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George Washington's Constitution

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George Washington's Constitution

By KURT LASH

Review of **Imperial from the Beginning: The Constitution of the Original Executive**, by Saikrishna Bangalore Prakash

New Haven: Yale University Press, 2015

The ghost of George Washington haunts almost every page of Saikrishna Prakash's new book, *Imperial from the Beginning: The Constitution of the Original Executive*. It is a man, not a text, that dominates Prakash's investigation of the creation of the American Presidency. From the Philadelphia Convention where Washington presided over (and likely influenced) the drafting of Article II, to the military quashing of the

Whiskey Rebellion with Washington riding at the head of the new federal army—it is the “imperial” presence and practices of General Washington that Prakash believes generally represent the original understanding of Executive Power.

This is a wonderful book for legal history buffs and anyone interested in the American Presidency. In addition to illustrating Prakash’s formidable grasp of historical theories of executive power, *Imperial from the Beginning* serves as a nice corrective to those who insist that the Founders abandoned altogether any notion of monarchical power. As Prakash recounts, the American Constitution created a quasi-monarchical Chief Executive whose powers were but partially constrained by Congress and the Courts. Understanding these powers requires less an investigation of the text than an exploration of a man. Washington’s practices as our first chief executive established traditions and understandings that have informed every subsequent presidency. In Washington, America came as close as it ever would to having a King and, according to Prakash, his practices illuminate the original understanding of executive power.

Prakash's central claim is that the simple words "[t]he executive Power shall be vested in a President of the United States of America" (Art. II, Sect. 1, cl. 1) had the profound effect of transferring to the Chief Executive a complete set of quasi-monarchical powers. All additional texts relating to the President and the Executive Branch either clarify or constrain this original unenumerated grant of power. Understanding the grant therefore requires understanding the full meaning of two words, "*executive power*," and the implications of granting such power to a single individual.

Prakash demurs regarding the relevance of his book to determining the modern scope of presidential power. However, as a work purporting to present the original meaning of the Constitution, Prakash knows (and probably hopes) his arguments will affect contemporary debates about constitutional executive power. Not surprisingly, the book explores any number of contemporary disputes including whether the Constitution creates a Unitary Executive (yes), whether the president is immune from civil suit (no), executive commandeering of state officials (just fine),

and whether the president enjoys unenumerated power to respond to national emergencies (nope).

As one might expect, the use of originalist methodology to determine the scope of executive power is controversial (see the [recent essay](#) by Stephen Griffin). Whatever one's views about originalism, however, the methodology remains a ubiquitous aspect of American constitutional practice. This means that significant historical works like Prakash's new book will, and should, receive both scholarly and judicial attention. Unfortunately, although Prakash claims to embrace originalist methodology, he never adequately explains his particular approach or how it affects his collection and analysis of historical evidence.

Originalism as an interpretive methodology involves some basic theoretical commitments. As Lawrence Solum has demonstrated,[\[1\]](#) most contemporary originalists agree that the meaning of constitutional text is fixed at the time of its adoption and that this meaning should meaningfully constrain contemporary judicial application of the text. Exactly *how* one determines the original fixed meaning, however, differs somewhat from originalist to originalist.

Probably all originalists agree that public commentary about the meaning of a proposed constitutional text (for example, during the ratification period) provides helpful evidence of the original communicative meaning of the text. Unfortunately, public commentary often is sparse or non-existent. This forces the originalist to turn to less universally accepted sources of evidence, such as statements of framers' intent, background principles of law or post-adoption commentary and practices. The greater the reliance on these less-universally accepted sources of evidence, the less broadly acceptable the author's ultimate conclusions (to other originalists, at least).

In the case of executive power, neither the text nor contemporary public discussion expressly focuses on issues such as “the unitary executive” and “presidential immunity” and “executive commandeering of state officials.” One could, therefore, follow originalist theorists like [Jack Balkin](#) and conclude that bare textual meaning was rather thin. This in turn allows for a wide variety of choices for later political and judicial “construction.”

Prakash, however, believes the original meaning of the text was much thicker and allows for fairly specific

conclusions regarding the meaning of “executive power.” Here, Prakash embraces what Solum would call “contextual enrichment” whereby historical context adds flesh and muscle to an otherwise bare skeletal meaning of the text. Prakash rejects what he calls the “‘literary theory’ of the Presidency, whereby the president’s powers are narrowly construed and wholly dependent on a lawyerly reading of the Constitution.” (p. 7) Instead, Prakash seeks “a holistic picture of constitutional text,” (p. 4) one that “recaptures original conceptions of the Constitution’s presidency.” As Prakash puts it:

This book’s claims about the meaning of constitutional phrases rest on eighteenth-century usage. It recounts what people of that era said about the meaning of various words, phrases and clauses found in the Constitution.

This seems uncontroversial on its face. Identifying historical patterns of usage for words and phrases prior to their adoption as legal texts is a major goal of most contemporary originalist scholarship. This approach allows us to discover that, at the time of their adoption, the words “domestic violence” were broadly understood as a reference to local insurrections and

not as a reference to spousal abuse. It also avoids the logical and evidentiary problems associated with trying to determine each framers' intent.

But Prakash does not limit his search for “usage” to patterns in place at the time of the text’s adoption and ratification. Nor is he primarily interested in ratification-period “conceptions” of executive power. Instead, Prakash embraces *any* eighteenth century usage that he believes illuminate “original conceptions.” This includes not only ideas derived from English common law, but also—indeed, *especially*—post-adoption usage and commentary. And not just any post adoption usage and commentary; Prakash’s specific goal is to present a “*Washingtonian* conception of the chief executive” (p. 4).

By doing so, Prakash moves away from an identifiable originalist approach and towards a kind of amalgam of originalism and common law tradition. This does not mean that his conclusions wrong (indeed, I think a number of his propositions about executive power are strongly supported by the pre-adoption historical record). However, it has the effect of rendering his project to recover our “*Washingtonian* Constitution” rather suspect in the eyes of originalists. *And that’s*

problematic given that this is the audience most likely to be interested in his book.

For example, Prakash's main arguments regarding scope of executive power involve the omission of certain words from Article II and the post-adoption practices of George Washington. The omission involves the framers' decision not to include the words "herein granted" in describing the powers of the Executive as they had Article I when describing the powers of Congress. This, to Prakash, suggests we should read Article II as granting the executive "general" unenumerated power subject only to specific qualifications (p. 81). This is a jarring assertion, given the ubiquitous Federalist assurances that the powers of the proposed national government were limited to those actually enumerated in the Constitution.[\[2\]](#)

Time and again, advocates of the proposed Constitution highlighted the difference between state constitutions of unenumerated general power and the proposed federal Constitution's limited enumerated powers. As Charles Pinckney explained to the South Carolina House of Representatives:

The distinction which has been taken between the nature of a federal and state government appeared to be conclusive—that in the former, no powers could be executed, or assumed, but such as were expressly delegated; that in the latter, the indefinite power was given to the government, except on points that were by express compact reserved to the people.[3]

The back and forth between Federalists and Anti-federalists regarding the document's balance of delegated national power and reserved state autonomy played a major role in the ratification debates. Prakash's account, however, is altogether silent about Founding era-views of federalism and the role federalism played in the drafting and ratification of the federal Constitution. Instead, Prakash gives us Alexander Hamilton's explanation *after* the adoption of the Constitution that:

It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause [of Article II]. (p. 71)

The problem, of course, is that post-adoption statements by political players like Hamilton may or may not reflect the original consensus understanding of the text. This seems particularly likely when one can find the same Alexander Hamilton *prior* to ratification taking what appears to be a very different view of the principle of limited enumerated power. As Hamilton wrote in Federalist No.32:

[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.

Here, Hamilton is echoing similar promises by fellow Publius-writer James Madison who also insisted *prior* to the adoption of the Constitution that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined” while “[t]hose which are to remain in the State governments are numerous and indefinite.”^[4] The point is that federal advocates of the Constitution repeatedly described the delegated powers of the national government—the *entire* national government—as both limited and *defined*.

They may have been lying, but the success of their argument depended on their presenting a text that could be read precisely as described by the Federalists. Had they not done so, the state conventions would have likely rejected the text.[\[5\]](#)

Even if one focuses on post-adoption debates, the idea of unenumerated executive power implicates not only standard “horizontal” separation of power considerations, but vertical separation of power doctrines as well. Prakash discusses executive power as if it were simply a matter of allocation among the three branches of the national government. But this misses the cross-cutting valence of federalism—an enormously important theory that informs the entire American Constitution and gives it its peculiarly American spin. For example, when Congress passed Alien and Sedition Acts in 1798, state assemblies raised federalism objections both to national regulation of speech but *also* ultra vires executive authority to countermand state immigration policy.[\[6\]](#) In short, one cannot construct a convincing account of the early understanding national power—congressional or presidential—without considering the reserved state powers side of the issue.

Instead, Prakash highlights the post-adoption actions of the person with the greatest incentive to ignore federalism and expand the operational scope of executive power: George Washington.^[7] This not only seems unwise from a Madisonian perspective (every branch seeks to expand its own power), it results in a purely nationalist perspective on the original Constitution.

In fairness, Prakash does not completely limit his investigations to Washington. Nevertheless, his book spends so much time focused on the man that I found myself wondering if the book's title was purposefully ambiguous. The "Constitution of the Original Executive" could refer to the original *Constitution*. But it could just as easily refer to *The Original Executive*, George Washington, and *his* understanding of executive power. If the latter, then the book is a boon for anyone interested in our first President, but it poses something of a problem for those interested in the original meaning of the Constitution.

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author of The Fourteenth Amendment and the Privileges and Immunities of American Citizenship (Cambridge University Press, 2014).

[1] See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *Notre Dame Law Review* 1 (2015).

[2] See Kurt T. Lash, *The Sum of All Delegated Power*, 124 *Yale L.J.F.* 180 (2014) (<http://www.yalelawjournal.org/forum/the-sum-of-all-delegated-power>).

[3] Charles Pinckney, *Speech Before the South Carolina House of Representatives* (Jan 16, 1788), in 4 *The Debates of the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, at 259-60 (Jonathan Elliot ed., 1891) [hereinafter *Elliot's Debates*].

[4] *The Federalist* No 45, *supra* note ___, at 292 (James Madison).

[5] An especially difficult issue involves whether the default rule of enumerated power (whether congressional or executive) was understood to be defeasible in situations involving a national emergency. Adrian Vermeule, for example, argues that the writers of the Federalist Papers described the executive as enjoying broad and undefined power in times of national emergencies. See generally, Adrian Vermeule, *The Constitution of Risk* (2014). Prakash, however, not only insists on a default rule of general undefined power, he also *rejects* the idea of special executive power in times of an emergency. See Prakash at 206-15.

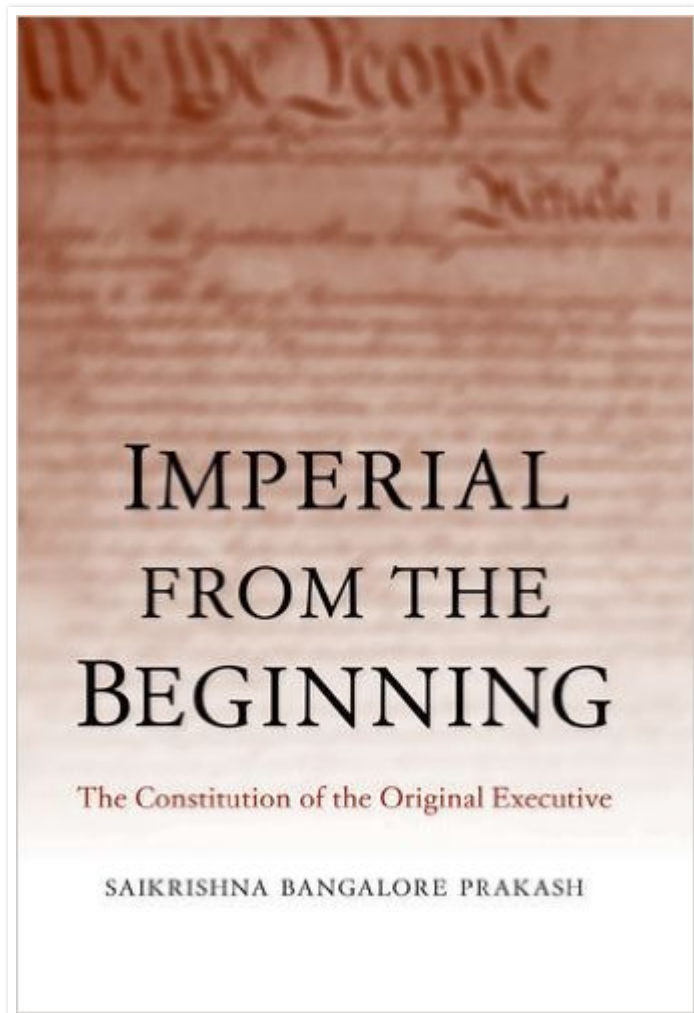
[6] See The Kentucky Resolution (1798).

[7] As Napoleon at St. Helena is reported to have remarked to Las Casas, “he [Napoleon] would have been a Washington had he been in Washington’s place, and that Washington himself would have been a Napoleon had he lived in France.” See <https://www.h-net.org/reviews/showrev.php?id=35731>. Napoleon’s remark nicely captures Madison’s insight that those who wield power will seek to expand that power, unless successfully opposed. In other words, Washington’s expansive use of the executive branch

may reflect more the political opportunity of a revered national hero than the original public meaning of Article II. (ht, Adrian Vermeule for the Napoleon quote).

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