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Originalism and the Executive

NEIL KINKOPF

Review of Saikrishna Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* (Yale, 2015)

Professor Saikrishna Prakash is one of the most talented and accomplished scholars of the presidency. He has done landmark work advancing the unitary executive theory of presidential power, co-authoring what remains the leading law review article on the subject while still a law clerk. So his new book, *Imperial from the Beginning: The Constitution of the Original Executive*, commands the attention of anyone interested in the American presidency.

The book is stubbornly committed to presenting a picture of the powers of the presidential office as those powers were understood to exist during the founding era (when the Constitution was ratified and in the years shortly following), with particular attention to the administration of George Washington. Discussion of the powers of the original executive has obvious implications for current conflicts over presidential power. Obvious as these implications may be, however, the book steadfastly—and puzzlingly—refuses to draw or even consider them. Instead, Prakash trains his focus wholly on the presidency in the founding era.

Anyone writing about presidential power will confront a decision: whether to focus on the forest (examining presidential power generally), on the one hand, or the trees (considering specific issues of presidential power), on the other. Faced with this choice, Prakash wisely heeds the advice of the late Yogi Berra — “When you come to a fork in the road, take it.” The opening chapters of the book discuss the presidency in broad terms. Its concluding chapters, the book’s strength, by contrast consider myriad specific issues of presidential power.

In the end, this project turns out to be unworthy of Prakash’s remarkable talents. Despite the book’s provocative title, the big picture he presents of presidential power turns out to be appropriately nuanced. So understood—properly hedged and qualified—the book’s broad significance is elusive. Yet the view of the trees, for its part, suffers from an unavoidable flaw: there are so many issues of presidential power that none is, or really can be, treated with the depth it deserves. Finally, the book is

rooted in a commitment to originalism as the proper method of constitutional interpretation, but ends up offering a case study of originalism's flaws. I elaborate these criticisms in turn below.

I. The Forest of Presidential Power

The book begins with a broad discussion of the nature of the presidency. The purpose of this examination is to establish the man-bites-dog thesis expressed in the book's title, viz., that the Presidency was originally understood as an imperial, even monarchical, office. Professor Prakash is a thoughtful and careful scholar. Too much so to actually maintain this sensational thesis. The case he actually advances is that the presidency is monarchical except where it isn't, and the founding generation understood the presidency to be much more monarchical than present-day commentators suppose. Thus reformulated, Prakash's thesis is not quite so arresting as the book's title would lead one to imagine—though it is still at odds with popular wisdom.

Prakash manages to marshal an impressive defense of his claim. Many Americans at the time of the founding in fact believed the Constitution created something like a monarchy. "Clear-eyed foreigners" (Prakash's term) could see the same thing. Yet this shouldn't strike us as so surprising. After all, everyone understood that the President would be George Washington and most in the founding generation were willing to entrust extensive authority to him.

While Prakash's case is surprisingly strong, at least three doubts linger. First, it was as common at the time of the founding as it is now for critics to use

"imperial" and "monarchy" as epithets. And this turns up in many of the sources that Prakash cites as evidence of the nature of the presidency at the founding. Second, George Washington himself was adamantly opposed to monarchy, as Prakash points out. Third, and most significantly, the Constitution itself seems to expressly reject Prakash's claim in the Guarantee Clause. The Guarantee Clause imposes on Congress the duty to guarantee to each state a republican form of government. It seems incongruous for a document containing such a clause to establish a monarchy at the federal level. Prakash urges that the term "republic" or "republican form of government" was imprecise at the time the Constitution was ratified. Many republics had monarchical elements and many monarchies had come to embrace republican elements, hence the mixed monarchies of eighteenth century Europe. In our own time, the Supreme Court has identified the Guarantee Clause as raising nonjusticiable political questions because the meaning of a republican form of government is not judicially discernible. Nonetheless, if republican means anything at all, it means no monarchy.

Having said that, it may be that some powers exercised by monarchs are also exercised by leaders of republics. In fact, it would be surprising if this were not the case. The real issue is not what label we apply to the leader. The crux of the matter is what powers the leader has. This is the concern of the book's remaining, and much more consequential, chapters.

II. The Trees

There are a great many specific controversies relating to presidential power. Professor Prakash takes us on a guided tour of nearly every one. He is a gifted and sure-footed guide. One has the sense that he has read every conceivable founding era source on presidential power and he does a fine job curating those sources to determine which are worthy of our attention. Prakash is an equally engaging guide. A good guide cares about his subject and has views about it. In this vein, Prakash is opinionated and clearly expresses his views regarding the merits of each of the controversies he examines. It would be a dull slog indeed if he were to merely present the controversies and leave open the matter of their resolution.

Nonetheless, and inevitably, Professor Prakash's conclusions are unpersuasive. I say inevitably because, given the great number of issues of presidential power the book canvases, it is impossible for Prakash to spend more than a few pages on any of them. The conclusions he sets forth are argued cogently enough. But they are presented so briefly that the reader is left with the sense that a full rehearsal of the arguments might lead one to a different conclusion. Take the removal power, for example. Controversies relating to this authority are as old as the Constitution. And the issue goes to the core of presidential power. More than any other presidential authority, after all, it is the power to remove subordinates "at will" that allows the President to control the executive branch. Indeed, agencies we today consider to be independent agencies (The Federal Reserve, the FCC, the SEC, the FEC, etc.) are independent precisely be-

cause they are headed by individuals who may be removed only for cause. This means the officers who head the independent agencies cannot be removed because of policy differences with the President.

Prakash discusses the First Congress's consideration of the removal question, resulting in the so-called Decision of 1789. Specifically, Congress debated the question whether the Constitution grants the President the power to remove subordinate officers, or if instead that power must be conferred by Congress. In the statute establishing the Department of Foreign Affairs, Congress determined to recognize the President's removal power over the head of that department in a manner that intentionally did not imply the power was statutory. In other words, the President's authority to remove the officer we now call the Secretary of State exists not because Congress confers it, but because the Constitution confers it.

Fair enough. It does not necessarily follow, however, that the same would be true of other officers. Moreover, it does not obviously follow that Congress lacks authority to regulate the terms on which the President may exercise the constitutionally-conferred removal power as a component of Congress's authority to establish and define the offices and agencies it creates. These are difficult questions and the just-over two pages Prakash devotes to them simply are not enough to convince anyone who isn't already convinced of his conclusions. It is nonetheless a lucid and engaging introduction to the topic, as long as the reader is careful not to treat it as more than that.

These inquiries into specific issues of presidential power are less interesting in isolation than when considered together. The reason is that from them emerges a strikingly perverse picture of the presidency. Most of us consider the President to have greater authority and autonomy in the area of foreign and military affairs than in domestic matters, where Congress's powers are more significant. The original presidency that Prakash recovers, however, is one with vast authority in the domestic realm, but one with relatively little independent power with respect to foreign and military affairs. For example, Presidents have frequently relied on the Commander-in-Chief role to justify extensive unilateral military power. Next to this model, the original understanding of the commander in chief will appear trifling. Commander in Chief was a widely used title at the time the Constitution was adopted. It referred to nothing more than the commander of a military unit: a captain was a commander in chief of a company and a colonel was a commander in chief of a regiment, etc.

The upshot of these observations, in Prakash's view, is that this title merely placed its holder in the chain of command; it conferred no authority to make any substantive decisions. So, the Constitution places the President at the head of the chain of command for all U.S. military forces, nothing more. Congress, by contrast, holds the power to declare war and, significantly, the power to make rules for the government and regulation of the military. These are sweeping powers, according to Prakash, that authorize Congress not only to determine whether to go to war, but to regulate the conduct of the war and even to dictate strategy.

Moreover, Prakash argues, the allocation of authorities disables the President from deploying military force in any way that encroaches upon Congress's power. Thus, the President may not order military deployments that constitute a declaration of war—which would cover virtually all offensive military deployments. Prakash does identify a few exceptional instances where military deployment does not represent a declaration of war, and thus may validly be ordered by the President without prior congressional authorization. First, the President may deploy the military to repel sudden attacks. Second, the President may deploy the military to rescue American citizens. And the President may order offensive military force against pirates because action against criminals is not a declaration of war.

As with the removal power, the picture that Prakash paints of the commander-in-chief power is controversial. There are originalist scholars who regard the President as largely unfettered in his authority to order the use of offensive military force. As with the removal power, Prakash's brief discussion can hardly be taken as conclusive or even as ultimately persuasive, but again it is a fine introduction to the subject. It also raises some obvious contemporary questions: Does the power to repel attacks include the power to strike preemptively? If we regard groups such as al Qaeda and ISIL as criminal syndicates, is the President constitutionally authorized to strike them? Does that power evaporate if the groups are more properly conceptualized as states or combatants? These important and interesting questions fall outside the scope of the book.

III. A Practical Suggestion

In the book's closing pages, Professor Prakash makes a few process-oriented prescriptions for presidents in exercising their duty to interpret the Constitution. This interpretive function is, in practice, performed by the Department of Justice's Office of Legal Counsel. Prakash urges that OLC be stripped of its "quasi-monopoly" over determining the scope of the President's constitutional power. Formally, OLC has no authority to bind the President. Thus, the President remains free to disagree with OLC's conclusions and to pursue his own constitutional interpretation. Practically, however, this rarely occurs, which leads to the "quasi-monopoly" Prakash complains of.

While I could not disagree more strongly with his prescription, I will concede that Prakash offers a powerful reason for it. He wants to ensure an element of adversariness. I agree that it is crucial that constitutional interpretation be informed by the full range of arguments and that this is best accomplished when the opposing arguments are briefed by actual opponents. If we think of the most shameful episode in OLC's history—the infamous Torture Memo—we find this adversariness lacking. The opposing views of the State Department were never sought by or introduced to OLC. Indeed, State appears to have been cut out of the decision-making loop entirely. But shifting the interpretive function from OLC back to the President will not redress this problem. The President can just as easily cut an agency out of the decision-making process as can OLC. In fact, the President can do so more easily, as access to the President is so tightly

(and, in many cases, secretly) guarded by his staff.

Prakash's suggestion seems based on his supposition that a President would receive opinions from the contending agencies and choose the best legal argument, offering a publicly reasoned explanation for his decision. This would bring us back to a model that looks a bit like practice in the Washington Administration. The most notable example is the controversy over the power of the federal government to charter the Bank of the United States. President Washington received the affirmative opinion of Treasury Secretary Alexander Hamilton (before he became a Broadway star) and the negative opinion of Secretary of State Thomas Jefferson, supported by a separate opinion from Attorney General Edmund Randolph. Washington agreed with Hamilton in this instance, but never reduced his reasons to a written opinion. In any case, there is no reason to think that this is how the process would work today. First, a President is unlikely to be familiar with constitutional law generally or the law of presidential power in particular, and so is unlikely to be equipped to perform this function personally. Even if a President were versed in this area of law, say because he taught Constitutional Law at a leading American law school, we might still expect that a President would choose between competing arguments based not on their merits but on the desired result.

This appears to be precisely what happened when President Obama confronted the question of whether the United States could continue to participate in enforcing a no-fly zone over Libya beyond the deadline set by the War Powers Act. By all accounts, OLC and the De-

fense Department opined that the President could not do so. President Obama decided to accept the State Department's ludicrous argument that facilitating the enforcement of a no-fly zone through drone bombing did not represent "hostilities" for purposes of the War Powers Act. President Obama, like President Washington before him, offered no opinion of his own on the matter as to the correct interpretation of law. Nor is this a historically isolated incident. President Jackson did the same thing when confronted with the question of whether he could withdraw funds from the Bank of the United States in order to put it out of business. He fired his dissenting Secretary of the Treasury and appointed a more compliant legal interpreter to the office (the future Chief Justice Roger Taney).

I am not at all sure that President Washington did anything different with respect to the Bank of the United States in his day. It seems unlikely that he was simply convinced by that the arguments of Secretary Hamilton were stronger as a pure matter of *law*. Rather, it may well be that he thought there were strong legal arguments to be made on both sides and it was legally open to him to determine that, as a matter of policy, the Bank would be salutary. Given all this, it seems fanciful to imagine that a President would engage in independent legal analysis. Rather, as the Obama and Jackson examples illustrate, we should expect Presidents to go opinion shopping. Prakash's prescription, I fear, would seriously undermine the rule of law.

IV. Originalism

Prakash begins by dividing the universe into two camps: originalists and living constitutionalists. Originalists will care about his project for obvious reasons. They rely on the original meaning (though Prakash recognizes that this construct has a variety of formulations) to determine constitutional interpretation. He does not, or prefers not to, fathom why living constitutionalists find the original understanding interesting. It is enough for him to note that even "proponents of a living Constitution ... suppose[] that the Constitution's original meaning matters in some unusual way." Unusual? As a descriptive matter, this characterization is exactly backwards. Non-originalist methodologies have been the overwhelming norm throughout the history of American constitutionalism. Among Supreme Court justices, no more than a handful have espoused originalism as a consistent interpretive methodology (as opposed to deploying originalist arguments in the truly usual way: as one of several legitimate sources of constitutional meaning). Perversely, the book ends up providing a good case against originalism as an interpretive method.

The book begins by responding to a familiar critique of originalism – that the Constitution's original meaning is indeterminate because the evidence is inconclusive. As Justice Robert Jackson famously put it, "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.... [The materials] supply more or less apt quotations ... on each side of any question. They largely cancel each other."

Prakash thinks Justice Jackson too hasty in dismissing founding era materials, however. In his view, even where the sources are not perfectly one-sided, they point quite strongly to an answer. The real problem, as Prakash sees it, is that the originalist record is too voluminous. He cites Justice Scalia's estimate that, if done right, examining the historic record for an answer to a particular question "might well take thirty years and 7,000 pages." If that is true, Scalia and Prakash have identified a literal embarrassment of riches. As Prakash himself points out, "[t]his life is too short to spend thirty years and 7,000 pages on a single question of presidential power." Quite so. Originalism is an unusable method of constitutional interpretation. Not a single justice in the history of the Supreme Court has managed to practice this approach.

Practical concerns aside, why would we want the meaning of the Constitution to turn on something so inaccessible? Constitutional interpretation would become the sole province of a tiny elite of legal historians. To put it in originalist terms, it strikes me as inconceivable that the founders would have ratified a Constitution that could not be interpreted by judges or by the President and Congress whose offices so obviously require them

to put the Constitution into practice. If this is true, the project of constitutionalism, to borrow from Justice Scalia, will have achieved terminal silliness.

Imperial from the Beginning is a useful guidebook. It provides a catalog of controversies regarding presidential power. It also collects an impressive array of sources for addressing those controversies. For these reasons, it should be an important resource for anyone confronting issues of presidential power (which I hope will continue to include lawyers at the Office of Legal Counsel). Anyone looking for resolution to these controversies, however, will do well to go beyond this volume; they will not be resolved by reference, however scrupulous, to the founding presidency.

Neil Kinkopf is a professor at Georgia State University College of Law. He teaches and writes about constitutional law and presidential power. He worked in the Justice Department's Office of Legal Counsel from 1993-1997.

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