It's "Executive Power," Not "Executivish Power"

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- Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019), available at MLaw Repository;
- Julian Davis Mortenson, *The Executive Power Clause,* 167 U. Pa. L. Rev. (forthcoming), available at SSRN.

Maybe you have been wondering, for one reason or another, just what the "executive power" entails. If so, you are in luck, for Professor Julian Davis Mortenson has an answer for you in two magisterial, deeply researched articles that also happen to be compelling reads: Article II Vests Executive Power, Not the Royal Prerogative*,* and its sequel, The Executive Power Clause. It turns out that "The executive power meant the power to execute. Period." (*Executive Power,* P. 5.)

It will come as no news to readers of this website that, about a quarter of a millennium ago, Article II of the Constitution vested the "executive power" of the United States in the president. And ever since that time, Americans have been arguing about just what this "executive power" entails. In truth, it seems this debate is likely to last as long as the Republic does—which suggests that the debate sometimes says as much about the debaters as their subject.

Much of this debate has revolved around the scope of congressional power to protect the independence of administrators from the president via for-cause restrictions on termination. In recent decades, the core argument against such restrictions, familiar from cases such as *Morrison* and *Free Enterprise Fund*, is that they may unduly interfere with the president's ability to exercise the executive power and to carry out the duty to "take care that the laws of the United States be faithfully executed." The Supreme Court will take yet another run at this unitary-executive problem during the current term in Seila Law LLC v. Consumer Financial Protection Bureau, in which the Court will decide whether Congress infringed too much on presidential authority by imposing a for-cause restriction on removal of the director of the Consumer Financial Protection Bureau. (Spoiler: Things are not looking so good for the director's independence.)

This debate regarding agency independence implicates the most obvious element of the "executive power," which is the power to implement (i.e., execute) legislative commands enacted by Congress or embedded in the Constitution. A reader unscarred by legal training might be forgiven for thinking that Article II's Vesting Clause grants the president *only* this enforcement power. This reader would be in good company insofar as there have been presidents, justices, and scholars who have shared this understanding. (*Article II,* P. 11.) On this view, which Professor Mortenson refers to as the "Law Execution" thesis, the president's executive power is an empty vessel into which somebody else must pour the content by legislative action. (*Executive Power*, P. 4.)

Many prominent scholars, as well as a president, some justices, and some legislators, have subscribed to a much more expansive understanding of the executive power as embracing a grab-bag of powers and privileges exercised by the British Crown at the time of the Constitution's drafting. (*Article II,* P.11.) This view is commonly referred to as the "Vesting Clause" thesis, but Professor Mortenson calls it the "Royal Residuum" thesis on the ground that this name provides a more accurate description. Adoption of the Royal Residuum thesis yields a considerably more potent and king-like president with powers

over national security and foreign affairs that Congress cannot constitutionally override. A president convinced she possesses such powers might, for example, conclude that statutory limits on wiretaps cannot restrict efforts to protect national security or that statutory restrictions on torture are unconstitutional. (*Article II*, P. 2.) So the choice between the Law Execution and Royal Residuum theses is, one might say, a big deal.

The title of the first of his two companion pieces gives its game away: *Article II Vests Executive Power, Not the Royal Prerogative.* Professor Mortenson explains that his methodology was "motivated by a metaphor: standing in front of James Madison's bookshelf and pulling texts off the wall to ask, what was the foundation on which the Founders were building?" (*Article II,* P. 20.) To this end, his research relied "on more than a thousand contemporaneous published texts by hundreds of commentators, with a research methodology that involved reviewing every instance of the word root 'exec-' and reading most of the texts cover to cover with the topic of presidential power squarely in mind." (*Article II*, P. 19.) Usual suspects, such as Blackstone, Bracton, Locke, Hobbes, and many others, duly appear, as do a legion of more obscure authors. Based on this research, Professor Mortenson concludes that, at the time of the Constitution's drafting, political and legal discourse consistently used the term "royal prerogative" to refer to "the basket of non-statutory powers held by the British Crown." (*Article II*, P. 5.) The phrase "executive power" was consistently used to mean "the narrow but potent authority to carry out projects defined by a prior exercise of the 'legislative power.'" (*Article II*, P. 5.)

One compelling example of the evidence for Professor Mortenson's case comes from Blackstone's listing of the elements of the "King's Prerogative." The "supreme executive power" of enforcing the laws is the first royal authority. (*Article II,* P. 53 (citing Blackstone, *Commentaries,* Ch. 3).) The King's Prerogative also, however, contains about forty other powers, which include such matters as sending and receiving ambassadors, making treaties, erecting lighthouses, vetoing legislation, and many others. Accordingly, "[t]he royal prerogative, as it was understood in the Founding era, thus comprised a long list of separate and highly particularized legal authorities within a well-understood framework of English constitutional law." (*Article II,* P. 57.) This list was composed of "'stuff the King can do,' so long as Parliament didn't tell him otherwise." (*Article II,* P. 57.) The "executive power" to enforce the law was just one especially important element from this long list.

The second of Professor Mortenson's articles, *The Executive Power*, shifts focus from the views contained in Madison's bookshelf to the views of the drafters and ratifiers of the Constitution. This effort involved "exhaustive review of every instance of the word root 'exec-' in three major collections spanning millions of words: the 29-volume *Documentary History of the Ratification of the Constitution,* the 34-volume *Journals of the Continental Congress*, and the 26-volume *Letters of Delegates of the Continental Congress*." (*Executive Power*, Pp. 8-9.) Based on this research, Professor Mortenson concludes that the Founders unanimously understood the "executive power" as an "empty vessel" that is "subsequent and subordinate" to legislation. (*Executive Power*, P. 60.)

He also tells a coherent story of how this understanding of the "executive power" fits the overall constitutional project. By the mid-1780s, the Confederation was near collapse due to its lack of sufficient executive authority, and an urgent need to fix this fatal flaw was a consistent theme of the Constitution's drafting and ratification. (*Executive Power*, P. 15.) The answer to this problem turned out to be, of course, the office of the presidency, vesting in the president the "executive power" to enforce the laws. This power, though subordinate to and confined by the legislative authority, was regarded as enormously consequential and dangerous. Proponents of the Constitution therefore strained to reassure people that the president was not a king by some other name, emphasizing that the former had fewer, more constrained powers than the latter. (*Executive Power*, P. 72.) Professor Mortenson acutely observes that, given the strongly anti-monarchical views of the day, "it would be deeply weird to imagine that the Framers snuck in—much less that the Ratifiers approved—an amorphous mass of royal

power that no English monarch has claimed since James II." (*Executive Power,* P. 72.) The royal prerogative is a pretty big elephant to stuff into Article II's executive power mousehole.

Professor Mortenson concludes that "[a]s a historical matter, the competition between the royal residuum and law execution interpretations of the Executive Power Clause isn't close." (*Executive Power,* P. 88.) The latter commands essentially unanimous support in the historical materials; the former rests on "an interpretation whose proponents have yet to identify a single sentence of direct affirmative support among the millions of words contained in our records of framing and ratification." (*Executive Power,* P. 88.) Still, I am quite sure that proponents of an expansive understanding of executive power will have quite a bit to say in response to Professor Mortenson's extraordinary articles—i.e., this is not the sort of debate that ends. It will be very interesting to read these responses.

The preceding paragraph sure reads like a closing paragraph, but I have just a couple more observations to make that I didn't manage to weave in before now. First, both *Article II* and *The Executive Power Clause* are delights to read. The text is wonderfully clear and at times downright breezy; the deep research is always handy in the extremely extensive footnotes. Also, Professor Mortenson's work has engendered a remarkable amount of popular attention, with discussions appearing in venues such as *The Atlantic, Slate,* and the *Lawfare Podcast*. It seems like the scope of executive power is on a lot of people's minds. If you would like to hear about this research while, say, gardening or on a long drive, you might check out The Lawfare Podcast: Julian Mortenson on "The Executive Power" or Amicus With Dahlia Lithwick: Redefining the Executive Power.

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