

RETHINKING PRESIDENTIAL SUPREMACY

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Thank you very much to Greg and Elizabeth and to all the students for putting together what is already off to a wonderful start. It has been a really rich, robust, and exciting day of discussion. I was also very excited and interested to hear from Spike Bowman and in absentia from Professor Turner on historical understandings of presidential power. That presentation very nicely tees up points for discussion. In the spirit of debate, then, I am going to shift my own agenda a bit.

My plan had been to start with my affirmative vision of the respective roles that the Constitution lays out for the President and Congress with respect to national security, particularly insofar as they relate to matters of transparency and secrecy. Then I was going to talk about different, very influential views that I place loosely under the label of “presidential supremacy,” and give examples to talk about the reach of the latter approach. However, we just heard an excellent breakdown of some of the major facets of a supremacist approach to interpreting the Constitution and in particular to original meaning. Therefore, I will start by making some responsive points to some of the analysis that we just heard. Then I will backtrack and speak more about my own affirmative reading of Article II of the Constitution and its relationship to other parts of the Constitution. Then I will offer a few examples to illustrate the reach of presidential supremacy.

As we just heard discussed, there is a substantial school of thought that argues that since roughly the Vietnam era, we have lost our way and we have lost the way of the Founders in that we have developed what some have called, and what was in fact the title of a book put out by the American Enterprise Institute, a “fettered presidency.”¹ I believe that this narrative reflects a misinterpretation of the Constitution, of the original meaning, and of the structure and original principles underlying the Constitution. So let me speak first to this core argument which Professor Turner has written about quite a bit, and others have written about as well, which is the argument that textually, support for presidential supremacy can be found in the original meaning of the term “executive

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1. See *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* (L. Gordon Crovitz & Jeremy A. Rabkin, eds., 1989).

power.” As we just heard from Spike Bowman, scholars including Professor Turner argue that while to us the term might look vague, to the founders it effectively encompassed all of the prerogatives of the British crown minus whatever was specifically allocated to Congress elsewhere in the Constitution.

I think this is a very problematic interpretation for a number of reasons. One is the methodology by which this content is derived from the words “executive power.” A core part of the argument is that if you look at writings with which the founders were familiar, those of Locke, those of Montesquieu, those of Blackstone, it is quite clear that Locke, Montesquieu, and Blackstone consider the executive power to include all of the prerogatives that were associated with the British crown, the powers of war and peace, etc. In addition, Professor Turner and some others have also looked to other writings, some of which we just heard excerpts from, particularly from Thomas Jefferson, James Madison, and Alexander Hamilton, to suggest that these men embraced this broad understanding of presidential power.

Now, the way in which these various writings are used itself speaks to a problem with uses of, and references today to, originalism. Scholars often talk about originalism as though it is very clear what originalism is: that it is about adhering to what the Constitution originally meant, end of story. But things are a lot more complicated than that. There have been many iterations of originalism. Indeed, when originalism came into vogue in the 1980s it most often referred to subjective framers’ intent. Today it has evolved to mean something more akin to original public meaning, a quest to discern “objectively” what a reasonable person at the time of the founding would have believed.

And so originalists today will look at Locke, Blackstone, and Montesquieu, for example, or look at some of the individual writings of Jefferson and others and say “ah, we can tell from these writings what a reasonable person would have meant by certain terms.” But in fact, often times these arguments devolve into subjective original intent arguments: “This is what Thomas Jefferson must have really meant or this is what Alexander Hamilton must have really meant.” And the reason it has to devolve to that is because in fact many of the statements of these early writers were wildly contradictory. For instance, in the Federalist Papers, Alexander Hamilton often spoke reassuringly of the notion that the President really would not be terribly empowered, as he could be checked by Congress in meaningful ways.² Hamilton said very specifically in one Federalist Paper that in fact the President would not

2. See, e.g., THE FEDERALIST NO. 69 (Alexander Hamilton).

even have the power to fire an executive official by himself, that he would have to get Senate approval before he could do that.³ And yet we are told that in fact, that is not what he really meant given some of his later writings. So, one problem is methodological. That is, original public meaning originalism often devolves into reading tea leaves to try to discern what the founders really had in their minds.

But even taking the quest on its own terms, the examples that I noted of the uses of Locke, Montesquieu, and Blackstone are in fact very problematic. Perhaps most importantly, all three of these writers are quite inconsistent in how they use the term “executive power.” They shift back and forth between suggesting that the prerogatives of the crown are categorically executive and suggesting instead that these are prerogatives that have typically, for functional reasons, been attached to the one who also holds the executive powers. That is a very important distinction because if in fact the three writers are saying “look, we all know that part of the definition of ‘executive’ is you have these prerogatives, you have the power of war and peace,” then that might shed some light on the definition of the phrase “executive power.” But if all they were saying is that you have the executive power, the power to carry out the laws that the legislature makes and then often times there are these other powers the executive gets, then it is not at all clear that the executive, categorically, as a matter of simple definition, encompasses these other powers. Indeed Locke, in talking about the powers of the executive, used two different terms to describe the executive power of carrying out the laws and the so-called “federative power” that encompasses powers of war and peace.⁴ This indicates, of course, that they were very different powers, even though functionally he suggested that they often were and should be brought together in the same person.

Also, as I’ve referenced, you have huge shifts at different times in the views expressed by Hamilton, Madison, and Jefferson as to the scope of executive power. Jefferson at one point urged Madison with almost comic enthusiasm, unfortunately I don’t have the actual language in front of me, but it really is pretty funny, the eagerness with which he said to Madison, you have to write under a pseudonym to counter these pseudonymous writings in which Hamilton was engaging during the Washington administration to argue for a very strong interpretation of the

3. THE FEDERALIST NO. 77, at 467 (Alexander Hamilton) (Bantam Dell 1982).

4. John Locke, SECOND TREATISE OF GOVERNMENT 86 (Barnes & Noble 2004) (1690).

executive power clause. Madison, at Jefferson's urging, took to the newspapers himself to counter Hamilton's arguments.⁵

Furthermore, if we go beyond so-called objective meaning originalism and look at original materials to try to discern what the Founders actually thought, we again run into problems for presidential supremacy. That is, if we actually look at the ratification debates and look at whether there were some common understandings of a very robust executive power, we do not see it. Instead, what we do see are two things. First, we see a lot of confusion as to exactly what executive power meant, and for good reason as we were shifting away from a very different system of mixed government where different branches were aligned with different classes of society and so different terms might mean different things in our new system of separation of powers. Second, we had just been through a revolution and conceptions of what executive powers should be were changing. So, not surprisingly, there was a lot of confusion.

But to the extent that there is any clarity through the rubble, it is largely clarity to the effect that the executive power, the one thing that everyone could agree on, is the power to execute statutes. Let me just give you a couple of statements from the framing and ratification that exemplify this point. This is from a paper that I am in the course of writing. Several statements from the opening day of debate on executive power at the Philadelphia Convention nicely captured this mix of confusion and a narrow understanding of executive power. Charles Pinckney opened debate by declaring that he was for a vigorous executive but was afraid the executive powers it would inherit from the Continental Congress might extend to peace and war and which would render the executive a monarchy.⁶ John Rutledge similarly stated that he was for vesting the executive power in a single person even though he was not for giving him the power of war and peace.⁷ And James Wilson explained that the royal prerogative did not provide a proper guide in defining the executive powers.⁸ Some of the crown's prerogatives, and this is important, Wilson says matter of factly, were actually legislative, including matters of war and peace.⁹ The only powers that he could see as purely executive were those of executing the laws and appointing

5. See generally THE PACIFICUS AND HELVETIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING (Liberty Fund 2007).

6. THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION 89 (Winton U. Solberg ed., 1990).

7. *Id.* at 90.

8. *Id.*

9. *Id.*

officers not otherwise appointed by the legislature.¹⁰ I went on a bit longer than I meant to for this opening part but these are just some responses to the core arguments to the effect that the words “executive power” in the Constitution as originally understood encompassed this awesome bundle of powers.

Let me just speak in my remaining few minutes about a couple of things that I think the Constitution does say about executive power. And then if I have a minute or two left I might also say a word about some current controversies, or else we can talk about that in the discussion time. I will start by saying one more thing about presidential supremacy theories of executive power apart from all the historical back and forth that I was just referring to about the meaning of the word “executive” and the crown’s prerogative. I think there is a more fundamental core behind those arguments and it is a functional point, albeit one deeply tied to historical discussion of the President’s capacities. Presidential supremacists frequently refer to the so called “Hamiltonian virtues.” These are virtues that Hamilton and others boasted that the President would have because he was a single actor and because he was not riddled with procedural constraints. He talked about Presidential secrecy, dispatch, vigor, and energy.¹¹ And indeed, those who, like myself, think the Constitution envisions a considerably checked President nonetheless start from that same point. As I read the Constitution, at the center of Presidential power remain these so-called “Hamiltonian virtues.” The President is indeed structurally created and history suggests that he was meant to be created to have these virtues. But what presidential supremacy leaves out are the protections that surround these capacities in order to keep them from turning tyrannical. Specifically, consider matters with respect to transparency. While indeed the President has the power to execute the law in secret, the Founders were quite careful to ensure that ultimately the policy he would be executing would itself be transparent. One way in which this manifests itself in the Constitution is by the simple fact that Congress by and large makes the law and the President executes it.

Additionally, we see this brilliant structural innovation in the Constitution which is an inverse relationship between the legal powers that a given actor has and the degree to which the actor is structurally transparent. So, Congress for the most part establishes the laws the President executes, but is designed to act in relative transparency so as to be safe for liberty. The President is actually quite constrained in what

10. *Id.*

11. See THE FEDERALIST NO. 70 (Alexander Hamilton).

activities he can initiate, certainly where Congress has spoken to the contrary. But, at the same time, when he does effectuate the law, he is structurally capable of much secrecy in doing so.

Additionally there is a dynamic series of checks both built into the Constitution and into Congress's legislative capacity to keep the President's secrecy from subverting the rule of law. Some I just talked about include the general oversight and legislative role of Congress in creating the law that is then delegated to the President to execute. Also, the First Amendment was, under virtually any theory of the First Amendment, meant at least in large part to check the government by enabling misdeeds to be exposed. Additionally, there is a lot of historical evidence to the effect that the Founders wanted to ensure that internally in the executive branch the President would not be surrounded by lackeys, that there would be people there who could perhaps call public attention to wrong-doing.

Let me just close with another historical statement or two to get at this overall argument that while indeed the Constitution is structured to ensure that the President can act with secrecy, vigor, dispatch and energy, it was equally crucial to the Founders to ensure that the destructive potential of those qualities would be checked. This is from Federalist No. 70, the same paper in which Hamilton famously spoke of the virtues of the President—being able to act secretly, vigorously, with dispatch, with energy.¹² Hamilton, in that same paper, practically in the same breath, explained that a single president, because we just have one president, would also be “more narrowly watched and more readily expected.” And that unity, meaning a single president, would give the people the opportunity of discovering, with facility and clearness, presidential misconduct so as to effectuate removal from office or other punishment.¹³

And so in closing, I did not have time to go through how this applies to current controversies, but let me just leave you some food for thought to consider how antithetical presidential supremacy is to this original constitutional design: presidential supremacy essentially would maintain the Hamiltonian virtues of secrecy, vigor, dispatch, and energy, but would do so without the accompanying accountability checks of which Hamilton and others spoke. From presidential supremacy springs everything from executive privilege to the state secrets doctrine; to arguments that certain statutes should not be passed in the first place because they would unconstitutionally constrain the President's

12. THE FEDERALIST NO. 70, at 426 (Alexander Hamilton) (Bantam Dell, 1982).

13. *Id.* at 432.

discretion; to arguments that when such statutes are passed, the President can circumvent them; to a massive classification power that allows such circumvention to occur in secret; to a strong power irrespective of the First Amendment to punish those who leak or the blow the whistle on such secret misconduct. Consider the impact, then, of presidential supremacy on the original constitutional design in which accountability was every bit as crucial as secrecy, vigor, dispatch and energy. Thank you.