

his famous observations, those who came to be the empirical basis for his “syndrome,” were high functioning. They were high functioning because low-functioning children with analogous difficulties would become subject to Jekelius Action rather than to any prolonged period of clinical observation. The case for treating Asperger’s as something distinct from autism may have always rested on a very grim sort of evidentiary selection bias.

I believe it is best if we just call the condition of such folks, myself likely included, “high functioning autism.” When that gets to be too much of a mouthful, just say HFA. There is no need to memorialize Hans Asperger.

Since Sandy Hook

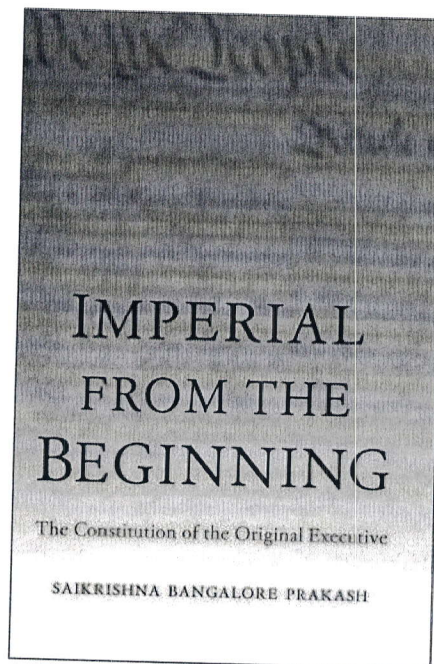
There is no need to memorialize Adam Lanza, either, but I do need to mention him in order to conclude this overlong review of a very fine, thoughtful, and moving book.

Lanza was the perpetrator of the Sandy Hook Elementary School shooting, in December 2012. As part of the normal course of events in the United States, after such a shooting, there was first an outcry about the ease with which the perpetrator obtained the guns, in this case a Bushmaster XM 15-E2D and a Glock 20SF, with which he shot and killed 20 children and six adults.

Then there was a backlash against that outcry. Because Lanza had once been diagnosed with Asperger’s syndrome, the backlash took the form, in some quarters, of a demand to know why someone with Lanza’s mental illness was walking about free. In other words, part of the response to Sandy Hook was a backlash against deinstitutionalization.

Fortunately, the re-institutionalization bandwagon never gathered steam. But it may remind some of us that the benefits of a “spectrum” understanding of autism aren’t just empirical. They are moral. By postulating a continuum from behavior that it quite normal though a bit quirky on the one end, to that of the nightmare cases of people who are locked up in their own skulls and stuck in meaningless repetitive behaviors, on the other end, scientists such as Wing remind us that normalcy itself is precarious. If we make it a habit of institutionalizing people simply because they share some characteristic with a mass shooter, then few if any of us will be safe. ☉

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Imperial from the Beginning: The Constitution of the Original Executive

By Saikrishna Bangalore Prakash

Yale University Press, New Haven, CT, 2015.

454 pages, \$45.

Reviewed by Louis Fisher

From the title of this book and its early chapter headings (including “A King, Under the Title of President” and “Constituting ‘His Highness’ the President”), readers might think that Saikrishna Bangalore Prakash is offering the U.S. President as a replica of William Blackstone’s king, who had power over all external affairs, including the power to declare war, to make treaties, and to appoint ambassadors. But the introduction to *Imperial from the Beginning* quickly belies that. “When Presidents exercise the right to decide whether the United States will wage war,” Prakash writes, “they act contrary to the original Constitution. . . . The Constitution grants many traditional executive powers to Congress, such as the power to decide to wage

war.” Prakash notes that “executive privileges and immunities, while fitting in more thoroughly regal systems, are best seen as foreign to the Constitution’s republican monarchy.” The term “republican monarchy” is in obvious tension, sounding like an oxymoron. Why would Prakash describe a system of self-government and separation of powers, operating through checks and balances, as a monarchy?

In discussing the Constitution’s framework for foreign affairs, Prakash acknowledges that many of the Framers “believed that the English Constitution ceded too much foreign affairs power to the Crown and that some aspects of foreign affairs had legislative overtones (such as the war power).” In drafting the Constitution, a number of exceptions “to the grant of executive power ensured that the President would have fewer foreign affairs powers than the English monarch.” Under an 18th-century English legal principle, the Crown could “do no wrong.” Americans, as Prakash notes, “knew from experience that he could.” They would also learn of the capacity of Presidents to do wrong.

Still, Prakash occasionally reintroduces the theme embodied in the book’s title, as when he writes: “The picture that emerges from the founding era is of an elective monarch, constitutionally limited in a number of significant ways.” He claims that “the Constitution’s presidency was redolent of monarchy,” while admitting that, “[f]or many, monarchy implies life tenure, with heirs succeeding to the throne. . . . Monarchy implies singularity; where authority is split among many, one is tempted to say that there is no monarch.” What is gained by using the word “monarch”? What evidence justifies its use?

As Prakash correctly notes, the Senate in 1789 debated whether the President should be styled “His Highness the President of the United States of America and Protector of the Rights of the Same.” An alternative proposal was “His Excellency.” Prakash does not mention that a House committee strongly opposed these titles, believing that “it is not proper to annex any style or title to the respective styles or titles of office expressed in the constitution.” Representative Thomas Tucker of South Carolina said that, if Congress intended to vote on such titles, it should add “an embroidered robe, a princely equipage, and finally, a crown and hereditary succession.”

He added, "This spirit of imitation, sir, this spirit of mimicry and apery will be the ruin of our country. Instead of giving us dignity in the eye of foreigners, it will expose us to be laughed at as apes."

Representative James Madison of Virginia joined in the attack on the Senate's proposal, stating that high-sounding titles for the president would "diminish the true dignity and importance of a republic," warning that borrowing titles from Europe would be "servile imitation ... odious, not to say ridiculous also." And why elevate the President to be "Protector of the Rights of the [People]"? Certainly that duty rests with Congress as well. Under this onslaught, the Senate agreed not to confer a title on the President. Congress wanted no part in recognizing in the President some type of monarchy, however defined or limited.

Prakash concedes that, when we read the Constitution today, "the semblance to monarchy is difficult, almost impossible to perceive. The text seems wholly republican in nature." Article IV guarantees each state a republican form of government, "suggesting that the Constitution likewise created a republic at the federal level, for who would erect a federal monarchy over a series of republics? Moreover, in the same article the Constitution speaks of republican 'citizens' rather than regal 'subjects.'" But Prakash then writes: "by giving the president command of the military, treaty authority, and powers to appoint to office, and dispense mercy, the Constitution guaranteed comparisons to European monarchs." This description conflicts with Prakash's earlier recognition that the Constitution vests the power to go to war in Congress, not in the President, and overlooks that the President's authority over treaties and appointments is shared with the Senate. Prakash concludes Chapter 1 with these words: "Of George W. Bush, it was said that he acted as a monarch. It is said of Barack H. Obama. And it will be said of future chief executives." But partisan attacks do not add monarchical qualities to the office of the President.

Further into the book, Prakash describes the model of the "Unitary Executive as a 'Poetus of a Monarchy.'" Proponents of a "Unitary Executive" insist that all constitutional powers to execute the law are vested in the President, but that has never been the case. In 1789, when the First Congress agreed that the President had authority to remove department heads, it also recog-

nized that the Comptroller in the Treasury Department did not serve at the pleasure of the President. Instead, he was recognized as carrying out quasi-judicial work in deciding claims against the government and other matters.

Prakash describes the scope of the Comptroller's duties in some detail, but he states that the Comptroller was subject to presidential control and that President Washington "directed his comptroller." What kind of control? By reviewing a comptroller's decision and revising it? No evidence exists that Washington ever attempted to do that. Prakash says that Washington directed the Comptroller to examine a particular claim, but certainly not that Washington sought to decide or control the outcome. As Prakash explains, Washington "might have concluded that when a law authorized a specific officer to make a decision, only that officer could take action, and that the president ought not interfere, much less direct the final decision."

Prakash mentions that Attorney General William Wirt in 1823 advised President James Monroe that he could not revise the decisions of accounting officers, but Prakash says that this "reading of the Constitution is flawed." Because the President "has the power to execute the law, he may execute any federal law himself." Even at the time of the Monroe administration, however, Wirt said that such a burden would be "an impossibility." It was not the duty of the President to audit public accounts. In one opinion, Wirt told Monroe that any interference by the President in the settlement of accounts would "be illegal." Subsequent attorneys general provided the same advice to Presidents. For example, Attorney General John Crittenden advised President Millard Fillmore in 1850 that a decision by the Comptroller on a claim was "final and conclusive" on all branches of the executive government. Presidents had no business getting involved: "*the settlement & adjustment of accounts have been left to accountants.*"

As Prakash points out, the scope of the President's removal power reached the Supreme Court in the 1926 case of *Myers v. United States*. As he says, the Court "embraced the Madisonian view" of an implied power of the President to remove department heads. That is largely true, but Prakash does not explain that the Court specifically recognized two significant limits to the President's removal power. The first was:

"Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." This is what Chief Justice Marshall in *Marbury v. Madison* called "a ministerial act," where an executive officer's obligation is not to the President but rather to a statutory policy assigned by Congress. The second limit on the removal power was: "Then there may be duties of a *quasi*-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." These are decisions by comptrollers, accountants, and auditors described by a number of attorneys general.

The theory of the Unitary Executive is undercut in a number of passages. With regard to foreign affairs, Prakash states that the Constitution "left the most consequential executive powers with Congress and made other vital powers exercisable only with the Senate's consent." He acknowledges that Congress "has created numerous executive fiefdoms called 'independent' agencies, and the Supreme Court has sanctioned their constitutionality."

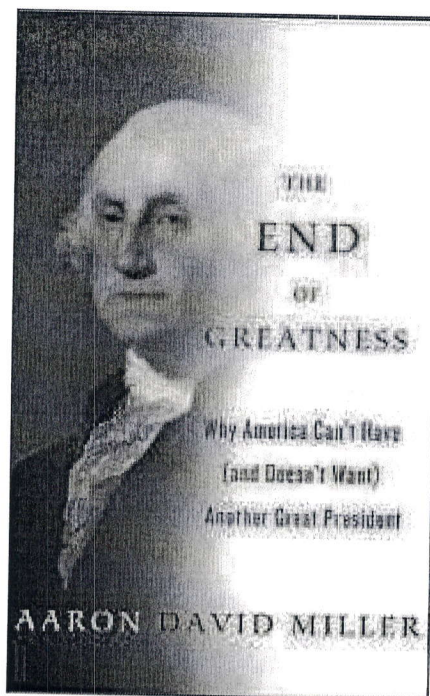
In several places, Prakash states that Congress is limited to the powers expressly granted to it. Because Article I begins with "All legislative Powers herein granted shall be vested in a Congress," this clause "evidently does not grant Congress any power not enumerated. ..." Similarly, an "obvious" reading of the Constitution leads one to conclude that Congress "is limited to its enumerated powers." Yet all three branches, from the beginning, had access to a combination of enumerated and *implied* powers. The latter were those that could be inferred from enumerated powers. Because it is the duty of the President to see that the laws are faithfully carried out, if a department head is unable or unwilling to carry out a law, the President has an implied power to remove that person. Because the "judicial Power" of the United States is vested in the Supreme Court and inferior courts, courts may need to reach constitutional questions through the power of judicial review, even though that is not expressly stated. And, because the legislative power is placed in Congress, in order to exercise that power in an informed

manner Congress has the implied power to investigate, issue subpoenas, and hold in contempt those who fail to testify or submit requested documents.

According to Prakash, the President “may forbid executives from investigating and prosecuting him.” Yet Nixon could not stop the prosecutions in Watergate that drove him from office. Independent Counsels not only investigated Clinton while he was in office but made it clear that they would pursue him after he left office, leading him to make a financial settlement with Paula Jones and admit that he had committed perjury. Because the Iran-Contra investigation had the capacity to impeach Reagan, he was the first President to completely waive executive privilege. Prakash places this limitation on Presidents: “Nor can the president finance and supply the militia by using his own wealth or that of private donors.” The Reagan administration, however, sought and received funds from foreign governments and private citizens to assist the Contras, resulting in the prosecution and conviction of several people.

Prakash provides a closely researched analysis of various presidential duties, focusing primarily on the early decades. His work is thoroughly documented by more than 2,000 notes referring to original and secondary sources. Much of the book, however, is devoted to analyzing a range of presidential duties that are not related to the title’s theme about the President serving as some type of monarch. ☉

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The End of Greatness: Why America Can't Have (and Doesn't Want) Another Great President

By Aaron David Miller

Palgrave MacMillan, New York, NY, 2014.

280 pages, \$28.99.

Reviewed by John C. Holmes

Early in *The End of Greatness*, Aaron David Miller names America's greatest Presidents, in chronological order, as “Washington, Jefferson, Jackson, Lincoln, Teddy Roosevelt, Wilson, FDR, and Truman.” Not surprisingly, Miller finds the three greatest among those to be George Washington, Abraham Lincoln, and Franklin D. Roosevelt. Washington, by abiding by and strengthening the importance of the Constitution, as well as by refusing to run for a third term that he could easily have won, stands tall among the top three. Lincoln, seemingly ill-fitted for the office and whose election led to the horrendously costly Civil War, just before he died began the healing process to bind the nation together. Roosevelt, who saw the nation through the Great Depression and led it to economic recovery, presided over the most tragic war in history.

The other Presidents among the greatest that Miller names—those he calls the “close but no cigar” crowd—left legacies that were “impressive, but not nearly as transformative

or groundbreaking” as the top three. Thomas Jefferson, Andrew Jackson, Theodore Roosevelt, Woodrow Wilson, and Harry Truman did not face “the nation-encumbering calamities or crises faced by Washington, Lincoln, or FDR. ...” Nevertheless, these second-tier greats “all stood at critical junctures in the nation's story” and, “denied the urgency and pressure for consequential policy changes, had to do more to create their own constituencies.” Miller finds Eisenhower underrated but not great. Concerning the post-Eisenhower Presidents, Miller writes:

Anyone watching the presidential movie over the past half century can be both inspired and depressed, but never bored. Since Eisenhower retired to his farm in Pennsylvania, the presidency has been one wild and bumpy ride. It has emerged as part soap opera, part psycho drama, and part deadly serious business. The story line has been advanced by some extraordinary characters: first the drama of Kennedy and Camelot and another martyred president; next scene, the tragedy and travails of the truly larger-than-life Lyndon Johnson; next up, Richard Nixon, perhaps the most fascinating and complex character in the history of the presidency, and the Watergate scandal that did so much to damage it; followed by the short sagas of Gerald Ford, a good man whose basic goodness, decency, and resulting decision to pardon his predecessor probably made his reelection almost impossible, and of course Jimmy Carter, one of our smartest presidents, who hated politics and did not understand how to use the presidency; and then, enter stage right, a president literally from Hollywood, who did. Ronald Reagan, though not a great president like our other top performers, was great at being president at a time when the country needed it. The drama then winds down with the experienced and, by his own admission, visionless George H. W. Bush, and then ramps up again big-time at home and abroad for another sixteen years of roller coaster rides: eight under Bill Clinton, compelling rascal and brilliant politician, who presided over

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