Divining Joseph's Dreams:* The Founders, Executive Power in Foreign Affairs, and the "Lowest Ebb"

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ABSTRACT

Justice Jackson's Youngstown categories cemented an expansive view of the Executive's foreign affairs powers, beyond the scope that the Founder's intended, into Supreme Court jurisprudence. Justice Jackson, in crafting his categories of presidential power, assumed that the Executive has a broad grant of foreign affairs authority because he assumed the Article II phrase "the executive power" implied some substantive powers beyond the power to execute the law. Justice Jackson's mistaken thesis when framing the Youngstown categories led to the Court's holding in Zivotofsky II – the first time that the Court used the "lowest ebb" category to override an act of Congress. Considering Zivotofsky, this Note calls for the Youngstown decision to be narrowed to conform to the original meaning of the Article II phrase "the executive power" as argued by Professor Julian Mortenson. Mortenson rightly concludes that by only vesting the executive power, the Founders expressly limited the Executive's authority to the powers enumerated in Article II and did not grant him 'residual' foreign affairs powers. Furthermore, by applying a Montesquieuian framework, it is evident that the Founders not only did not grant residual foreign affairs powers to the Executive but also would have considered any grants or use of residual foreign affairs powers by the Executive as unconstitutional.

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

** Georgetown Law, J.D. 2020; The George Washington University, B.A. 2017, History & Philosophy. This note is dedicated to my paternal grandparents, Rodolfo Martinez and Guillermina Martinez Niño de Rivera, and my maternal grandparents, Erasmo Don Zabala and Maria Yolanda Segarra Don. I owe everything to the sacrifices they made and the legacy they created. I would like to thank Dean William Treanor and Dean John Mikhail for inspiring the topic of this note during their Constitutional Law Seminar. Moreover, I would like to thank Michael McQueeney and Alexander Nowakowski for their insight and feedback. The contributions of the *Georgetown Journal of Law & Public Policy* editors and staff have been invaluable. Above all, I would like to thank Sydney, my brother Emiliano, my sister Carlota, and my parents Rodolfo and Yolanda for their patience and support.

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INTRODUCTION

The Article II phrase "*the executive power*"[1] has long been claimed to vest the president with a bundle of national security and foreign affairs powers. Professor Julian Mortenson's recent law review article, *Article II Vests the Executive Power, Not the Royal Prerogative*, argues that rather than vest the President with additional powers, *the executive power* limits the president to a "single discrete, and potent authority: the power to execute the law."[2] The *executive power* is thus an "empty vessel until there [are] laws or instructions that [need] executing."[3] Royal Residuum Thesis scholars have confused *the executive power,* the power to execute the law, with the *royal prerogative,* the bundle of substantive powers

1. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America").

2. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1169 (2019).

3. *Id.*

held by the British Crown.[4] In conducting this analysis, Mortenson relies on the eighteenth century bookshelf: the collection of dictionaries, books, and other documents that the Founders would have been well versed in.[5] Mortenson's thorough historical analysis demonstrates that the Founders explicitly did not vest the Executive with the substantive powers of the *royal prerogative*.

Proponents of the Royal Residuum Thesis have misunderstood the historical evidence and attribute a host of unenumerated powers to the President under the Vesting Clause. They conflate the historical practice of referring to "presidents, governors, [and kings] as 'the executive' or 'the executive power'"[6] with the Founders' understanding of the term *the executive power*. For example, Blackstone uses the shorthand "executive power" to refer to the king, and Royal Residuum Thesis proponents have argued that the Founders, by using the term *the executive power,* intended to grant the President with many of the same powers granted to the king. Instead, the Founders understood the conceptual difference between referring to a head of state as an executive or the executive power, and the single power granted by *the executive power*—the power to execute the law.[7] This Note agrees with Mortenson's conclusion that by only vesting *the executive power*, the Founders expressly limited the Executive's authority to the powers enumerated in Article II.

This Note takes Mortenson's analysis a step further and argues that Justice Jackson's famous *Youngstown* categories cemented an expansive view of executive powers, that goes beyond what the Founder's intended, into Supreme Court jurisprudence. Furthermore, this Note calls for that decision to be narrowed to conform to the original meaning of the phrase *the executive power*.[8] Mortenson briefly addresses the *Youngstown* categories in order to argue against Royal Residuum Thesis interpretations of the categories, but he does not discuss narrowing the categories to conform to his view.[9] Justice Jackson, in crafting his categories of presidential power, believed that the Executive has a broad grant of foreign affairs authority because he assumed *the executive power* implied the substantive powers of the *royal prerogative*. Justice Jackson's mistaken thesis when framing the *Youngstown* categories led to the Court's holding in *Zivotofsky v. Kerry*.[10]In *Zivotofsky*, the Court argued that "the Executive Power Clause, standing alone, justified presidential defiance of a statute that required the United States to issue a passport listing "Israel" as the place of birth for a young boy born in Jerusalem."[11]

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4. *Id*. at 1173.

5. *Id*. at 1189. ("There is no question that politically articulate eighteenth-century Americans—and certainly members of the political elite—were eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone.")

6. *Id*. at 1245.

7. *Id*. at 1247.

8. *Youngstown*, 343 U.S. at 637–38.

9. Mortenson, *supra* note 2, at 1170 n.10. (showing that the Executive Power Clause is incapable of giving rise to *any* substantive foreign affairs authority, much less an indefeasible one).

10. Zivotofsky v. Kerry, 576 U.S. 1 (2015).

11. Mortenson, s*upra* note 2, at 1184.

According to Justice Jackson, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."[12] This category presumes that the Court can allow the President to override acts of Congress even in areas where the President has not been specifically delegated foreign affairs authority under Article II, such as in *Zivotofsky*.[13] Rather, the Founders' understanding of *the executive power* presumed that the law could bind the President on questions of national security and foreign affairs. The "President must obey duly enacted statutes in those areas too – unless some other grant of Article II authority rebutted that presumption."[14]

The Founders' understanding of *the executive power* demonstrates that they intended to limit the President's foreign affairs powers to those enumerated in Article II. Therefore, the *Youngstown* categories must be narrowed to conform with this view. Part I demonstrates that under an originalist analysis, the Executive does not have "residual powers"[15] in foreign affairs and that the Founders would view any grant of residual powers as unconstitutional. Two main arguments will support this claim.

First, Part I expands upon Mortenson's view by focusing its analysis on founding documents, the debates on the treaty-making power and the power to declare war, and the meaning of the Commander-in-Chief power. This analysis demonstrates that the Founders expressly rejected granting the Executive broad foreign affairs powers akin to those granted to a king under the *royal prerogative*.[16] By considering these specific provisions dealing with executive power, this Note expands upon Mortenson's view by further analyzing the Founders' intent when vesting foreign affairs powers.

Second, Part I uses Baron de Montesquieu's political philosophy in *The Spirit of the Laws* as the conceptual lens the Founders would have used to determine the constitutional limits of executive foreign affairs authority.[17] Mortenson addressed how advocates of the Royal Residuum Thesis have misconstrued Montesquieu's philosophy and demonstrates that Montesquieu would have rejected a Royal Residuum Thesis view.[18] This Note utilizes a Montesquieuian framework to conclude not only that the Founders did not grant residual foreign affairs powers to the Executive, but also that they would have considered any grants or use of

12. *Youngstown*, 343 U.S. at 637–38.

13. *Zivotofsky*, 576 U.S. at 10.

14. Mortenson, *supra* note 2, at 1174.

15. Refers to the notion that the Executive can assert foreign affairs powers beyond those enumerated in the Constitution.

16. Mortenson, *supra* note 2, at 1173–75.

17. *See* MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 [I:71, 308, 391, 485, 497, 580] [II:34, 530] [III:109, 197] (1911) https://memory.loc.gov/ammem/hlawquery.html (citing Montesquieu ten times, more than any other political philosopher—including Locke (cited four times), Vattel (cited four times), and Blackstone (cited once)).

18. Mortenson, *supra* note 2, at 1259-60.

residual foreign affairs powers by the Executive as unconstitutional.[19] Finally, Part I rebuts arguments in favor of residual foreign affairs powers.

Part II applies the meaning of *the executive power* and the Montesquieuian framework developed in Part I to the reasoning presented in *Youngstown* and *Zivotofsky*. It concludes that *Youngstown*'s "lowest ebb" category grants residual foreign affairs powers to the Executive and that it should be narrowed to conform to the original meaning of *the executive power*. The Executive is only vested with *the executive power*, not the *royal prerogative*. First, this section argues that the "lowest ebb" does not sufficiently constrain executive foreign affairs powers. Justice Jackson viewed the Executive's authority more expansively than the Founders and did not consider the original meaning of *the executive power* in his reasoning in *Youngstown*.[20] Second, this section argues that the holding in *Zivotofsky,* the first time that the Court used the "lowest ebb" category to override an act of Congress, exemplifies the failings of the lowest ebb in application.[21] This Note ultimately concludes that the "lowest ebb" category should be narrowed because the Founders did not intend to vest any foreign affairs powers to the President other than those explicitly delegated to him by the Constitution.

I. EXECUTIVE AUTHORITY AND FOREIGN AFFAIRS: EXECUTIVE POWER V. ROYAL PREROGATIVE

At the Founding, the meaning of *the executive power* was unambiguously limited to law execution and did not include a grant of residual foreign affairs powers.[22] The Founders had a clear sense of the legal meanings of *executive power* and the *royal prerogative* and intended to limit the Executive's foreign affairs authorities to those enumerated in Article II.[23] Differentiating these two grants of powers will demonstrate that the Founders only vested the Executive with *the executive power* and not the *royal prerogative*.

First, (A) Part I applies Mortenson's interpretation of *the executive power* to Founding documents, the debates on the treaty-making power and the power to declare war, and the meaning of the Commander-in-Chief power to demonstrate that the Founders deliberately limited the foreign affairs powers of the Executive. They did not vest him with residual *royal prerogative* powers. Second, (B) Part I analyzes Baron de Montesquieu's political philosophy to provide a conceptual

19. FARRAND, *supra* note 17.

20. Jack Goldsmith, *Zivotofsky II As Precedent In The Executive Branch*, 129 HARV. L. REV. 112, 145 (2015) (explaining that, as President Roosevelt's Attorney General in the run-up to World War II, Justice Jackson wrote opinions upholding broad assertions of presidential power).

21. *Zivotofsky*, 576 U.S. at 61 (Roberts, C.J., dissenting) ("Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs.").

22. Mortenson, *supra* note 2, at 1188.

23. *See* THE FEDERALIST NO. 69 (Hamilton); *see also* Norman A. Graebner, *Foreign Affairs and the U.S. Constitution, 1787-1788*, 98 MASS. HIST. SOC. 1 (1986); *see also* Jonathan G. D'Errico, *The Specter of A Generalissimo: The Original Understanding of the President's Defensive War Powers*, 42 FORDHAM INT'L L.J. 153 (2018).

framework to understand the Founders' intended limits on executive authority. In addition, Montesquieu's philosophy evidences that any executive action exceeding Mortenson's definition of *the executive power* would be considered unconstitutional by the Founders.[24] Finally, (C) Part I addresses arguments in favor of a broad conception of foreign affairs power of the president. This section addresses the view of executive foreign affairs authority presented by Saikrishna Prakash's Royal Residuum Thesis. Prakash argues that "the Constitution establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power."[25] The Founders did not intend to grant the Executive broad foreign affairs powers. A broad grant would be akin to the powers of a king granted under the *royal prerogative* rather than the power granted by the vesting of *the executive power*.[26]

A. The Inferiority of the Power of the President to that of the British King[27]

First, (i) this section summarizes Mortenson's argument that the meaning of *executive power* does not imply any residual foreign affairs powers in order to demonstrate that the President's foreign affairs powers are limited to the substantive powers expressly specified outside the Vesting Clause.[28] Second, (ii) this section uses the debates on the treaty-making power and the power to declare war, along with the meaning of the Commander-in-Chief power, to demonstrate that the Founders intended to limit the Executive's authority, including in foreign affairs, and differentiate him from a monarch.[29]

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24. *See* Mortenson, *supra* note 2, at 1173–75 (Far from presuming that law cannot bind the President on questions of national security and foreign affairs, the Founders' Constitution presumed that the President must obey duly enacted statutes in those areas too—unless some other grant of Article II authority specifically rebutted that presumption).

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

26. Mortenson, *supra* note 2, at 1174.

27. THE FEDERALIST NO. 69 (Alexander Hamilton) ("There is evidently a great inferiority in the power of the President, in this particular, to that of the British king.").

28. Mortenson, *supra* note 2, at 1174–75; Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 687 (2004) (To the extent that the phrase "executive Power" conveyed any widely understood independent meaning, it encompassed simply a power to execute the laws).

29. THE FEDERALIST NO. 69 (Hamilton) ("The one [, the monarch,] would have a right to command the military and naval forces of the nation; the other [, the president], in addition to this right, possesses that of DECLARING war, and of RAISING and REGULATING fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties; the other is the SOLE POSSESSOR of the power of making treaties. The one would have a like concurrent authority in appointing to offices; the other is the sole author of all appointments. The one can confer no privileges whatever; the other can make denizens of aliens, noblemen of commoners; can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation; the other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church! What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be

1. Foreign Affairs and the Original Meaning of the Executive Power

While the Founders had differing goals in framing the Constitution, "the words they used to describe and debate their proposals, criticisms, and counter-proposals were—at least on some points—strikingly consistent."[30] The Founders had a learned understanding of the meaning of the phrase *the executive power* in English constitutionalism and understood it to mean "the power to execute."[31] Mortenson demonstrates that the Founders were familiar with Blackstone's *Commentaries on the Laws of England* and understood the conceptual distinction between *the executive power* and the *royal prerogative*.[32] Blackstone discusses the "rights and capacities which the king enjoy[s] alone" and refers to them as "The King's Prerogative," i.e., the *royal prerogative*.[33]

At the time of the Founding, the *royal prerogative* represented a "residual and defeasible authority for Crown action in areas that Parliament—or more precisely the 'King-in-Parliament'—had not (yet) chosen to occupy. In other words, it was just 'stuff the King can do,' so long as Parliament didn't tell him otherwise."[34] Among these royal authorities was the "supreme executive power," specifically defined as "the right of enforcing the laws."[35] Thus, *the executive power* was just one out of several powers within the *royal prerogative*.[36] Consequently, the meaning of *executive power* contains no residual grants of authority because if the Executive goes beyond his directives, the Executive is no longer engaged in an act of execution and the Executive "could no longer intelligibly speak of [his] actions as [a] manifestation of executive power."[37] This definition of *executive power* is consistent with Blackstone, other legal scholarship, and dictionary definitions identified by Mortenson throughout his article.[38]

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in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.").

30. Mortenson, *supra* note 2, at 1191.

31. *Id.* at 1188–89 ("We know a lot about what the Founders were reading, partly from statistical analysis of citations in political debates and the contemporary press . . ."); *see generally* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984); *see also* FARRAND, *supra* note 17, I:65 ([Mr. Wilson] did not consider the Prerogatives of the British Monarch as a proper guide in defining Executive powers).

32. *Id.*; *see generally* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND, INTRO. (6th ed. 1780).

33. Mortenson, *supra* note 2, at 1223.

34. *Id.* at 1227–29 (In the context of English constitutional law, the term "prerogative" had a very specific meaning: "all powers, pre-eminences, and privileges, which the Law giveth to the Crowne.").

35. *Id.*

36. *Id.* at 1229 (The writers are both precise and explicit about what was for them a schoolboy distinction between ""the prerogative" as the basket category for royal power, and "the executive power" as *one specific authority among a great many* in that basket).

37. *Id.* at 1237; *see* Justinian, *Institutes*, book III, Tit 27 (1756 trans.) ("He, who executes a mandate ought not to exceed the bounds of it") ("*is, quis exequitur mandatum, non debet excedere fines mandati*").

38. *Id.* at. 1258-69 (Mortenson dedicates Part V of his article to analyze dictionary definitions of *execute, execution, executive* and *executive power*. Most notably, he finds that "A handful of dictionaries do reference the full phrase "executive power" precisely as used in the Article II Vesting Clause: a term of art for a conceptual authority that is capable of being vested in a government entity. I have found five

Furthermore, by not granting *royal prerogative* powers to the Executive, the Founders intentionally limited the Executive's foreign affairs power, in comparison with the British Monarch. For example, some of the King's foreign affairs *royal prerogative* powers included:

> The "sole power of sending ambassadors to foreign states and receiving ambassadors at home"; the power "to make treaties, leagues, and alliances with foreign states and princes"; "the sole prerogative of making war and peace"; the role of "the generalissimo, or the first in the military command";"; the "sole power of raising and regulating fleets and armies"; and "the power . . . of prohibiting the exportation of arms or ammunition out of this kingdom under severe penalties."[39]

While some of these powers resemble grants of executive authority, the U.S. Constitution grants a majority of these powers to both Congress and the President, or to Congress alone.[40] These constitutional differences further evidence the Founders' intention to limit executive authority, and their intention not to include residual foreign affairs powers within *the executive power*.

While the nature and scope of the executive branch and executive authority were greatly debated after the Revolution and during the Convention,[41] the Founders agreed that the Executive's powers, including in foreign affairs, should be limited in comparison to the powers of the Monarch.[42] For example, "when the Convention [turned] to the seventh provision[, of the Virginia Plan,] it readily accepted the notion of a national executive, but rejected the prescription that the United States, in the British tradition, would consign all powers over foreign affairs, formerly embodied in Congress, to the national executive, unless the Convention [was] prepared to limit those powers by a strict definition."[43] Subsequent debates over executive authority resulted in the exclusion of powers that had been traditionally delegated to the Monarch under the *royal prerogative*. In particular, the consequential power to declare war, which was traditionally

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such definitions. Each of them defines "executive power" to mean exactly what an informed reader of Madison's bookshelf would have expected: the power to execute laws.").

39. *Compare id.* at 1224–26 *with* U.S. Const. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . .").

40. U.S. CONST. art. II, § 2; U.S. CONST. art. I, §§ 8–9 ("To declare war; Regulate captures during war; To raise and support armies; To provide and maintain a navy; Address and respond to threats to the United States; Regulating captures during wartime; To regulate commerce . . ."); Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELATIONS, (May 05, 2019, 11:10 AM), https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president.

41. *See generally* THE FEDERALIST Nos. 8, 9, 19, 23, 24, 26, 28, 69, 74, 78 (Alexander Hamilton), No. 47 (James Madison); FARRAND, *supra* note 17.

42. FARRAND, *supra* note 17.; *see generally* Articles of Confederation art. VI.; Articles of Confederation art. VIII.; Articles of Confederation art. IX.

43. FARRAND, *supra* note 17, at I:64-–73; Graebner, *supra* note 23, at 4.

delegated to the Executive, was delegated to the legislative branch instead, and the Executive was forced to share the power to make treaties and appoint ambassadors with the legislative branch.[44] The delegates of the Convention were skeptical that "national leaders would always display wisdom in the conduct of the country's external relations [,and they] sought, therefore, to maximize the constraints on the exercise of the treaty-making as well as the war-making powers."[45] Considering the above, it is difficult to argue on originalist grounds that the Founders intended to grant residual foreign affairs powers to the Executive.

2. Debates on Foreign Affairs Powers and the Nature of Executive Authority

The debates on the treaty power and the war declaration power, as well as the meaning of the Commander-in-Chief power, demonstrate the Founders' express rejection of vesting the Executive with non-statutory powers traditionally granted to the Monarch under the *royal prerogative*. Instead, the Founders intended to limit the Executive's foreign affairs authority to the enumerated powers in the Constitution. Mortenson's article more specifically asserted his own view and addressed the historical and conceptual shortfalls of the Royal Residuum Thesis.[46] By considering these specific provisions dealing with executive power, this Note cements Mortenson's view, and more specifically, analyzes the Founders' intent when vesting foreign affairs powers.

First, whereas the power to make treaties was solely delegated to the Monarch as part of the *royal prerogative*,[47] the delegates at the Convention expressly rejected giving the Executive the sole power over treaties. Instead, they initially preferred granting the treaty power solely to the Senate.[48] Hamilton proposed a plan that would grant the Senate the sole power "of declaring war, the power of advising and approving all Treaties, [and] the power of approving or rejecting all appointments of officers except the heads or chiefs of the departments of Finance War and foreign affairs."[49] This delegation of the treaty power was adopted in a draft of the Constitution and was reviewed by the Committee of Detail.[50] The Committee of Detail agreed that the treaty-making power should belong to the Senate because it "was neither wholly legislative nor wholly executive. It regarded such powers, [including] the authority to make war, as essentially a legislative power, but one not to be given to Congress as a whole."[51]

In subsequent debates on granting the Senate the sole authority to make treaties, regional issues arose due to the conflicting commercial interests of the

44. *See* FARRAND, *supra* note 17, at II:183,185.
45. Graebner, *supra* note 23, at 7.
46. *See* Mortenson, *supra* note 2, at 1181.
47. *Id.* at 1224-25.
48. Graebner, *supra* note 23, at 5-6.; FARRAND, *supra* note 17, at I:66.
49. Graebner, *supra* note 23, at 5-6.
50. *Id.*
51. Graebner, *supra* note 23, at 6-7.; *See also* FARRAND, *supra* note 17, II:85, 129-33, 183, 185; *See also* THE FEDERALIST Nos. 24, 26, 28 (Hamilton).

states.[52] This led to further debates, and a proposal by John Francis Mercer[53] that delegated the power to make treaties solely to the Executive Branch.[54] However, this proposal received no endorsement from any other members of the Convention,[55] and the debates concluded with the treaty power being divided between the President and the Senate. But "even those who recognized the essential role of the Executive in treaty-making emphasized the importance of safeguards against excessive executive authority."[56]

Second, the debates during the ratification of the Constitution over the power to declare war are yet another example of the Founders' express rejection of granting residual foreign affairs authority, akin to powers under the *royal prerogative*, to the Executive,. "Anti-Federalists and Federalists [argued] over the *wisdom* of granting Congress the war power, not *whether* Congress possessed the war power."[57] Both the Federalists and the anti-Federalists understood the Declare War Clause to grant Congress the power to declare wars.[58] While the Anti-Federalists argued against the idea of granting Congress the war power, they did not argue that this power should be delegated to the Executive instead.[59] Rather, they expressed separation of powers concerns about the over-delegation of power to either Congress or the President.[60]If the Founders agreed that the

52. Graebner, *supra* note 23, at 8 ("[As part of this same plan,] To the supreme executive Hamilton would extend the power to execute all laws passed by the legislature, "to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate."").

53. Delegate from Maryland. FARRAND, *supra* note 17, at II:297.

54. *Id*.

55. Graebner, *supra* note 23, at 9.

56. *Id*. at 13 (stating Is this a quote? If so, use quotation marks. that so great was the fear of executive power, asserted William Davie, that the Philadelphia convention was compelled to grant approval authority over treaties to the Senate).

57. Cameron O. Kistler, *The Anti-Federalists and Presidential War Powers*, 121 YALE L.J. 459, 466-67 (2011) (stating that the presidentialist interpretation of the Declare War Clause is simply implausible in light of the state ratification debates) (emphasis added).

58. *Id*. at 466 ("Even if presidentialists could advance evidence suggesting that the Anti-Federalist position was a calculated one, under modern originalist doctrine that showing would be immaterial as it was the public understanding of the war power, and not the purported private opinions of individual Anti- Federalists, that was ratified into law.").

59. *Id*. at 460-61.

60. *Id*. at 467 ("That still, however, leaves the problem of reconciling the Anti-Federalists' general argument against presidential power with the Anti-Federalist argument against Congress's possession of the power to declare war. I suggest that the most convincing explanation would be the simplest: the Anti-Federalists were arguing that both legislative and executive tyranny were real risks. In one possible post-ratification world, the President could try to use his command of the army to make himself king. Yet during the consideration of the Constitution it was no secret that George Washington would likely be the first President, and Washington had already passed up the opportunity to make himself king. Therefore, the Anti-Federalists also had to demonstrate the structural flaws of the Constitution in a world in which the President did not try to destroy the Constitution. Relying upon a prominent understanding of the separation of powers, Anti-Federalists argued that the Constitution was defective because it vested Congress with too much of the war power.").

Executive should not have what was at that time the fundamental foreign affairs power of an executive, then modern scholars should assume that the Founders intended to generally limit the Executive's foreign affairs powers.

Third, the Commander-in-Chief power further exemplifies how the Executive's powers under Article II are unlike the Monarch's authority under the *royal prerogative*. In Federalist No. 69, Hamilton lays out the differences between the Commander-in-Chief power of the President and the Monarch stating that "[the President's] authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it."[61] Hamilton's comparison correctly represents the President's foreign affairs powers as being more limited than the Monarch's extensive military authority. The Founders clearly intended to differentiate the Commander-in-Chief power of the President from that of the Monarch.[62] For example, when Washington was designated "General and Commander in chief, of the army of the United Colonies" by the Continental Congress, it is clear that this commission left his conduct limited "in every respect by the rules and discipline of war," and directed him "punctually to observe and follow such orders and directions, from time to time, as he shall receive from this, or a future Congress of these United Colonies, or committee of Congress."[63] The Founders, therefore, purposefully differentiated and limited the Executive's foreign affairs and military direction powers in comparison to the powers of the British Monarch.[64]

By contrast, the Monarch under the *royal prerogative* had the power of the "generalissimo,"[65] which included "the exclusive authority to raise, regulate, and command all manner of military forces—armies, fleets, forts, and any places of strength."[66] By not delegating all of these powers to the Executive under Article II, or to the Executive as part of the Commander-in-Chief Clause, the Founders intended to redefine the scope of executive power and limit the exercise of foreign affairs powers. Even when considering the Executive's defensive

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61. THE FEDERALIST NO. 69 (Hamilton) ("The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.").

62. D'Errico, *supra* note 23, at 177-78.

63. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb-Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 773-74 (2008); *See also* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 96 (Worthington Chauncey Ford et al. eds., 1904–1937), *available at*.http://memory.loc.gov/ammem/amlaw/lwjclink.html [https://perma.cc/2WBQ-YJBX].

64. This example is not intended to imply that the Constitutional meaning of the Commander-in-Chief power is the same as the meaning ascribed to it in the context of the American Revolution or an indication of a Constitutional intention for legislative control of the Executive's exercise of that power. *Id.* at 800-02.; *Id.* at 801 (State Constitutions do not imply that the Commander-in-Chief must be free from legislative control).

65. An equivalent of a Commander-in-Chief. *See* Mortenson, *supra* note 2, at 1224-25.

66. D'Errico, *supra* note 23, at 175-76.

war-making authority, "it is hardly a license for plenary military power or a *royal prerogative* for war-making."[67] Given English constitutional precedent, the Founders did not intend the Executive to assume residual foreign affairs powers without the express delegation or acceptance of an analogous *royal prerogative* in the U.S. Constitution.

The preceding analysis of Mortenson's article and of these three foreign affairs powers demonstrates that the Founders shared Mortenson's definition of *the executive power*. They clearly understood that the Executive was limited to an enumerated set of foreign affairs powers. They meant to differentiate between the executive authority of the President—an enumerated list of powers and the power to *execute* the laws—and the *royal prerogative* of the King, whereby the King could exercise any powers not prohibited by Parliament.

B. Separation of Powers: The Executive may not be both Judge and Legislator

Montesquieu, as the most cited political philosopher at the Convention, provides a useful framework for understanding the Founders' intended limits on executive authority. Mortenson relies on Montesquieu to address how advocates of the Royal Residuum Thesis have misconstrued Montesquieu's philosophy and demonstrates that Montesquieu would have rejected the Royal Residuum Thesis view.[68] Furthermore, Montesquieu's philosophy evidences that the Founders would have considered any action taken by the Executive exceeding Mortenson's definition of *executive power* to be unconstitutional.[69] Montesquieu's discussion of separation of powers and the "three forms of government" in *The Spirit of the Laws*[70] presents a useful analytical framework to understand what the Founders would have considered the constitutional limits of executive authority.[71]

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67. *Id.* at 181. ("Although the awakening of the President's inherent defensive authority momentarily quiets Congress' war powers, the Framers ensured this hush does not last for long. Outside immediate exercises of the President's defensive power, the Framers intended Congress to guide the 'sword of the community' by either funding or frustrating war. Congress' critical limitations on executive authority ensure that the President's war powers could never subsume the tall shadow cast by the eighteenth-century British Crown.").

68. Mortenson, supra note 2, at 1251-60.

69. As stated earlier, Montesquieu was the most cited to political philosopher at the Convention. *See* FARRAND *supra* note 17, [I:71, 308, 391, 485, 497, 580] [II:34, 530] [III:109, 197].

70. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Batoche Books 2001).

71. *See* Mortenson, *supra* note 2, at 1259. *Every single citation* to Montesquieu's discussion of the separation of powers invokes the portion of his discussion where "the executive power" unambiguously means the execution of domestic law. THE FEDERALIST Nos. 9 (Hamilton), 47 (Madison) (Both citing to Montesquieu). Further evidence of Montesquieu's influence on the Founders is found in his description of how power should be separated among the branches. Montesquieu states, "To prevent the executive power from being able to oppress, it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit as the people, as was the case at Rome till the time of Marius. To obtain this end, there are only two ways, either that the persons employed in the army should have sufficient property to answer for their conduct to their fellow-subjects, and be enlisted only for a year, as was customary at Rome: or if there should be a standing army, composed chiefly of the most despicable part of the nation, the legislative power should have a right to disband them as soon as it pleased; the soldiers should live in common with the rest of the people; and no separate camp, barracks, or fortress should be suffered." MONTESQUIEU, *supra* note 58, at 182. This principle is very similar to the

First, for analytical purposes, this Note assumes that since the Founders were very familiar with Montesquieu's writings, they would have understood the Executive to be acting outside the limits of his power where he was acting as both "judge and legislator."[72] Second, under Montesquieu's theory of the forms of government, the Founders would have considered any action taken by the Executive where he was acting as both "judge and legislator" to be a "despotic" act, and therefore an unconstitutional act. Since *the executive power* only delegates the power to execute the law, the Executive acts despotically, i.e., unconstitutionally, any time he asserts foreign affairs authority beyond the delegated powers enumerated in Article II of the Constitution.

Montesquieu posits that in every government there are three categories of power: "the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."[73] Applied to the U.S. Constitution, these can be paralleled to the powers held by the legislative branch, the executive branch, and the judicial branch, respectively. Montesquieu concludes that there can only be liberty in a society when these powers are held by distinct persons (or distinct branches of government). As he explains, "when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[74] In other words, each branch of government must be separate from the other, and one branch commandeering the powers of another would constitute a tyrannical, and thus unconstitutional, act. Madison himself reflected on this passage from Montesquieu in The Federalist No. 47. He elaborated that:

> "[Montesquieu] did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."[75]

Madison's analysis of Montesquieu demonstrates that the Founders understood the separation of powers principle through a Montesquieuian lens; they feared

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delegation of power to Congress under U.S. Const. art. I, § 8. "To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

72. Mortenson, *supra* note 2, at 1189. "There is no question that politically articulate eighteenth-century Americans—and certainly members of the political elite—were eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone."

73. MONTESQUIEU, *supra* note 70, at 173; In a longer note, there would be further analysis of the characteristics that Montesquieu attributes to each branch of government and how those characteristics affect the application of Montesquieu presented here.

74. *Id.* In the same passage, Montesquieu adds "[there] is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." *Id.*

75. Madison, *supra* note 41.

granting the President authority that was otherwise reserved for the Legislative Branch or not granted to his office at all. The Founders crafted a system that would avoid situations "where the whole power of one department is exercised by the same hands which possess the whole power of another department."[76]

In addition, Montesquieu theorized that there are "three species of government: republican, monarchical, and despotic."[77] He describes a despotic government as one "in which a single person directs everything by his own will and caprice."[78] Despotic governments are characterized by fear,[79] and "in [a despotic government] there are no laws; the judge himself is his own rule."[80] There is no liberty in despotic governments because in order to have liberty in a society it is "requisite [that] the government be so constituted as one man need not be afraid of another."[81] If the three powers of government are held by three separate branches then the people have liberty, but when these powers are held by the same person (or branch), in violation of the separation of powers principle, then there is no liberty and despotism may arise.

Under this Montesquieuian framework, the Founders would have considered any action taken by the Executive that went beyond the powers delegated to him by the Constitution to be an unconstitutional act. By asserting residual foreign affairs powers, the Executive is acting as both "judge and legislator." The Executive would act as a legislator by asserting the power to determine the nature and scope of his own foreign affairs powers and the Executive would act as a judge by asserting that he has the authority to decide the nature of his own foreign affairs powers. Although, as Madison described, the branches can certainly work together and share some authorities, if the Executive acts on his own, and without the express delegation of authority, he is acting despotically. The Founders' philosophical basis for the separation of powers principle would have precluded them from entertaining the notion that the Executive could exercise non-delegated, residual foreign affairs powers. If the Executive did so, according to the Founders, he would be acting unconstitutionally.

C. The Royal Residuum Theory: Confusing the Executive with a Monarch

Some scholars argue that on originalist grounds, *the executive power*, apart from meaning the power to execute the law, has a secondary foreign affairs meaning.[82] In particular, Professor Prakash and Professor Ramsey have argued for this view asserting that the Executive enjoys a "residual" foreign affairs power under

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76. This idea will be further applied in the analysis of *Youngstown* and *Zivotofsky*.

77. MONTESQUIEU, *supra* note 70, at 25; DAVID WALLACE CARRITHERS ET AL., MONTESQUIEU'S SCIENCE OF POLITICS: ESSAYS ON THE SPIRIT OF LAWS 235-38 (Rowman and Littlefield Publishers 2001).

78. MONTESQUIEU, *supra* note 70, at 25.

79. *Id.* at 43.

80. *Id.* at 94.

81. *Id.* at 173.

82. *See* Prakash & Ramsey, *supra* note 25, at 355.

Article II, Section 1's grant of "the executive power."[83] They maintain that this "approach is consistent with broader principles of separation of powers and checks and balances."[84] These arguments in favor of the Royal Residuum Thesis,[85] sometimes called the Vesting Clause Thesis, are incorrect because they misunderstand the historical evidence and the Founders' Montesquieuian conception of separation of powers.[86]

First, the ordinary meaning of *the executive power* did not include foreign affairs powers. The Royal Residuum Thesis view is inconsistent with the demonstrated definition of *the executive power* because it mistakenly conflates *the executive power* with the *royal prerogative*.[87] The Crown's powers over foreign affairs arose from the *royal prerogative,* while *the executive power* was just one of the many powers that made up the *royal prerogative*.[88] The fact that the *royal prerogative* is a list of non-statutory powers, which scholars have access to, indicates that had the Founders wanted to vest those powers in the Executive, they could have easily and explicitly granted him those powers through a constitutional grant mirroring the *royal prerogative*. The absence of such a grant implies that the Founders did not intend to empower the Executive with residual foreign affairs powers.

Prakash suggests that the Article II Vesting Clause may vest powers beyond those subsequently enumerated because the Article I Vesting Clause explicitly indicates that Congress's legislative powers only extend to those powers "herein granted."[89] However, the absence of the phrase "herein granted" in Article II is not sufficient evidence for this interpretation because it still ignores the original meaning of *the executive power*. Had the Founders intended to grant the Executive authority beyond those enumerated in Article II, they would have explicitly granted the office with more expansive powers than just *the executive*

83. *Id*. at 253.

84. *Id*. at 260.

85. Mortenson, *supra* note 2, at 1181.

86. Mortenson rebuts the Royal Residuum Thesis in greater detail in Part IV of his article. *Id*. at 1244 ("First and most important, while looking for evidence in the historical materials, residuum theorists have systematically confused two different things: [i] the use of the phrase 'executive power' to reference a *conceptual power* capable of being 'vested,' and [ii] the use of the phrase 'the executive' as a metonym for *the political entity* in which that conceptual power was vested. Second, residuum theorists have misread an idiosyncratic taxonomy adopted by two authors—to be clear, not a taxonomy that contradicts anything about the conceptual structure described above; just an odd way of talking about it. The third reason is a little different. It has to do, not with errors made by the residuum's champions, but with the ready audience they find in many lawyers and academics. Some listeners' receptivity may of course result from what they *want* presidential power to be—a bias to which none of us is immune. The more significant reason, however, seems to be a common misunderstanding of what the Founders meant by a 'separation' of powers in the first place."); *See also* Bradley & Flaherty, *supra* note 28, at 552.

87. Mortenson, *supra* note 2, at 1224.

88. *See* Prakash & Ramsey, *supra* note 25, at 253 (what should be considered the *royal prerogative* is referred to as *the executive power* by authors).

89. *Id*. at 266–67.

power.[90] Just as the words "herein granted" imply a limit to legislative power, the words "the executive power" also imply a limit to the Executive's authority. The Founders clearly appreciated the legal difference between these two terms and intended to limit executive powers to those enumerated in Article II.[91]

Second, the Royal Residuum Thesis view is inconsistent with "broader principles of separation of powers and checks and balances."[92] Applying a Montesquieuian framework, since *the executive power* only delegates the power to execute the law, the Executive acts despotically any time that he asserts authority outside the delegated powers of Article II. The Royal Residuum Thesis argues for a despotic use of executive authority because *the executive power* is the power to execute the law, not the power to create or imply law. Any assertion that the Executive retains residual foreign affairs powers would amount to the President commandeering the authority of another branch of government. This results in advocating for a use of executive authority that would be an unconstitutional use of power and a violation of separation of powers principles.

II. *YOUNGSTOWN AND ZIVOTOFSKY*: MISCONCEPTIONS OF EXECUTIVE POWER

The *Youngstown* "lowest ebb" category should be narrowed to conform to the original meaning of *the executive power* because, as it is currently interpreted, the "lowest ebb" allows the Court to unconstitutionally grant the Executive residual foreign affairs powers. First, Justice Jackson's "lowest ebb" category is not constraining enough on executive action because he adopts an expansive view of executive authority and misunderstands the phrase "the executive power."[93] Justice Jackson's categories further exacerbate the potential for Montesquieuian despotism and unconstitutionality because the "lowest ebb" allows the Court, in situations where the president does not have inherent authority, to override acts of Congress, i.e., it enables the Executive to become both "judge and legislator." Second, Z*ivotofsky* demonstrates how the "lowest ebb" category may lead to situations where executive authority can be expanded beyond the constitutional limits of Article II and lead to an unconstitutional use of executive authority.[94] *Zivotofsky*, by holding that the Executive had exclusive authority to recognize

90. This interpretation of Article II does, as Prakash identifies, leave foreign affairs powers not specifically apportioned by the Constitution. While this has serious implications for the effectiveness of carrying out foreign policy, given the scope of this paper, this consideration will only be addressed in the conclusion. *Id*. at 258.

91. *See* Part I (A).

92. Prakash & Ramsey, *supra* note 25, at 260.

93. Goldsmith, *supra* note 20, at 145 (stating that "[a]s President Roosevelt's Attorney General in the run-up to World War II, Justice Jackson wrote opinions upholding broad assertions of presidential power").

94. *Zivotofsky,* 135 S. Ct. at 2113 (Roberts, C.J., dissenting) ("Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs"); Chase Harrington, *Zivotofsky II and National Security Decisionmaking at the Lowest Ebb*, 66 DUKE L.J. 1599 (2017).

states,[95] allowed the Executive to act in a way the Founders would have considered "despotic" and thus unconstitutional.[96] In *Zivotofsky,* the Court allowed the Executive to act as both "judge and legislator," running against the principle of the separation of powers, one of the philosophical frameworks upon which the Founders relied.

A. Divining Joseph's Dreams: Youngstown and Executive Power

By not considering the original meaning of *the executive power* in framing the *Youngstown* "lowest ebb" category,[97] Justice Jackson allowed the Court to potentially enable the Executive to exceed his constitutional authority in foreign affairs. This framework "at once casts a shadow over assertions of presidential power and invites assertions of presidential power to lurk in its shadows."[98] The formulation of the "lowest ebb" not only prevents Congress from encroaching on the Executive's enumerated powers, but also leaves room for the Executive to overrule Congress by asserting residual foreign affairs powers. Considering the analysis in Part I, the "lowest ebb" category currently allows the Court to empower the Executive with residual powers not vested in the Executive under Article II. This is inconsistent with the Founders' understanding of *the executive power*.

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95. *Zivotofsky,* 135 S. Ct. at 2083.

96. Another example of the Court allowing the Executive to act "despotically" is in *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304 (1936). In *Curtiss-Wright*, the Court held that the president could usurp congressional authority to act in the "national interest." In a longer note, it would be worthwhile to also discuss *Curtis-Wright* in relation to *Zivotofsky* and *Youngstown.*

97. The three *Youngstown* categories are:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
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> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only [by] disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. *Youngstown,* 343 U.S. at 635-38.

98. Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 154 (2002).

In *Youngstown,* the Solicitor General argued that the Vesting Clause "constitutes a grant of all the executive powers of which the Government is capable."[99] In his concurrence, Justice Jackson rejected this interpretation and stated that the Vesting Clause is "an allocation to the presidential office of the generic powers thereafter stated" and not "a grant in bulk of all conceivable executive power."[100] While Justice Jackson rejected the notion that *the executive power* is a broad or limitless grant of power, he did not indicate that *the executive power* is simply the power to bring the law into execution. Before serving as a Supreme Court Justice, Justice Jackson served as President Franklin D. Roosevelt's Attorney General and upheld broad assertions of executive power, and "at the Youngstown oral argument, Justice Jackson acknowledged that he 'claimed everything' on behalf of the President while in the executive branch, and he noted that the 'custom . . . did not leave the Department of Justice when [he] did.'"[101] Given his personal experience and the *Youngstown* categories he developed, Justice Jackson would likely agree with a more expansive view of executive power than Mortenson's view that executive authority is limited to the delegated powers under Article II.[102]

Justice Jackson further evidences his broad view of executive power when considering the Commander-in-Chief Clause. He states the President should receive wide latitude when commanding the instruments of national force "against the outside world," but when these instruments are used for domestic purposes his power should be more limited.[103] In other words, the President should receive "the widest latitude" when conducting foreign policy, but not when the President tries to use his foreign policy powers to direct domestic affairs. Justice Jackson's argument demonstrates that he misunderstood the meaning of *the executive power* and misunderstood, or chose to ignore, that in the realm of foreign affairs the Founders established that the Executive's power is not unlimited and that his actions may even be constrained by the legislative branch.[104] Outside of practical

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99. *Youngstown*, 343 U.S. at 640–41.

100. "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match the perspective the forefathers would have had in response to George III only by looking at the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power, but rather I regard it as an allocation to the presidential office of the generic powers thereafter stated." *Id*. at 641.

101. Goldsmith, *supra* note 20, at 145–46. In fairness to Justice Jackson, he was the only justice to address and reject the Solicitor General's version of the Royal Residuum theory. Bradley, *supra* note 28, at 547.

102. *Youngstown,* 343 U.S. at 641. (Jackson, J., concurring) ("I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.").

103. *Youngstown,* 343 U.S. at 645.

104. Little v. Barreme, 6 U.S. 170 (1804). Justice Jackson does not address *Little v. Barreme* in his reasoning and the case is only cited to three times in the *Youngstown* decision by Justice Clarke. *Youngstown,* 343 U.S. at 660, 662–63.

considerations, Justice Jackson does not provide evidence that the Founders intended the Executive to have "the widest latitude" in directing foreign affairs abroad. Instead, he argued, "[t]he Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is."[105] Rather than provide a "sketch," Part I has demonstrated that the Founders provided a clear blueprint regarding the scope of executive authority under Article II. This blueprint does not provide the President with "the widest latitude" in foreign affairs, even in a defensive context.[106]

By not considering the Founders' intent, Justice Jackson crafts his categories based only on a functionalist view that the Executive has a broad, but not unlimited, grant of power in foreign affairs. Justice Jackson's flawed reasoning about executive power causes the "lowest ebb" category to both potentially limit assertions of executive power and potentially allow for the expansion of assertions of executive power.[107] This latter possibility is troubling considering the original meaning of *the executive power* and the limited scope of executive authority analyzed in Part I. The mere possibility that the Court can use the "lowest ebb" to override a legislative act and uphold executive action that is not justified by an enumerated grant of power in Article II presents a potential separation of powers violation. Apart from the possibility of encroaching on legislative power, the "lowest ebb" is dangerous because it allows the Executive to act as if he was vested with the *royal prerogative,* i.e., that the Executive has a whole host of unlisted statutory powers that are at his disposal if the Court allows him to use them.[108]

The "lowest ebb" should be reframed, considering Mortenson's view, to avoid unconstitutional expansions of foreign affairs authority. Since *the executive power* is only the power to execute the law, the Executive acts despotically (unconstitutionally) any time that he asserts foreign affairs authority outside the delegated powers under Article II of the Constitution. The "lowest ebb" can be reframed to state:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a

105. *Youngstown*, 343 U.S. at 653.

106. D'Errico, *supra* note 23, at 181. *See also* David Cole, *Youngstown v. Curtiss-Wright*, 99 YALE L.J. 2063, 2088–89 (1990) ("It would be more efficient, and we might well be more effective internationally, if the President were assigned dictatorial powers. The Framers no doubt recognized that an imperial executive was an effective and efficient way to run a government. But they also realized that it is not the way to run a democracy. The test is to square our internal democratic principles with the conduct of our foreign affairs. It is a test we have all too often failed. The Framers suggested that the best way to succeed would be to assign responsibility for our most important external decisions to the most representative branch.").

107. Bellia, *supra* note 98, at 154.

108. Mortenson, *supra* note 2, at 1223–25.

> case only [if disabling the Congress from acting upon the subject would *not* amount to granting the President residual foreign affairs powers].

Reframing the "lowest ebb" category in a way that reflects this principle would properly incorporate the original meaning of *the executive power*.

B. Zivotofsky: The Lowest Ebb, the Royal Prerogative, and Despotism

Zivotofsky represents the danger of the "lowest ebb" when applied by the Court to disable an act of Congress and enable the Executive. The Court invalidated Section 214(d) of the 2003 Foreign Relations Authorization Act (FRAA), which directed the Secretary of State to record, upon request, the birthplace of a Jerusalem-born U.S. citizen as "Israel."[109] The Court held that "the President holds an exclusive power to recognize foreign states and that section 214(d) placed an unconstitutional limitation on this recognition power."[110] The Court relied "heavily on historical practice and functionalist arguments to support its conclusion that the President enjoys exclusive authority over foreign recognition."[111] *Zivotofsky* was the first time that the Supreme Court sustained a President's disregard of a federal statute in the field of foreign affairs.[112]

In particular, the Court insisted that "recognition is a topic on which the Nation must 'speak . . . with one voice.'"[113] The majority asserted that:

> [T]he Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition.[114]

Relying on "institutional competencies," the Court determined that, although in the lowest ebb, the Executive has the sole recognition power.[115] This reasoning

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109. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002) (codified at 7 U.S.C. § 1765d-1(d) (2012)), *invalidated by* Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083 (2015) (*Zivotofsky II*).

110. *Zivotofsky*, 135 S. Ct. at 2083.

111. Harrington, *supra* note 94, at 1599. Notably, the Court dodged the question on whether the Vesting Clause provides further support for the President here and stated "because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the 'executive power' shall be vested in the President, provides further support for the President's action here." *Zivotofsky*, 135 S. Ct. at 2086.

112. *Zivotofsky*, 135 S. Ct. at 2113 (Roberts, C.J., dissenting) ("Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs.").

113. *Id.*

114. *Id.*

115. Harrington, *supra* note 94, at 1640 ("If institutional competencies were a valid consideration when resolving disputes between the political branches, much of our constitutional history might look different. President Truman could have seized the steel mills to protect the American forces in Korea from supply shock. President Reagan could have lawfully sold TOW antitank missiles to Iran because only he possessed 'the delicate and often secret' intelligence to liberate American hostages and support anticommunist fighters in Nicaragua. In almost every instance of presidential initiative receding to the judgment of Congress, an institutional advantage of the executive was blunted.").

allows the Executive, in cases when his power is at the "lowest ebb," to claim the authority to "displace federal law [simply by] invoking the structural advantage of the executive branch *against* Congress."[116]

Zivotofsky demonstrates the danger of the "lowest ebb" because using functionalist arguments to justify upholding presidential power leads to granting the executive unvested *royal prerogative* powers. The Founders would not have accepted efficiency arguments to allow for the granting of power to one branch over another. For example, in *Little v. Barreme,* Chief Justice Marshall held that President Adams lacked the power to go beyond the authority Congress delegated and rejected the argument that Adams's interpretation of the Act should be upheld because it would be more "effective."[117] Efficiency arguments are not sufficient, and although the Court in *Zivotofsky* did not exclusively rely on the "one voice" argument, the use of functionalist arguments exemplifies the danger of the lowest ebb as it is currently formulated.[118]

Zivotofsky demonstrates that the "lowest ebb" allows for two readings that can either limit or expand executive authority.[119] If, in a future circumstance, efficiency and institutional competence arguments are considered sufficient by the Court to uphold executive action and grant residual foreign affairs powers, the Court would effectively be enabling a violation of the separations of powers principle because the Executive would be allowed to act as both "judge and legislator." Considering the recognition power, the *Zivotofsky* majority allowed the

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116. *Id.*; *see also* Goldsmith, *supra* note 20, at 145 ("One consequence, I have argued, is that the executive branch in its many foreign policy disputes with Congress will significantly magnify the impact of Supreme Court decisions that favor presidential power. . . . The Justices in the Zivotofsky II majority appeared to believe that they could arbitrarily limit the opinion's untidy reasoning and otherwise very broad implications with some caveats about the limited scope of the holding and paeans to the breadth of Congress's Article I powers in the field of foreign affairs. This strategy (if it is that) overlooks that the 'law' of Zivotofsky II will largely be written not by the Court, but by executive branch lawyers who will interpret its pro-executive elements for all they are worth. It is no accident that the three dissenting Justices who characterized Zivotofsky II as a 'perilous step' or a decision that 'will erode the structure of separated powers' all (like Justice Jackson) served previously in roles providing legal advice to the President.").

117. Little v. Barreme, 6 U.S. 170, 177–78 (1804); Harrington, *supra* note 94, at 1642; Chief Justice Roberts in dissent cites *Little v. Barreme*, making this same point. *See Zivotofsky*, 135 S. Ct. at 2125.

118. Harlan Grant Cohen, *Zivotofsky II's Two Visions for Foreign Relations Law*, 109 AJIL UNBOUND 10, 13 (2016) (noting that "[f]or our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs," Chief Justice Roberts suggested that the category of exclusive Presidential powers that would allow the President to disregard a contrary congressional act may be an empty set).

119. *Id.* at 12 ("At the heart of the disagreement between Justice Kennedy and Chief Justice Roberts are their competing approaches to Justice Jackson's famous *Youngstown* concurrence and its tripartite analysis of separation of powers questions. Justice Kennedy read the framework as a flexible one. Because the President is, in this case, acting contrary to a clear statutory mandate, 'his claim must be "scrutinized with caution."' That said, Justice Jackson left some room for the President to act even in that third category, and as Justice Kennedy noted, 'when a Presidential power is "exclusive,"' as Justice Kennedy found the recognition power to be in this case, 'it "disabl[es] the Congress from acting upon the subject."'). *See generally* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015).

Executive to determine both the requirements for recognition and whom the U.S. will recognize. While this may be efficient,[120] it can be considered a circumstance where the Executive is acting as both "judge"—deciding who is recognized—and "legislator"—determining the requirements for recognition. In circumstances like these, the Court allows for a separation of powers violation and grants unconstitutional foreign affairs authority.

To avoid this possibility, the Court should apply a reformulated lowest ebb category in these cases. Like the example given above, the Court should reformulate the category to disable Congress from acting only if it would *not* amount to granting the President residual foreign affairs powers. Then the lowest ebb category would *only* serve to limit executive foreign affairs powers, rather than to potentially expand them. This would be consistent both with the Founders' intended scope of executive foreign affairs authority, and with the original meaning of *the executive power*.

CONCLUSION

This Note demonstrates, through originalist analysis,[121] that Justice Jackson's *Youngstown* categories cemented an expansive view of executive powers beyond the scope that the Founder's intended into Supreme Court jurisprudence and calls for that decision to be narrowed to conform to the original meaning of the phrase *the executive power*.[122] Justice Jackson, in crafting his categories of presidential power, assumed that the Executive has a broad grant of foreign affairs authority because he assumed *the executive power* implied the substantive powers of the *royal prerogative*. Justice Jackson's mistaken thesis when framing the *Youngstown* categories led to the Court's holding in *Zivotofsky*.

The Founders intended the Article II phrase *the executive power* to mean "a power of putting [the] laws in execution,"[123] and that it be only one of the powers held as part of the *royal prerogative*. Thus, executive authority in foreign affairs is limited to the powers listed in Article II and any granting of residual foreign affairs powers would be considered unconstitutional by the Founders. In addition, the distinction between the *royal prerogative* and *the executive power*, when applied to the *Youngstown* categories,[124] demonstrates that the lowest ebb category, in its current formulation, allows the Court to grant the President residual powers from the *royal prerogative*. The "lowest ebb" category can expand the

120. This proposition assumes that Article II *does not* grant the President the sole recognition authority. *Contra Zivotofsky*, 135 S. Ct. at 2083.

121. Mortenson, *supra* note 2, at 1174 ("Arguments that the President possesses a free-floating and indefeasible foreign affairs power cannot rest on historical claims about original understanding. They must rest instead on some form of what originalists call living constitutionalism, and in particular on a meticulous demonstration that such powers have in fact emerged over time.").

122. *Youngstown,* 343 U.S. at 637–38.

123. Mortenson, *supra* note 2, at 1172–73.

124. *Youngstown,* 343 U.S. at 637–38.

Executive's powers beyond his enumerated powers in Article II and is inconsistent with the Founders' understanding of *the executive power*.

Overall, the Court has been wary of the potential abuse of the "lowest ebb" category and of functionalist arguments, but only the Court's explicit adoption of the described meaning of *the executive power* and its implication on the Executive's foreign affairs power can lead to the reframing of the lowest ebb category.[125] An additional consideration in the field of foreign policy is that Congress must consciously remind the Executive, and itself, of the Founders' intended scope of executive and legislative power in foreign affairs. If Congress does not act to prevent the Executive from claiming residual foreign affairs powers, then there will be no change in the foreign affairs status quo.[126]

Some questions that this Note leaves unanswered but that remain important for further consideration are: How should the "residual" foreign affairs powers not expressly granted to Congress, or the President, be delegated? Can they be delegated at all? If the Founders' intent conflicts with modern conceptions of *effective* foreign policy, how much weight should functionalist arguments be given? Should this definition of *executive power* and limitations on the Executive's foreign affairs powers also apply to times of war or national emergency? As Lincoln said "[is] it possible to lose the nation and yet preserve the Constitution?"[127]

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125. Michael J. Turner, *Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin*, 58 AM. U. L. REV. 665, 698 (2009) ("By restricting the 'zone of twilight' to a relatively static definition, Medellin may invalidate presidential action that, although constitutionally permissible, is mandated by 'the imperatives of events rather than dependent on a "particularly longstanding practice" of congressional acquiescence.'").

126. Kazi S. Ahmed, *The President vs. Some Old Goat: The Justiciability of War-Powers*, 123 PENN ST. L. REV. 191, 216 (2018) ("The Constitution requires that Congress and the President cooperate in matters of war. Although the President was vested with the power of Commander in Chief of the nation's armed forces, the Framers intended Congress to have the exclusive power to decide whether the nation should go to war. Over the course of the Korean and Vietnam Wars, however, the President established himself as the nation's primary decision-maker in matters of war. Notwithstanding the War Powers Resolution, Congress has been unable to reclaim its war-making authority. In response to these developments, courts have decided to take a hands-off approach. When presented with cases involving the allocation of the nation's war-powers, courts have frequently invoked the political question doctrine to dismiss such cases. However, many war-power cases present justiciable issues. Further, judicially discoverable and manageable standards exist to resolve war-power cases. Therefore, courts should fulfill their Article III duties and adjudicate war-power cases if the legal issue presented is whether the President exceeded the scope of his constitutional authority. After all, in order to preserve our nation's democratic principles of checks and balances, '[c]ourts [must] be last, not first, to give them up.'").

127. *Youngstown*, 343 U.S. at 662.