

ORIGINALISM AND THE SEPARATION OF POWERS

SAIKRISHNA PRAKASH joined the Virginia faculty in 2009, after many years at the University of San Diego School of Law. His scholarship concerns the federal separation of powers, with a particular emphasis on executive authority and the limits of presidential power. The past two decades have given Prakash plenty to talk about: foreign wars, an impeachment, and innumerable disputes about executive authority. By concentrating on these (and other) timely debates, Prakash has emerged as one of the leading advocates for the use of originalism as a methodology for interpreting the Constitution's structural provisions.

Prakash became interested in the proper allocation of government power at an early age. "As a teen in San Diego, I had a newspaper route—an early morning route," he recalls. "I had to fold and rubber-band all the papers at around 5:00 a.m. But because I would read the paper before biking my route, some customers complained that delivery was occasionally a bit tardy." The articles that most caught Prakash's attention (besides the ones on his beloved Chargers and Padres) concerned the tugs-of-war between Congress and the executive branch. "During the Ronald Reagan administration, there were so many disputes regarding Iran-Contra, executive privilege, war powers, and the use of an independent counsel. Each was engrossing."

Prakash received a Bachelor of Arts in political science and economics from Stanford University, where he studied under acclaimed political scientists David Brady, John Ferejohn, and Keith Krehbiel. He then attended Yale Law School. "I was privileged to have some of the best professors—Akhil Amar, Harold Koh, Kate Stith—each of whom were deeply interested in the separation of powers." While in law school, he wrote a paper about the Budget Enforcement Act, predicting that Congress could easily evade the act's "spending caps." He also published a Note on the Founders' views regarding control of executive branch agencies, "Hail to

the Chief Administrator: The Framers and the President's Administrative Powers.”¹ In it, Prakash argues that the original Constitution granted the President the power to direct those who execute federal law. “The incredibly cheesy title—‘Hail to the Chief Administrator’—one that I have yet to top—kind of says it all. The President may execute all federal law and direct those who help execute it.”

Upon graduating, Prakash clerked for Judge Laurence Silberman of the United States Circuit Court for the District of Columbia. Though Prakash had taken administrative law in law school, he said much of his real education came from Judge Silberman. “The Judge knew so much about administrative law that by the time I clerked for him, he had forgotten more than I would ever know,” Prakash says. Judge Silberman “knew every intricacy of standing, mootness, ripeness, and political question doctrine because he had a stunning memory for case law.” Prakash also notes that Judge Silberman was extremely generous with his time, having a daily lunch with his clerks. “Judge Silberman was fond of putting us in our place,” recalls Prakash. “Because I was the only clerk from Yale, the Judge (who went to Harvard) liked to quip that by clerking for him, I was belatedly receiving a legal education. And he was right.”

Prakash then clerked for Justice Clarence Thomas on the Supreme Court of the United States. The Justice had a well-developed conception of the proper role of judges and a strong attachment to originalism as a means of constitutional interpretation. These approaches played out in a number of extremely memorable cases, including *Adarand v. Peña* (the constitutionality of affirmative action in federal construction contracts), *U.S. Term Limits v. Thornton* (the constitutionality of state-imposed term limits for federal office), and *United States v. Lopez* (whether the Commerce Clause authorizes the criminalization of gun possession within a thousand feet of a school). Prakash also fondly recalls the many discussions about the Dallas Cowboys, the mentoring, and the Justice's booming and unforgettable laugh. “The Justice, the co-clerks, and the cases—each was incomparable.”

After practicing tax law for two years at Simpson, Thacher, and Bartlet in New York City, Prakash taught at the University of Illinois College of Law as a visiting professor before joining Boston University School of Law full time. He then went west to the University of San Diego School of Law, finding the faculty and the weather extremely congenial. “San Diego is a powerhouse, with a first-rate faculty and top-notch human beings.”

¹ 102 *Yale L.J.* 991 (1993).

Prakash's first law school conference was memorable both because of the intellectual firepower and the identity of one of the conferees:

"My friend Michael Paulsen had invited me to attend a University of Minnesota conference commemorating *United States v. Nixon* (the executive privilege/Nixon tapes case). When I got to the conference, I was amazed at how many people were in attendance. It was 1999 and executive privilege was in the news because of the Bill Clinton/Monica Lewinsky scandal. So I thought it made sense that there seemed to be a thousand attendees. Only later did I come to realize that while *United States v. Nixon* was a case largely forgotten, everyone had heard of a fellow named Kenneth Starr, and all were familiar with his investigation of Whitewater and the Clintons. A thousand people attended because they wanted to see the independent prosecutor, who at the time was the legal equivalent of Beyoncé."

Prakash's scholarship is animated by a deep interest in the founding of the United States. His work endorses the view that the Constitution can only be fully understood by recognizing the historical meaning and context of its words and phrases. Accordingly, Prakash has devoted much of his work to originalist inquiry and a defense of originalism as a constitutional methodology. He recognizes that some originalism seems wrong, even utterly mistaken. But he thinks that originalism serves at least as a starting point in discerning contemporary constitutional meaning. "Originalism may wax and wane. Yet because of its intuitive appeal, it will always be a part of constitutional discourse. Even those who oppose using original meanings to make sense of the Constitution occasionally make appeals to those meanings, at least when it suits."

In his piece written for the Minnesota conference, "A Critical Comment on the Constitutionality of Executive Privilege,"² Prakash argues that the concept of executive privilege fits uneasily with the rest of the structure of Articles I and II. Executive privilege is the idea that the President enjoys a constitutional right to shield communications within his administration from the prying eyes of the courts and Congress. The claim typically rests on the sense that each branch should have some control over communications within its branch. Without the privilege, the President would lack candid advice that would be useful in the execution of his powers and duties. Prakash points out that while Congress has an express and narrow evidentiary privilege in the form of Article I's Speech and Debate Clause, there is little in Article II suggesting an implicit and

2. 83 *Minn. L. Rev.* 1143 (1999).

broader privilege to keep executive branch communications secret. He also argues that other matters far more important to the presidency are widely understood to be left to the discretion of Congress. Only Congress can decide if there will be a bureaucracy to enforce the laws and an army and navy to defend the country. Further, under its appropriations power, Congress also decides how much money executive officers will receive for their salaries and expenses. Because Congress controls these much more consequential means of implementing presidential powers, it makes little sense to infer a far less consequential constitutional authority to withhold communications from the courts or Congress. Prakash concludes that the Constitution leaves the question of executive privilege, like many other questions about the structure of the executive office, to the political branches. Congress may, by statute, grant the President an evidentiary privilege and decide its contours.

Another early piece (co-authored with Steven Calabresi), “The President’s Power to Execute the Law,”³ argues for the Constitution’s endorsement of a unitary executive. In the pages of the *Columbia Law Review*, two distinguished professors, Lawrence Lessig and Cass Sunstein, had just argued that the theory of the unitary executive was a “myth” with no solid grounding in the Constitution or the founding. Because they were responding in part to his law school Note—and because he felt that their argument was mistaken—Prakash wrote an article attempting to show why the unitary executive was indeed part of the Framers’ original design. Separately, Steven Calabresi of the Northwestern School of Law had decided to respond to Lessig and Sunstein as well. Eventually, Prakash and Calabresi combined their separate pieces. The resulting article described the principle meaning of executive power, how the Faithful Execution Clause confirmed the grant of a power to execute the law, and why the Opinions Clause assumed that the heads of departments were subordinate to the President. The article also explained that the Constitution was built on the presumption that there were only three powers of government and three types of officers. This meant that there could be no separate fourth branch of government. “The President’s Power to Execute the Law” has become a seminal article for the proposition that the Constitution empowered the President to personally execute federal law by directing others in their execution of it.

Another of Prakash’s articles considered the President’s powers over foreign affairs. The Constitution does not specifically list all foreign affairs

3 104 *Yale L.J.* 541 (1994).

powers. For instance, it never expressly allocates the power to withdraw from treaties or the power to direct U.S. diplomats. Some have argued that the Constitution simply does not allocate such powers. Others, such as Yale Law School's Harold Koh, have contended that Congress enjoys such powers because it has so many consequential foreign relations powers (war, foreign commerce, etc.). Writing with Michael Ramsey, Prakash argues in "The Executive Power over Foreign Affairs,"⁴ that the grant of "executive power" included a grant of foreign affairs powers. The article argues that in the late eighteenth century the phrase "executive power" was known to have a foreign affairs component. Writers such as Montesquieu, Locke, and Blackstone had claimed as much, as had Americans. When the Constitution granted the President "the executive power," it granted him all those powers deemed executive, subject to the Constitution's numerous constraints. Because the Constitution expressly granted some foreign relations powers to Congress and required the Senate's consent before using others, the Constitution did not grant the President a plenary foreign affairs power. Instead, he has all those foreign affairs powers considered executive and not allocated elsewhere. Using his executive power, the President may declare the foreign policy of the United States, instruct U.S. diplomats, and oust foreign diplomats and consuls. Hence, rather than being "laconic" in foreign affairs, as Louis Henkin once wrote, the Constitution grants the federal government full authority in foreign affairs, using a system of express grants coupled with a residual sweeping grant to the executive. This reading of the Constitution closely coheres with practices that date back to the Founding, ones in which the President exercises many foreign relations powers that are not traceable to the specific enumerations of Article II.

While Prakash has focused on presidential powers, he has also written about other horizontal aspects of federal power. One of his most provocative (and shortest) pieces is "Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity."⁵ There Prakash asks whether the phrase "regulate commerce" has a different meaning as applied to the three branches of the Commerce Clause—interstate, foreign, and Indian commerce. The article argues that while judicial doctrine treats each branch of the Commerce Clause differently, with federal power varying across the three branches, the Constitution's text suggests that the scope of the power ought to be identical. Prakash contends that the same

4 111 *Yale L.J.* 231 (2001).

5 55 *Ark. L. Rev.* 1149 (2003).

phrase—“regulate commerce”—ought to have the same meaning in all three contexts. More specifically, he claims that the Constitution ought to be read with a rather high presumption of “intrasentence uniformity.” He claims that it would be anomalous for a phrase in one clause to have multiple meanings in that clause.

In “How to Remove a Federal Judge” (with Steve Smith),⁶ Prakash argues that tenure of the sort enjoyed by federal judges was a common law tenure, one that could be terminated on a finding of misbehavior. The article notes that the concept of “misbehavior,” the opposite of the Constitution’s “good behavior,” had a broader meaning than “high crimes and misdemeanors.” It also highlights that some officers enjoyed good-behavior tenure in American regimes (state and continental) that lacked the machinery of impeachment. Finally, early Congresses provided that federal judges were to be ousted from their offices when convicted of bribery in ordinary courts. Over time, this article has elicited the most inquiries from the public. “Apparently quite a few folks feel that a federal judge has wronged them. I have to tell them that, despite the title, the article is purely academic and advances a theory that is not widely accepted, at least not yet.”

An article in the *Virginia Law Review*, “Removal and Tenure in Office,”⁷ discusses the removal of non-Article III officers. The article makes the standard unitary executive case for a presidential power to remove, claiming that the grant of executive power includes a power to remove executive officers. Contrary to conventional wisdom (and a Supreme Court case, *United States v. Chadha*), the article also maintains that Congress has constitutional authority to remove federal officers. Prakash points out that Congress can disestablish offices and that Congress has long provided that officers are automatically ousted from their offices upon being convicted for certain offenses in the ordinary courts. Relying on these established congressional means of removal, Prakash contends that Congress can pass laws providing that some named officer or officers shall be ousted from office. The President’s power of removal is not a power to protect officers from removal, and so there is no conflict between the President’s power to remove and a congressional power to do so outside of impeachment. Finally, Prakash discusses whether federal judges have constitutional authority to remove officers who help exercise judicial power. He argues that judges have constitutional power to remove indi-

6 116 *Yale L.J.* 72 (2006).

7 92 *Va. L. Rev.* 1779 (2006).

viduals that help exercise their federal judicial power, just as the President has a constitutional right to remove officers who help implement federal executive power.

Taken together, Prakash's work displays a knack for analyzing complex constitutional questions in a novel and convincing manner. His primary lens is originalism, and he focuses on the link between early historical practices and modern questions related to the division of governmental power. Prakash's research often leads to surprising or controversial outcomes. But even those who resist originalist inquiry must contend with the creative and careful reasoning that drives him toward these conclusions. Only in the middle of his career, Prakash has become one of the leading scholars on executive power in the country—still inspired by current events, but now in a position to shape how to interpret them.

EXCERPTS

**THE EXECUTIVE POWER
OVER FOREIGN AFFAIRS****(with Michael D. Ramsey) 111 *Yale L.J.* 231, 305 (2001)**

No foreign affairs scholar writes on a clean slate. Many eminent scholars and judges have labored to make sense of the Constitution's allocation of foreign affairs powers. Although these attempts often have little in common, they share one trait: They have given up on the Constitution. The received wisdom would have us believe that the foreign affairs Constitution contains enormous gaps that must be filled by reference to extratextual sources: practice, convenience, necessity, national security, international relations law and theory, inherent rights of sovereignty, and so forth. Yet reaching for these extratextual sources casts doubt on the entire enterprise, for one would think that the Constitution's text ought to play the preeminent role in discerning the Constitution's allocation of foreign affairs powers.

Perhaps due to the array of extratextual sources brought to bear, modern scholarship remains without a coherent and complete theory of the constitutional division of foreign affairs powers. First, there is no adequate explanation of the source and scope of the foreign affairs powers of the President. It is conventional wisdom that the President is, at minimum, the "sole organ" of communication with foreign nations and is empowered to direct and recall U.S. diplomats. Many scholars would go further, asserting that the President is the primary locus of foreign affairs power. Yet the President's enumerated powers do not seem to convey anything approaching even the minimum powers everyone assumes the President to enjoy. Second, there is no adequate explanation of the foreign affairs powers of Congress. Most scholars assume that Congress has a general power to legislate in foreign affairs matters, and many argue that Congress, rather than the President, should be the dominant decisionmaker. But the enumerated foreign affairs powers of Congress, while seemingly broader than the President's, also do not apparently encompass the full extent of the foreign affairs powers Congress is thought properly to exercise. Third, and most importantly, modern scholarship has achieved no consensus on even the most basic framework for resolving disputes over the allocation of particular foreign

affairs powers not specifically mentioned in the Constitution's text. To pick a few examples, the power to terminate treaties, to enter into executive agreements, and to establish and enforce U.S. foreign policy are heatedly and inconclusively debated with no apparent hope of converging upon a common approach.

We need to wipe the foreign affairs slate clean and start over. In our view, modern scholarship should stop assuming that the Constitution's text says little about foreign affairs and stop treating foreign affairs powers as "up for grabs," to be resolved by hasty resort to extratextual sources. Outside the foreign affairs field, constitutional scholars agree that the text is the appropriate starting point. That should be true of foreign affairs scholarship as well. In this Article, we hope to show that the Constitution's text, properly construed, answers the supposedly perplexing foreign affairs questions posed above.

We argue that the text supplies four basic principles that provide a framework for resolving controversies over the source and allocation of foreign affairs powers. First, and most importantly, the President enjoys a "residual" foreign affairs power under Article II, Section 1's grant of "the executive Power." As we seek to establish in this Article, the ordinary eighteenth-century meaning of executive power—as reflected, for example, in the works of leading political writers known to the constitutional generation, such as Locke, Montesquieu, and Blackstone—included foreign affairs powers. By using a common phrase infused with that meaning, the Constitution establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power.

Second, the President's executive power over foreign affairs is limited by specific allocations of foreign affairs power to other entities—such as the allocation of the power to declare war to Congress. Thus, the President has a circumscribed version of the traditional executive power over foreign affairs. Notwithstanding the common understanding of executive power, the President cannot regulate international commerce or grant letters of marque and reprisal. Third, Congress, in addition to its specific foreign affairs powers, has a derivative power to legislate in support of the President's executive power over foreign affairs and its own foreign affairs powers. But contrary to the conventional view, Congress does not have a general and independent authority over all foreign affairs matters. In particular, Congress cannot establish relations with a foreign country or establish foreign policy. Fourth, the President's executive

power over foreign affairs does not extend to matters that were not part of the traditional executive power, even where they touch upon foreign affairs. In particular, the President cannot claim power over appropriations and lawmaking, even in the foreign affairs arena, by virtue of the executive power. That is to say, the President is not a lawmaker, even in foreign affairs.

Below we begin the task of wiping the foreign affairs slate clean and writing anew. Part I highlights the difficulties of modern foreign affairs scholarship, including its repeated denial that the Constitution's text can provide much meaningful guidance in allocating foreign affairs powers. Part II details the four fundamental principles that we derive from the Constitution's text and that provide a comprehensive framework for addressing foreign affairs disputes. This Part further illustrates how these principles are consistent with the Constitution's text read as a whole and how they provide guidance in the resolution of key dilemmas of foreign affairs law. Part III begins the task of establishing the common eighteenth-century understanding of executive power by discussing the usage of that phrase in eighteenth-century political thought. In this Part we show that eighteenth-century political theory included foreign affairs powers as part of the executive power, thus providing a firm foundation for our reading of Article II, Section 1.

In Part IV we discuss foreign affairs powers under the Articles of Confederation, illustrating first that the Continental Congress's exercise of foreign affairs powers was commonly called "executive" power, and second that serious practical problems arose from a multimember body's exercise of the executive foreign affairs powers. In Part V we consider the Philadelphia Convention, in which delegates shifted portions of the executive power of the Continental Congress to a single President. We show how both background understandings of the phrase "executive power" and specific discussion by the delegates confirm a reading of executive power to include foreign affairs powers. We also show how dissatisfaction with the breadth of the traditional executive power over foreign affairs led the delegates to allocate certain foreign affairs powers elsewhere, laying the foundation for our interpretation of these allocations as exceptions carved out of the President's executive power. Part VI addresses the ratifying conventions, and shows that their discussions of foreign affairs are consistent with our view of unallocated foreign affairs powers as presidential executive powers. Finally, Part VII examines the Washington Administration and finds a usage and practice that closely

conform to our theory of executive power over foreign affairs.

Our framework reveals that there are no gaps in the Constitution's allocation of foreign affairs powers. The Constitution's text supplies a sound, comprehensive framework of foreign affairs powers without appeal to amorphous and disputed extratextual sources. Moreover, there is substantial evidence that this textual framework is the correct interpretation of the Constitution, as it comports with usage and practice before, during, and after the Constitution's ratification. Finally, other theories or frameworks have a rather difficult time of accounting for the evidence supporting our framework. To slight the foreign affairs meaning of executive power is to downplay Locke, Montesquieu, Blackstone, Washington, Jay, Jefferson, Hamilton, and even Madison.

REMOVAL AND TENURE IN OFFICE

92 *Va. L. Rev.* 1779 (2006)

Removal is an under-theorized and relatively unexamined area of constitutional law. What little scholarship there is has its limitations. Existing works focus almost solely on the President's removal power. Scholars quietly assume that Congress cannot remove officers, except by impeachment. Most also say nothing about whether the judiciary may remove officers. Finally, scholars make few claims about the Constitution's original meaning. Constitutional text supposedly does not address removal, leading many to believe that any quest for original meaning will be fruitless. Hence claims about sound policy, prior practice, and judicial opinions dominate the undersized removal literature.

Given the history of famous removal clashes, the dearth of scholarship is somewhat remarkable. The first Congress debated whether the President had a right to remove. The Senate censured Andrew Jackson for his removal of the Treasury Secretary, the only such censure by a house of Congress. Andrew Johnson was impeached because he dismissed his War Secretary, and he came within one vote of being removed. Presidential removals also led to famed cases like the mammoth *Myers v. United States* and the stunted *Humphrey's Executor v. United States*. More recently, the quarrels over the Independent Counsel were, in no small measure, about whether Congress could create a prosecutor insulated from presidential removal.

A wag might say that a dearth of scholarship in an area of constitutional law makes it more likely that the area is basically sound. When it comes to removal, however, the wag would be wrong. In fact, methodical and comprehensive scholarship is sorely needed because in its absence, incompatible claims have flourished. On one hand, *Bowsher v. Synar* declares that Congress cannot have a power to remove officers by statute. On the other hand, the 1802 Repeal Act, which removed judges when it terminated their underlying offices, suggests otherwise. Or consider the intuition that because the President has a removal power, no one else may remove officers. No less than the Supreme Court has held that courts may remove officers they appoint, thereby ensuring that the President lacks a removal monopoly.

The want of a comprehensive analysis of removal has also left basic questions about the President's ability to remove unanswered. For instance, does his removal authority extend to all executive officers, to all those whom he actually appoints, or to all officers of the United States (save for federal judges)? Similarly, scholarship has inadequately addressed whether Congress may constrain the President's ability to remove, even though this very question has arisen in famous cases.

This Article seeks to fill the gaps in the literature, addressing questions long neglected. Consider Congress. Despite the prevailing intuition that Congress cannot remove officers, the case for a congressional removal power is a compelling one. Where offices and officers are concerned, Congress is not merely some bystander. Congress's powers over offices are extensive—it creates offices, specifies their duties, and sets their salaries. Indeed, it has long been understood that Congress can remove officers. Congress can terminate offices, thereby ousting incumbent officers; Congress can enact tenure limits, thereby decreeing the future removal of officers; and Congress can mandate the removal of officers who have been convicted of civil or criminal offenses. Although the Supreme Court and the executive branch have drawn the line when it comes to statutes that do nothing more than remove incumbent officers, nothing in the Constitution supports this artificial line drawing. Like other removal statutes, these “simple removal statutes” can be necessary and proper for carrying federal powers into execution.

Consider the President. In recent times, executive branch lawyers have claimed that the President's appointment power is the source of his removal power, the theory being that whoever appoints may remove. This seemingly reasonable argument is mistaken. First, it greatly overstates

presidential power because it supposes he may remove non-executive officers merely because he appointed them. Properly understood, any distinct removal power arises from the grant of executive power. Although one might argue that the President's executive power enables him to remove all officers (other than judges), the Constitution is better read as granting him a power to remove executive officers only. It follows that the President has no constitutional right to remove presidentially appointed non-executive officers. Most importantly, the Constitution does not grant him the authority to remove the quasi-judicial and quasi-legislative officers who control the independent agencies. If the President's removal power arises from the grant of executive power, the President has far less removal authority than is commonly supposed.

Second, in a different sense, the appointment argument may understate the President's power over officers. If we look to England and her colonies as a guide, the President's executive power may not grant a distinct "removal power" at all. Instead, the President might have the ability to set the tenure of executive officers. Rather than granting all executive officers tenure during pleasure, the President might use his discretion to grant some officers good behavior tenure. Much as English monarchs did, the President might constrain his future ability to remove in order to attract those who would shun an insecure appointment during pleasure. In other words, perhaps the President may impose an *ex ante* limit on his ability to remove in order to attract superior officers.

Finally, consider the federal judiciary. In *Ex parte Hennen*, the Supreme Court held that federal courts could remove clerks because the courts had appointed them. If this argument is to be believed, it means that the President could remove all presidentially-appointed inferior judicial officers, even though such officers perform vital judicial functions for Article III courts. Once again, the appointment argument is misguided. Inferior judicial officers, such as the clerks of the court, exist to help carry into execution the judicial power of federal courts. To perform that function, inferior judicial officers likely receive an implicit delegation of judicial power from an Article III court. A court may remove its inferior judicial officer by retracting its grant of judicial power. This conception of a judicial removal power makes the appointer irrelevant, as he or she should be.

Part I tackles the controversial topic of a congressional power to

remove. Part II considers a presidential power to remove. Somewhat predictably, Part III discusses a judicial power to remove.

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