

CommonLaw.S2.Ep10.FINAL.mp3

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RISA GOLUBOFF: Hello, and welcome back to Common Law, a podcast from the University of Virginia School of Law. I'm Risa Goluboff, the dean.

LESLIE KENDRICK: And I'm Leslie Kendrick, the vice dean.

RISA GOLUBOFF: You know, Leslie, we've talked with guests this season about how law and lawyers have changed the world at different points in time. But there's often this tension that we've talked about, about whether people are using and creating laws to effect change in society or whether social forces, like war and other things, affect how we interpret laws that already exist. So is it the case of when law changed the world, or did the world change the law?

LESLIE KENDRICK: That's true, and our guest today will highlight that tension again. UVA Law Professor Saikrishna Prakash has written a new book about how and why the American president's powers have evolved and grown over time. The book is called *The Living Presidency-- An Originalist Argument Against Its Ever-Expanding Powers*.

RISA GOLUBOFF: There's a lot to talk about just in that title. Sai, welcome to the show.

SAIKRISHNA PRAKASH: Well, thank you both for having me.

LESLIE KENDRICK: Sai, you've written about the office of the president before in your first book *Imperial from the Beginning*, which is about the president's powers at the Constitution's founding. What was the president originally designed to do?

SAIKRISHNA PRAKASH: Well, the original presidency had many different functions. It was principally a law executor to carry into execution Congress's laws, but it also had a number of ancillary authorities, an interstitial authority over foreign affairs. So going beyond just merely making treaties and receiving ambassadors, but doing other things in foreign affairs that weren't assigned to Congress or shared with the Senate.

It was also given a significant check over Congress in the form of a veto. So even though it didn't have legislative power directly, it could exercise a significant influence on the legislative products of Congress. And then it was supposed to supervise the bureaucracy. And although that may not seem as imperial as it is today, compared to the executives of that era, it was quite a sea change.

RISA GOLUBOFF: So what was the bureaucracy like at the time?

SAIKRISHNA PRAKASH: Well, when I say it was a sea change, what I mean is, compared to the anemic state executives and the anemic continental executive, the presidency was designed to be stronger. So there was a bureaucracy before there was a Constitution under the Articles of

Confederation, and Congress supervised it as a plural executive. And that didn't work out too well, and so they eventually moved to secretaries, who oversaw departments.

But that, too, suffered from either excessive congressional micromanagement or congressional inattention, as members of Congress came to and left the Capitol. So they thought there was a need for one superintending officer over all these departments, and that's certainly one of the intended functions of the executive branch, or the president in particular.

LESLIE KENDRICK: So that is what the presidency was designed to do. And when did it start accruing more power?

SAIKRISHNA PRAKASH: Well, I think as soon as you begin implementing a statute, it's inevitably the case that implementation of a law will drift and flow in various ways. And so you see changes throughout the history of the presidency. Initially, presidents chose not to vigorously exercise their veto, and so they never plumbed how far they could go. So that was not a change as much as just a decision not to use a lever that was given to them by the Constitution. I think the election of Andrew Jackson was a sea change in conceptions.

Andrew Jackson, in his first election and certainly his second, conceived himself as having a mandate from the people. Prior presidents didn't conceive of themselves as having a popular mandate. But Jackson told Congress, I'm the only person who represents the entire United States. And then from Jackson, you went to a regime where presidents started making promises as candidates, which was not the case. But eventually, presidents start making promises while praising a system where they made none. And of course, we eventually get into the modern era, where the party platform is in part a presidential platform.

And then independent of that, the presidents have their own agendas, and they run on a policy platform of changing the law in various respects. And they are expecting as legislative party leaders or as the party chieftain to be able to convince their comrades in Congress to enact their agenda, and they hope that the opposition perceives that they have a popular mandate. But the popular mandate idea was not part of the original Constitution because they conceived of electors voting for the president, not a popular vote. And in the first couple of elections, most of the electors were selected by electors and not through the popular vote.

LESLIE KENDRICK: So the president had fairly expansive powers from the founding, but those powers also grew over time. What happened to increase those powers between the founding and, say, Andrew Jackson's presidency?

SAIKRISHNA PRAKASH: I think the founding itself provided some building blocks, and as you just pointed out, there's some change conceptions. So there's several building blocks from the founding that helped the president acquire greater power. First is the idea that there's only one president and that the president is unitary. I think that gives the presidency an advantage over the other branches that are fractured. Article II is capable of a broad reading, either under the Vesting Clause with the grant of executive power or the Commander In Chief Clause.

The fact that Congress is divided into two branches rather than being one divides the opposition, so to speak, the institutional opposition. As you guys know, the Continental Congress was unicameral, but moving to a bicameral Congress was done for purposes of a compromise amongst the states. That, of course, means that Congress is divided. Congress is not only divided into two chambers, but it's also divided by party, which, again, further weakens Congress.

And then I think finally, the president has at his or her fingertips a bureaucracy second to none. And all these institutions are prone to read executive authority in expansive aggressive ways, in part because that furthers their institutional interests, but also because they identify with the executive branch and wish to see executive power expanded.

RISA GOLUBOFF: So it strikes me that you described really well why the executive power grows in practice, even though it was always available theoretically. But one of the ideas that we talk about in constitutional law is the idea of ambition counteracting ambition. So as the executive branch reaches for more power, how does Congress respond?

SAIKRISHNA PRAKASH: Well, you're absolutely right, Risa. Madison talks about ambition counteracting ambition and tying the interests of the man to the place. But he didn't foresee the rise of political parties, and therefore couldn't foresee that some members of Congress favor the expansion of executive power when their co-partisan is in the White House, which means that sometimes their ambitions are furthered by ceding authority to the executive branch, at least temporarily. So it's not so much today that ambition counters ambition.

Sometimes the president's ambition and the members of Congress ambition dovetail, and so there's no need to check the president. In fact, you are going to defend him. And the opposition party, of course, is likely to oppose the president's agenda and the use of authority to further it. But if Congress is divided along partisan lines, either 50/50 or more likely 55-45 or 60-40, that's just not a recipe for Congress being able to successfully push back.

And then, of course, if you add on top of that there are two chambers, all you need is a large enough minority or majority in one chamber to prevent Congress from enacting legislation. It doesn't even need to go to the president. And if it does, the president can often veto it, right? So the Founders gave the president a check on Congress. And although that seems like they gave a check for Congress to exercise against the president, that check has waned over time. You cannot pass legislation over a president's veto unless you have 2/3 in both chambers, and that's almost impossible in the modern era.

LESLIE KENDRICK: This institutional analysis is so fascinating, and the interbranch dynamics in particular. I'm wondering if you can give us an example of the way in which executive power has evolved over time, and the specific executive powers I'm thinking about are foreign affairs and war powers. Could you just give us some examples of how, over time, those powers have changed as just an illustration of the dynamics that we're talking about?

SAIKRISHNA PRAKASH: Well, for war powers, it's a familiar story. I think at the founding, Congress was given the power to declare war, which was not just the power to issue some document. The power to declare war was the power to decide to wage it. And nations could wage

war in formal and informal ways. The formal way is through this declaration, a written declaration. And so when they give the Congress this power, they are basically saying no one else can declare war, right?

It's implicit that only Congress can do so and that Congress has to do so through bicameralism and presentment, and so the president's not supposed to have authority to start wars. And Washington, Adams, Jefferson, Madison, each of them say this in numerous incidences through their presidency. They don't ever start a war on their own.

But over time, both changes in the conception of America's place in the world-- we go from a very weak nation to a somewhat stronger nation to a super, super strong nation-- and the perception that America has global interests and has to defend them, plus drift in constitutional understandings with respect to what it means to be commander-in-chief, what it means to declare war, all those things conspire to create a situation where presidents now claim that they can use significant amounts of military force overseas, and that is not war within the meaning of the Constitution.

Why is that? Because practice has essentially ceded that authority to the presidents. And the Office of Legal Counsel and the Department of Justice says, whatever presidents have done overseas, future presidents can do. That is not war. Whatever presidents have yet to do may be war, and maybe a president can't do that. But of course, that's an unstable situation because if practice makes the presidency, there really are no permanent limits to the president's capacity to see still more war powers.

And I'll say one final thing. The Korean War was a massive land war. If practice makes the presidency, it appears as if the president can involve the nation in a massive land war involving hundreds of thousands of US troops and thousands upon thousands of US casualties. So even though the OLC claims there's something left of the old regime, not much is.

RISA GOLUBOFF: And what do you make of all this, Sai, I mean, this more powerful presidency? Do we need a more powerful president in the modern world? Is this a bad thing, a good thing, a mixed thing? How do you think about what's at stake in this expansion?

SAIKRISHNA PRAKASH: Well, I'm an originalist, Risa, so I look at it with some disdain. I don't know what it means to say that the president has to preserve, protect, and defend the Constitution once you say that he can change it by unilateral acts. And that, of course, is the modern doctrine, right, that practice makes perfect. You can amend the Constitution, the executive can, through repetitive acts. And I say in the book sometimes one act is enough.

And this was said in the 19th century, and there are examples of it in the 19th and 20th century, where one president takes an act and then every successor just cites it. And so I think the idea of the executive being bound to law is somewhat illusory if the president and the executive branch itself understands that it can change the law not through some formalized process, but just by breaking it. We only tend to focus on this when it happens right before our eyes, right? There will be people that oppose it, and there will be people that support it.

The president will tend to violate existing legal norms when it's in service of his agenda or the party's agenda. And in that context, they can always expect some party faithful, some party faithful within Congress, to come to their defense, which means the attempt to push back is often stillborn in the sense that if half the Congress and half the country support whatever the president has done, the president's not going to be stopped.

LESLIE KENDRICK: It is really interesting you point out this is a bipartisan issue. It's a bipartisan dynamic. That is, either party will engage in this when they're in power, and there will always be an inbuilt base of support within the party for that. It's hard for me, being embedded in our society, to take political parties out of the equation. But it seems as though the rise of political parties has had just an enormous impact on this. How do you think all this would look if we didn't have political parties? Or is that just-- I can't conceive of it. Can you? Can you explain what that would look like?

SAIKRISHNA PRAKASH: Well, I mean, it's an interesting thought experiment, and I certainly haven't given it deep thought. But I would suspect we'd still have some of the same things we have now, right? I mean, presidents seize new authority because they want power and fame, right? That's sort of what politicians want, right? Some people want cookies, and other people want toys, and some people want power and fame. I think they face pressure to keep their promises, right? In a regime where they don't make promises, they don't have anything to keep. But if you're making a laundry list of promises, you want to be seen as following through on them, certainly for history's sake, but also for reelections sake.

So I guess what I'm trying to say, Leslie, is there would be other forces impelling presidents forward and other reasons why they would succeed, even if we didn't have parties. Parties certainly help. Congress would still be divided, right, even if there weren't any parties, and that would tend to make it more difficult for Congress to check the president. I mean, think of impeachment. Impeachment is an impossible process not merely because of parties. You need 2/3 of the Senate. A 2/3 threshold is a structural barrier that exists independent of party affiliation.

RISA GOLUBOFF: So you said earlier in response to one of my questions, I'm an originalist. And as you describe this, you talk about the living presidency and compare it to the living Constitution. I wonder if you can say a little bit more about what's problematic in the evolution, both in that presidency and the Constitution, right? Why are you an originalist? What is it about the evolution that you find challenging?

SAIKRISHNA PRAKASH: So thank you for that great question, Risa. I think a lot of people, when they think of the living Constitution, tend to think of rights. And my point is, however bad some people might think the presidency is or however expansive it's become in a way that's problematic, there really aren't any limits to how powerful it can become, right? Because if you go back to the founding and you said, can you imagine that the president will one day start wars, their answer is going to be, no, because that's why we gave Congress the power to declare war.

What seems natural to us would have been astounding at the founding because they just wouldn't have conceived the text being reconceptualized in this way. So the book is a plea to progressives

to think through this very important part of the Constitution and then ask them, what are you going to do to cabin this, or are you really OK with it? A single president is far more important in terms of constitutional change than any Supreme Court Justice.

If we think about Lincoln or Roosevelt or Reagan, they not only appointed the justices that then had a tremendous impact on the future course of constitutional law, they were able to reconceptualize constitutional law and get Congress to do various things while they were presidents. And so we focus on the courts in Con Law because they have the cases.

But a lot of the constitutional change is occurring outside the courts, and it's being directed by the president. So is it a healthy system where majorities are voting for the president often without constitutional change in mind and then the president's able to effect great constitutional change? It doesn't seem like a healthy system to me.

LESLIE KENDRICK: So do you think what we have is kind of a hydraulic effect, where because formal constitutional change is so hard, energy for change kind of finds other avenues and it manifests in other ways?

SAIKRISHNA PRAKASH: Look, I think, A, legal or constitutional drift is inevitable, even if you have a constitution that's easily changed. But, B, I totally agree with you that if you make it rather difficult to amend the Constitution, you can expect people to try to amend it in informal ways because there might be a supermajority for something, but not enough to pass the amendment. They're just going to discover other ways of doing so, and I think that's understandable.

I think from the perspective of the Founders, they thought they were moving from a system of impossible change, unanimous state consent, to a system that seemed more reasonable. And it was from their perspective, it just is not from ours. But having said that, it's also the case that if you have informal constitutional change, you will not make use of the formal system. Would we have a broader scope of federal power, legislative power, written into the Constitution if the Court had continually struck down laws as being beyond the Commerce Clause? I would think so.

But you don't have to use the system in Article V if you can use the other system, right? So you're right, there is definitely some sort of hydraulic pressure. And if you look at most of the last several amendments, they're really more about housekeeping than they are about the scope of federal power. There's a couple of things there, right? But they're actually vestiges of a previous era, right, that reflect a more cramped sense of legislative power that you wouldn't need to even pass today, given the more capacious conception of legislative power.

RISA GOLUBOFF: So, Sai, the picture that you paint is a fairly depressing one that--

SAIKRISHNA PRAKASH: [LAUGHS]

RISA GOLUBOFF: Well, the Constitution created the possibility of these powers, and they weren't initially all used. But then as time has passed, more and more have become used, and the

institutions that were intended to check the powers have become weaker. And we've added to them the party system and the popular conception of the presidency that make it harder for them to be exercised. And so is there something that gives you optimism that there is some mechanism that could change this? Or do you see hope for a more restrained presidency in the future? Or are you diagnosing the problem, but don't see any way out of it?

SAIKRISHNA PRAKASH: Well, first of all, the book isn't meant to be a downer, and I didn't write it that way, and I didn't write it feeling depressed. It's meant to be at least mostly descriptive, but there is obviously some sort of normative claim there as well. The last chapter is focused on what can be done, and I think there are things that Congress could do. And so I have a baker's dozen of reforms.

It runs the gamut from bulking itself up, basically hiring more staff to deal with the disadvantage it has in information and personnel vis-à-vis the executive branch to passing a better War Powers Act to passing more informer and qui tam statutes to ensure that the executive is properly executing the law. So I've got plenty of things that Congress could do, and I had the pleasure of testifying before the House Rules Committee a month or two ago.

And it was a very interesting experience because there was actually no partisanship in the committee proceedings. Every single member seemed committed to the idea of reining in executive power. They all understood that their institution was weaker. And as I told them, most of you will never be president, so you should not favor executive power on the theory that you will someday wield it. And they, of course, recognized that. And I think right now, it's the perfect veil of ignorance. No one knows who the next president will be.

This is the only time where you can actually think about possibly reforming the presidency. And whether you have to make it effective in six months or four years to get Donald Trump to sign it, it's better than nothing, right? So there's plenty that could be done, and I think there are some members of Congress who are thinking about it. And of course, there are other members who are fighting trench warfare either for or against the president.

RISA GOLUBOFF: Thank you so much, Sai. This has been a fascinating conversation.

SAIKRISHNA PRAKASH: Well, thank you guys for making it all possible.

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LESLIE KENDRICK: So, Risa, that was really interesting, and I'm so glad that we got a chance to talk to Sai about his book. His first book says the presidency was always pretty capacious. The legal rules that were set for the presidency made it a much stronger executive than was the norm at that time, which I think is really interesting and a really important point that often gets lost. Because for us looking back, it seems like it's narrow. But for them at the time, it was quite broad.

And then he says that already fairly capacious conception of an executive has been shaped and transformed and expanded through a kind of combination of social and political forces and legal

interpretation as time has gone on. And I see, as we've seen in so many other episodes, this symbiotic relationship between law and extralegal forces and how they shape each other, and it's just really interesting to think about that in the context of the presidency.

RISA GOLUBOFF: I agree completely. And one of the things I think is so interesting about the story Sai is telling is most folks who are thinking about the power of the presidency today would probably start with FDR thinking about the fears of dictatorial presidency during the 1930s, when you have the rise of dictatorships, Mussolini and Hitler in Europe and in other countries, and people started to see that with Roosevelt in his response to the New Deal.

But Sai takes us way further back than that, right? He says, no, this isn't just about the powers the president is exercising, it's really about the nature of how the presidency is thought of and conceived of in a larger institutional framework. And he takes you all the way back to Andrew Jackson, right, in the early 19th century.

LESLIE KENDRICK: I think one thing that's really interesting about Sai's work is the institutional analysis and how much the Constitution itself was a product of various assumptions about how institutions would play off against each other, with each other, and against each other and how actually over the last many, many years those dynamics have been different from what anyone necessarily anticipated.

RISA GOLUBOFF: I agree. And from our perspective, you and I, we have lumper-splitter, we have liberty-equality. We've got various differences, but we're both pretty far on the right's end of thinking about the Constitution. So it's good to have the structure. It's good to have Sai come in and talk to us about the structure and think about that. And I think his linking of the living presidency with a living Constitution, I think we're both pushing back on that a little bit in this conversation, but the link is certainly one that I think is important to think about.

LESLIE KENDRICK: That's exactly right.

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That wraps up this episode of Common Law. We hope you'll join us next time for more stories about when law changed the world and when the world changed the law.

RISA GOLUBOFF: If you're tired of social distancing, get closer to us by telling us what you think. Rate or review us on Apple podcasts or wherever you hear the show. To learn more about this episode and catch up on others, visit us at commonlawpodcast.com or follow us on Twitter @commonlawuva.

LESLIE KENDRICK: In two weeks, we'll be back with our next guest, Harvard Law Professor Richard Lazarus. He'll be discussing his new book *The Rule of Five* about a landmark environmental law case at the Supreme Court.

RISA GOLUBOFF: Common Law comes to you from the University of Virginia School of Law. Today's episode was produced by Sydney Halleman, Robert Armengol, and Mary Wood, with help from Virginia Kane. This show is recorded remotely via our cell phones. I'm Risa Goluboff.

LESLIE KENDRICK: And I'm Leslie Kendrick. We hope you stay safe and healthy, and we'll see you next time.

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