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Summer 2009

Review of The Constitution's Text in Foreign Affairs

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Recommended Citation

Marcus, Daniel and Maeva Marcus. Review of The Constitution's Text in Foreign Affairs, by Michael Ramsey. *Law and History Review*, 27, no. 2 (2009): 472-473.

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Book Review

Michael D. Ramsey, *The Constitution's Text in Foreign Affairs*, Cambridge: Harvard University Press, 2007. Pp. 492. \$65.00 (ISBN 0-674-02490-7).

American constitutional historians and jurists have debated for decades what to make of the Constitution's relative silence about foreign affairs. The framers said a good deal about one aspect of foreign affairs—war powers—which they spelled out in some detail, allocating them between Congress and the President. But there are only a few provisions dealing with diplomacy and foreign affairs more generally, empowering the President to make treaties and name ambassadors, but only with the advice and consent of the Senate. Nonetheless, the lesson of American history and constitutional law, at least since the early twentieth century, is that the President has the preeminent if not exclusive role in shaping and conducting U.S. foreign policy.

As the title of his book suggests, Ramsey's mission is to find a basis in the Constitution's *text* for the President's foreign affairs powers, and to use that text—as illuminated by history and the structure of the Constitution—as a basis for resolving the major issues as to the roles of the President, Congress, federal courts, and the states, in foreign affairs. His tools in accomplishing this mission are a keen, clear, and largely persuasive, legal analysis, combined with a careful but incomplete, and ultimately unsatisfactory, exploration of historical sources for the founding era.

Ramsey is not the first historian or constitutional scholar to take issue with the breathtaking extra-constitutional conception of Presidential power over foreign affairs embodied in the Supreme Court's 1936 *Curtiss-Wright* decision. There Justice Sutherland set forth the theory that the President has broad and exclusive authority over foreign affairs, derived not from the Constitution but from the sovereignty of the national government. Ramsey exposes substantial flaws in this theory, both as a matter of history and as inconsistent with the delegated-powers structure and theory of the Constitution.

Ramsey's alternate thesis is that a *textual* basis for the broad Presidential authority that we accept today can be found in the Vesting Clause of Article II, Section 1, which grants to the President the "executive power." His central argument is that the term "executive power" was understood by the founding generation to include the power to direct the foreign affairs of the nation, conducting diplomacy, entering into international agreements, settling disputes, and defending the nation from attack. But it does not include the power to legislate, i.e., to affect the domestic polity. So, for example, the *Steel Seizure* decision was correct, because President Truman was improperly extending his power as Commander in Chief to alter "domestic rights and duties within the U.S. legal system."

Ramsey courageously tackles most of the specific interpretive issues that have vexed scholars and that the courts have dodged or fudged: Can the President take the nation to war without a declaration of war or other authorization by Congress? Does the President's commander-in-chief power under Article II permit him to ignore laws passed by Congress pursuant to its Article I powers that impinge on his authority? Can a ratified treaty be terminated by the President without action by the Senate, whose consent was required to make the treaty effective in the first place? Can the President enter into "executive agreements" with other nations without the advice and consent of the Senate? Do such executive agreements preempt state law under the Supremacy Clause? Can the President, by adopting a foreign policy for the nation, himself preempt the states from acting inconsistently, or can only Congress by legislation trigger the Supremacy Clause? Is there a "dormant" foreign affairs power limiting the states in a manner comparable to the dormant Commerce Clause? Is customary international law part of U.S. law, and what are the respective roles of the President, Congress, and

the courts in making it so?

In answering these questions, however, Ramsey's relentlessly logical analysis leads him to privilege the text while downplaying a basic belief of the founding-era generation that the Constitution set forth only a general framework to be fleshed out by experience. (His startling conclusions as to the role of states in foreign affairs, for example, may be supportable by textual exegesis but surely are trumped by the historical record.) Had Ramsey consulted *The Documentary History of the Supreme Court of the United States, 1789–1800*, he would have found material that would have given him a more complete understanding of the historical evidence he uses (Washington's appointment policy, the neutrality proclamation, advisory opinions, *Ware v. Hylton*, among other matters) and obliged him to temper some of his textual interpretations. Ramsey's excessive reliance on history found in law journal articles causes him to miss the nuances of many of the controversies he discusses (including the *Steel Seizure Case*) and mars the implementation of one of the express purposes of his work: to inquire into historical meaning in order to explicate the text of the Constitution.

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