

# EXECUTIVE POWER IN FOREIGN AFFAIRS

ALEX KOZINSKI\*

Article II of the U.S. Constitution begins by declaring that "the executive Power shall be vested in a President of the United States of America."<sup>1</sup> This so-called Executive Vesting Clause has been the subject of intense constitutional discussion since the Constitution was ratified. For instance, in 1793 Alexander Hamilton and James Madison debated whether this clause grants residual authority to the President beyond the enumerated powers listed in the Constitution.<sup>2</sup> The answer to this question is significant not only because it affects the power and the authority of the President, but also, as a necessary implication, because it impacts the rights and freedoms of U.S. citizens here and abroad.

Some of the most notable Supreme Court cases concerning the contours of executive power have arisen in the context of war<sup>3</sup> and foreign affairs.<sup>4</sup> Thus, it is not surprising that now, during the War on Terror, the subject of executive power is once again at the forefront of both American law and politics.

Modern executive power jurisprudence finds much of its basis in Justice Robert Jackson's concurring opinion in the *Steel Seizure Case*. In that case, Justice Jackson declared, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>5</sup> He then went on to fashion a sliding scale for the exercise of executive power vis-à-vis congressional power.

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\* Judge, United States Court of Appeals for the Ninth Circuit.

1. U.S. CONST. art. II, § 1, cl. 1.

2. Compare Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 PAPERS OF ALEXANDER HAMILTON 33, 33-43 (Harold C. Syrett ed., 1969) (arguing for residual power), with James Madison, *Helvidius No. 1* (Aug. 24, 1793), reprinted in 15 PAPERS OF JAMES MADISON 66, 66-73 (Thomas A. Mason et al. eds., 1985) (arguing against residual power).

3. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

4. See, e.g., *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

5. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

According to Justice Jackson, the President's power is at its "maximum" when Congress actually confers power on the President to act.<sup>6</sup> The President's power occupies a middle position, a "zone of twilight," when the President acts without authorization or opposition from Congress.<sup>7</sup> Finally, presidential power is at its "lowest ebb" when the President acts contrary to laws passed by Congress.<sup>8</sup> It is both important and interesting to note that Justice Jackson did not say that the President may not act contrary to legislation; he simply said the power to act was at its "lowest ebb" and that under these circumstances the President must "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>9</sup> Thus, even Justice Jackson's framework allows for the possibility that the President may have powers that in fact supersede constraints imposed by the other branches of government.

Of course, it is an awesome thing for one man to hold such power. Therefore we have seen—consistent with our American values—a gradual cutting back of executive power. It becomes less and less with every administration, and now it is practically gone. But there's a little bit left, and this panel, composed of Professor Martin Flaherty and Professor Michael Ramsey, discusses that remaining portion.

This is not the first time that Professor Flaherty and Professor Ramsey have thrown academic jabs, uppercuts, and hooks at one another over this topic. Round One of Flaherty v. Ramsey took place over several hundred pages in the *Yale Law Journal* and the *Michigan Law Review*.<sup>10</sup> Naturally, being the dutiful moderator of Round Two, I wanted to make an assessment of Round One.

Now, I cannot say that I absorbed everything that is in their previous articles, but I do want to declare a winner—at least on preliminary grounds. Professor Ramsey's article in the *Yale Law Journal* makes a very persuasive point. As is explained in the

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6. *Id.*

7. *Id.* at 637.

8. *Id.*

9. *Id.*

10. Compare Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

last paragraph—always a good paragraph to read—the article argues that we need to “drag the constitutional foreign affairs debate back to the text, where constitutional debates ought to begin (if not end).”<sup>11</sup>

However, while Professor Ramsey’s point may very well win a substantive debate, my decision in Round One is not based on substance. Professor Flaherty’s article in the *Michigan Law Review* is the preliminary winner of Round One for both a textualist and non-textualist reason.

The textualist reason is that Professor Ramsey’s article is 125 pages long and has 545 footnotes, for an average of 4.36 footnotes per page. However, Professor Ramsey’s article was left in the dust by Professor Flaherty’s 143 pages with 690 footnotes, averaging 4.825 footnotes per page. So, just on text alone, it seems to me that Professor Flaherty won Round One. But there’s more.

The non-textualist reason is found in Professor Flaherty’s 690th footnote, conveniently placed on the last page: “Prakash and Ramsey simply beg the question of how the Constitution should be interpreted when they assert that reliance on post-constitutional practice or other non-textual materials involves ‘giv[ing] up on the Constitution.’”<sup>12</sup> This is the clincher. It’s the begging-the-question trump argument.

With that summary of Round One in mind, prepare yourself for the rematch.

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11. Prakash & Ramsey, *supra* note 10, at 356.

12. Bradley & Flaherty, *supra* note 10, at 688 n.690.