# Lost Meanings
# UM scholar reveals Constitution's original intent

**By Jesse Froehling**

*UM law Professor Rob Natelson has become a leader in the field of trying to unravel the true intent of the Founding Fathers when they wrote the U.S. Constitution.*

In 1942 during World War II, President Franklin Roosevelt sought to protect the U.S. by interning the country's Japanese-Americans. Ten years later, President Harry Truman crushed a strike when he ordered the Secretary of Commerce to seize the nation's steel mills. After the attacks of Sept. 11, 2001, President George W. Bush stashed suspected Islamic militants at Guantanamo Bay, Cuba, and denied them habeas corpus. To justify the action, Bush's lawyers, as had the lawyers for the Truman and Roosevelt administrations, pointed to the backbone of U.S. law – the Constitution.

The lawyers concluded the first sentence of Article II, Section 1 – "The executive power shall be vested in the President of the United States of America" – gives the president broad authority to do whatever necessary to fight the war on terror beyond the enumerated powers listed later in the document.

"It's actually a very common claim," says UM law Professor Rob Natelson. "Ever since the founding, presidents and their supporters have argued that, in addition to the enumerated powers, that sentence gives them broad authority."

The question then is what exactly does that first sentence in Article II, Section 1 mean? To answer that, Natelson says, you must look to the past, specifically to 18th-century law.

## Digging Into The Past

Natelson speaks precisely and carefully but grows excited easily, hopping to his feet and fishing out a handful of change to illustrate the Constitution's coinage clause. Never is he more animated than when discussing the past. In fact, Natelson's small, tidy office in the UM law school is a testament to history. The Ten Commandments hang on the wall above his computer desk, and the Magna Carta, one of the Western World's greatest legal documents, hangs near the doorway in a place of prominence. The walls also boast a family picture, including the three daughters whom he speaks to at home in Latin.

Natelson's infatuation with history is more than just a personal interest. He says when analyzing a legal document, it's always standard procedure to apply the meaning that the authors ascribed to it. The U.S. Constitution, he points out, is a legal document. As such, the root of its correct interpretation lies in the intentions of the people who created it. By examining the world in which the founders lived, Natelson says, lawyers and legal scholars can answer questions that have plagued the nation's legal system for 200 years.

Natelson has emerged as a leader in the field of study called Originalism, which argues the Constitution has a fixed meaning that was established at the time of its drafting. He's recognized as a national authority on the framing of the Constitution, and his work has appeared in the nation's most prestigious law journals. Academics have cited his work in publications such as the Harvard Law Review, the Yale Law Review, the Michigan Law Review and the Georgetown Law Journal. In many cases, he's been the first to discover the meaning behind the Constitution's apparently ambiguous clauses.

"Probably my biggest contribution has been to bring back to general notice the scope of 18th-century law," he says. "Most of the founders who actually put the pen to paper were lawyers. They had practiced law on Main Street, served in the legislature, been attorneys general. Some were judges. Quite a number had gone to England for education."

In 2005 Natelson followed the founders' footsteps to England. He visited London's Middle Temple, one of four institutions called "Inns of the Court" that traditionally have trained English barristers. Some of the Americans who signed the Declaration of Independence and adopted the Constitution were former students of the Middle Temple. Natelson dug through the library there to find texts studied by the founders – men such as John Dickinson and Edward Rutledge.

"People understand that John Dickinson went to the Middle Temple, but they never take the next step to ask what effect his scholarship had on his legal education," Natelson says. Natelson's approach is "to reintroduce in constitutional writing evidence that the founders found commonplace but has passed away with time."

The first order of business, he says, is immersion in the founders' world.

"You look at the kind of books that they read," he says. "Greco Roman classics, the Bible, English and European history – especially English constitutional history. And also you look at colonial experience. The Revolutionary War experience, what is the colonial experience with Britain? You look at notes taken by delegates during the Constitutional Convention, so you can see why things were put in, why they were taken out." The list goes on.

## Originalism Revival

Originalism fell out of legal fashion for a while, Natelson says, and there are several reasons why. First, Natelson notes, the quality of research has been bad.

“Historians are not legal scholars, legal scholars are not historians and few of either are classicists,” he says. “My research method is more like those of a historian than a lawyer, because I’m trying to unearth the truth rather than merely build a case. But I have the advantage of legal training and 11 years in law practice, which enables me to place the historical materials in a legal context. I also have some classics background, which allows me to better understand the founding generation’s use of English and Latin, as well as their general mindset.”

Another reason the legal scholars began to ignore history is because, “If you don’t read Latin, you don’t get very far in 18th-century law,” he says. The last reason involves the mentality with which lawyers read law. Take the Guantanamo lawyers for example, Natelson says. They already had a conclusion in mind about habeas corpus.

“Instead of investigating the issue impartially, lawyers on both sides tended to scour the historical record, often not very effectively, to find evidence that supported their pre-established positions,” he says. “The research resulted in confusion, some of which manifested itself in the majority, as well as the dissenting opinions of Boumedienne v. Bush,” the landmark Supreme Court decision that granted habeas corpus to enemy combatants in Guantanamo Bay.

“In looking for evidence to support their positions, those lawyers with advocacy roles were only doing their job,” Natelson says. “Unfortunately, many law professors and other constitutional commentators have tended to do the same. I see my role as an academic differently.”

Besides its landmark status, Boumedienne marked a return to Originalism, a notion that pleases Natelson. While researching the historical facts surrounding the decision, Natelson stumbled upon documents that helped to answer a larger question: Did President Bush have the ability to set up tribunals in the first place? What is the executive power of the president of the United States? Does the first sentence of Article II of the Constitution convey a broad, undefined mass of executive power?

“I came up with a rather clear answer,” Natelson says. In an article to be published soon in the Whittier Law Review, Natelson expands on his conclusion.

“Lawyers are creatures of habit,” he says. “They tend to draft documents according to certain patterns or formulas.”

Natelson checked numerous 18th-century documents that, like Article II,

granted enumerated powers. His goal was to find drafting patterns to see what interpretation of Article II fit those patterns.

Natelson found that legal documents frequently include a passage near the beginning that merely identifies the person to whom the document grants powers. Further down the document lists those powers. But insofar as he could find, the documents almost never began with a general grant of broad, unidentified authority, then address other matters before returning to enumerate specific powers.

“What this suggests is that the first sentence of Article II is not a broad grant of kingly executive authority,” he says. “The sentence merely tells the reader that the title of the chief executive will be the president of the United States – nothing more.”

In other words, Presidents Bush, Truman and Roosevelt were wrong when they asserted that Article II granted them powers other than those listed elsewhere in the Constitution.

**Hidden Meanings Unmasked**

Along the way to this conclusion, Natelson discovered something else that, to his knowledge, everyone else had overlooked – the close connection between the Constitution’s sections on the presidency and the documents by which the British crown had empowered governors in the American colonies.

“In 11 out of the 13 colonies, the governors were appointed from London,” he says. “Somebody was designated to be governor of, say, North Carolina. He would get a document called a commission, and then he’d get a set of instructions. What’s really striking is that when you look at Article II of the Constitution, and then you look at a commission, you can see a lot of ways that Article II is just a stripped-down version of a commission, with an instruction or two added.

“So colonial commissions may offer us some real insight into interpreting some parts of the Constitution,” Natelson says, “but up till now no one writing about constitutional law seems to have noticed.”

Despite its ability to flush out answers to some of the legal system’s oldest questions, Originalism hasn’t always translated well to the present day. Take, for instance, the issue of impeachment. Section 4 of the Constitution’s Article II stipulates the ways in which a president may be removed from office: “The President … shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors.”

Most of the clause, Natelson points out, is rather self-explanatory. But what, exactly, did the founders mean when they said a president could be removed from office for “misdemeanors”?

Digging through 18th-century law, Natelson found that misdemeanors, according to the lexicon of the day, meant a breach of trust. And breaching the public's trust could be as simple as performing negligently. Natelson notes that deciding whether a president was negligent could be influenced by political factors, but that ultimately political factors should not be decisive.

"Is there ambiguity?" Natelson says. "Yes. But fortunately, most cases are pretty much on one side or the other."

One objection to Originalism is that the Constitution is antiquated, that the people who wrote the document in the 18th century couldn't possibly have envisioned a world where "commerce" involves the Internet and a single "arm" can destroy a country.

"These are tough questions," Natelson says. "But no different from the sorts of questions that courts regularly deal with when they apply traditional rules to new events. The legitimacy of our government and public officials depends on the Constitution, which is the stated basis for our federal government. If the Constitution is not really law because the politicians or courts can change it whenever they want, then who is the president? Is there a president? How long will he serve? What are his powers?

"Any competent constitutional law professor can use 'living constitution' devices to manipulate the rules to show that we really don't have a constitutional president, or that he has virtually unlimited power, or that he can serve a life term," he says. "How do you know the contrary? Only because the Constitution – using the original meaning of the words – tells you."

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