpretation of the Constitution, as it comports with usage and practice before, during, and after the Constitution’s ratification.”⁴⁶ To that extent, their analysis follows the work of scholars they earlier criticized for relying on *practice*.

In constructing what they call a “comprehensive textual theory of foreign affairs,”⁴⁷ Prakash and Ramsey necessarily go outside the text to identify principles of constitutional foreign affairs powers. First, “the President’s executive power includes a general power over foreign affairs.”⁴⁸ That principle is not found in the text. Instead, they say “the Constitution’s text reflects a foreign affairs framework that can be described with four basic principles.”⁴⁹ They develop the first principle by relying heavily on Locke, Montesquieu, and Blackstone, “the great political philosophers most familiar to the Framers.”⁵⁰ To those writers, “foreign affairs powers were part of the executive power.”⁵¹ As explained in the next section, the Framers clearly broke with Locke, Montesquieu,

⁴² *Id.* at 235.

⁴³ *Id.*

⁴⁴ See, e.g., Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45 (2007).

⁴⁵ Prakash & Ramsey, *supra* note 6, at 236.

⁴⁶ *Id.*

⁴⁷ *Id.* at 252.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 253.

⁵¹ *Id.*

and Blackstone, a fact evident simply by reading the text of Articles I and II.⁵²

Prakash and Ramsey identify three other constitutional principles: (1) “the President’s executive foreign affairs power is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution’s text,” (2) the President’s executive power over foreign affairs “does not exceed the powers of the eighteenth-century English monarch over foreign affairs,” and (3) Congress “has only its specifically enumerated powers in foreign affairs, but these include a power to legislate in support of the President.”⁵³

As to the last discussed principle, why should Congress be confined to enumerated powers in foreign affairs while granting the President access not only to enumerated powers, but also those that might be implied or “residual”? In part, Prakash and Ramsey rely on the language that begins Article I: “All legislative Powers herein granted shall be vested in a Congress”⁵⁴ Article II powers for the President lack the “herein granted” language.⁵⁵ However, from the beginning Congress has never been limited to enumerated powers. As with the other two branches, it possesses powers that can be reasonably implied from enumerated powers, including the need to rely on committees to carry out legislative duties. Moreover, the last principle by Prakash and Ramsey allows Congress to legislate in foreign affairs only when it “supports” the President. Congress is a separate and independent branch, capable and authorized to pass legislation either supporting or opposing the President.

James Madison underscored the need for implied powers in Federalist No. 44. When objections were raised against giving Congress the power to make all laws “which shall be necessary and proper,” he said without the substance of that power “the whole Constitution would be a dead letter.”⁵⁶ It was wholly impractical to try to enumerate every power for the three branches. Madison highlighted the need for implied powers: “No axiom is more clearly established in law, or in reason, than that whenever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.”⁵⁷

⁵² See *infra* Section III.

⁵³ Prakash & Ramsey, *supra* note 6, at 253–55.

⁵⁴ *Id.* at 256 (quoting U.S. CONST. art. I, § 1).

⁵⁵ See generally U.S. CONST. art. II.

⁵⁶ THE FEDERALIST NO. 44 (James Madison).

⁵⁷ *Id.* at 322.

As explained by Robert Reinstein, it is incorrect to say that by omitting “herein granted” in Article II the Framers somehow opened the door to a vast range of independent executive power.⁵⁸ The Constitution limits executive power in many ways, undercutting the notion that the Vesting Clause operates as “a residual source of plenary powers in the presidency.”⁵⁹ The powers assigned to the President in Article II “do not suggest a residue of unspecified powers that can be characterized as ‘executive’ in nature.”⁶⁰ Instead, “most of the royal prerogatives were vested in Congress, not in the President,” and the powers that were specifically placed with the President “were subject to substantial legislative constraints and constitutional prohibitions.”⁶¹ Congressional power in external affairs is further analyzed in Section VIII.

III. ANALYZING THE BRITISH MODEL

The Framers studied Locke, Montesquieu, and Blackstone closely. In his treatise published in 1690, Locke spoke of three branches of government: legislative, executive, and “federative.”⁶² The latter consisted of “the power of war and peace, leagues and alliances, and all transactions with individuals and communities outside the commonwealth.”⁶³ Locke said the federative power (what we today call foreign affairs) was “always almost united” with the executive; separating the executive and federative powers, he warned, would invite “disorder and ruin.”⁶⁴

However, the Framers understood the danger of combining executive and federative powers. John Jay in Federalist No. 4 spoke for many Framers when he wrote:

It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as, a thirst for military glory, revenge for personal affronts, ambition, or private

⁵⁸ See Reinstein, *supra* note 35, at 308.

⁵⁹ *Id.* at 309.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 143–48 (C. B. Macpherson ed., Hackett Publishing Co. Inc. 1980) (1690).

⁶³ *Id.* at 146.

⁶⁴ *Id.* at 148.

compacts to aggrandize or support their particular families, or partisans.⁶⁵

Those and other motives on the mind of the sovereign “often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”⁶⁶ Looking to that history, the Framers placed in Congress, not the President, the decision to take the country from a state of peace to a state of war.

Frequently we are told that the Framers embraced Montesquieu, especially the doctrine of separation of powers developed in *The Spirit of the Laws*.⁶⁷ We have it from Woodrow Wilson that the makers of the Constitution “followed the scheme as they found it expounded in Montesquieu, followed it with genuine scientific enthusiasm.”⁶⁸ No doubt Montesquieu is referred to frequently at the Philadelphia convention, the state ratifying conventions, and in Madison’s Federalist No. 47 as “the celebrated Montesquieu” and the “oracle” always cited on the separation doctrine.⁶⁹ Flattery did not mean acceptance. The Framers did not borrow theory wholesale from Montesquieu and other writers. They based their arguments on what had been learned at home, particularly the experiences of colonial government in America long before Montesquieu published his work.⁷⁰ Subsequent lessons were gained from the Articles of Confederation.

As for Blackstone, he defined the king’s prerogative as “those rights and capacities which the king enjoys alone,” including the right to send and receive ambassadors, “making war or peace,” and unilaterally making treaties.⁷¹ The king could issue letters of marque and reprisal (authorizing private citizens to undertake military actions) and he possessed “the sole power of raising and regulating fleets and armies.”⁷² The Framers assigned those powers either exclusively to Congress or, as with treaties, shared them between the President and the Senate.

Prakash and Ramsey agree that the Framers “believed that the English system afforded too much foreign affairs power to the monarch” and for

⁶⁵ THE FEDERALIST NO. 4 (John Jay).

⁶⁶ *Id.*

⁶⁷ See THE FEDERALIST NO. 9 (Alexander Hamilton) (citing *Spirit of Laws*, Vol. I Book IX, Chap. I (1748)).

⁶⁸ WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (Columbia Univ. Press 1961) (1908).

⁶⁹ See THE FEDERALIST NO. 47 (James Madison).

⁷⁰ *Id.*

⁷¹ 2 WILLIAM BLACKSTONE, COMMENTARIES *239–40, *257.

⁷² *Id.* at *258, *262.

that reason the President “had a greatly diminished foreign affairs power as compared to the English monarchy.”⁷³ Still, they say the President “retained a residual power—that is, the President, as the possessor of ‘the executive Power,’ had those executive foreign affairs powers not allocated elsewhere by the text.”⁷⁴

At the Philadelphia convention, Charles Pinckney said he was for “a vigorous Executive but was afraid the Executive powers of (the existing) Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one.”⁷⁵ John Rutledge wanted the executive power placed in a single person, “tho’ he was not for giving him the power of war and peace.”⁷⁶ James Wilson preferred a single executive but “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.”⁷⁷

Edmund Randolph expressed concern about executive power, calling it “the foetus of monarchy.”⁷⁸ Delegates at the convention, he said, had “no motive to be governed by the British Government. as our prototype.”⁷⁹ If the United States had no other choice he might adopt the British model, but “the fixt genius of the people of America required a different form of Government.”⁸⁰ Wilson agreed that the British model “was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.”⁸¹

Later in the convention, Pierce Butler said he “was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.”⁸² In embracing the British model, Butler stood alone. Roger Sherman strongly objected: “The Executive shd. be able to repel and not to commence war.”⁸³ Elbridge

⁷³ Prakash & Ramsey, *supra* note 6, at 254.

⁷⁴ *Id.*

⁷⁵ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 64–65 (Max Farrand ed., 1966 ed.).

⁷⁶ *Id.* at 65.

⁷⁷ *Id.* at 65–66.

⁷⁸ *Id.* at 66.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (Max Farrand ed., 1966 ed.).

⁸³ *Id.*

Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”⁸⁴ Gerry highlighted the key word: a republic. The Framers broke with the British model that vested all of external affairs to the Executive. They did so because they were creating a form of government that vested power in the people, not in a monarch.

After Sherman and Gerry rebutted Butler, George Mason explained that he was “agst giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate, because not so constructed as to be entitled to it.”⁸⁵ The British model allowed single executives to take the country to war. The republican model promoted by the Framers did not grant single executives such power. At the Philadelphia convention, the Framers placed in Congress many of Locke’s federative powers and Blackstone’s prerogatives.⁸⁶ At the Pennsylvania state ratifying convention, James Wilson expressed the prevailing sentiment that the system of checks and balances

will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.⁸⁷

In North Carolina, James Iredell contrasted the limited powers of the President with those of the British monarch.⁸⁸ The king of Great Britain was not only Commander in Chief, “but [he] has power, in time of war, to raise fleets and armies. He has also authority to declare war.”⁸⁹ The President “has not the power of declaring war by his own authority, nor that of raising fleets of armies. These powers are vested in other hands.”⁹⁰ In South Carolina, Charles Pinckney assured his colleagues that the President’s power “did not permit him to declare war.”⁹¹

⁸⁴ *Id.*

⁸⁵ *Id.* at 319.

⁸⁶ See Louis Fisher, *Domestic Commander in Chief: Early Checks by Other Branches*, 29 CARDOZO L. REV. 961, 963 (2008).

⁸⁷ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1836) [hereinafter 2 ELLIOT’S DEBATES].

⁸⁸ See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (Jonathan Elliot ed., 1836) [hereinafter 4 ELLIOT’S DEBATES].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 287.

Prakash and Ramsey acknowledge that the Framers rejected the English model because it extended too much foreign affairs power to the executive. But they also argue that in assigning a “residual power” to the President “as the possessor of ‘the executive Power,’” the President has access to foreign affairs powers “not allocated elsewhere by the text.”⁹² In their interpretation, the Constitution “has a simple default rule that we call the ‘residual principle,’” meaning that foreign affairs powers not assigned elsewhere “belong to the President, by virtue of the President’s executive power”⁹³

IV. VARIOUS DEFINITIONS OF RESIDUAL

The risk of assigning to the President “residual” powers over foreign affairs is underscored by the way it has been analyzed by scholars, yielding five meanings in addition to the Prakash-Ramsey definition. A second interpretation of residual power appears in a study published in 2006 by Jack Goldsmith and John Manning.⁹⁴ They analyze the power of the President to determine the details needed to carry out legislative policy. For the most part they refer to the President’s “completion power,” but at times they use the term “residual.” With regard to the dissent by Chief Justice Vinson in the *Steel Seizure Case*,⁹⁵ they say he thought the President “possessed a residual capacity to take the steps necessary to carry out Congress’s program, even if Congress itself had not provided those specific steps.”⁹⁶ To Justice Black, writing for the majority in the *Steel Seizure Case*, they conclude it was his position that the President “could only act to enforce what Congress had affirmatively authorized him to enforce, and that he had no residual authority under Article II to complete a statute in the absence of congressional specification.”⁹⁷

The Goldsmith-Manning use of residual differs fundamentally from the Prakash-Ramsay interpretation. Prakash and Ramsey apply residual to a range of independent presidential powers in foreign affairs that may be exercised without prior congressional action. To explain the meaning of the “executive Power” in Article II, they turn to the works of Locke, Montesquieu, and Blackstone and seek guidance from tradition and eighteenth-century precedents. Goldsmith and Manning do not reach back

⁹² Prakash & Ramsey, *supra* note 6, at 254.

⁹³ *Id.*

⁹⁴ See generally Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2285 (2006).

⁹⁵ See *infra* Section IX.

⁹⁶ Goldsmith & Manning, *supra* note 94, at 2285.

⁹⁷ *Id.* at 2287.

to political philosophers and precedents from earlier centuries in search of independent presidential powers. Instead, they focus on the latitude available to Presidents in carrying out statutory policy provided by Congress. They conclude that Presidents “have long exercised, and courts have long recognized, some version of a presidential authority to prescribe incidental details of implementation necessary to complete an unfinished statutory scheme.”⁹⁸

A third meaning of residual appears in a memo by the Office of Legal Counsel, which often relies on such words as “plenary,” “inherent,” and “exclusive” to describe presidential authority in foreign affairs.⁹⁹ At times it uses the word “residual,” as in this sentence: “Just as the first President and the first Congress recognized that the executive function contained all the residual power to conduct foreign policy that was not otherwise delegated by the Constitution, subsequent historical practice has generally confirmed the President’s primacy in formulating and carrying out American foreign policy.”¹⁰⁰ This appears to be some sort of combination of two meanings of residual: confirming the existence of independent presidential power (Prakash-Ramsey) but also the latitude needed to carry out the statutory policy of Congress (Goldsmith-Manning).

William Howard Taft supplied a fourth meaning of residual. He began by saying

the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest¹⁰¹

Here he appears to refer to the existence of some kind of emergency situation that justifies presidential action when Congress is out of session or is unable to provide statutory authority in a timely manner. Taft

⁹⁸ *Id.* at 2302.

⁹⁹ See 10 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 159–62 (1986).

¹⁰⁰ *Id.* at 162.

¹⁰¹ WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139–40 (1924 ed.).

disagreed with those “who have insisted upon the necessity for an undefined residuum of Executive power in the public interest.”¹⁰²

Taft referred to language from Theodore Roosevelt who insisted that “the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers.”¹⁰³ Roosevelt believed it was not only the President’s “right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution”¹⁰⁴ He further felt at liberty to act “for the common well-being of all our people whenever and in whatever measure was necessary, unless prevented by direct constitutional or legislative prohibition.”¹⁰⁵ Taft rejected that theory of government, “ascribing an undefined residuum of power to the President,” regarding it as “an unsafe doctrine” that might lead “under emergencies to results of an arbitrary character, doing irremediable injustice to private right.”¹⁰⁶

Having repudiated Roosevelt’s position, the last paragraph of Taft’s book seems to move in the direction of a residual power. To Taft,

[t]he Constitution does give the President wide discretion and great power, and it ought to do so. It calls from him activity and energy to see that within his proper sphere he does what his great responsibilities and opportunities require. . . . [I]t is entirely proper that an energetic and active clear-sighted people, who, when they have work to do, wish it done well, should be willing to rely upon their judgment in selecting their Chief Agent, and having selected him, should entrust to him all the power needed to carry out their governmental purpose, great as it may be.¹⁰⁷

As Jefferson Powell has pointed out, Roosevelt’s stewardship theory promoted independent presidential initiatives particularly in “great national crises . . . which call for immediate and vigorous executive action.”¹⁰⁸ In an article published in 1993, Henry Monaghan includes a “residuum”

¹⁰² *Id.*

¹⁰³ *Id.* at 143.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 144.

¹⁰⁷ *Id.* at 157.

¹⁰⁸ WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS xxiv (H. Jefferson Powell ed., 2002).

power that is part of the “parameters of the presidential emergency power.”¹⁰⁹ This emphasis on national emergency therefore merits a fifth definition of residual presidential power. The Prakash-Ramsey and Goldsmith-Manning articles do not link residual power solely to emergency actions, nor does the OLC memo.

Monaghan explains that “any executive residuum can operate only on what remains after the enormous reallocation of former Crown powers to Congress or to the Senate.”¹¹⁰ Additionally, “the limitations of an acceptable residuum argument must be stressed. Its principal use is in the area of foreign affairs, to free the President from the need for statutory authority for every action taken.”¹¹¹ To Monaghan, “the President cannot lawfully disregard positive law in an emergency, [but] what if no relevant positive law exists?”¹¹²

In turning to the *Steel Seizure Case*, Monaghan says the Supreme Court “seems to reject the existence of any executive emergency power, [but] a careful examination of all seven opinions filed does not support such a definite assertion.”¹¹³ To Monaghan, “[a]n analysis of the concurring and dissenting opinions indicates that a majority of the justices embraced the existence of some residual presidential emergency power.”¹¹⁴ Having said that, Monaghan notes that despite the arguments made by the executive branch and President Truman’s public statements, “no emergency existed. Ample time existed for congressional action, both before and after the seizure, yet Congress did nothing. To transform political deadlock into an emergency would drain the concept of emergency of all content.”¹¹⁵ The *Steel Seizure Case* is further analyzed in Section IX.

In an article published in 2008, Prakash analyzed various words used to explain the sources of presidential power, including “regulable,” “residual,” and “absolute.”¹¹⁶ He points out that scholars “[t]oo often . . . use somewhat confusing terminology, obscuring their assertions and arguments. . . . [C]onfusion . . . seems endemic to arguments about

¹⁰⁹ Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993).

¹¹⁰ *Id.* at 22–23.

¹¹¹ *Id.* at 24.

¹¹² *Id.* at 34.

¹¹³ *Id.* at 37.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 37–38.

¹¹⁶ See generally Saikrishna Bangalore Prakash, *A Taxonomy of Presidential Powers*, 88 B.U. L. REV. 327 (2008).

presidential power.”¹¹⁷ In defining “residual power” in 2008, Prakash explained that he was using it “in a different sense” than in his article with Ramsey in the 2001 *Yale Law Journal*.¹¹⁸ This sixth definition “cover[s] those powers the President can exercise at the sufferance of Congress. In other words, these are powers where the President has a generic power to do something, save for when Congress has exercised, and hence withdrawn from the President, some portion of the power.”¹¹⁹

There are several differences between the 2001 and 2008 definitions of residual offered by Prakash. First, the focus in 2001 was on the President’s general power in foreign affairs, drawn initially from a textual interpretation of Article II’s grant of “the executive Power.” The 2008 definition applies to all presidential actions, foreign and domestic. Second, the effort in 2001 sought to identify independent presidential powers rooted in the works of Locke, Montesquieu, Blackstone and eighteenth-century precedents and tradition. The 2008 article treats residual as derived from Articles I and II. Third, the 2001 definition identified independent presidential powers in foreign affairs, whereas in 2008, Prakash held that residual powers of the President could be withdrawn by Congress: “If a power is a residual power, the President cannot act inconsistently with the relevant statutes because Congress has superseding constitutional authority over the area. . . . As Congress becomes more specific in its statutes, the President’s law enforcement/execution discretion becomes more circumscribed.”¹²⁰ The 2008 article therefore offers a sixth definition of residual.

Prakash recognized that “it probably is wishful thinking to imagine one can standardize discussions via a suggested taxonomy of presidential powers.”¹²¹ He says that “the newfangled terms and phrases” introduced by scholars “typically have the shelf-life of a banana.”¹²² To Prakash, “terms like ‘inherent,’ ‘unenumerated,’ and ‘plenary’ are used in ways that often confuse more than they enlighten.”¹²³ When scholars use “terms with no common meaning, . . . [it becomes] more difficult to understand claims about presidential powers.”¹²⁴ No doubt that is true, but the existence of

¹¹⁷ *Id.* at 328.

¹¹⁸ *See id.* at 335 n.36 (citing Prakash & Ramsey, *supra* note 6, at 253–54).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 335.

¹²¹ *Id.* at 340.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

various meanings of residual adds substantial confusion not only to scholarly discourse but to Supreme Court opinions.

V. EXPANSION OF PRESIDENTIAL POWER

Prakash and Ramsey analyze the growth of presidential power after 1789 by discussing various initiatives, such as “President Washington’s 1793 declaration of neutrality in the Anglo-French war.”¹²⁵ As they explain, “the Neutrality Proclamation . . . revealed the executive’s power to establish nonbinding foreign policy.”¹²⁶ In what sense was it nonbinding? The administration began prosecuting individuals who did not remain neutral. As Prakash and Ramsey point out, Washington “took this momentous step without consulting Congress.”¹²⁷ In retrospect, Washington probably wished he had reached out to lawmakers. Prakash and Ramsey say that “Washington never claimed that his Neutrality Proclamation had legal force of its own right . . .”¹²⁸ Still, his administration proceeded to prosecute individuals who did not comply with the proclamation.

Washington and his Cabinet soon discovered that jurors rebelled against the idea of convicting someone for a crime established by an executive proclamation. They insisted that criminal law in the United States could be made only by Congress, not the President.¹²⁹ Whatever authority the king of England possessed to independently make criminal law, jurors rejected such authority for the President. In the face of that revolt, the administration dropped plans to prosecute¹³⁰ and came to Congress for legislation, which passed the next year as the Neutrality Act. Jurors had a better understanding of the Constitution than Washington and his eminent legal advisers.

To Prakash and Ramsey, when the administration issued the proclamation, it did not claim to have legal authority. “The proclamation . . . did not appear to claim legal force of its own.”¹³¹ However, Washington’s administration threatened individuals with

¹²⁵ Prakash & Ramsey, *supra* note 6, at 246.

¹²⁶ *Id.* at 297.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 84–85, 88 (1849); Henfield’s Case, 11 F. Cas. 1099 (Cir. Ct. D. Pa. 1793) (No. 6360).

¹³⁰ See JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 273 (AMS Press, Inc. 1969) (1804).

¹³¹ Prakash & Ramsey, *supra* note 6, at 343.

prosecution. In court, prosecutors relied on “treaties, the law of nations, and common law.”¹³² Prakash and Ramsey state that the administration “was hardly on safe legal ground in offering common law as its legal authority.”¹³³ They also say that reliance on treaties and the law of nations was “not very convincing” either.¹³⁴ In discussing the proclamation, Prakash and Ramsey cite scholars who conclude that if the President’s foreign affairs power “is ‘inherent’ or derivative of some extraconstitutional principle, it is not obvious that that power encompasses only policy and not lawmaking.”¹³⁵ Those scholars rely on a principle outside the Constitution and argue that presidential authority could result in lawmaking.

VI. ERRONEOUS DICTA IN CURTISS-WRIGHT

The constitutional risk of relying on historical misconceptions by the Supreme Court to promote independent presidential power comes from scholars such as Henry Monaghan, who rely on Justice George Sutherland’s decision in *United States v. Curtiss-Wright Export Corporation*,¹³⁶ claiming “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”¹³⁷ Prakash and Ramsey are critical of the sole-organ doctrine, describing it as “notorious.”¹³⁸ They add: “whatever its other demerits, it simply does not approach the matter as a *constitutional* question.”¹³⁹ As will be explained, Sutherland claimed to provide constitutional analysis but failed in that effort.

To Prakash and Ramsey, scholars “cannot explain the constitutional origins of the ‘sole organ’ power.”¹⁴⁰ However, immediately after the Court’s decision, scholars began to expose constitutional and historical mistakes in *Curtiss-Wright*. Writing in 1938, Julius Goebel pointed out that Sutherland’s view of sovereignty passing from the British crown directly to the union was false.¹⁴¹ In fact, the peace treaty with Great

¹³² *Id.*

¹³³ *Id.* at 343 n.494.

¹³⁴ *Id.* at 345.

¹³⁵ *Id.*

¹³⁶ 299 U.S. 304 (1936).

¹³⁷ Prakash & Ramsey, *supra* note 6, at 251 (quoting *Curtiss-Wright*, 299 U.S. at 320) (citing Monaghan, *supra* note 109, at 48).

¹³⁸ *Id.* at 238.

¹³⁹ *Id.* at 239 (emphasis in original).

¹⁴⁰ *Id.* at 251.

¹⁴¹ See generally Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555 (1938).

Britain on September 3, 1783 acknowledged that various states, including New Hampshire, Massachusetts Bay, and Rhode Island, were “free sovereign and independent States.”¹⁴² Sutherland claimed that the President “alone negotiates” treaties and that “into the field of negotiation the Senate cannot intrude,” but Goebel pointed to early examples of Presidents consulting with Senators about a pending treaty.¹⁴³

As to treaty negotiation, it is instructive to look at Sutherland’s book published in 1919, reflecting on his twelve years as a U.S. Senator.¹⁴⁴ In *Curtiss-Wright*, he claimed that the Constitution commits treaty negotiation exclusively to the President:

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.¹⁴⁵

Yet in his book, Sutherland fully understood that Senators participate in the negotiation phase and Presidents accepted this “practical construction.”¹⁴⁶

Many Presidents have invited not only Senators, but also members of the House of Representatives to participate in treaty negotiation. The purpose: to build political support not only in the Senate for the treaty, but also support in the House for authorization and appropriation bills needed to implement the treaty.¹⁴⁷ In 2009, the Office of Legal Counsel cited Sutherland’s “clear dicta” in *Curtiss-Wright* that “[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”¹⁴⁸ Clear dicta, yes, but erroneous dicta. The belief in

¹⁴² *Id.* at 571 n.40.

¹⁴³ *Id.* at 572 n.47.

¹⁴⁴ See GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* (1919).

¹⁴⁵ *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis in original).

¹⁴⁶ See SUTHERLAND, *supra* note 144, at 122–24.

¹⁴⁷ *But see id.* at 124–25 (discussing the framers intent to not include the House during treaty negotiations, and even President Washington himself refused “to accede to a request from the House of Representatives to lay before that body the instructions, correspondence and documents relation to the negotiation of the Jay treaty, [which] was approved by the House itself . . .”).

¹⁴⁸ OFFICE OF LEGAL COUNSEL, MEMORANDUM OPINION FOR THE ACTING LEGAL ADVISER DEPARTMENT OF STATE 9 (June 1, 2009), <https://www.justice.gov/file/18496/download> [<https://perma.cc/DC4D-MXJ9>].

presidential monopoly over treaty negotiation has been regularly and decisively refuted by numerous studies.¹⁴⁹

The third conceptual and historical error by Sutherland in *Curtiss-Wright* refers to a speech by John Marshall during debate in the House of Representatives in 1800. Marshall described the President as the “sole organ of the nation in its external relations, and its sole representative with foreign nations.”¹⁵⁰ Marshall never meant by “sole organ” that the President possessed plenary and exclusive power over foreign affairs. Merely reading the text of Articles I and II would dispense with that theory. It is essential to read Marshall’s entire speech to understand what he meant by “sole organ.”

In 1800, Thomas Jefferson campaigned for President against John Adams. Jeffersonians in the House urged that President Adams be either impeached or censured for turning over to Great Britain an individual charged with murder. Because the case was already pending in an American court, some lawmakers wanted to sanction Adams for encroaching upon the judiciary and violating the doctrine of separation of powers. . . .

Marshall took the floor to methodically shred the call for impeachment or censure. . . .¹⁵¹

Adams was not claiming some kind of independent authority drawn from inherent presidential power. The Jay Treaty with England contained an extradition provision in Article twenty-seven, directing each country to deliver up to each other “all persons” charged with murder or forgery.¹⁵² Adams was not making foreign policy unilaterally. He was not the “sole organ” in formulating

¹⁴⁹ See, e.g., Forrest R. Black, *The United States and the Treaty Power*, 4 ROCKY MTN. L. REV. 1, 4 (1931); William Whitwell Dewhurst, *Does the Constitution Make the President Sole Negotiator of Treaties?*, 30 YALE L.J. 478, 483 (1921); Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1512 (1989); Richard E. Webb, *Treaty-Making and the President’s Obligation to Seek the Advice and Consent of the Senate with Special Reference to the Vietnam Peace Negotiations*, 31 OHIO ST. L.J. 490, 490 (1970).

¹⁵⁰ *Curtiss-Wright*, 299 U.S. at 319 (quoting 6 ANNALS OF CONG. 613 (1800)).

¹⁵¹ Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT. 149, 163–64 (2016). See also 6 ANNALS OF CONG. 533 (1800).

¹⁵² See Jay Treaty, Eng.-U.S., art. XXVII, Nov. 19, 1794, 8 Stat. 116.

the treaty. He was the sole organ in implementing it. Adams was fulfilling his Article II, Section three duty to take care that the laws, including treaties, be faithfully executed. Under Article VI of the Constitution, all treaties “shall be the supreme Law of the Land.”¹⁵³

Decade after decade, these errors in *Curtiss-Wright* continued to expand presidential power in external affairs. Federal courts at all levels cited the sole-organ doctrine to support the existence of inherent and exclusive power for the President in foreign affairs.¹⁵⁴ Although scholars continued to repudiate the errors in *Curtiss-Wright*, courts nevertheless accepted the dicta as valid when interpreting presidential authority.¹⁵⁵ The executive branch depended heavily on this dicta “to expand presidential power at the cost of traditional checks and balances.”¹⁵⁶

VII. PARTIAL CORRECTION IN 2015

The sole-organ doctrine expanded presidential power for nearly eight decades until it reached the Supreme Court in 2015. At issue was congressional legislation in 2002 containing language on Jerusalem passports. For purposes of registration of birth, certification of nationality, or issuance of a passport to a U.S. citizen born in Jerusalem, the Secretary of State “shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.”¹⁵⁷ In signing the bill, President George W. Bush stated that if Section 214(d) were construed to impose a legislative requirement, it would “impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.”¹⁵⁸ The language “speak for the Nation” appeared to reflect John Marshall’s sole-organ speech as interpreted in *Curtiss-Wright*.

Litigation on Section 214(d) consumed many years. In 2009, the D.C. Circuit dismissed the case as a “political question.”¹⁵⁹ Three years later,

¹⁵³ U.S. CONST. art. VI, cl. 2. See also Fisher, *supra* note 151, at 163–64.

¹⁵⁴ See Fisher, *supra* note 151, at 175.

¹⁵⁵ See *id.* at 186, 194.

¹⁵⁶ *Id.* at 201.

¹⁵⁷ Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

¹⁵⁸ Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sept. 30, 2002).

¹⁵⁹ See *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1228 (D.C. Cir. 2009).

the Supreme Court vacated that judgment and remanded the case for further proceedings.¹⁶⁰ It specifically rejected the position that the dispute represented a political question unsuitable for the courts.¹⁶¹ In 2013, the D.C. Circuit held in favor of the President's recognition power and invalidated Section 214(d).¹⁶² In doing so, it relied five times on the sole-organ doctrine in *Curtiss-Wright*.¹⁶³ The Court understood it was dicta, but emphasized it was Supreme Court dicta. It made no reference to scholarly studies that explained it was not merely dicta but erroneous dicta.¹⁶⁴

In response to the decision of the D.C. Circuit, I filed an amicus brief with the Supreme Court on July 17, 2014, asking it to correct the erroneous dicta in *Curtiss-Wright* that had expanded presidential power in external affairs and damaged the constitutional system of checks and balances.¹⁶⁵ When the Court is in session, the *National Law Journal* each week selects a brief that merits attention. On November 3, 2014, it selected mine, featuring this heading: "Can the Supreme Court Correct Erroneous Dicta?"¹⁶⁶

In *Zivotofsky v. Kerry*, the Supreme Court finally jettisoned the sole-organ doctrine. In doing so, it left in place other erroneous dicta inserted in *Curtiss-Wright*, including the claim that "the President has the sole power to negotiate treaties."¹⁶⁷ As for the sole-organ doctrine, Secretary of State John Kerry urged the Court to define executive power over foreign affairs in broad terms, relying on language in *Curtiss-Wright* that described the President as "the sole organ of the federal government in the field of international relations."¹⁶⁸ The Court said it "declines to acknowledge that unbounded power. . . . The *Curtiss-Wright* case does not extend so far as the Secretary suggests."¹⁶⁹

Having rejected the sole-organ doctrine, the Court proceeded to build a close substitute. In deciding for the first time to place the recognition

¹⁶⁰ See generally *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012).

¹⁶¹ *Id.* at 191.

¹⁶² *Zivotofsky ex rel. Zivotofsky v. Kerry*, 725 F.3d 197, 200 (D.C. Cir. 2013).

¹⁶³ See *id.* at 211, 213, 215, 219.

¹⁶⁴ *Id.* at 212. See also Fisher, *supra* note 151, at 150.

¹⁶⁵ Brief of Louis Fisher as Amici Curiae in Support of Petitioner, *Zivotofsky v. Kerry*, 725 F.3d 197 (2013) (No. 13-628), available at <http://www.loufisher.org/docs/pip/Zivotofsky.pdf> [<https://perma.cc/A9RM-NLT4>].

¹⁶⁶ Jamie Schuman, *Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?*, NAT'L L.J. (Nov. 3, 2014), <http://www.loufisher.org/docs/pip/fisherbrief.pdf> [<https://perma.cc/4SKF-4EC8>].

¹⁶⁷ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015).

¹⁶⁸ *Id.* at 2089.

¹⁶⁹ *Id.*

power exclusively with the President, the Court announced that “[r]ecognition is a topic on which the Nation must ‘speak . . . with one voice’” and “[t]hat voice must be the President’s.”¹⁷⁰ Between the two political branches “only the Executive has the characteristic of unity at all times.”¹⁷¹ With unity, said the Court, “comes the ability to exercise, to a greater degree, ‘[d]ecision, activity, secrecy, and dispatch,’” borrowing those qualities from Federalist No. 70 by Alexander Hamilton.¹⁷²

The Court assumed that those five qualities—unity, decision, activity, secrecy, and dispatch—are always salutary, meriting trust in independent presidential decisions in external affairs. The record demonstrates that those same five qualities have caused substantial damage to the country and its constitutional system. One need only reflect on the following presidential initiatives from 1950 to the present time: Truman taking the country to war against North Korea in 1950 without receiving prior congressional authority;¹⁷³ Truman allowing U.S. troops to travel northward, prompting the Chinese to introduce their forces to create a costly stalemate;¹⁷⁴ Kennedy and his Bay of Pigs;¹⁷⁵ Johnson’s decision to escalate the war in Vietnam;¹⁷⁶ Nixon widening the Vietnam war to Cambodia;¹⁷⁷ Reagan’s involvement in Iran-Contra;¹⁷⁸ Bush II using military force against Iraq on the basis of six claims that Saddam Hussein possessed weapons of mass destruction, with all six claims found to be empty;¹⁷⁹ and Obama ordering military action against Libya in 2011, leaving behind a country broken legally, economically, and politically.¹⁸⁰

¹⁷⁰ *Id.* at 2086 (citing *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 424 (2003)).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the “Imperial President” Myth*, 19 HARV. J.L. & PUB. POL’Y 533, 533 (1996).

¹⁷⁴ See *Truman, MacArthur, and the Korean War*, CONSTITUTIONAL RIGHTS FOUNDATION: BILL OF RIGHTS IN ACTION (Jan. 4, 2019), <http://www.crf-usa.org/bill-of-rights-in-action/bria-17-3-b-truman-macarthur-and-the-korean-war.html> [https://perma.cc/25G4-TDWM].

¹⁷⁵ See Eric R. Martell, “Defeat Is an Orphan:” *The Kennedy Administration and the Bureaucratic Tug-of-War over the Bay of Pigs*, 9 FED. HIST. J. 87, 88 (2017) (discussing the Bay of Pigs having been “the failed invasion of Cuba in 1961 to unseat Fidel Castro.”).

¹⁷⁶ See Stanley Faulkner, *The War in Vietnam: Is it Constitutional?*, 56 GEO. L.J. 1132, 1137 (1968).

¹⁷⁷ See Jean Lacouture, *From the Vietnam War to an Indochina War*, 48 FOREIGN AFF. 617, 617 (1970).

¹⁷⁸ See Sarah Lovering, *President Reagan and the Iran-Contra Affair: A Lesson in Leadership Failure*, 14 LBJ J. PUB. AFF. 58, 59 (2002).

¹⁷⁹ See Glenn Kessler, *George W. Bush’s claims on weapons found, and not found, in Iraq*, THE WASHINGTON POST (Nov. 13, 2014), <https://www.washingtonpost.com/news/fact->

(continued)

In relying on Federalist No. 70, the Court ignored Hamilton's warning in Federalist No. 75 about unchecked presidential power. He noted that several writers had placed the power to make treaties "in the class of executive authorities," but to Hamilton "it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them."¹⁸¹ Speaking more broadly about the realm of foreign affairs, he cautioned:

The history of human conduct does not warrant that exalted opinion of human virtue, which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a president of the United States.¹⁸²

In upholding for the first time an exclusive authority of the President to recognize foreign governments, the Court spoke in broad and positive terms about executive authority in external affairs. As Jack Goldsmith noted, there should be little doubt that executive branch lawyers will exploit the Court's "untidy reasoning" and interpret its "pro-executive elements for all they're worth."¹⁸³ From *Curtiss-Wright* to *Zivotofsky*, the Supreme Court in a series of rulings has expanded presidential power beyond constitutional boundaries. At times it defers to executive initiatives while on other occasions it clearly endorses presidential power in the field of external affairs.¹⁸⁴ In a study published in 2016, David Rudenstine points out that decisions by the Supreme Court in the field of national security have denied "a remedy to injured individuals, insulat[ed] unlawful conduct, needlessly reinforce[ed] a secrecy system . . . undermin[ed] the possibility of transparency, and erod[ed]

checker/wp/2014/11/13/george-w-bushs-claims-on-weapons-found-and-not-found-in-iraq/?noredirect=on&utm_term=.2e2b15b7fa5d [https://perma.cc/62DB-37C3].

¹⁸⁰ See Dominic Tierney, *The Legacy of Obama's 'Worst Mistake'*, THE ATLANTIC (April 15, 2016), <https://www.theatlantic.com/international/archive/2016/04/obamas-worst-mistake-libya/478461/> [https://perma.cc/G8SN-XCBA].

¹⁸¹ THE FEDERALIST NO. 75 (Alexander Hamilton).

¹⁸² *Id.*

¹⁸³ Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 146 (2015).

¹⁸⁴ See generally LOUIS FISHER, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS (2017).

democratic values.”¹⁸⁵ Through these decisions, the Court “has effectively elevated the executive in national security cases above the law.”¹⁸⁶

VIII. CONGRESSIONAL POWER

Prakash and Ramsey conclude their article in the *Yale Law Journal* by examining the power of Congress in foreign affairs. They identify two sources: the powers expressly granted by the Constitution’s text (including authority derived from the “Necessary and Proper Clause”), plus what they call “derivative powers.”¹⁸⁷ That may sound like a legislative source of authority comparable to the President’s residual authority, but they define it not as an independent legislative power, but rather one that enables Congress to “legislate to carry into execution presidential foreign affairs powers.”¹⁸⁸ In their model, the president benefits not only by having access to executive residual power, but also from congressional derivative powers.

As defined by Prakash and Ramsey, the derivative powers of Congress sound very different from its implied powers. The latter are certainly not limited to carrying out the President’s priorities. Why refer to certain powers as “derivative”? Derived from what? The Constitution? Presidential authority? In their analysis, it appears to be the latter. They state that “Congress had a derivative power to legislate in support of presidential powers over foreign affairs.”¹⁸⁹ Only in support? Never in opposition? Congress is not restricted in that manner. As Prakash and Ramsey acknowledge in discussing the role of Congress during the Washington administration, lawmaking and appropriations, “even where these powers implicated foreign affairs . . . remained independent powers of Congress.”¹⁹⁰ Congress remained at liberty to support or oppose the President.

In turning to specific examples from Washington’s administration, Prakash and Ramsey focus on the problem of attacks by Algiers on U.S. ships and taking U.S. mariners as hostages to be ransomed.¹⁹¹ President Washington understood he could not act alone. The issue could be resolved “only by money (paying the ransom) or force, both of which lay

¹⁸⁵ DAVID RUDENSTINE, *THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER* 316 (2016).

¹⁸⁶ *Id.* at 7.

¹⁸⁷ See Prakash & Ramsey, *supra* note 6, at 346.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 350.

¹⁹⁰ *Id.* at 349.

¹⁹¹ *Id.* at 347.

under Congress's control."¹⁹² Because "President[ial] residual powers were of little use during the Algiers situation, Washington did not take unilateral measures as he had in other circumstances."¹⁹³

In 1790, in his capacity as Secretary of State, Jefferson identified for Congress a variety of alternatives for dealing with demands from the Barbary powers. The policy was to be established by Congress and implemented by the President:

Upon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce. If war, they will consider how far our own resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the co-operation of other Powers. If tribute or ransom, it would rest with Congress to limit and provide the amount; and with the Executive, observing the same constitutional forms, to make arrangements for employing it to the best advantage.¹⁹⁴

On March 3, 1801, one day before Jefferson took office as President, Congress passed legislation to provide for a "naval peace establishment."¹⁹⁵ Of the frigates to be retained and kept in constant service, six "shall be officered and manned as the President of the United States may direct."¹⁹⁶ Acting under this authority, Jefferson directed that a squadron be sent to the Mediterranean. In the event the Barbary powers declared war on the United States, American vessels were ordered to "protect our commerce & chastise their insolence—by sinking, burning or destroying their ships & Vessels wherever you shall find them."¹⁹⁷ After issuing that order based on congressional authority, Jefferson also wrote that it was up to Congress to decide what policy to pursue in the Mediterranean: "The real alternative before us is whether to abandon the Mediterranean or to keep up a cruise in it, perhaps in rotation with other powers who would join us as soon as there is peace. But this Congress

¹⁹² *Id.* at 347–48.

¹⁹³ *Id.* at 348.

¹⁹⁴ 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 105 (1832).

¹⁹⁵ 2 Stat. 110, sec. 2 (1801).

¹⁹⁶ *Id.*

¹⁹⁷ 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 467 (1939).

must decide.”¹⁹⁸ He did not treat Congress as a subordinate branch simply because the issue was one of foreign affairs.

On December 8, 1801, Jefferson informed Congress that he sent a small squadron of frigates to the Mediterranean to protect against attacks by the Barbary powers.¹⁹⁹ Because hostilities resulted, Jefferson asked Congress for further guidance, explaining he was “unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense.”²⁰⁰ It was up to Congress to authorize “measures of offense also.”²⁰¹ Jefferson provided Congress all the documents and communications it needed so that the legislative branch, “in the exercise of this important function confided by the Constitution to the Legislature exclusively,” could consider the situation and act in the manner it considered most appropriate.²⁰² As Michael Ramsey has pointed out, Jefferson’s public statement to Congress differed from advice he received from his Cabinet.²⁰³

Studies by the Justice Department and statements made during congressional debate in 1994 imply that Jefferson took military initiatives against the Barbary powers without seeking the approval or authority of Congress.²⁰⁴ In fact, Congress in at least ten statutes expressly authorized military action against the Barbary powers during the administrations of Presidents Jefferson and Madison.²⁰⁵

Through their interpretation of congressional “derivative powers,” Prakash and Ramsey appear to expand legislative authority beyond the constitutional text only when needed to promote presidential goals, not congressional initiatives as a separate branch of government, including an interest in providing oversight of the President and executive agencies. In discussing this issue, they acknowledge that Congress can decide to withhold its derivative powers when it does not want to support presidential objectives. But why not interpret those derivative powers to

¹⁹⁸ 8 THE WRITINGS OF THOMAS JEFFERSON 63–64 (Paul Leicester Ford ed., 1897).

¹⁹⁹ See 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 314 (James D. Richardson ed.).

²⁰⁰ *Id.* at 315.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 185–88 (2007).

²⁰⁴ See 4A Op. O.L.C. 185, 187 (1980); 140 CONG. REC. 19809 (1994) (statement by Senator McCain). The OLC opinion was placed in the Congressional Record in 1993. See 139 CONG. REC. 25702-05 (1993).

²⁰⁵ See LOUIS FISHER, PRESIDENTIAL WAR POWER 35 (2013 ed.).

enable Congress to pursue legislative objectives unrelated to presidential goals?

Prakash and Ramsey underscore their effort to revive “the historical understanding of Article II, Section 1.”²⁰⁶ They say that “[w]hen the Constitution assigns a foreign affairs power to Congress, that allocation is an exception to the President’s executive power.”²⁰⁷ Yes, but it also reflects the Framers’ decision to reject the traditional reliance on vesting all external affairs in the executive and allowing single executives to take the nation to war. The Framers believed strongly in a system of checks and balances to limit the abuse of political power.

By developing the notion of purely derivative legislative powers to further presidential goals, Prakash and Ramsey say that “Congress lacks a comprehensive power to legislate in foreign affairs.”²⁰⁸ Why limit Congress in that manner? Lawmakers have substantial power to legislate in foreign affairs to pursue their own goals. Yet Prakash and Ramsey place this restriction: “Outside its specific foreign affairs powers such as declaring war or regulating commerce, and laws necessary and proper to such powers, Congress may legislate only to carry into execution the President’s foreign affairs powers.”²⁰⁹ Nothing in the framing of the Constitution or developments from 1789 to today supports that abridged theory of congressional authority.

Finally, Prakash and Ramsey say their purpose is “to drag the constitutional foreign affairs debate back to the text, where constitutional debates ought to begin (if not end).”²¹⁰ They define their purpose in these terms: “Let the debate about the textual allocation of the executive power over foreign affairs begin.”²¹¹ That debate is critically important, but nothing in the text or Framers’ intent justifies a broad expanse of “residual” powers for the President while assigning highly limited “derivative powers” to Congress.

IX. THE STEEL SEIZURE CASE

In an article published in 1984, Lucius Wilmerding said that four Justices in *Youngstown Company v. Sawyer* attributed to the President “a

²⁰⁶ Prakash & Ramsey, *supra* note 6, at 355.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 355–56.

²¹⁰ *Id.* at 356.

²¹¹ *Id.*

residual power” under the Constitution to protect the country.²¹² In his concurrence, Justice Tom Clark said, “the Constitution does grant to the President extensive authority in times of grave and imperative national emergency.”²¹³ The Framers certainly recognized that the President had authority to “repel sudden attacks,” but Justice Clark did not apply that phrase to defend President Truman’s decision to seize steel mills to prosecute the war in Korea. The United States in 1952 was not subject to a sudden attack.

In describing this emergency authority, Justice Clark said: “I care not whether one calls it ‘residual,’ ‘inherent,’ ‘moral,’ ‘implied,’ ‘aggregate,’ ‘emergency,’ or otherwise.”²¹⁴ He did not explain what he meant by this reference to residual powers. He conceded that Congress could lay down specific procedures to deal with a national crisis, “but that in the absence of such action by Congress, the President’s independent power to act depends upon the gravity of the situation confronting the nation.”²¹⁵ Thus, the Justice recognized that Congress could use its independent powers to constrain the President in external affairs. He could not sustain Truman’s action because Congress “had prescribed methods to be followed by the President in meeting the emergency at hand.”²¹⁶ Thus, although Justice Clark used the word “residual” and spoke in general terms about presidential powers during a national emergency, he voted against the steel seizure.²¹⁷ It is incorrect to say that Clark endorsed some broad notion of a residual presidential power.

Justice Clark was not alone in speculating about future severe crises (more severe than a strike by steel workers) that might justify unilateral presidential actions in foreign affairs. The concurrence by Justice Harold Burton recognized that extreme emergencies might permit independent presidential power, but the steel strike “is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President’s constitutional power to meet such catastrophic situations”²¹⁸ For Burton, no theory of residual presidential powers in foreign affairs justified Truman’s action.

²¹² See LUCIUS WILMERDING, JR., SEIZURE OF INDUSTRY UNDER WAR POWERS: TRUMAN AND THE STEEL MILLS, in DEMETRIOS CARALEY ED., THE PRESIDENT’S WAR POWERS FROM THE FEDERALISTS TO REAGAN 113 (1984).

²¹³ *Youngstown Co. v. Sawyer*, 343 U.S. 569, 662 (1952).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 662, 666.

²¹⁸ *Id.* at 659.

Wilmerding said that four Justices defended the doctrine that the President is “the sole possessor of executive power” and has constitutional authority to do whatever is necessary “in cases of imperious necessity” to protect the nation.²¹⁹ He reached that number by saying Clark “associated himself” with the dissent by Chief Justice Fred Vinson (joined by Justices Stanley Reed and Sherman Minton) in vindicating President Truman’s claim to a residual power under the Constitution to save the country when in danger.²²⁰ To Wilmerding, Chief Justice Vinson “constructed a dilemma to prove that the power [to seize steel mills] exists: either the President has a residual power, under the Constitution, to save the country when in danger, or he has not.”²²¹ Wilmerding concluded: “Four members of the Court have flatly declared themselves in favor of the doctrine of residual power.”²²²

When one reads the forty-four page dissent by Vinson, it does not support Truman’s steel seizure by invoking a broad reading of residual presidential powers. Vinson did not argue that Truman acted solely on some interpretation of Article II. Instead, he gathered evidence to show that various treaties and statutes supported Truman. For example, Vinson discussed in detail the Defense Production Act of 1950, the Mutual Security Act of 1951, and the extension of the Defense Production Act in 1951, explaining that President Truman had “the duty to execute the foregoing legislative programs.”²²³

Chief Justice Vinson included language that President Truman sent to Congress on April 9, 1952, explaining why he ordered the steel seizure but also deferring to legislative judgment on what should be done.²²⁴ In a series of statements, Truman said “it may be” that Congress will consider some other course “to be wiser,” to have government force the steel workers to continue to work “for another long period, without a contract,” and that Congress might conclude that a shutdown of the steel industry is permissible even though it “would immediately endanger the safety of our fighting forces abroad and weaken the whole structure of our national security.”²²⁵ In short, under Vinson’s interpretation Truman did not invoke either inherent or residual authority to claim exclusive control over foreign

²¹⁹ See Wilmerding, Jr., *supra* note 212, at 113.

²²⁰ *Id.*

²²¹ *Id.* at 114.

²²² *Id.* at 124.

²²³ *Youngstown*, 343 U.S. at 671–72.

²²⁴ *Id.* at 675–77.

²²⁵ *Id.* at 676.

affairs. After considering his menu of possible options, for and against the seizure, Congress decided not to pass legislation offering support to Truman.²²⁶

Vinson proceeded to undercut any reliance on residual authority for Truman: “We also assume without deciding that the courts may go behind a President’s finding of fact that an emergency exists.”²²⁷ He added that although the Presidency was “deliberately fashioned as an office of power and independence,” the Framers “created no autocrat capable of arrogating any power unto himself at any time.”²²⁸ Vinson’s dissent is hardly a model of clarity and consistency in constitutional analysis, but certainly it is not a full-throated advocacy of independent presidential residual authority in foreign affairs.

Earlier, when District Judge David Pine struck down the steel seizure, he noted that the Justice Department defended Truman’s action as necessary at a time of “impending national emergency” that placed the nation in “a critical situation,” and under those conditions the President possessed an “inherent” power to take possession of the steel companies.²²⁹ Moreover, according to the Justice Department, the “courts are without power to negate Executive action of the President by enjoining it.”²³⁰ The term “inherent” is a familiar one. If a power is said to inhere in the President, it by nature belongs to the President and cannot be interfered with or limited by other parties, including Congress and the judiciary.²³¹ To Judge Pine, the assertion of inherent presidential power “spells a form of government alien to our Constitutional government of limited powers,” therefore finding the steel seizure “illegal and without authority of law.”²³²

Judge Pine also made several references to the administration’s claim that the President possessed some kind of “residuum of power.” To Pine, the term seemed to be synonymous with presidential inherent power. For example, he said the administration’s brief, reiterated in oral argument, claimed for the President a “broad ‘residuum of power,’” at times referred to as an “inherent” power under the Constitution.²³³ He understood the attorney from the Justice Department to say that the terms “broad residuum” and “inherent” were “not to be confused with ‘implied’ powers

²²⁶ *Id.* at 677.

²²⁷ *Id.* at 678.

²²⁸ *Id.* at 682.

²²⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 572 (D. D.C. 1952).

²³⁰ *Id.*

²³¹ *See Fisher*, *supra* note 28, at 2.

²³² *Youngstown Sheet*, 103 F. Supp. at 576.

²³³ *Id.* at 573.

as that term is generally understood, namely, those which are reasonably appropriate to the exercise of a granted power.”²³⁴ On that same page, in a subsequent paragraph, Pine again on two occasions equated “residuum” with “inherent.”²³⁵

After explaining his reasons for denying that President Truman possessed some kind of inherent authority to seize the steel mills, Pine cited Chief Justice Taft’s treatise on *Our Chief Magistrate and His Powers* (1916), which said the President cannot exercise a power that is not “fairly and reasonably traced” to a specific grant of power or justly implied and proper and necessary to its exercise.²³⁶ Such grant of authority must be either in the U.S. Constitution or in statutes passed by Congress “in pursuance thereof.”²³⁷ To Taft, the President possessed “no undefined residuum of power” simply because he considered it to be in the public interest.²³⁸ Pine therefore repudiated any claim to either an inherent or residuum source of presidential power.²³⁹

In his evaluation of the *Steel Seizure Case*, Edward Corwin began by examining the opening clause of Article II of the Constitution: “The executive Power shall be vested in a President of the United States of America.”²⁴⁰ He explained that the term “executive Power” has not developed always “at the same pace; while at times it has seemed to be arrested, during the last fifty years its maturation has been virtually uninterrupted.”²⁴¹ Over time, various powers have been attributed to the President, including “residual,” “resultant,” and “inherent.”²⁴² The chief impact on constitutional government of the “overextension of presidential power” has been the threatening “concept of a ‘government of laws and not of men’—the ‘Rule of Law’ principle.”²⁴³

As Corwin noted, Truman’s order to seize the steel mills “cited no specific statutory authorization, but invoked generally the powers vested in the president by the Constitution, and laws of the United States.”²⁴⁴ In

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 574.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See *supra* Section VIII (discussing how Taft in other writings moved in the declaration of emergency and residual authority for the President).

²⁴⁰ Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 53 (1953). See also U.S. CONST. art. II, § 1, cl. 1.

²⁴¹ Corwin, *supra* note 240, at 53.

²⁴² *Id.* at 54.

²⁴³ *Id.*

²⁴⁴ *Id.* at 55.

reporting his actions to Congress, Truman conceded the power of Congress “to supersede his order.”²⁴⁵ Therefore, he did not assert at that point exclusive or plenary authority, either under a “residual” power or any other type of executive prerogative. Corwin summarized Justice Black’s decision for the Court in this manner: Truman’s executive order to take possession of the steel mills “was not deducible from the aggregate of the executive powers under Article II of the Constitution; nor was the Order maintainable as an exercise of the president’s powers as commander-in-chief of the armed forces.”²⁴⁶

To Corwin, Black’s attitude about presidential authority was “decidedly cavalier.”²⁴⁷ Corwin cited this language in the closing paragraph of Black’s opinion:

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.²⁴⁸

The word cavalier is generally defined as being offhand and a disdainful dismissal of important matters, and yet Corwin acknowledged that presidential power in the previous fifty years had grown “almost uninterrupted,” leading to an “overextension of presidential power” that threatened the rule of law.²⁴⁹ Corwin quoted with approval Vinson’s dissent, proclaiming that Truman “had the moral duty to keep this Nation’s defense effort a ‘going concern.’”²⁵⁰ From that analysis, it appears that Corwin preferred not a nation of laws, but one dependent on the President making the right moral choice. Imagine the Framers writing Article II in that manner.

Toward the end of his article, Corwin describes Vinson’s dissent as “impressive for its delineation of the emergency and convincing in its summation of evidence regarding presidential emergency power.”²⁵¹ To Corwin, the *Steel Seizure Case* supports the notion that the President “does

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 56.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 56–57 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952)).

²⁴⁹ *Id.* at 54.

²⁵⁰ *Id.* at 60.

²⁵¹ *Id.* at 65.

possess ‘residual’ or ‘resultant’ powers over and above, or in consequence of, his specifically granted powers to take temporary alleviative action in the presence of serious emergency.”²⁵² Further: “Such residual powers being conceded, it would follow logically that a seizure of property made by exercise of them would give rise to a constitutional obligation on the part of the United States to render ‘just compensation’ in accordance with the requirements of the Fifth Amendment.”²⁵³

To Corwin, it was “fairly evident that the Court would never venture to traverse a presidential finding of ‘serious’ emergency which was prima facie supported by judicially cognizable facts but would wave aside a challenge to such a finding as raising a ‘political question.’”²⁵⁴ The reasoning here is weak. The Supreme Court was well aware that Truman regarded the pending steel strike as an emergency, particularly because of the need of steel to prosecute the war in Korea. Nevertheless, six Justices held against Truman, and the three dissenters did their best to argue that existing statutory authority gave adequate support to Truman. The dissenters highlighted his public announcement that he would defer to the judgment of Congress.

X. CONCLUSION

Presidential power in foreign affairs is extensive and adequate because of access to an array of enumerated and implied powers. Efforts to add “inherent” powers have been appropriately rejected by the Supreme Court and Congress in the *Steel Seizure Case*, Nixon’s impoundment of appropriated funds, Nixon’s warrantless domestic surveillance, and Bush II’s creation of military tribunals by proclamation rather than statutory authority. Adding “residual” powers to the presidential repository is unnecessary and ill-advised for many reasons.

First is the issue of definition, a problem underscored by the many different uses of “residual.”²⁵⁵ Moreover, locating residual powers for the President requires research into precedents established more than two centuries ago. The judiciary has little competence to carry out that task. Even an originalist like Justice Scalia recognized that the judicial system “does not present the ideal environment for entirely accurate historical inquiry.”²⁵⁶ His observation wholly qualifies as an understatement. He

²⁵² *Id.*

²⁵³ *Id.* at 65–66.

²⁵⁴ *Id.* at 66.

²⁵⁵ See *supra* Section IV (for an analysis of the definition of “residual”).

²⁵⁶ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

warned that the “inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values”²⁵⁷ No one can doubt that scholars dipping into foreign policy precedents in the years preceding the Framers can discover quite a range of possibilities, many of them conflicting. We should not invite that exercise by the courts, risking misconceptions about the scope of presidential power that damage constitutional government.

Consider the multiple errors of history contained in Justice Sutherland’s decision in *United States v. Curtiss-Wright Exploration Corporation*, including his complete misreading of John Marshall’s speech in 1800 about the President as “sole organ” in external affairs. Although scholars, decade after decade, exposed Sutherland’s error and denounced the Court for expanding presidential power beyond constitutional boundaries, the error continued as a source of independent presidential power for nearly eight decades until partially corrected in *Zivotofsky v. Kerry*. Sutherland’s other historical misconceptions, including the President having “sole power to negotiate treaties” and the claim that after America’s independence from Great Britain the realm of external and foreign affairs was transferred directly to the national government—and then associating foreign affairs with the executive—were left in place.²⁵⁸

Given the presidential record from Truman to the present time, why would we promote greater presidential authority over foreign affairs and military initiatives? In more recent publications, Prakash and Ramsey explore the risks of promoting independent presidential power. In 2013, Prakash spoke about Presidents making “rapid, even hasty, decisions because they are his alone to make.”²⁵⁹ He described the President like “a tightly coiled spring, full of potential energy, ready to act when an emergency erupts.”²⁶⁰ Decisiveness and energy have resulted in presidential errors from World War II to the present time—misfortunes for the United States and many regions of the world. Prakash notes that Presidents were expected to act “with secrecy, vigor, and dispatch.”²⁶¹ True, but consider the damage created by presidential secrecy, vigor, and dispatch from Truman forward.

²⁵⁷ *Id.* at 864.

²⁵⁸ See Fisher, *supra* note 184, 159–63, 186–99, 206–18.

²⁵⁹ Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1362 (2013).

²⁶⁰ *Id.*

²⁶¹ *Id.* at 1395.

Prakash underscored that risk in a publication in 2015: “From a design perspective, the president who can act with information, energy, and unity of purpose and action may also be the one entity most tempted to go rogue, to declare an emergency that could lead to the Constitution’s demise.”²⁶² In 2016, Ramsey expressed concern about presidential military initiatives that lack constitutional support. Among his examples, President Obama’s air campaign in Libya in 2011 represented his “most aggressive unilateral use of force.”²⁶³ The U.N. Security Council provided support, but there was “no plausible claim to congressional authorization.”²⁶⁴ What was initially justified as a humanitarian intervention continued “until the rebel forces succeeded in toppling Qaddafi in October.”²⁶⁵ Although the Office of Legal Counsel issued a memo defending the use of force in Libya, Ramsey said it “greatly overstated the support from past practice.”²⁶⁶ Beyond the constitutional issues, Ramsey regarded the Libyan operation as “generally viewed as a failure” because regime change led not to a democratic government but to “continuing turmoil.”²⁶⁷ The military intervention was “too hasty and poorly justified.”²⁶⁸

²⁶² Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1348 (2015).

²⁶³ Michael D. Ramsey, *Constitutional War Initiation and the Obama Presidency*, 110 AM J. INT’L L. 701, 711 (2016).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 712.

²⁶⁷ *Id.* at 716.

²⁶⁸ *Id.*

