



Constitutional Ambiguity and the Interpretation of Presidential Power

Waterman, Richard W. Albany, NY: SUNY Press, 2025. 324 pages. \$120 (hardcover); \$35.95 (softcover)

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BOOK REVIEW

Waterman, Richard W. ***Constitutional Ambiguity and the Interpretation of Presidential Power***. Albany, NY: SUNY Press, 2025. 324 pages. \$120 (hardcover); \$35.95 (softcover).

Richard W. Waterman argues in *Constitutional Ambiguity and the Interpretation of Presidential Power* that "... constitutional ambiguity provides the foremost opportunity for presidents ..." to stretch the limits of executive power (1). He considers three leading theories of understanding the Constitution in his book: First, "strict constructionism"; second, the "living Constitution"; and third, "the unitary executive theory" (2). His discussion depends heavily on "an eclectic assemblage of observers of the presidency" (including "the Framers ... judges ... presidents, members of Congress, experts in both constitutional law and theory, historians, political scientists" and many others) who "... often provide a different viewpoint on presidential power" than modern scholars (2). The author calls on these "... different perspectives across time to develop a more generalizable and reliable focus on the changing nature and scope of presidential power" (4).

In Chapter 1, Waterman considers the "... undefined nature of the president's Article II powers," working through the list of constitutional grants to the president (9). He then does a deep dive in Chapter 2 to examine how the Constitution first came about by surveying many of the topics related to the Founding, including the Articles of Confederation, the role of state constitutions, and the ratification debates. Waterman observes that "... the Framers spent little time debating or delineating the powers of the new presidential office ..." and made deals to reach an agreement, but because key areas were "largely left undefined," there has always been "... ambiguity regarding the meaning of the various presidential powers" (55).

Constitutional ambiguity has not resolved itself over the years, Waterman argues in Chapter 3. Because of the Framers' and ratifying conventions' decisions not to clarify presidential power, "... we are left with the concept of presidential power unmoored to a specific definition" (57). Here, Waterman contends that "... constitutional ambiguity has been a subject of continuing concern as well as a mainstream idea in the realm of constitutional interpretation" and in this chapter, he relies on "... a historical time series of the viewpoints of observers of the presidency across American history" to show this dynamic (59). Waterman notes, "presidents who seek power, and may not find explicit justification for it in the constitutional text, can use the wiggle room provided by constitutional ambiguity to redefine their powers" (79–80).

In Chapter 4, Waterman argues that one reason why the Constitution was not much studied in its early years was because of "... a lack of quality law schools and available legal documentation" (82). He looks at how before the Civil War, scholars generally did not have access to the needed documents, nor was the general public adequately educated on similar issues (83). Waterman notes how, unfortunately, this situation has parallels today, as "... there is little evidence that the public is knowledgeable about ..." the Constitution in modern times (113).

Chapter 5 is, in Waterman's words, "... a case study of how ambiguity impacted both the powers of the presidency and the nation's perception of itself ... ambiguity affected many of the words of the Constitution, including its first three: 'We the People'" (115). Waterman notes how "... ambiguity provided the discretion necessary for individuals, politicians, and even judges to interpret the Constitution in different

and not necessarily consistent ways,” especially in the context of the Civil War (159). Waterman then turns to the three theories identified in the book’s introduction and devotes a chapter to each of them.

The focus of Chapter 6 is on “strict constructionism,” and Waterman finds that this theory was generally adhered to by early presidents, except for when a few of them believed that they had a good reason to deviate from it (201). These well-known deviators are discussed in this chapter: George Washington, Thomas Jefferson, Andrew Jackson, John Tyler, James Polk, Abraham Lincoln, and Andrew Johnson (201). Waterman points out that “strict constructionism” lost its appeal because it “... established a presidency that was too weak and especially ill-equipped to deal with the realities of a nation emerging ... as a world foreign and economic power” (203).

In Chapter 7, Waterman points out that one advantage of the “living Constitution” is that it “... provided a rationale for an expanded presidential role” in a quickly changing world (205). However, this theory is also flawed: having established that the Constitution itself was ambiguous, Waterman observes that “... a living constitution leaves wide open the question of precisely which powers should be assigned to a flexible, elastic, organic, and living presidency,” and its limits remain unclear (217–218).

In Chapter 8, Waterman examines the third theory of constitutional interpretation, referred to as the unitary executive theory. As Waterman notes, Richard Pious explains that because the president has the “executive power,” “... all executive functions are to be exercised by the president and subordinates; Congress may not infringe on the ‘core functions’ of the presidency ... and the president’s powers are anterior and superior to those of Congress ...” (233). The advantages of a unitary executive, the author observes, are offset by its downsides: namely the fact that it exists “to expand the power of the presidency over the executive branch ... without definable limits” (268). Waterman finds that, of the three theories examined in his book, “each approach has potential benefits, but none alone ...” is the right fit for our contemporary world (268).

Waterman concludes in Chapter 9 with a series of questions that build on the groundwork laid in prior chapters. Today, he posits, we need to decide whether the Constitution is enough for the challenges of life in 2025, and how we should understand it going forward (268). Relatedly, we need to decide how much latitude to give presidents, and how to check them (268).

Constitutional Ambiguity and the Interpretation of Presidential Power is an expert-led journey through the history of the American presidency with the concept of constitutional ambiguity as its touchstone. At the end of the trip, there are still no easy answers to the hard questions raised by the book. Still, thanks to Waterman’s thoughtful and thorough analysis, we have a much more informed starting point for discussion of these vitally important issues.

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