



The President Who Would Not Be King: Executive Power Under The Constitution

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ABSTRACT

This is a review essay of Michael W. McConnell's book, *The President Who Would Not Be King: Executive Power Under the Constitution*, published by Princeton University Press in 2020. The book has 421 total pages and sells for \$35 in hardback. The review begins by identifying objectives of the research and providing a biography of the author. Second, the contents of the book are reviewed, including the Introduction, four parts, and the Conclusion. Third, the text is compared to other recent books available on the same topic. Finally, the strengths and weaknesses of the book are evaluated.

Keywords: 1787 Constitutional Convention; Article II of the Constitution; executive authority; presidential congressional relations.

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INTRODUCTION

The challenges posed by recent presidents' employment of their powers, combined with Congress' dysfunction, has led to an imbalance in the constitutional order. For author Michael W. McConnell, the ever-more-powerful presidency calls for a reexamination of the "framers design for the presidency based on the text they wrote, their experience of royal authority in colonial times, and the interpretive battles in the early years of the republic" (p. 7). Presently teaching at the Stanford Law School and a Senior Fellow at the Hoover Institution, McConnell has background as law clerk, lawyer, Reagan administration Justice Department Assistant Solicitor General, and Appeals Court judge in addition to previous academic appointments.

The book is divided into four part containing eighteen chapters, bordered by an Introduction and Conclusion. In the Introduction, the author presents the purpose, scope, and method of the study. In starting with a "historically-informed understanding of the text" (p.14), McConnell admits that the documentary record of the Constitution's creation and ratification is incomplete and often misunderstood.

Part I encompasses six chapters and examines the work of the 1787 Convention and ratification debates in molding Article II of the Constitution. Chapter 1 notes that the delegates at the convention were well-versed on the British monarch's prerogative powers, including those which had been repudiated. Chapter 2 explains how various plans for a new government dealt with the executive. Chapter 3 covers election and impeachment provisions. In Chapters 4 and 5, McConnell analyzes the finalizing of Article II by the Committee on Detail, Committee on Postponed Matters, and Committee on Style, respectively. Several state ratifying conventions are covered in Chapter 6 for their debates on the presidency, including those in North Carolina, New Hampshire, South Carolina, and Virginia.

Part II presents the prerogative powers which were allocated to the executive. These include the president's legislative powers (Chapters 8-9), power to control law execution (Chapter 10), and foreign affairs authority (Chapter 11). Chapter 12 delineates some powers denied to the executive.

Part III assesses the structure of Article II. Chapter 13 includes discussion of the executive power vesting clause, including the controversy over its competing meanings. Chapter 14 reviews those powers and duties outlined in Sections 2 and 3 of Article II. In Chapter 15, McConnell offers his own typology of presidential power based on two sets of variables. In the first set, one determines whether authority derives from the Constitution or not and whether that power is "defeasible"—able to be revised or removed—or not. Applying the aforementioned variables to constitutional powers on the one hand and statutory powers on the other, McConnell holds that all prerogative powers are perpetual, but that "residual" constitutional powers and delegated statutory powers are subject to change according to the situation and Congress's role. McConnell holds that this offers a more accurate and dynamic view of presidential authority than that offered by Justice Robert Jackson's oft-cited concurrence in the U.S. Supreme Court's ruling in the *Youngstown Sheet and Tube v. Sawyer* (343 U.S. 579, 1952) case.

Part IV of the text covers Chapters 16 through 18. Chapter 16 presents case studies of the latter case along with the Supreme Court's decision in *Zivotofsky v. Kerry* (576 U.S. 1, 2015) as a way of demonstrating alternate outcomes dealing with foreign policy issues. In order to demonstrate that his approach to separation of powers can be applied to presidents of different parties and ideologies, McConnell presents three case studies involving the last three executives in Chapter 17. For example, he covers the issue of the authorization of torture against detainees in the George W. Bush administration, the nuclear deal with Iran in the Barack Obama White House, and the first impeachment and acquittal of Donald Trump. Chapter 18 evaluates delegated powers, such as those granted by Congress to administrative and independent agencies.

In a one-page Conclusion, McConnell reiterates the imbalance of authority between the president and Congress and repeats his proposed cure: "Maybe a renewed attention to the original design will point a way forward and will work for presidents of a variety of temperaments and commitments" (p. 351).

Other recent publications have analyzed presidential power from similar or divergent perspectives. Louis Fisher [1] examines presidential authority from the legal perspective of constitutional language. Chiou and Rothenberg [2] show how many of the devices utilized by the president to circumvent Congress create more problems and erode existing authority. Milkis and Nelson [3] uncover how changes in the office over time have impacted chief executives. Finally, Prakash [4] contends that the violation of the Madisonian balance between the branches of American government has perpetuated an illegitimate expansion of executive power.

While McConnell's treatise has received overwhelmingly positive reviews, it is not without flaws. First, although he deals with each separately, the author could do a better job connecting the Constitutional Convention's plans for the presidency with ratification debates and documents. Second, McConnell's illustrative examples of controversies dealing with presidential power are limited to foreign policy and include only the last three chief executives. Third, while the author does a solid job examining prerogative powers, his coverage of residual and delegated authority is sparse. That is unfortunate, because a large part of the present concern with presidential authority ignores the fact that Congress often reacts to executive employment of residual powers with questionable moves of its own.

Though McConnell's book makes a significant contribution toward a proper comprehension of the president's constitutional powers, it leaves for us to ponder whether Americans are biased toward activist executive leadership regardless of restraints.

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