



I have to admit, I approached *Executive Unbound* with some trepidation. In the opening paragraphs, the authors announce that we live “in an age after the separation of powers, and the legally constrained executive is now a historical curiosity.” What’s more, they urge us to celebrate this development.

The *New York Times* book editors assigned their review to the Straussian political philosopher Harvey Mansfield, the self-styled expert on “manliness” who’s as rabid a supporter of the imperial presidency as you’re likely to find. In the late Bush era, Mansfield wrote a 3,000-word *Wall Street Journal* op-ed, “The Case for the Strong Executive,” arguing that defects in the rule of law “suggest the need for one-man rule.”

Yet even Mansfield blanched at *Executive Unbound*’s case for unbridled presidential power. He began his review by noting indignantly, “Eric A. Posner and Adrian Vermeule, law professors at Chicago and Harvard, respectively, offer with somewhat alarming confidence the ‘Weimar and Nazi jurist’ Carl Schmitt as their candidate to succeed James Madison for the honor of theorist of the Constitution.”

Gott im Himmel! A book that embraces a leading “Nazi jurist,” applauds the American presidency’s liberation from law, and is apparently hardcore enough to scare manly Harvey Mansfield? What sort of work is *Executive Unbound*? A *Satanic Bible* for worshippers of the strong presidency? The black-metal version of John Yoo?

As I dug into the book—while Tomahawk missiles rained down on Libya in yet another unauthorized presidential war—that’s what I was expecting. But Posner and Vermuele have produced something very different and, quite to my surprise, I liked it.

Honesty goes a long way. Unlike Yoo, the law professor and Justice Department official who served as legal craftsman for the Bush administration’s Terror Presidency, *Executive Unbound*’s authors don’t try to stretch the Constitution to fit whatever actions modern presidents feel they have to take—from ignoring federal statutes restricting surveillance and torture to launching wars at will. Posner and Vermuele don’t waste a single word trying to convince you that the modern presidency is consistent with the Constitution. (The book has only two passing citations to Yoo’s work.) Instead, they argue that the Constitution doesn’t matter.

Their book makes a refreshingly straightforward case that the modern presidency is unconstrained by law—and that you should like it that way. Even those who, like me, disagree vehemently with the latter proposition will find Posner and Vermuele’s arguments provocative and challenging.

The authors’ target is “liberal legalism,” the idea that law, promulgated by representative legislatures and guarded by the judiciary, “does and should constrain the executive.”

Does the law constrain the modern president? *Executive Unbound* makes a powerful case that it does not. The modern presidency looks nothing like the modest, businesslike, law-governed executive the Framers envisioned, and Congress and the Supreme Court show little inclination to put the president back in his proper constitutional place. Like it or not, this is the way our government works, Posner and Vermuele argue—and, indeed, it does work that way.

Should law constrain the president? Posner and Vermuele argue that it should not. Political checks are adequate for curtailing “the most lurid forms of executive abuse,” they insist, and since “no democracy has collapsed” in any nation with a sufficiently high average income, “tyrannophobes” need to relax. It turns out that *Executive Unbound* is a somewhat misleading title. The book doesn’t argue that modern presidents are totally unconstrained—just that legal constraints are far less important than political ones.

The transition from “does” to “should”—from positive to normative—is where the problems begin. Posner and Vermuele argue that the legally unconstrained presidency isn’t just inevitable, it’s good: necessary to meet the challenges of the modern world at home and abroad. Here they go badly astray. But first let’s look at their positive case, which is quite strong.

Liberal legalism “has collapsed under the pressure of fact,” the authors contend. Sundry emergencies—along with public demands for quick action in non-crisis situations—have overwhelmed the quaint and fragile Madisonian system of separated powers. The authors draw on the insights of Carl Schmitt to argue that the rule of law cannot hold when things fall apart and crises, real or imagined, strike. Given Schmitt’s background—among other things, he was a Nazi Party member from 1933 onward, the one-time president of the Union of National-Socialist Jurists, and an apologist for the Night of the Long Knives—this is what you might call “leading with your chin.”

In fact, between the galley copy and the hardcover, someone—a timorous editor?—got cold feet. Schmitt is “our hero,” the authors announce on page four of the galley, contrasting themselves with liberal legalists who lionize Madison. The final copy was toned down to “we draw upon the thought of the Weimar legal theorist Carl Schmitt.”

It's hard to resist the opportunity for cheap shots, and Posner and Vermuele don't make refraining easier when they write law review articles with titles like "Should Coercive Interrogation Be Legal?" (answer: yes!).

But if a philosopher invokes Heidegger, crying "Nazi!" hardly counts as a sound refutation of the argument: you can't dismiss a theory by pointing to the character of the theorist. And Schmitt's view that "the rapidity of change in the policymaking environment" overwhelms legislative responses, making "executive government inevitable," surely has something to be said for it as a descriptive matter. For example, *Executive Unbound's* authors show that in the twin crises that bookended the Bush presidency—9/11 and the financial collapse of late 2008—Congress shrank from responsibility, delegating vast powers to the president with little resistance from the judiciary.

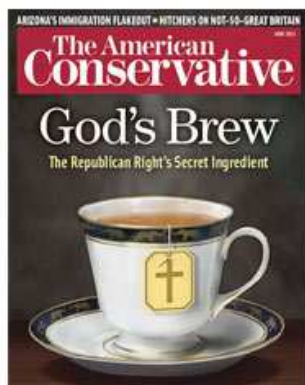
Madison imagined a self-reinforcing constitutional architecture in which "the interest of the man"—that is, the ambitions of individual representatives, judges, and presidents—would lead each to defend "the constitutional rights of the place," the authority of the particular branch he occupied, thus preserving limited government and individual liberty.

Things haven't worked out as planned. Individual presidents have every reason to protect and expand their power, but individual senators and representatives lack similar incentives to defend Congress's constitutional prerogatives. "Congress" is an abstraction. Congressmen are not, and their most basic interest is getting reelected. Ceding power to the White House can be a means toward that end: even in nonemergency situations, doing so allows members to have their cake and eat it too. They can take credit for passing high-minded, vaguely worded statutes, and take it again by railing against executive-branch bureaucracy when it imposes costs in deciding what those statutes mean.

On the rare occasions when Congress attempts to cabin executive discretion, the authors note, it usually does so through "framework statutes" that "have a Potemkin quality," offering a facade of constraint without the substance. One of their examples is the War Powers Resolution, passed over Nixon's veto in 1973, to, as section 2 proclaims, "fulfill the intent of the framers of the Constitution ... [and] insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."

As Posner and Vermuele point out, though, the WPR has been a spectacular failure in achieving that purpose. In the 37 years since the resolution's passage, presidents have put troops in harm's way over 100 times without letting the law cramp their style. During 1999's Kosovo War, President Bill Clinton exposed the resolution for the parchment barrier it is, becoming the first president to wage war beyond its 60-day limit and daring the other branches to stop him. (They didn't.)

We can expect much the same from President Obama should our involvement in Libya last beyond mid-May. And given the institutional constraints that *Executive Unbound's* authors identify, it would be surprising if Congress or the courts acted forcefully to check him.



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So far, so good—albeit depressing. For the most part, Posner and Vermuele play the role of dispassionate analysts: here's what the political science data show, don't shoot the messenger. Yet there's a normative aspect to their argument as well. And when they shift from "this is the way it works" to "it's swell that it works that way," *Executive Unbound* becomes dramatically less persuasive.

Legal checks "have been relaxed largely because of the need for centralized, relatively efficient government under the complex conditions of a modern dynamic economy and a highly interrelated international order." What's more, the authors insist, America needs the legally unconstrained presidency both at home (given an increasingly complex economy) and abroad (given the shrinking of global distances).

These are disputed points, to say the least. If Friedrich Hayek was at all correct about the knowledge problem, then if anything increasing economic complexity argues for less central direction. Nor does the fact that we face "a highly interrelated international order" suggest that we're more vulnerable than we were in 1789, as a tiny frontier republic surrounded by hostile tribes and great powers. Economic interdependence—and the rise of other modern industrial democracies—means that other players have a stake in protecting the global trading system.

Posner and Vermuele coin the term "tyrannophobia," which stands for unjustified fear of executive abuse. That fear is written into the American genetic code: the authors call the Declaration of Independence "the ur-text of tyrannophobia in the United States." As they see it, that's a problem because "the risk that the public will fail to trust a well-motivated president is just as serious as the risk that it will trust an ill-motivated one." They

contend that our inherited skepticism toward power exacerbates biases that lead us to overestimate the dangers of unchecked presidential power. Our primate brains exaggerate highly visible risks that fill us with a sense of dread and loss of control, so we may decline to cede more power to the president even when more power is needed.

Fair enough in the abstract—but Posner and Vermuele fail to provide a single compelling example that might lead you to lament our allegedly atavistic “tyrannophobia.” And they seem oblivious to the fact that those same irrational biases drive the perceived need for emergency government at least as much as they do hostility towards it. Highly visible public events like the 9/11 attacks also instill dread and a perceived loss of control, even if all the available evidence shows that such incidents are vanishingly rare. The most recent year for which the U.S. State Department has data, 2009, saw just 25 U.S. noncombatants worldwide die from terrorist strikes. I know of no evidence suggesting that unchecked executive power is what stood between us and a much larger death toll.

Posner and Vermuele argue that only the executive unbound can address modernity’s myriad crises. But they spend little time exploring whether unconstrained power generates the very emergencies that the executive branch uses to justify its lack of constraint. Discussing George H.W. Bush’s difficulties convincing Congress and the public that the 1991 Gulf War’s risks were worth it, they comment, “in retrospect it might seem that he was clearly right.” Had that war been avoided, though, there would have been no mass presence of U.S. troops on Saudi soil—“Osama bin Laden’s principal recruiting device,” according to Paul Wolfowitz—and perhaps no 9/11.

Posner and Vermuele are slightly more perceptive when it comes to the home front, letting drop as an aside the observation that because of the easy-money policy that helped inflate the housing bubble, “the Fed is at least partly responsible for both the financial crisis of 2008-2009 and for its resolution.” Oh, well—I guess we’re even, then.

Sometimes, the authors are so enamored with the elegant economic models they construct that they can’t be bothered to check their work against observable reality. At one point, attempting to show that separation of powers is inefficient, they analogize the Madisonian scheme to “a market in which two firms must act in order to supply a good,” concluding that “the extra transaction costs of cooperation” make “the consumer (taxpayer) no better off and probably worse off than she would be under the unitary system.”

But the government-as-firm metaphor is daffy. In the Madisonian vision, inefficiency isn’t a bug, it’s a feature—a check on “the facility and excess of law-making ... the diseases to which our governments are most liable,” per *Federalist* No. 62. If the “firm” in question also generates public “bads” like unnecessary federal programs and destructive foreign wars—and if the “consumer (taxpayer)” has no choice about whether to “consume” them—he might well favor constraints on production.

From Franklin Roosevelt onward, we’ve had something close to vertical integration under presidential command. Whatever benefits that system has brought, it’s imposed considerable costs—not least over 100,000 U.S. combat deaths in the resulting presidential wars. That system has also encouraged hubristic occupants of the Oval Office to burnish their legacies by engaging in “humanitarian war”—an “oxymoron,” according to Posner. In a sharply argued 2006 *Washington Post* op-ed, he noted that the Iraq War had killed tens of thousands of innocents and observed archly, “polls do not reveal the opinions of dead Iraqis.”

Alas, in this book a late-inning footnote is the closest the authors come to acknowledging that enhanced executive “efficiency” might make America and the world worse off. It’s note 96 in chapter six, “Tyrannophobia”: “We do not claim, however, that we live in the best of all possible worlds.” Yes, perhaps not.

Executive Unbound amply demonstrates that resurrecting the Madisonian system will be a difficult task, maybe an impossible one. Moreover, the evidence that Posner and Vermuele compile should spur those who recoil from the power and presumption of the modern presidency to a greater appreciation of the role of political—as opposed to legal—checks in restraining executive power. But one thing the book is unlikely to do is make you any less “tyrannophobic.”

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3 Responses to “Hail to the Tyrant”

1. **Leon**, on [May 10th, 2011 at 11:56 am](#) Said:

There are many things necessary to dismantle tendencies toward the oligarchy and tyranny towards which our republic has devolved, including repeal of the 17th ammendment.

Let senators again be directly elected by the legislatures of each state to better secure true representation of each state’s interests within the Constitutional federation. Diffuse power whenever and wherever possible.

2. **paul gottfried**, on [May 10th, 2011 at 2:35 pm](#) Said:

Gene,

I've a long book on the Straussians and the American conservative movement that will be published later in the year by Cambridge University Press. My book deals specifically with the questions that you raise about Mansfield and his love-hate relation to an all-powerful executive. The typical Straussian attitude toward an aggressive presidency is the one found in Schlesinger and in other FDR-Wilson hagiographers of the post-World War Two period. Presidential power is great as long as it advances liberal internationalist aims. The Straussians would also be talking up Obama, if they found his foreign policy sufficiently aggressive in the right ways. After all they adored Lieberman, who was almost as leftwing as Obama when it came to domestic issues.

3. **William Dalton**, on [May 10th, 2011 at 2:59 pm](#) Said:

I'm attracted to your idea, Leon, even though the direct election of Senators was endorsed by that stodgy godfather of strict constructionists, William Howard Taft. No fossil himself, Taft believed an educated electorate, which we had a hundred years ago, was more likely to send competent and progressive Senators to Washington than were the state legislatures who were frequently working in the interest of the dreaded "trusts". Today, of course, the American voter has never been more illiterate, if by literate one means a familiarity with those writings of the historians and political theorists which had informed and inspired the work of the Constitution's framers, and the "trust" Americans have most reason to fear is that whose CEO sits in the Office of the President.

That is why I think the even more essential corrective is one that doesn't even need a Constitutional Amendment – the selection of the Electoral College. The framers feared nothing more than the direct popular election of the government's chief executive. From the cauldron of popular discontent and the availability of a popular military leader had former republics fallen prey in moments of crisis to the siren call of effective tyranny. The purpose of the Electoral College was to prevent the ascension of another Caesar by popular demand, assuring that the President and Vice President would be selected, not by an expression of the vox populi, but a "college" of elders themselves chosen for their wisdom and sagacity, who would be the best to entrust with the critical task of electing "the commander in chief".

How to do this? Return the choice of electors to the state legislatures, which even today every state legislature has the power to do without amending the Constitution, or, if electors are to be chosen by popular balloting, require that they run in their own name and on the basis of the confidence the public can repose in them to make a wise choice, and forbid them from pledging themselves in advance to any "candidate" for the Presidency. Prior to the Twentieth Century, it was considered unseemly, a mark of dangerous ambition, for any man to campaign on his own behalf to become President. That would be a good custom to restore in the Twenty-First Century. Separate the Office of the President from the American people and the strength derived from enjoying popular confidence and the power of those who hold the office will again reside where it is supposed to reside – in the faithful execution of the laws enacted by Congress and those treaty obligations to foreign powers ratified by the Senate. When the name of the President of the United States is no better known to the average American than are the names of the Chief Justice or the Speaker of the House will we know that the Constitutional balance has been restored.

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