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# Originalism as King

By John C. Yoo

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## Federalism & Separation of Powers Practice Group

### A Review of:

The President Who Would Not Be King: Executive Power under the Constitution, by Michael W. McConnell (Princeton), <https://press.princeton.edu/books/hardcover/9780691207520/the-president-who-would-not-be-king>

### About the Author:

John Yoo is Emanuel Heller Professor of Law at the University of California, Berkeley, a visiting scholar at the American Enterprise Institute, and a visiting fellow at the Hoover Institution. He is the author, most recently, of *Defender in Chief: Donald Trump's Fight for Presidential Power* (2020).

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### Other Views:

- Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. (2001), available at <https://digitalcommons.law.yale.edu/ylj/vol111/iss2/1/>.
- The Lawfare Podcast: 'The President Who Would Not Be King,' (Jan. 26, 2021), <https://www.lawfareblog.com/lawfare-podcast-president-who-would-not-be-king>.
- Lee J. Strang, *Can Originalism Constrain the Imperial Presidency?*, 21 FEDERALIST SOC'Y REV. 232 (2020), available at <https://fedsoc.org/commentary/publications/can-originalism-constrain-the-imperial-presidency>.

Reading Robert Bork's 1990 *The Tempting of America* can evoke a poignant wistfulness. *The Tempting of America* confirmed the rigorous originalism that a Justice Bork would have brought to a Supreme Court so badly in need of principles of interpretation. If Robert Bork had won confirmation, rather than Anthony Kennedy, the Supreme Court might have begun its journey toward originalism in 1987, rather than three decades later. With his intelligence and persuasiveness, Bork might have convinced the Justices to abandon the free-wheeling lawmaking that would produce *Planned Parenthood v. Casey*, *Obergefell v. Hodges*, and *NFIB v. Sebelius*.

Readers may have exactly the same feeling after finishing *The President Who Would Not Be King* by Michael McConnell, a law professor at Stanford Law School and a senior fellow at the Hoover Institution. It is worth a read, but not just because it presents an engaging, reasoned view on the scope of presidential power. It also gives us a glimpse of what might have been.

According to press reports and Beltway rumor at the time, President George W. Bush considered McConnell—at that time a judge on the U.S. Court of Appeals for the Tenth Circuit—for one of the vacancies left by Chief Justice William Rehnquist and Justice Sandra Day O'Connor. Only 50 years old at the time, McConnell had already enjoyed a distinguished career as a legal scholar, first at the University of Chicago and then the University of Utah, where he became perhaps the nation's leading originalist scholar of the Religion Clauses.

Instead, President Bush chose John Roberts. Roberts subsequently led the Court to uphold vast expansions of federal power, as in the Affordable Care Act case, and to interfere with the separation of powers, as in last year's case upholding the Deferred Action for Childhood Arrivals program. But worse yet, at critical times Roberts has seemed to tailor his decisions out of a concern for their political consequences. So he has fled from any consistent philosophy of judging and sought refuge in common-law acrobatics designed to narrow decisions, deny enduring principles, and disguise the Court as an impartial arbiter.

In *The President Who Would Not Be King*, McConnell puts the exact opposite traits on display. Questions of presidential power give us a good idea of how a Justice McConnell might have approached the job. As a scholar who has devoted most of his career to religion and individual rights issues, McConnell examines the President's powers to enforce the law, remove subordinates, and conduct foreign policy and war with a fresh eye and few, if any, pre-existing biases. Whether the reader ultimately agrees or disagrees with his answers, he or she comes away with respect for how McConnell works through the legal questions.

First, McConnell commits to a scrupulous originalism in interpreting the nature of executive power under the Constitution. His careful reading of the day-to-day proceedings of the Constitutional Convention in the summer of 1787 might make some eyes glaze over, but it is all in service to the Framers'

understanding of the text that they wrote and ratified. Not for McConnell are today's functional concerns for "accountability," "legitimacy," or "efficiency." McConnell does not seek to achieve the mythical "balance" between the branches so desired—but so mysteriously undefinable—by critics of the Presidency. McConnell sees the role of the law as enforcing the original understanding of the Constitution. "The founders' conception may or may not be the executive we want for the twenty-first century," he writes in the introduction. "It certainly is not what we have, or what the Supreme Court has fashioned for us, or what modern presidents claim. But who in the nation today thinks our current dispositions of power are ideal?" But, reminiscent of Donald Rumsfeld's line about whether the United States should have invaded and occupied Iraq with better equipment, McConnell basically says that we go to work with the Presidency the Framers gave us, not the one we wish they had.

Second, McConnell anchors his analysis in the constitutional text. He takes us on a tour of history, beginning with British understandings of the powers of the Crown versus Parliament, slowly and carefully marching through the experience of Constitution-making in Philadelphia, and then filling in details with early practice in the Washington, Adams, and Jefferson administrations. But he doesn't journey through these events to recreate the world of the Founders or to make broader points of political theory, unlike, say, scholars who follow in the footsteps of Leo Strauss, Harvey Mansfield, and Harry Jaffa.

Instead, McConnell follows specific historical paths only that relate directly to the constitutional text. For example, he goes to great pains to demonstrate that the Committee on Detail—about which little is known—introduced "audacious innovations" to the text of Article II. But McConnell does not stray into the major questions swirling about the Constitutional Convention, such as its treatment of slavery or the Great Compromise between the large and small states. He relies on history, but only a usable history, much like a judge relies only on the factual evidence needed to reach a judgment.

His focus on a usable past does not prevent McConnell from making some unique contributions. Many of the episodes about which he writes, such as the failures of the revolutionary state constitutions, the debates on the floor of the Philadelphia Convention, and Congress's early enactments, have already appeared in legal journals and specialist books. But McConnell synthesizes them into a whole that provides a coherent vision of the Founders' presidency. Until now, Charles C. Thach's *The Creation of the Presidency, 1775-1789: A Study in Constitutional History*, though first published in 1925 (as usual, the Liberty Fund has printed an excellent affordable edition), had provided the best place to start when researching a question on the executive power. *The President Who Would Not Be King* will supplant Thach as the new starting point for future students of the Presidency.

McConnell introduces two more discrete insights into our understanding of the Presidency. First, he resurrects a point first made by University of Chicago Professor William W. Crosskey, whose two-volume *Politics and the Constitution in the History of the United States* (1953) attempted to defend the New Deal on the ground that the Constitution gave Congress plenary power to regulate the economy and society. Crosskey made the implausible

argument that the Framers did not intend Article I, Section 8 to enumerate Congress's limited powers. Instead, he argued, it lists only the Crown prerogatives that the Founders had chosen to transfer away from the executive. Therefore, Crosskey concluded, the Framers must have intended to give Congress broad, unenumerated power unlimited by Article I, which he believed performed a separation of powers, rather than a federalism, role.

There are a number of reasons why Crosskey missed the mark on the nature of federalism. But McConnell resuscitates Crosskey's theory to illuminate presidential power. He reads Articles I and II as disposing of the prerogatives held by the British King, as the Founders knew them through a mixture of British precedent, Blackstone's *Commentaries*, and recent colonial history. McConnell carefully reviews the royal prerogatives and traces where they end up in the constitutional scheme: many go to Congress (regulating trade, raising the military, coining money), some remain with the Executive (enforcing the law, Commander-in-Chief, issuing pardons), and others are shared (making treaties, making judicial and cabinet appointments). McConnell is surely right that the Founders approached the task of drafting the constitutional text in this way, and viewing Articles I and II through this lens can lead to surprising insights, such as clarifying the power over immigration.

Nevertheless, this textualist approach to the separation of powers does not escape the fundamental question that has faced us ever since the Founding: Who exercises the executive powers not textually addressed in Articles I or II? Neither Article, for example, explicitly assigns the power to set foreign policy, which under the British constitution had fallen under the King's prerogatives. Foreign policy famously sparked the first greatest division among the Founders over presidential power when President Washington declared that the United States would remain neutral in the wars of the French Revolution. Hamilton defended the Neutrality Proclamation on the ground that Article II, Section 1's declaration that "the executive Power shall be vested in a President of the United States of America" grants to the President all federal executive powers not specifically taken away elsewhere in the Constitution. In response, Madison claimed that most unenumerated powers should rest with Congress, due to America's anti-monarchical history, Article II's other limited textual powers, and the legislature's central role in all matters.

Presidents, judges, and scholars have argued that the answer must come from Article II, Section 1's vesting of the executive power in the President. But different theories of the executive can yield different interpretations of the Vesting Clause. The "unitary executive" theory—which holds that the President alone enjoys the unenumerated executive powers of the federal government—generates the corollary that the Vesting Clause contains substantive powers, such as the power to wage hostilities abroad short of war. Other theories argue that the clause is more procedural and primarily limited to management of the executive branch's personnel (what I sometimes refer to as the President as head of HR theory) or just law execution.

McConnell's second contribution addresses this gap in the constitutional text. If his approach to the constitutional text has it right, the Framers would have left the foreign affairs power and other executive powers to the President. Otherwise, why

would they have carefully chosen which royal prerogatives to transfer to Congress? They must have assumed that the Vesting Clause's phrase "the executive power" would create a Presidency that could still operate as an effective, republican branch of government. "Most of the enumerations of executive power incorporate limitations designed to reduce the scope of the corresponding prerogative power that had been exercised by the king," McConnell writes. "The various enumerations do not have the appearance of a comprehensive and systematic description of the necessary powers of a functioning executive branch." Had Madison prevailed, McConnell could have observed, the nation would be incapable of conducting any foreign policy at all. The nation narrowly avoided disaster in the War of 1812 because President Madison—putting his theories to the test—ceded leadership in war to Congress.

Article I's enumeration of powers does not give Congress the right to set our attitudes toward other nations beyond trade and declaring war—it does not give Congress, for example, the ability to recognize whether Israel's capital is Jerusalem or to communicate with our embassies abroad. But to root the foreign relations power in the President's right to receive ambassadors—as some do—is laughable. McConnell observes that this latter view "would entail such a latitude of construction as to make the limiting language of the Constitution illusory" (one gets the feeling that this amounts to a terrible insult in the McConnell household). Given that foreign relations was considered an executive power in the Anglo-American constitutional tradition, that it was not vested in Congress in Article I, and that it does not arise from any powers enumerated in Article II, McConnell concludes that the power must come from Article II, Section 1's Vesting Clause. Recent claims that "the executive power" only conveys the power of law enforcement, McConnell observes, are "demonstrably incorrect" due to his careful review of the royal prerogatives.

Taking his own unique path, McConnell ultimately reaches the same destination as Hamilton, and later joined by Presidents Washington, Jefferson, Jackson, Lincoln, and FDR. In my scholarly work, I have defended the same view and shared many of McConnell's assumptions and methods. But if McConnell had become Chief Justice, and I had somehow ended up an Associate Justice on his Court (I think this could well have caused many worthies to head for our northern neighbor), I may well have dissented from his opinions from time to time over differences in originalist method.

The question of war will illustrate. McConnell takes the view generally advanced by most presidential and foreign relations scholars since the Vietnam War: the Declare War Clause gives Congress the sole authority to decide whether to wage war, except for self-defense in the case of sudden attacks. I have argued that the Declare War Clause does not give Congress the sole authority to begin military hostilities abroad, but instead that the Constitution creates a political—rather than legal—process where the Article I and II branches can use their respective war-related powers to struggle for primacy in conducting hostilities. Why we reach conflicting views reveals important differences in the practice of originalism.

First, originalists should agree that the constitutional text controls, and that history matters only insofar as it helps us recapture the Framers' understanding of the words that they ultimately adopted. McConnell makes an important contribution to our understanding of the Presidency by reminding us to carefully study the actual text used in Article II and to compare its structure and design not just to Article I, but to the British constitution. He is right that only the constitutional text should guide our interpretation of presidential power, rather than contemporary beliefs about the proper balance of power between the branches or functional ideas about the best way to arrange government functions.

But I think that on war powers, McConnell might pass by the text too quickly as he proceeds to the history. We agree that the Crown possessed the power to raise the military, make war, and conduct war as Commander-in-Chief (and we both reject the implausible notion that the Commander-in-Chief power is just a title and that Congress could order all military decisions, down to tactics). We also agree that the constitutional text disperses these powers, giving many of them to Congress. But we diverge over whether allocating the power to "Declare War" in Article I gives Congress control over starting war, except for cases of self-defense. "In a significant departure from the British model," McConnell argues, "the framers assigned the power to initiate war to Congress, not to the President. This was no surprise."

At this point, McConnell goes quickly to the drafting history of the Declare War Clause as well as early practice. But the constitutional text should give him more pause. It seems to me that an interpreter should look to other portions of the Constitution to glean any available insights before turning to the history—especially when comparing provisions of the original Constitution, which composed a single document written and ratified at the same time. Here, Article I, Section 10 reveals the shortcomings of the Declare War Clause:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

This provision creates exactly the system that McConnell outlines. States cannot "engage" in war "without the Consent of Congress." Section 10 even has the explicit exception for self-defense ("unless actually invaded"), and even one for anticipatory self-defense (taking action to preempt an "imminent" attack) which Article I, Section 8 lacks, but which most read into it anyway (as they must). If the Framers had wanted to require congressional permission before the President could wage war, they simply could have repeated this exact language and replaced "No State shall" with "The President shall not." Or to put the point differently, McConnell's view requires the belief that the Framers wrote with uncharacteristic sloppiness and confusion in Article I, Section 8's Declare War Clause, and then two sections later used more detailed, careful language to mean exactly the same thing. As Chief Justice John Marshall reminded us in *McCulloch v. Maryland*, we must read different words in the Constitution to mean different things. Marshall reasoned that "necessary" in the Necessary and Proper Clause did not mean indispensable, as

Jefferson would have had it, because Article I, Section 10 also limited a state's powers to impose imposts and duties "except what may be *absolutely* necessary for executing its inspection laws." The Framers inserted "absolutely" in Article I, Section 10, but not in Article I, Section 8 before "necessary"; therefore, Jefferson's inclusion of "indispensable" before "necessary and proper" had to be wrong. Article I, Sections 8 and 10 similarly suggest that the President's power over war is broader, and Congress's narrower, than McConnell thinks, because different language must convey different meanings.

When it comes to the Framing history, McConnell carefully reviews the history of the drafting and ratification of the Constitution as it relates to war powers. Much of this history cuts against the idea that the Framers would have used the Declare War Clause as a shorthand for giving Congress control of all military hostilities. Vietnam War-era critics argued that a presidential role in launching wars ran counter to the anti-monarchical origins of the American Revolution. If the Framers rebelled against King George III's dictatorial powers, they reasoned, surely they would not give the President much authority. This is a variation of Madison's failed arguments as Helvidius, just as my view is an extension of Hamilton's as Pacificus. It is true that the revolutionaries reacted to the British monarchy by creating weak executives at the state level. But as McConnell properly acknowledges, the anti-executive reaction did not last so long as to dominate the constitution-making years. When the Framers wrote the Constitution in 1787, they rejected these failed experiments and restored an independent, unified chief executive with its own powers in national security and foreign affairs.

Indeed, Anglo-American political theory at this time posited that the unpredictability and high stakes of foreign affairs made them unsuitable for legislation. Instead, foreign affairs demand swift, decisive action—sometimes under pressured or even emergency circumstances—that is best carried out by a branch of government that does not suffer from multiple vetoes or delay caused by disagreements. Legislatures were too large and unwieldy to take the swift and decisive action required in wartime. Our Framers replaced the Articles of Confederation—which had failed in the management of foreign relations because they had no single executive—with the Constitution's single President for precisely this reason. Even given access to the same information as the executive branch, Congress's loose, decentralized structure could paralyze American policy while foreign threats loom. Article II represented an effort to restore, rather than further diminish, the executive after the failures of revolutionary government.

This historical background should provide the context for a narrow reading of the Declare War Clause. McConnell agrees that British and early American history shows that Anglo-American governments rarely, if ever, declared war before waging military hostilities. He further agrees that declarations of war, as described by Blackstone, played the primarily legal functions of notifying the enemy of the status of hostilities under international law or giving the government more leeway in domestic affairs. But declarations of war did not play a role in authorizing hostilities under domestic constitutional law. In the century before the Constitution, as McConnell accepts, Great Britain—where the Framers got the idea of declaring war—fought numerous major

conflicts but declared war only once beforehand. Indeed, in the Philadelphia Convention, the original drafts of the Constitution had given Congress the power to "make" war, but the delegates amended it to "declare," so as, Madison's notes report, to make clear the President could "repel sudden attacks."

But we should ask what importance the records of the Philadelphia Convention should have in the interpretive enterprise. McConnell is no purist in the originalist enterprise. He thinks that the differences between "original intent" and "original public meaning" are "exaggerated." Both, he says, "will necessarily rely on much the same sources and methods." Thus, he considers evidence starting from British constitutional history, through the Philadelphia Convention and ratification debates, and ending with the practice of early administration, "with the objective eye of a linguist or historian, unpolluted by modern politics or results-orientation," but without drawing distinctions as to their significance for interpretation. Here, I dissent from Chief Justice McConnell. It seems to me that the records of the state ratification debates and the surrounding pamphlet wars in public must have primacy of place over the Philadelphia Convention. Of course, the choices made in Philadelphia were critical. But they were unknown to those who ratified the Constitution—the limited records we have, primarily notes taken by Madison, were not published until after his death in 1836. They could not have influenced the votes of the delegates to the state ratifying conventions, who were the ones legally authorized to accept or reject the Constitution. In modern legislative parlance, the records of the Philadelphia Convention amount to the secret discussions of an interest group that had drafted a proposed bill, while the state ratifying debates represent the official record created by the legislators who alone have the power to introduce the bill and ultimately make it law.

The reason why Madison's Notes are so popular in interpretation is because they record the arguments and choices made by one group of delegates, at one time, in one place, in one proceeding. The ratification is far more difficult to investigate as effectively, as the process was decentralized and dispersed in time and space, with arguments in one convention not necessarily appearing in others. But it is far more important, I think, because of the legally authoritative power of the state conventions. And if one looks at the records of the ratification process, it is difficult if not impossible to conclude that the participants in the debates both in and outside the convention halls believed that giving Congress the power to declare war presented a significant check on the President's ability to start military hostilities. In debates where Anti-Federalists attacked the innovation of a unitary executive, Federalists did not rely on the Declare War Clause to claim that only Congress could authorize military hostilities.

Instead, the Federalists expected Congress's power of the purse to serve as the primary check on presidential war. The 1788 Virginia ratifying convention was perhaps the most important one—the Constitution narrowly escaped defeat there, some of the country's greatest leaders debated there, and the Constitution reached the necessary ninth vote for ratification there. During the Virginia Convention, Anti-Federalists attacked the military powers given to the President. Patrick Henry declared (as McConnell recognizes): "If your American chief be a man of

ambition and abilities, how easy is it to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him.” James Madison, leading the Federalists, did not defend by invoking the Declare War Clause to show that only Congress could start wars. Rather, he responded with the power of the purse: “The sword is in the hands of the British king; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist.”

Despite the startling absence of the Declare War Clause from the ratification debates, McConnell still concludes that it gives the power to Congress to control all offensive military action. In this respect, he follows arguments put forward by Michael Ramsey and Sai Prakash, who separately have argued that “declare war” was the everyday language that 18th century Americans would have used to mean “authorize” or “initiate” war. Ramsey and Prakash tried to prove their point by assembling examples drawn from the statements of politicians and writers of the period that use “declare” and “begin” war interchangeably—of which there are many. McConnell furthers this line of argument by relying heavily on post-ratification practice, particularly Congress’s authorization of hostilities during the Quasi-War of 1798 with France. Congress not only authorized the naval conflict but carefully regulated how American ships were to carry it out. The Supreme Court upheld Congress’s right to control the nature of the hostilities in a series of cases over prizes (though the power over captures is explicitly given to Congress, which ought to limit these cases’ relevance). The broader reading of the Declare War Clause, therefore, “enjoys the weight of early evidence . . . we may conclude that congressional authorization is required before the President may employ the armed forces in offensive military operations that constitute acts of war.” But we might ask why post-ratification evidence on the colloquial meaning of a constitutional provision should count in the process of interpretation, as the early Presidents and Congresses may well have gotten the Constitution wrong. Otherwise, *Marbury v. Madison* was wrong to find that the First Congress had violated Article III by adding cases to the original jurisdiction of the Supreme Court.

On this last point, we might ask why McConnell would prefer the colloquial meaning of “declare” war to its more precise legal meaning. McConnell acknowledges that declaring war had fallen into disuse and that it had a narrow legal purpose that did not include authorizing military hostilities under domestic law. His general approach to presidential power—carefully tracing how the Framers re-allocated the Crown’s prerogatives—should militate in favor of preferring the legal, rather than the popular, meaning of constitutional terms. For example, McConnell asks how British legal sources, colonial charters and state constitutions, political theorists and convention delegates used the phrase “executive power.” He does not undertake a general survey to see what Americans colloquially meant by “executive power”—in fact, he rejects the conclusions of scholars who have attacked the substantive reading of the Vesting Clause for linguistically reducing “executive” to “execute.” Instead, McConnell’s Crosskey-esque approach to reading constitutional texts should have led him to view the President as having the ability to launch military hostilities, subject to Congress’s control over the purse and the creation of the military—which were a total check over major

wars before the post-WWII creation of our enormous, offensive standing armed forces.

This criticism over war, however, should not detract from the overall enterprise. McConnell’s work should assume a place on the bookshelf of foundational legal works on the American presidency. It makes a series of judicious choices among competing theories, rigorously uses originalist sources and methods, and generally reaches the right conclusions about the executive power. While I may dissent on war powers, it is because I share McConnell’s own methods. I think McConnell, whether Chief Justice or leading scholar and teacher, would find that the best of compliments.

