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## Law Matters, Even to the Executive

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## LAW MATTERS, EVEN TO THE EXECUTIVE

*Julian Davis Mortenson\**

POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11. By *Jack Goldsmith*. New York: W.W. Norton & Co. 2012. Pp. xvi, 252. \$26.95.

THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC. By *Eric A. Posner* and *Adrian Vermeule*. New York: Oxford University Press. 2011. Pp. 210. \$29.95.

### INTRODUCTION

In both constitutional and international law, many legal rules cannot be implemented without what most people would describe as the voluntary compliance of their target. Is that really “law”? Or is rule compliance in such circumstances just an expression of “interests”? Forget jurisprudence for the moment. As a practical matter, what does it mean to work as a lawyer in a field where the rules are not coercively enforced against private parties by an independent judiciary whose orders are implemented by a cooperative executive? This question has particularly high stakes for national security policy, where we find judicial deference at its highest, the centralization of modern government at its most pronounced, delegations of authority to the executive at their broadest, and contempt for idealism at its most self-satisfied.

Two recent books on executive power prompt this return to such well-trodden ground. In *The Executive Unbound: After the Madisonian Republic*, Eric Posner<sup>1</sup> and Adrian Vermeule<sup>2</sup> claim that the constitutional rule-of-law apparatus is basically worthless. In *Power and Constraint: The Accountable Presidency After 9/11*, Jack Goldsmith<sup>3</sup> says just about the opposite. This Review argues that Goldsmith is right and supplements his account by identifying a key mechanism in the political economy he describes. The Review begins by separating the various threads of argument advanced by Posner

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and Vermeule to expose how implausible their conceptual claims will seem to most lawyers. It then explores how their (largely unsupported) descriptive claims are contradicted by Goldsmith's empirical account as well as by other evidence adduced here. The Review closes by suggesting that one of the most plausible causal mechanisms for the efficacy of law—the deep vein of respect for legality that characterizes our culture—is itself a primary target of Posner and Vermeule's project.

Posner and Vermeule make three kinds of arguments. First, they make a theoretical claim about the necessary conceptual vacuity of legal rules that apply to the executive. Leaning heavily on Carl Schmitt, they argue that law itself—certainly the actual laws applicable to executive action in the American system, but perhaps even law in general—is an elaborate shell game with no interpretive constraint beyond what the decider decides. The second claim is empirical: regardless of whether law contains interpretive limits conceptually, the only thing that in fact constrains the American presidency is politics, construed narrowly as competition between self-interested electoral constituencies. On this model, law is a smokescreen for brute policy clashes between political enemies, and presidential behavior changes only as a function of evolving majoritarian political preferences. The third claim is a prediction about the federal separation of powers: while modern governance cannot help but evolve into radical executive-centricity, we shouldn't worry about it because tyrannical policies are unlikely to result.

These claims are individually wrong and collectively dangerous. The first—that law does not impose genuine interpretive constraints—is simply implausible. Virtually any legal norm leaves room for interpretation, and virtually any legal rule has boundaries beyond which its application is uncertain. But that doesn't mean that law as such contains no meaningful interpretive limits. Posner and Vermeule's inapposite rejoinder that the president "can" ignore the law in secret is no different from the fact that I "can" run a stop sign or throw a rock through a stranger's window at night. The Schmittian theory of law endorsed by Posner and Vermeule is a relic of a time when totalitarianism seemed potentially inevitable and possibly even attractive. Efforts to revive it for modern purposes offer a bridge to nowhere.

Their second argument—that whatever the lawyers say, presidential action is just a function of material political interest—doesn't square with reality. On this question, an ounce of experience (or at least a vaguely plausible empirical grounding) is worth several pounds of theory. Granted, legal obligations are neither perfectly constraining nor the only influence on executive behavior. As Goldsmith's work makes clear, however, lived experience teaches us to take law seriously. In a series of painstakingly researched case studies, Goldsmith builds a richly detailed account of the way structural checks and balances continue to impose real political constraints on the president. But for present purposes, what emerges most usefully from his work is something on which Goldsmith does not focus: evidence that law *as such*, far from being a dependent derivative of power politics, itself regularly

constrains national security policy. Indeed, legal rules limiting official behavior regularly generate compliance—whether effectuated by congressional interference, judicial order, or executive self-policing—that is at odds with the material policy priorities of presidents and their political constituents.

Posner and Vermeule appear at one point to sense this problem, hinting in an elliptical aside that law talk might have force if adopted as a policy priority by sufficiently powerful actors. That move, however, gives the game away. Because for law to matter requires only that people care about it—that we subjectively experience it as a priority worth defending or a liability worth planning around. And in the United States, respect for legality is a core component of the collective national culture: while Goldsmith does not himself make this argument, it is the necessary predicate for many of the episodes he describes. If Posner and Vermeule’s point is that for modeling purposes, we can describe this kind of compliance pull as a mere policy preference, then what first seemed like a radical argument turns out to be a pretty uninteresting exercise in semantics. True enough: law is not magical fairy dust, and its enforcement requires that people in power care about it. But we have known that for a very long time.

That brings us to their third argument, a dramatic descriptive claim about the liberal political order that—were it to become a leitmotif of intellectual and political discourse—would operate to undermine the cultural bulwark of our legal heritage. It is by now trite to observe that the national balance of power has tilted toward the executive branch. But Posner and Vermeule go much further. For them, the Madisonian liberal order has passed into the realm of myth, and structural restraint on the executive into something more like farce. To the extent this picture depends on contingent choices about legal and political structures, their counsel of inevitability operates to entrench existing arrangements that already promote presidential dominance. But there is a deeper risk at work. Both the separation of powers and the efficacy of law depend on a culture of respect for the rules and for the actors who implement them. If law matters because people think it does, then a sustained effort by public intellectuals to deny its relevance may be the most radical act of all. The law is, ultimately, what we do. And debates about whether it is real both reflect and constitute the answer to that question.

#### I. MADISON IN THEORY

Posner and Vermeule pitch their work as descriptive analysis of empirical fact, explaining how politics “actually” function and the way law “actually” works.<sup>4</sup> Despite this sociological posture, their discussion edges repeatedly toward a conceptual claim that public law contains no genuine interpretive constraints. In their view, presidents have not only the practical power but the legal right to do whatever they want, free from constraint as a matter of both sociological fact and legal theory.

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4. *E.g.*, Posner & Vermeule, pp. 13, 88, 207.

On this account, legal restraint is untenable both practically (in terms of whether legal prohibitions have operational legs) and conceptually (in terms of whether rules are logically capable of prescribing definitive limits in the first place). Radical outcome indeterminacy is thus a congenital condition of law in the administrative state,<sup>5</sup> and perhaps even of legal structure more generally. Even when a separation of powers dispute is “accompanied by legal arguments,” the content of such claims is endlessly manipulable: “just another move in the bargaining game” (Posner & Vermeule, p. 63). The upshot is that “the executive governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crisis” (Posner & Vermeule, p. 4). And, crucially, this absence of interpretive constraint in crisis “merely reveal[s] the underlying dynamics that operate de facto in all periods” (Posner & Vermeule, p. 33).

Posner and Vermeule’s loose assertions about the infinite conceptual tractability of legal constraint are no more convincing than those of Carl Schmitt, the intellectual precursor on whom they rest this argument almost entirely. These days, their interest in Schmitt is not unusual: for a man with so many skeletons in his closet,<sup>6</sup> he has enjoyed a remarkable resurgence of scholarly attention.<sup>7</sup> Because of Schmitt’s strange return to prominence, and because Posner and Vermeule rely on his framework as the intellectual foundation of their own,<sup>8</sup> it is useful to expose the implausibility of his claims by being clear about precisely what they are.

Schmitt’s *Political Theology*<sup>9</sup>—the work that most influences Posner and Vermeule’s understanding of legality, legitimacy, and the rule of law<sup>10</sup>—is easy to misread, not least because of what can often feel like its romantic

5. E.g., Posner & Vermeule, p. 85 (“[Judicial review of agency decisions] is a triumph for the nominal supremacy of the APA, but not for any genuine version of the rule of law.”); Posner & Vermeule, p. 97 (discussing how administrative-law doctrines preserve a “facade of lawfulness”). Compare on this point some strange ideological bedfellows. E.g., GIORGIO AGAMBEN, *STATE OF EXCEPTION* 3–7, 30 (Kevin Attell trans., Univ. of Chi. Press 2005) (2003) (making a similar point); DAVID DYZENHAUS, *THE CONSTITUTION OF LAW* 160–73, 196–219 (2006) (similar).

6. Schmitt was a member of the Nazi Party and a prominent official in the Third Reich. WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* 4 (1999).

7. In recent years, a number of Schmitt’s works have been translated into English for the first time. E.g., CARL SCHMITT, *CONSTITUTIONAL THEORY* (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928); CARL SCHMITT, *DICTATORSHIP* (Michael Hoelzl & Graham Ward trans., Polity Press 2013) (1921); CARL SCHMITT, *LEGALITY AND LEGITIMACY* (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2004) (1932). And references to his work in legal scholarship have exploded. David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 *CASE W. RES. J. INT’L L.* 457, 468 (2010) (describing Schmitt’s revival after decades of being “barely discussed outside academic circles, or even much . . . within [them]”).

8. E.g., Posner & Vermeule, pp. 3–5, 18–19, 32–34, 41–45, 51–54, 90–112.

9. CARL SCHMITT, *POLITICAL THEOLOGY* (George Schwab trans., MIT Press 1985) (1922).

10. Posner and Vermeule note that they “do not need, and will dispense with, some of Schmitt’s more jurisprudential and abstract claims.” Posner & Vermeule, p. 32; see also Posner & Vermeule, p. 91 (suggesting that they have cleaned “layers of interpretive dross and continental conceptualisms . . . off of Schmitt’s thinking”). I therefore focus solely here on *Political*

attachment to cryptic formulations. Schmitt is sometimes understood to make the banal realpolitik observation that, during extreme emergencies, political leaders will do whatever they think necessary, regardless of what the law says. But *Political Theology* actually posed a far more radical challenge to the very concept of a Rechtsstaat, claiming that law as such is incapable of imposing any interpretive constraint that can even theoretically restrict an interpreter's decision.

Schmitt's critique began by focusing on crisis. The key analytical concept in this respect was what Schmitt called "the exception"—his word for any circumstance that the positive legal structure does not, and perhaps cannot, adequately anticipate. The distinguishing conceptual characteristic of the exception is that "it cannot be circumscribed factually and made to conform to a preformed law."<sup>11</sup> The necessary consequence of the exception, when it emerges from latency, is the abandonment of law: "unlimited authority" for the sovereign and "the suspension of the entire existing order."<sup>12</sup> In his famous first sentence, Schmitt pointed to this unbound discretion as the hallmark of a person or institution's sovereignty in society: "Sovereign is he who decides on the exception."<sup>13</sup>

So what can the sovereign do in an emergency? For Schmitt, the answer was simple: anything. This is true in two respects: first, the sovereign (and the sovereign alone) "decides whether there is an extreme emergency"; second, the sovereign (and the sovereign alone) decides "what must be done to eliminate it."<sup>14</sup> So far, the cold-blooded realist reading of *Political Theology* seems apt. Schmitt appears simply to identify a social phenomenon that he calls "sovereignty" and to define that phenomenon as a prediction that in dire emergencies, those at the levers of state power will ignore the law and do whatever they think necessary.<sup>15</sup>

Schmitt's real challenge to the rule of law, however, ran much deeper. In part this turned on his particularized assessment of actual legal rules in existing legal systems. Drawing on a critique of what Schmitt viewed as a decaying European parliamentary order,<sup>16</sup> *Political Theology* began by

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*Theology* and its concept of "the exception," see *infra* text accompanying notes 12–13, which is unequivocally central to their claims about the relationship between law and executive power.

11. SCHMITT, *supra* note 9, at 6.

12. *Id.* at 12.

13. *Id.* at 5.

14. *Id.* at 7. Or put differently, "The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited." *Id.*

15. Schmitt associated a *Volk's* failure to exercise such sovereignty with weakness. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 53 (George Schwab trans., Univ. of Chi. Press 2007) (1932) ("If a people no longer possesses the energy or the will to maintain itself in the sphere of politics, the latter will not thereby vanish from the world. Only a weak people will disappear.").

16. See SCHMITT, *DICTATORSHIP*, *supra* note 7. For the later development of his critique of the Western liberal order, see, for example, SCHMITT, *supra* note 15; CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., MIT Press 1985) (1923); and SCHMITT, *LEGALITY AND LEGITIMACY*, *supra* note 7. Schmitt was hardly alone in describing the contemporary decay of liberal constitutionalism. See, e.g., EDWARD S. CORWIN, *TOTAL WAR*

analyzing emergency provisions like the French state of siege and constitutional provisions like Article 48 of the Weimar Constitution.<sup>17</sup> Both purported to limit the executive's power by requiring their invocation to be grounded in some reference to, as Schmitt put it, "the public interest or interest of the state, public safety and order, *le salut public*, and so on."<sup>18</sup> For Schmitt, these limits were beneath contempt—so flexible as to be incapable of specifying interpretive constraint.

From these fact-specific observations about particular emergency power laws, however, Schmitt's position rapidly transformed into a challenge to the very concept of liberal legal order. It quickly became clear that what he called the exception was actually the rule, pervading the liberal state during emergencies and calm alike.<sup>19</sup> Understanding the sweep of that claim takes some explaining. Schmitt grounded his critique in what sounds to modern ears like an absurdly mechanistic account of what it means for a system to be "law." Liberal legal theorists, he suggested, necessarily rely on "a metaphysics that identifies the lawfulness of nature [with] normal lawfulness. This pattern of thinking is characteristic of the natural sciences. It is based on the rejection of all 'arbitrariness,' and attempts to banish from the realm of the human mind every exception."<sup>20</sup> For law to be law in this metaphysical sense, he claimed, requires us to believe the fantastical notion that "the machine now runs itself."<sup>21</sup>

Having stuffed this straw man,<sup>22</sup> Schmitt then pummeled it soundly. "[T]he legal idea," he pointed out helpfully, "cannot realize itself, it needs a

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AND THE CONSTITUTION 176 (1947) ("[T]he separation of powers as a barrier preventing the fusion of [p]residential and [c]ongressional power is today in an extremely enfeebled condition."); Otto Kirchheimer, *Legality and Legitimacy* (Anke Grosskopf & William E. Scheuerman trans.) (1932), in *THE RULE OF LAW UNDER SIEGE* 44, 44–45, 48 (William E. Scheuerman ed., Univ. of Cal. Press 1996) (the delegated "fus[ion of] legislative and executive authority . . . leaves no room for the core element of the principle of legality" and facilitates the "ongoing decay of the legislative state").

17. SCHMITT, *supra* note 9, at 10–15.

18. *Id.* at 6.

19. Note that, in borrowing Schmitt's conceptual framework, Posner and Vermeule reverse his logic. Schmitt starts with a set of observations about emergency and works inward from that fringe case to his nihilistic conclusion about the nature of law everywhere. Posner and Vermeule head in the opposite direction: they start by claiming that legal restraints on executive action are conceptually empty even in the ordinary case, and then extrapolate outward from there to an a fortiori defense of their claims about executive power on the fringes. See, e.g., Posner & Vermeule, p. 106 ("reverse spillover, from ordinary to extraordinary times").

20. SCHMITT, *supra* note 9, at 41.

21. *Id.* at 48.

22. Rule skeptics have often made similar claims about legal theories that take formalism seriously. E.g., JEROME FRANK, *LAW AND THE MODERN MIND* 118 (1930) (mocking "the insistent effort to achieve predictability by the attempt to mechanize law, to reduce it to formulas in which human beings are treated like identical mathematical entities"); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 359 (1973) ("The essence of rule application, as I defined it above, is that it is *mechanical*."). In fairness, there are threads of formalist rhetoric on which such claims can draw. CESARE BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS*

particular organization and form before it can be translated into reality. That holds true for the formation of a general legal norm into a positive law as well as for the application of a positive general norm by the judiciary or administration.”<sup>23</sup> In other words, the fantastical notion is, well, fantastical: the machine cannot run itself.

This does not qualify as blinding insight, much less one that requires a return to Weimar Germany.<sup>24</sup> In Schmitt’s hands, however, the pedestrian observation that no set of rules can successfully prescribe every instance of their application formed the basic premise of a radical conclusion about the essential nature of law itself:

Every legal thought brings a legal idea, which in its purity can never become reality, into another aggregate condition and adds an element that cannot be derived either from the content of the legal idea or from the content of a general positive legal norm that is to be applied.<sup>25</sup>

That additional element is “the decision”: a pure and completely unconstrained choice about what real world outcome a decisionmaker should impose on a particular case, a choice that is “instantly independent of argumentative substantiation and receives an autonomous value.”<sup>26</sup> As a matter of legal theory, *there is no law*—as a matter not of epistemic uncertainty but of ontological existence—until the decisionmaker has made a decision about the juridical outcome. And that decision is fully independent of any interpretive constraints we might have thought that law imposed; it is simply a raw choice driven solely by the decisionmaker’s untethered judgment. This moment of choice is—not by analogy but in fact—another manifestation of the exception, which “frees itself from all normative ties and becomes in the true sense absolute,” departing entirely from the realm of legal constraint.<sup>27</sup>

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ch. 4 (Edward D. Ingraham trans., Philadelphia, Philip H. Nicklin 1819) (1764) (“In every criminal cause the judge should reason syllogistically.”); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 50, 163–64 (Anders Wedberg trans., 1945) (comparing legal studies to scientific discernment of natural laws); C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at vi–vii (Boston, Little, Brown & Co. 1871) (“Law, considered as a science, consists of certain principles or doctrines. To . . . be able to apply them with constant facility and certainty . . . is what constitutes a true lawyer . . .”); MONTESQUIEU, *THE SPIRIT OF THE LAWS* 163 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) (“[T]he judges of the nation are . . . only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor”). See generally MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 17–20 (1986) (discussing a shift from the Founding Era “notion of a constitution as some sort of machine or engine” to the early twentieth-century understanding of the Constitution as an “organism”).

23. SCHMITT, *supra* note 9, at 28.

24. The legacy of this concept runs back at least as far as Oliver Wendell Holmes, Jr., and the realists he inspired. For classic discussions, see O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), and Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L. Q. 274 (1929).

25. SCHMITT, *supra* note 9, at 30.

26. *Id.* at 31.

27. *Id.* at 12.

Like a 1L despairing that the world is without form and void because the reasonableness standard just won't apply itself, Schmitt then concluded that if law cannot mechanistically generate a specified answer for every conceivable question, then its pretensions of interpretive constraint are wholly illusory. So law has no conceptual traction whatsoever, not only in an emergency but even in the most mundane circumstances. "[T]he pivotal [legal] authority is not derived from the norm of decision"; instead, "[w]hat matters for the reality of legal life is who decides."<sup>28</sup>

The response seems so obvious that I always worry I'm missing something. But I don't think so. The fact that discretion exists does not mean that it can't be bounded. The application of a rule to peripheral cases may indeed be difficult or even completely indeterminate. But that doesn't mean interpretive constraints have no purchase generally, or even that such purchase vanishes altogether in the harder cases.<sup>29</sup> This is certainly not the place to rehash well-worn jurisprudential debates, but I expect most lawyers will find that *Political Theology* bears little relationship to their experience of the legal enterprise. Is the "reasonableness" standard for negligence actually unbounded? Does authorizing an agency to prohibit materials that are "hazardous to life and limb" really let bureaucrats do whatever they want? On this score, it speaks volumes that a highly motivated and palpably frustrated Goldsmith was unable, as head of the Office of Legal Counsel, to find a way around statutory prohibitions that were disrupting high-priority counterterrorism initiatives.<sup>30</sup> Even Schmitt eventually found himself arguing that international law (!) contained unambiguous rules forbidding the prosecution of Nazis for aggression.<sup>31</sup> Yes, there are foolish juries, biased judges, self-dealing presidents, and maddeningly imprecise precedents. But the legal system also imposes real limitations, both internal and external to the actors that it regulates. And that brings us to Part II.

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28. *Id.* at 33–34.

29. The classic citation is H.L.A. HART, *THE CONCEPT OF LAW* 90–91, 99, 136–41 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012). Engaging with the important empirical question of how many cases are hard ones is beyond the scope of this Review. But even the most radical critical theorists may find that the actual practice of law presents fewer hard cases than their private lucubrations might have predicted. *Cf.* RICHARD A. POSNER, *HOW JUDGES THINK* 254 (2008) ("Jerome Frank[,] in his twin roles as bomb-throwing legal realist and Second Circuit judge[,] . . . did not abandon legal realism on the bench, but he curbed it; his judicial opinions are well within the mainstream.").

30. *E.g.*, JACK GOLDSMITH, *THE TERROR PRESIDENCY* 71 (2007) ("For months, [we] had been trying to find a way to put an important counterterrorism initiative on a proper legal footing. We had come up empty, however . . . [prompting David Addington to charge that] 'the blood of the hundred thousand people who die in the next attack will be on *your* hands . . . .'"); *id.* at 41 (similar).

31. CARL SCHMITT, *The International Crime of the War of Aggression and the Principle "Nullum crimen, nulla poena sine lege"* (1945), in *WRITINGS ON WAR* (Timothy Nunan ed. & trans., Polity Press 2011).

## II. MADISON IN PRACTICE

Executive theorists have long been preoccupied with the modern viability of checks and balances as a safeguard against tyranny. And it is at Madisonian liberalism—which Posner and Vermeule characterize as governance based on “mutual checking and monitoring by the branches of government” (Posner & Vermeule, p. 18), where “representative legislatures govern” and “law does and should constrain the executive” (Posner & Vermeule, p. 3)—that *The Executive Unbound* directs its fiercest fire. In their view, this vision has “collapsed,” and “law cannot hope to constrain the modern executive.”<sup>32</sup> Instead, “[t]he president may take action in the real world, if necessary in violation of restrictive framework statutes . . . and the sole question will be what Congress or the judges are able or willing to do about it after the fact. The latter question is essentially one of politics, not law . . .” (Posner & Vermeule, p. 111).

Madison’s vision is thus replaced by tautology: the president can do whatever he can do. And for Posner and Vermeule, that’s pretty much anything, at least so far as the other branches are concerned. “Legislators and judges are, for the most part, unable to effectively oversee or monitor the executive[ ],” which means that the “major constraints on the executive, especially in crises, do not arise from law or from the separation-of-powers framework,” and that “liberal legalism has proven unable to generate meaningful constraints on the executive” (Posner & Vermeule, pp. 4, 7, 25).<sup>33</sup>

Their arguments intermingle Schmittian theoretical claims with more pragmatic empirical assertions, a mixing of frames that confuses the exposition. The descriptive sociological component, however, comes in two forms. The first is explicit and institutional: the Madisonian separation of powers is defunct, Posner and Vermeule say, because Congress and the judiciary are not powerful enough to impose their will on the president. The second is implicit and cultural: law as such isn’t important enough, they suggest, to be a significant source of subjective motivation for either political or civic actors.

## A. Durability of the Madisonian Model

So let’s move from theory to fact—from models to evidence. Is the executive in fact “unbound,” at least by Madisonian structural checks and legalistic bean counters? Can we seriously talk about the possibility of “the demise of liberal legalism, of the separation of powers, even of the rule of law itself”? (Posner & Vermeule, p. 14).

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32. Posner & Vermeule, pp. 18, 14–15; *see also* Posner & Vermeule, pp. 11, 207.

33. The book is characterized by a distinctly low regard for the other branches of government. The judiciary cringes, “supine,” in the face of an “overmatch[ing]” executive. Posner & Vermeule, pp. 19, 165. Congress, itself “generally supine” and suffused by “torpor,” “leaks like a sieve” at the best of times and simply “stand[s] aside passively” in crisis. Posner & Vermeule, pp. 8, 26, 61, 170.

The answer is obviously no. In its strong form, Posner and Vermeule's argument far outstrips the evidence they offer. They are surely right that the legislature is "overmatched" by the president some of the time (Posner & Vermeule, p. 19). But to ignore occasions when Congress drove outcomes on political questions of the highest salience leaves out a huge part of the story. Did Congress not impose its own agenda in the showdowns with President Obama over transferring Guantanamo detainees to the United States? Or with President Bush over the core provisions of the Detainee Treatment Act ("DTA")? In each case, the stakes were both symbolically and substantively high. And in each case, it was Congress that drove the tempo and substance of policy innovation. Recent scholarship is full of lessons like these, surely enough to render Posner and Vermeule's claims about executive dominance radically incomplete.<sup>34</sup>

The same flaws plague their description of a "supine" judiciary, which involves a far more complex picture than they admit.<sup>35</sup> So, for example, they say that "[b]etween 2001 and 2004, the courts were conspicuously silent about counterterrorism policy" (Posner & Vermeule, p. 35). First, they must mean the Supreme Court, since the lower courts were anything but silent.<sup>36</sup> But even that suggestion would be perplexing. Full review by the Supreme Court less than three years after litigants filed suit on such novel issues is not exactly avoidance incarnate. More to the point, the combination of *Hamdi*<sup>37</sup> and *Rasul*<sup>38</sup> (a case Posner and Vermeule do not mention) forced the establishment of executive tribunals that, for all their faults, created an institutional setting for lawyers to do their work and prompted the release of large

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34. For some recent explorations of executive branch compliance with legislative restrictions even in the foreign affairs context, see, for example, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 343–44 (2006); Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT'L L. 517 (2013); and Laura A. Dickinson, *Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1 (2010).

35. I do not mean to overstate the case—courts extend lots of deference to the government in the national security context. See, e.g., Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 7, 2013, at A1, available at <http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html> (noting that the Foreign Intelligence Surveillance Act ("FISA") Court did not deny any of the 1,800 surveillance orders submitted in 2012). But the idea that courts are categorically "supine" on national security matters doesn't match the facts. See *infra* text accompanying notes 36–43.

36. E.g., *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003) (remanding to the district court with orders to issue Padilla a writ of habeas corpus), *rev'd*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 532 (E.D. Va. 2002) ("This Court finds that Hamdi is entitled to due process of law as provided by the Fifth Amendment to the United States Constitution."), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004) (plurality opinion).

37. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

38. *Rasul v. Bush*, 542 U.S. 466 (2004).

numbers of prisoners.<sup>39</sup> Even under the supervision of a D.C. Circuit dominated by judicial conservatives and an ethic of unanimity, more than half of the post-*Boumediene*<sup>40</sup> habeas proceedings have resulted in orders of relief,<sup>41</sup> and more than 80 percent of winning detainees have already been released.<sup>42</sup> Here again, attention to the actual empirical scholarship is useful: the most complete study to date emphasizes both a high detainee win rate in the small number of litigated habeas cases and what plausibly appears to be a “shadow of the law” effect in the vastly larger number of instances in which detainees have been released before any judicial order.<sup>43</sup>

A milder version of their claims does have some force. If Posner and Vermeule had limited themselves to observing, as they do at one point, that “government in the administrative state centers around the executive, with Congress and the courts relegated to secondary positions” (Posner & Vermeule, p. 220 n.90), it would have been hard to disagree. Generations of scholars have made this observation,<sup>44</sup> and it has long presented a genuine problem for Madison’s heirs.<sup>45</sup> In that tradition, Posner and Vermeule fairly summarize the difficulties that have arisen with enforcing certain aspects of

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39. *E.g.*, DEPUTY SEC’Y OF DEF., COMBATANT STATUS REVIEW TRIBUNAL PROCESS 1–2 (2006), available at <http://www.defense.gov/news/aug2006/d20060809csrtrprocedures.pdf> (Enclosure (1)) (requiring one of the Combat Status Review Tribunal panelists to be a judge advocate general (“JAG”)); Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 423–24 (2010) (describing shadow-of-the-law effect of Supreme Court’s national security decisions).

40. *Boumediene v. Bush*, 553 U.S. 723 (2008).

41. Email from Brian E. Foster, Covington & Burling, LLP, to Julian Davis Mortenson (Oct. 2, 2013, 9:37 AM) (on file with editors) (latest “habeas scorecard” maintained by Covington & Burling).

42. *Guantanamo Habeas Scorecard*, CTR. FOR CONST. RIGHTS, 1 (May 30, 2012), <http://ccrjustice.org/files/2012-05-30%20Updated%20Habeas%20SCORECARD.pdf>.

43. Huq, *supra* note 39 (emphasizing the uncertainty of assessing *Boumediene*’s effects).

44. *See, e.g.*, ORESTES A. BROWNSON, *THE AMERICAN REPUBLIC* 235–36 (ISI Books 2003) (1865) (criticizing the “growing disposition on the part of Congress to throw as much of the business of government as possible into the hands of the Executive,” and observing that “[t]he danger in this respect is all the greater because it did not originate with the [Civil War], but had manifested itself for a long time before”); CORWIN, *supra* note 16, at 172 (“[T]he Constitution of peacetime and the Constitution of wartime have become, thanks to the New Deal, very much the same Constitution.”); ALEXANDER HAMILTON, *PACIFICUS* No. 1 (1793), reprinted in ALEXANDER HAMILTON & JAMES MADISON, *THE PACIFICUS—HELVIDIUS DEBATES OF 1793–1794*, at 8, 15–17 (Morton J. Frisch ed., 2007) (noting the powerful advantage of presidential initiative in a system that is biased toward inaction).

45. Clinton Rossiter, author of the indispensable work on emergency powers and no half-hearted supporter of a strong executive, long ago anticipated Posner and Vermeule’s challenge: “The man who is prone to overemphasize the petty activities of modern legislatures may too easily be convinced in a crisis, where the parliament is relegated to a secondary position, that this arrangement should be continued as a permanent feature of his constitutional government.” CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 296 (1948). Compare on this point some contemporaneous sources more sympathetic to Posner and Vermeule’s empirical views about the rule of law. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 107–10 (Bruce Caldwell ed., definitive ed. 2007) (1944) (“The [legislative] delegation of particular technical tasks to separate [administrative] bodies, while a regular feature, is yet only the first step in the

the framework statutes enacted after Nixon left office. The pathology of the congressional response they recount is well known. In the wake of lurid executive abuses, a nationwide political movement galvanizes Congress to pass a statute seeking to rein in executive power—say, the War Powers Resolution. After the political moment passes, the intense public focus on restraining the executive dissipates, and at the next moment of conflict—say, President Clinton’s bombing of Kosovo or Obama’s use of force against Libya—the legal rules have much less effect. By then, other political considerations blunt the effectiveness of congressional efforts to call the president to account<sup>46</sup> for a variety of reasons, including the exercise of initiative by a (comparatively) unitary executive, the “vetogate” barriers to congressional reaction, and the advent of the political party system.<sup>47</sup>

But reality complicates even these standard claims about presidential dominance. It is on this point that Goldsmith’s succinct and fair-minded account of the lived experience of executive governance—from someone who was part of it—is indispensable. He concludes that “[f]ar from rolling over after 9/11,” the Madisonian checking institutions “pushed back far harder against the Commander in Chief than in any other war in American history” (Goldsmith, p. xi). Rather than enjoying a period of unchallenged preeminence, “never before has the Commander in Chief been so influenced, and constrained, by law” (Goldsmith, p. 208).

Why are Goldsmith’s conclusions so different from those of Posner and Vermeule? His work does not engage directly with theirs,<sup>48</sup> but the answer seems to have two parts: first, an explicit disagreement between the two accounts about how much the president is politically restrained by institutional checks and balances; and second, an implicit disagreement about the extent to which political actors are subjectively motivated by concerns about legality.

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process whereby a democracy which embarks on planning progressively relinquishes its powers. . . . It will at best be reduced to choosing the persons who are to have practically absolute power.”); see also JAMES BURNHAM, *THE MANAGERIAL REVOLUTION* (1941) (similar).

46. See also ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* 3–5 (2007) (similar). Even here, though, the momentum of their attack on Congress carries Posner and Vermeule into insupportable assertions. Thus, they claim that the war on terror demonstrates a “picture of congressional (and judicial) passivity” in the wake of major national security events. Posner & Vermeule, p. 50. But the Authorization for Use of Military Force was enacted seven days after the Towers fell, and the Patriot Act became law a month later—both imposing significant legal limitations on the authority originally sought by the president. It is hard to see congressional passivity there. So too, in the wake of the Abu Ghraib abuses, the idea that the DTA (for all its flaws) did not mark a decisive legislative response to a major national security failure is hard to square with the facts.

47. Posner & Vermeule, pp. 85–88. For discussion of all these points, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 438–47 (2012), and Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 413–19 (2011). On vetogates, see William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

48. He mentions Posner and Vermeule in passing, along with authors like Garry Wills and Bruce Ackerman, as writers who have sounded a “death knell for the separation of powers and for presidential accountability.” Goldsmith, pp. x–xi & 258 n.10.

The first point is Goldsmith's central affirmative thesis.<sup>49</sup> While Congress and the judiciary may indeed suffer competitive disadvantages in isolation, Goldsmith argues that they now find significant compensatory support in "something new and remarkable: giant distributed networks of lawyers, investigators, and auditors, both inside and outside the executive branch, that rendered U.S. fighting forces and intelligence services more transparent than ever, and that enforced legal and political constraints, small and large, against them" (Goldsmith, pp. xi–xii). This distributed surveillance system—which Goldsmith, in a nod to Bentham and Foucault, calls the presidential synopticon (Goldsmith, pp. 205–07)—yields a virtuous cycle of mutually reinforcing restraints that Posner and Vermeule just miss. The emergence of these novel checking institutions, however, does not tell us whether the battles they pick have a more-than-coincidental relationship to the law. Are these actors simply pursuing their material preferences about the distribution of goods, or are they motivated at least sometimes by regard for the rule of law as such?

This brings us back to the second problem with Posner and Vermeule's argument: the obstinate sociological fact that law *as law* has a powerful cultural hold on the American imagination, both inside and outside the executive branch.<sup>50</sup> Goldsmith's book does not itself articulate this point, but the independent motivational force of law and legality as a value worth protecting is the indispensable precursor for virtually every piece of the neo-Madisonian picture that he describes.<sup>51</sup> This unspoken theme of Goldsmith's work, coming from a government lawyer with wartime service during the first George W. Bush Administration, evidences a proposition that is obvious to most practitioners: law exerts real constraining force even when it appears to be against material interest and even when there is no immediately apparent enforcement authority. At least in our society, the political actors and institutions that restrain presidential power are regularly motivated not only by Madisonian ambition but by law, honor, and integrity as well.

## B. *Institutions: Political Checks and Balances*

### 1. The Model

For Goldsmith, the central institutional component of the synopticon is the dramatic bureaucratization of the national security process. Scarred by

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49. See *infra* Section II.B.

50. See *infra* Section II.C.

51. Goldsmith's account, in short, shows that Posner and Vermeule are wrong about the separation of powers as a viable political checking strategy. But that point, standing alone, does not show whether the rule of law as such motivates the machine. It is principally on this score that the synopticon metaphor falls short, since it does not capture the subjective internal commitment to legality that necessarily characterizes so many of the episodes that he discusses.

the 1970s Church–Pike hearings, the intelligence community reached a statutory “Grand Bargain” with the legislative branches, which included hard legal limits on intelligence authority, personal presidential approval for all covert actions, and regular reports to Congress of all foreseeable covert operations and intelligence activities (Goldsmith, pp. 86–89). As legal responsibilities imposed by the Grand Bargain expanded, and especially after renewed scrutiny on the heels of the Iran–Contra scandal, a “chastised executive branch created elaborate bureaucratic structures, monitored closely by lawyers”—who had previously been almost entirely excluded from the process—“and others, to ensure compliance with its grand bargain duties” (Goldsmith, pp. 83–89). The result is that nowadays “more than one hundred executive branch officials, including ten or so lawyers and often more, typically weigh in” before a covert action can go forward (Goldsmith, pp. 89–90). And that is before the legislative branch is brought into the picture, as it must be: “[n]othing of significance happens . . . without the intelligence committees, or some subset, knowing about it” (Goldsmith, p. 90).

On Goldsmith’s account, broad bureaucratic—and especially lawyerly—participation pervades the national security apparatus. “The U.S. military,” for example, “is filled from top to bottom with accomplished lawyers who work intimately with military commanders around the globe to ensure that they . . . comply with and are accountable to the maze of domestic, international, and foreign laws that govern every step of military activity” (Goldsmith, pp. 124–25). Central Intelligence Agency (“CIA”) lawyers, unlike those of foreign intelligence services, are highly involved in operational planning and are charged broadly with keeping the Agency inside legal boundaries. And the statutory inspectors general, whose jurisdiction has been expanded by Congress to “every corner of the national security bureaucracy except the White House itself” (Goldsmith, p. 106), are perhaps the most formidable bureaucratic check of all. Acting “more as an agent of Congress than of the President,” these “congressional ferrets” have “access to all records and information inside the relevant agency and full power to launch investigations, issue subpoenas, and refer criminal wrongdoing to the Justice Department” (Goldsmith, pp. 99, 105–06).

As an institutional matter, in short, “the executive” is not a single person sitting alone in an office deciding whether to invoke a Schmittian exception. Rather, the executive is a loosely affiliated cohort of many, many people who have imperfectly aligned policy priorities and lots of reasons to worry about what the law requires. And as Madison could have told us, the insertion of all these extra players has had profound effects on the national security process. Goldsmith may fairly be faulted for soft-pedaling the reality that not all officials act ethically, or the fact that part of a lawyer’s job is to help her clients find valid ways around legal restrictions.<sup>52</sup> But for lawyers to play a meaningful checking function requires, not that every lawyer check all

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52. For a critique along these lines, see Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith’s Power and Constraint*, 45 CASE W. RES. J. INT’L L. 23 (2012) (book review).

actions by every client, but only that some lawyers check some actions by some clients. On that score, Goldsmith's evident discomfort with certain aspects of the synopticon renders him a particularly credible witness about how regularly it is in fact effective.<sup>53</sup>

The most straightforward internal bureaucratic check is formal interference with executive policy. The military's judge advocate general ("JAG") lawyers, for example, have the legal authority to "veto" targeting decisions "at many points in the targeting process" (Goldsmith, p. 137). They "often say 'no' to proposed intelligence or covert operations, or suggest changes to shape the operation to comply with the law" (Goldsmith, pp. 93–94, 97). Perhaps even more effective is the threat of a backward-looking investigation of previous activity. Goldsmith powerfully illustrates the mushrooming impact of the CIA inspector general's multiyear torture investigation on both detention policy and CIA operations, describing how "[s]ome of the hardest calls the CIA made about the operation of the detention and interrogation program" took "place practically under the critical gaze of the Office of Inspector General."<sup>54</sup>

Another bureaucratic weapon can be of both dubious legality and far-ranging impact: leaking information to Congress, public interest groups, and the press. Far from being stamped out by an ascendant presidency, the flow of national security leaks after September 11 has been historically unprecedented. Partly this is a function of the sheer size of the national security apparatus; what was once "an intimate affair" now requires the sort of bureaucratic process outlined above (Goldsmith, p. 72). Partly it is related to

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53. See GOLDSMITH, *supra* note 30, at 94 ("The [inspector general] investigators came across to me as aggressive prosecutors out to get their prey . . ."); *id.* at 91 (describing "the swarm of lawyers" inside a military apparatus); *id.* at 132 ("[Executive branch] lawyers had a huge impact on terrorism policy, and much of it wasn't salutary."); *id.* at 206 (describing "excessive leaking"). For more about the way executive branch lawyers can and do check their clients, see also, for example, Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, LAW & CONTEMP. PROBS., Spring 1998, at 83, 85, 91–92, describing a view of "career lawyers [as] a dangerous political fifth column" who "can pose an impediment to democratic change," and Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1933–45 (2007), arguing that "unregulated deference to the JAGs has limited some combat operations, and will continue to do so."

54. Goldsmith, pp. 95–104. For detail on the numerically and politically significant instances where the Office of Legal Counsel ("OLC") has blocked presidential initiatives, see Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1717–20 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)), asserting that the visible instances of checking substantially understate the total number; but compare Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13, 20 (2011), available at [http://www.harvardlawreview.org/media/pdf/vol124forum\\_ackerman.pdf](http://www.harvardlawreview.org/media/pdf/vol124forum_ackerman.pdf), suggesting potentially offsetting selection bias in the process of choosing which OLC materials to publish. For a more systematic empirical assessment of inspectors general, see Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1031 (2013), emphasizing the effectiveness of inspector general oversight, while noting that inspectors general "var[y] significantly" in independence and rigor.

the 9/11 Commission's promotion of information sharing across agencies.<sup>55</sup> Partly it results from the explosive growth of the technology available for distributing information (Goldsmith, pp. 73–79). And partly it is driven by increased cynicism about secrecy in both the press and the executive branch in the face of rampant overclassification (Goldsmith, pp. 61, 70–72, 219). The result has been an unbroken chain of startling media scoops about one major national security secret after another; according to the former director of the CIA and the National Security Agency (“NSA”), only a “very narrow number of specific operational acts” remain “as secret now as the day they were conceived.”<sup>56</sup> Indeed, the Obama Administration's increasingly aggressive prosecution of unauthorized leaks<sup>57</sup> is eloquent testimony to their effectiveness.

These leaks extend the synopticon into a civil society that channels, investigates, and capitalizes on information that escapes the cone of executive silence. Journalists, of course, play a key role in this, and Goldsmith succinctly charts the evolution of the press on national security questions from a docile cotraveler of the federal government to a much more aggressive and skeptical institution (Goldsmith, pp. 58–60, 81). A news story, however, “can't survive in a vacuum, it needs to motivate sources and engage an audience.”<sup>58</sup> Why be brave and violate classification if the public evidently doesn't care?<sup>59</sup>

That's where the rest of civil society comes in, in the form of “well-networked, well-resourced groups of experts devoted to criticizing the government's war and security policies in the name of individual rights”: the American Civil Liberties Union, the Center for Constitutional Rights, Human Rights First, the International Committee of the Red Cross, and so on (Goldsmith, pp. 173–74). Partly this happens through litigation. It may now be hard to recall the atmosphere in which groups like these decided to advocate for terror detainees, but Goldsmith's interviews effectively convey the remarkable commitment to principle of the people who made exactly

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55. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 416–19 (2004). Recall that the 9/11 Commission's recommendations were prompted by the detrimental effects of what were understood to be legal restrictions on intra-executive information sharing. *Id.* at 78–80.

56. Goldsmith, p. 68 (internal quotation marks omitted).

57. E.g., David Carr, *Blurred Line Between Espionage and Truth*, N.Y. TIMES, Feb. 27, 2012, at B1, available at <http://www.nytimes.com/2012/02/27/business/media/white-house-uses-espionage-act-to-pursue-leak-cases-media-equation.html> (“The Obama administration . . . has been more prone than any administration in history in trying to silence and prosecute federal workers.”).

58. Goldsmith, pp. 64–66 (internal quotation marks omitted).

59. To a surprising degree, many of the biggest national security secrets—interrogations, black sites, signals intelligence—were reported by major media outlets in at least sketchy form soon after September 11. Goldsmith, pp. 63–66. But *Washington Post* reporter Dana Priest suggests that the populace had little appetite for these stories so soon after the dramatic terrorist attack: “None of our early stories had legs, really.” Goldsmith, p. 64 (internal quotation marks omitted).

those choices while Ground Zero was still smoldering.<sup>60</sup> Civil society also brings to bear the crowdsourced application of data-mining technology to the flood of evidence that filters out through an exponentially larger number of distribution outlets (Goldsmith, pp. 76–78). Together, these massively multipronged distribution channels and the analytical capacity of modern data analysis tools “empower[ ] the public to watch the government closely, and to build powerful mosaics of supposedly secret government activity.”<sup>61</sup>

From there, the echo chamber continues to reverberate, as competing governmental institutions kick in, not only alongside civil society’s reaction but also quite often because of it. Where Posner and Vermeule suggest in a related context that “because the very multiplicity of overseers dilutes the responsibility of each, the whole will be less than the sum of the parts” (Posner & Vermeule, p. 57), Goldsmith shows that exactly the opposite can also be true. For all the individual effectiveness of any of these distributed checks and balances individually, their real power comes when they cumulatively trigger and amplify one another (Goldsmith, pp. 90–91). It was only by acting “in mutually reinforcing networks that crossed organizational boundaries” that “these institutions extracted and revealed information about the executive branch’s conduct in war—sometimes to adversarial actors inside the government, and sometimes to the public” (Goldsmith, pp. 90–91, 207).

## 2. A Case Study

There may be no better example of this dynamic than the development of U.S. detainee policy after September 11. Every single element of the distributed checks and balances described above got involved. The Center for Constitutional Rights started the process by filing lawsuits challenging the detention of hundreds of people in an offshore black hole (Goldsmith, pp. 161–65). Then the Abu Ghraib pictures were leaked (Goldsmith, p. 177), and the solicitor general’s averral that these men were entitled to nothing more than the initial battlefield detention decision suddenly rang hollow.<sup>62</sup> Shortly thereafter, the Court decided *Hamdi*, which adumbrated the due

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60. Goldsmith, pp. 161–80, 198. He recalls in particular the shameful history of the term “lawfare,” a smear charging civil rights lawyers with “abusing law and legal systems” on behalf of terrorists “to further their strategic or political aims” and “thwart[ ] U.S. efforts to defeat Islamist terrorists.” Goldsmith, p. 224. This reminder only underscores the personal and professional bravery of people who stood up for basic American principles at a time when others, like me, had a hard time imagining defending “people like that.”

61. Goldsmith, p. 78. See generally David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005). A key piece in disclosing the black sites rendition regime, for example, involved a squib of a story from a Pakistani newspaper that printed the tail number of a suspicious airplane. The story bounced around on blogs and bulletin boards until the registration information was traced to a Massachusetts firm that was found to be a CIA front. Goldsmith, p. 66.

62. Transcript of Oral Argument at 42–43, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion) (No. 03-6696) (argument of Solicitor General) (explaining that detainees can contest the evidence against them during interrogation).

process required for even the most cold-eyed terrorists, and *Rasul*, which signaled unmistakably that access to habeas corpus would be constitutionally required for detainees in Guantanamo Bay (Goldsmith, pp. 178–79).

The resulting litigation yielded seemingly endless grist for an impassioned opposition that was gradually realizing just how baseless many Guantanamo detentions seemed to be. It escaped no one's notice that Hamdi was released (the White House's fear of him having apparently evaporated) as soon as the Court ordered the administration to prove its charges.<sup>63</sup> The Guantanamo litigation yielded regular information dumps about America's detention archipelago, which were then flyspecked by advocates and academics, who published report after report debunking administration propaganda about the worst of the worst (Goldsmith, pp. 112–18, 170). Meanwhile, more leakers—perhaps emboldened by what was perceived as a shifting national mood—brought new information about detainee abuses into the public eye, with human rights organizations busily “packag[ing] the manifold revelations about the U.S. government's secret interrogation practices into an aggressive advocacy campaign” all the while (Goldsmith, pp. 118–19).

At that point, the Madisonian process kicked into high gear. Congress opened hearings about detainee abuses, and what would have seemed impossible only a year earlier suddenly happened with surprising speed: “[a] Congress controlled by the President's party [took] the extraordinary and unprecedented step of curtailing what the Commander in Chief believed was one of his most important wartime tools”—unfettered interrogation policy (Goldsmith, p. 199)—and legally mandating a tougher approach to internal executive review of individual detainees' case portfolios (Goldsmith, pp. 184–88). In addition to thirty-two grants of merits relief (against twenty-seven denials) in the detainee litigation so far,<sup>64</sup> extensive changes took place in the shadow of these legal constraints: scores of detainees were released; Afghan detention operations were radically revamped; and lethal targeting policy was reformulated (Goldsmith, pp. 178–79, 192–94). Despite a “consistent with my commander in chief power” signing statement by the president, the DTA “stopped the CIA program in its tracks” (Goldsmith, pp. 119–20). Without “new and clear legal assurances”—which were never forthcoming (Goldsmith, p. 120)—the CIA refused to continue under the

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63. Jerry Markon, *Hamdi Returned to Saudi Arabia: U.S. Citizen's Detention as Enemy Combatant Sparked Fierce Debate*, WASH. POST, Oct. 12, 2004, at A02, available at <http://www.washingtonpost.com/wp-dyn/articles/A23958-2004Oct11.html> (“Hamdi's release also mean[t] that the government never had to explain why he was detained in the first place. A Pentagon statement said Hamdi was released because ‘considerations of United States national security did not require his continued detention.’ The statement added that no further details were available ‘because of operational and security considerations.’”).

64. Foster, *supra* note 41.

earlier interrogation protocols.<sup>65</sup> As Goldsmith puts it, “Law and accountability had spooked the spooks and led them to pull back despite White House wishes otherwise” (Goldsmith, p. 120).

### C. *Motivations: Law, at Least Sometimes*

Posner and Vermeule might dismiss the legal dimension of the detainee treatment scandal as “law talk” that can only make a difference by ginning up political outrage, either outside or inside the executive branch. In a couple of places, they hint at that kind of response.<sup>66</sup> But this defense reveals their claim to be an empty semantic exercise.<sup>67</sup> Indeed, it necessarily concedes the only two points that matter: first, that law has significant substantive content apart from the interpreter’s exogenous political agenda; and second, that this content exerts independent influence on the preferences of official actors and political constituents. On this score, the biggest problem with Posner and Vermeule’s description of governance is their strangely insistent disregard for the cultural value of legality as it is experienced by the general population and public servants alike.

There is no getting around it: influential actors across the political spectrum take law seriously and have done so even in the teeth of serious threats to the national security. Yet a question remains: Why? At a sufficiently high level of abstraction, the reasons boil down to extrinsic and intrinsic motivation. While Posner and Vermeule’s language is grammatically capable of accounting for each, it can do so only at the cost of substantially stripping

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65. Even a new set of OLC memos re-approving the interrogation protocols under restrictions similar to those eventually adopted by the DTA did not satisfy the Agency, apparently since the memos were written before the DTA was enacted and (among other things) did not address that statute’s legislative history. *See, e.g.*, Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (Op. O.L.C. May 10, 2005), available at <http://www.justice.gov/olc/docs/memo-bradbury2005-3.pdf>.

66. I found only one instance where they concede this squarely. Posner & Vermeule, p. 72 (noting that political actors may “develop a sense of legal obligation to follow [legal] precedent”); *cf.* Posner & Vermeule, p. 88 (“To be sure, if the framework statutes are very specific, then violating them may itself create a political cost for the president . . .”).

67. This point is entirely consistent with a view that the enforcement of constitutional law is “just” politics in the thin sense that it is effectuated by political actors who must often reckon with competing and in some cases trumping material considerations. The most interesting efforts on this front seek to chart precisely that complex terrain. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 11 (1967) (“The concentration of *more* power into [executive] hands, or of certain sorts of power, may be ‘inevitable’ . . . but which powers, how much of them, and how they can be effectively limited, are the questions we should be asking.”); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1424 (2012) (reviewing Posner & Vermeule) (“Between the legal romantic’s vision . . . and the cynic’s vision . . . lie the complex realities of the relationship between presidential power and law.”); Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 982 (reviewing Posner & Vermeule) (“As a descriptive matter, we would say that the law constrains the President, in many areas quite a bit and in some areas hardly at all.”); Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 793 (2010) (“[A] consideration or factor [like legality] can be a reason without being a dispositive one.”).

their model of falsifiable content. Although the discussion that follows below goes well beyond Goldsmith's book, several of his narratives offer a useful vehicle to make the point.

### 1. Carrots and Sticks

According to the bad man model of law, roughly speaking, the law is what enforcers do. Goldsmith's account is full of indications that, even on the most reductively materialist account, law matters precisely because both compliance and disobedience can have demonstrable consequences. What Posner and Vermeule miss in particular is the full panoply of disciplinary measures that individuals can suffer for lawbreaking as such.

Start with Secretary Rumsfeld's complaint that the "mere threat of lawsuits and legal charges effectively bullies American decision makers, alters their actions, intimidates our security forces, and limits our country's ability to gather intelligence."<sup>68</sup> Just so. Consider the CIA. Criminal investigations have so rattled the Agency that "lawyers are [now] in great demand"; the internal view, says one insider, is now "[w]atch your back and get a lawyer."<sup>69</sup> The Agency now returns repeatedly to the White House, the National Security Council, and the attorney general for reaffirmation that CIA programs not only "reflect[ ] administration policy" but "[are] lawful."<sup>70</sup> The inspector general's sweeping investigations into torture policy and the ensuing references for criminal investigation were "one hundred times more wrenching," observes CIA General Counsel Rizzo, "than Iran Contra," and they "have changed the Agency forever."<sup>71</sup>

Prosecution, however, is only the tip of the iceberg.<sup>72</sup> In one of his most effective passages, Goldsmith rattles off a long list of potential consequences for violating the law, each of which receives extensive discussion elsewhere in the book: "lawyer scrutiny, reporting requirements, inspector general and congressional investigations, Accountability Board proceedings, prosecutorial and ethics investigations, civil trials, FOIA processing and disclosures, public criticism and calumny, and elections, all of which impose various forms of psychological, professional, reputational, financial, and political costs on those held accountable" (Goldsmith, p. 235). As Goldsmith's earlier account of his own experience when subpoenaed as part of a leak investigation suggests,<sup>73</sup> these are not abstract claims about platonic institutions but concrete observations about the specific experience of particular

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68. Goldsmith, p. 230 (internal quotation marks omitted).

69. Goldsmith, pp. 93, 96–98 (internal quotation marks omitted).

70. Goldsmith, p. 97 (internal quotation marks omitted).

71. Goldsmith, p. 239 (internal quotation marks omitted); *see also id.* at 108–09.

72. Indeed, if prosecution were the end of the story, it would be hard to explain the dramatic changes in executive behavior that Goldsmith describes. As is well known, there have been no criminal prosecutions for the Bush Administration's coercive interrogations.

73. GOLDSMITH, *supra* note 30, at 177–82.

human beings in a real bureaucratic context. Individual costs, in short, for individual wrongs.<sup>74</sup>

If anything, toting up the concrete results of particular investigations actually understates the point. As Goldsmith notes, “Even dysfunctional oversight has important ‘before-the-fact’ disciplining and accountability effects” (Goldsmith, p. 92). Echoing what Guantanamo habeas lawyers have argued for years,<sup>75</sup> he explains that “[h]aving to tell another institution with different and often adversarial interests what it is up to forces the executive branch to reflect on its actions and anticipate problems” (Goldsmith, p. 92). In such cases, even though “[t]he hard questions and criticism are intermittent . . . the intelligence community does not know when they will come, or what operations might blow up and spark criticism. And so they prepare for them, with the self-reflection that preparation entails, in practically every case” (Goldsmith, p. 92). We see these effects in *Rasul* and *Boumediene*, which were followed by the implementation of administrative tribunals, the release of hundreds of detainees without further trial, and the extensive reworking of detention systems in Afghanistan (Goldsmith, pp. 178–79, 193). We also see them in the tendency for legal regulations to be interpreted ever more strictly as they filter down the rank hierarchy in the “law-dominated world” of the American military, where everyone “is constantly reminded, and fearful, of legal limits and obligations” (Goldsmith, p. 143).

In addition to these punitive costs of breaking the law, Goldsmith calls attention to an important reward for legal compliance: the fact that “a properly run, law-dominated military also garners enormous power from the constraint of law” (Goldsmith, p. 145). How so? Through what Posner and Vermeule, in another context, call “credibility-generating mechanism[s]” (Posner & Vermeule, p. 146). In keeping with modern counterinsurgency doctrine, for example, Goldsmith describes how the modern defense establishment has come to believe that the strategic benefits of complying with the laws of war outweigh any offsetting costs (Goldsmith, pp. 145–60). Think in this regard of the 2011 Security Council resolution authorizing the use of force against Libya, which imposed limits on the engagement as part of its imprimatur under international law and thereby helped shore up the developing coalition of nation states.<sup>76</sup> In a related vein, Goldsmith concludes that Congress would not have agreed to extend presidential power in

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74. Nor do such incentives for legal compliances require the sticks to be wielded by the pure of heart. If political enemies are out to get you, one of the best ways to protect yourself—and nobody’s saying it’s foolproof—is to keep your nose clean.

75. The entire theory of the *Boumediene* briefing (and, not incidentally, of the *Boumediene* decision) was that the amount of judicial scrutiny after the fact should be a function of the quality of executive review before the fact. Brief for *Boumediene* Petitioners at 7–9, 19, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195), 2007 WL 2441590, at \*7–9, \*19; see also *Boumediene*, 553 U.S. at 794. Goldsmith’s empirical grounding refutes claims that “[l]egal uncertainty and indecision amount to deference to the executive.” POSNER & VERMEULE, *supra* note 46, at 259. Sometimes they might. And other times they might not.

76. DEP’T OF STATE & DEP’T OF DEF., UNITED STATES ACTIVITIES IN LIBYA 25 (2011), available at <http://s3.documentcloud.org/documents/204673/united-states-activities-in-libya-6-15-11.pdf>; S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

the 2008 Foreign Intelligence Surveillance Act (“FISA”) amendments without simultaneously creating an inspector general to investigate executive compliance with the remaining limits on surveillance (Goldsmith, pp. 105–07). Nor is it only through formal mechanisms that such trust can be secured. Unlike George W. Bush, who “invited a reputation as a lawless cowboy,” Obama secured “enormous stores of credibility and trust” by the simple expedient—if that is the right word for it—of taking law seriously and expressing the need to respect its constraints (Goldsmith, p. 40). The president’s public and verifiable commitment to legality is thus itself a key lever in increasing the politically vetted delegations of power.<sup>77</sup>

## 2. Conscience and Values

There is more to the picture, however, than external incentives. We care about legality, not just because we’re hungry for carrots or scared of sticks, but also because we respect the intrinsic normative weight of law as such. Here in particular, Posner and Vermeule’s analysis rests on a startlingly flat account of human nature. In one especially memorable passage, they describe the signal incentive of public service as the opportunity for officials to act *unfaithfully*, prioritizing their own personal policy preferences over those of the electoral majority.<sup>78</sup> This carries the rational actor model without embarrassment, caveat, or explanation to the governance context, yielding a view of preference satisfaction that explains presidential candidacies as a function of the tantalizing opportunity for agency slack. This inattention to the ethic of service and legality characterizes a much broader imaginative failure to comprehend the compliance pull of a public trust that is carried out with integrity. And that failure is central to the cognitive framework of *The Executive Unbound*.

The holes in this framework are probably obvious to most Americans, who after all live in a country that has come to be defined more by a particular socio-legal order than by any ethnic, racial, or religious identity. Here again, Goldsmith’s account offers a useful source of evidence for those inclined to look for it. He does err—along with others before him—in suggesting significant historical precedent for presidential lawbreaking.<sup>79</sup> Far

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77. Cf., e.g., STEPHEN HOLMES, PASSIONS AND CONSTRAINT 114–20, 131–33, 267–74 (1995); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273, 275–76.

78. Posner & Vermeule, p. 117 (“[E]lectoral systems do not offer traditional rewards and sanctions to the agent but instead essentially offer a reward in the form of the right to engage in actions that are not optimal for the principal.”). Some pretty tough-minded supporters of a strong executive would disagree. E.g., THE FEDERALIST NO. 76, at 417 (Alexander Hamilton) (E.H. Scott ed., Scott, Foresman & Co. 1898) (“The supposition of universal venality in human nature, is little less an error in political reasoning, than that of universal rectitude.”).

79. He says, for example, that “President Thomas Jefferson, a fierce opponent of unilateral presidential war power before 1800, authorized military expeditions against Barbary Coast nations in the Mediterranean without congressional authorization.” Goldsmith, p. 23. This suggests a unilateral initiation of hostilities that didn’t actually happen. See Mortenson, *supra* note 47, at 404–05.

more important, however, are his descriptions of the actual decision process of flesh-and-blood people, both inside and outside the executive branch, whose actions suggest the importance of law to their own sense of dignity or propriety.

As it relates to the present discussion, the culture of legality expresses itself in two ways. First and perhaps foremost, sometimes law drives politics outside the executive branch, creating a set of electoral facts on the ground to which a politically aware executive must respond, at least sometimes by altering its course. This legalization of policy disputes is familiar: journalists pursue scoops about illegal behavior; bloggers decry incursions on the rule of law; and the political discourse generally takes on a moralizing tone that centers on the legal character of the dispute. Goldsmith suggests, for example, that public opposition to the Terrorist Surveillance Program and the Guantanamo detentions was driven more by the perceived illegality of those programs than by the practical counterterrorism policy question that each presented (Goldsmith, p. 179). And at least tentatively, the comparatively milder response to the 2013 disclosures of what seemed like more plausibly *legal* NSA dragnet surveillance appears to bear this out.<sup>80</sup>

At least as important as the politically mobilizing role of law talk, however, is the legal valence of honor and integrity within the executive branch itself. We need not reach far for examples of executive branch actors who have defended their view of the law at significant professional risk: Elliot Richardson and William Ruckelshaus refusing to fire the special counsel;<sup>81</sup> John Ashcroft refusing to approve invasive privacy violations contrary to statute;<sup>82</sup> the JAG Corps fighting against the Bush Administration's disregard for law in the counterterrorism context (Goldsmith, pp. 125, 135–37, 176). Even the act of leaking information becomes “whistleblowing” once it is motivated by “[a]nxiety about . . . perceived illegality” rather than self-interest alone (Goldsmith, p. 71). Goldsmith's account is filled with examples of

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80. See, e.g., Jennifer Stisa Granick & Christopher Jon Sprigman, Op-Ed., *The Criminal N.S.A.*, N.Y. TIMES (June 27, 2013), available at <http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html?pagewanted=all> (noting with chagrin that “public opinion quickly migrated from shock to ‘meh’” after the Obama Administration mounted a public defense of the surveillance program's legality). Assessing this comparative lack of outrage is complicated both by the desensitizing effect of the earlier news and by an inevitably partisan opinion filter. See, e.g., *Majority Views NSA Phone Tracking as Acceptable Anti-Terror Tactic*, PEW RESEARCH CTR., 3 (June 10, 2013), <http://www.people-press.org/files/legacy-pdf/06-10-13%20PRC%20WP%20Surveillance%20Release.pdf> (noting that 37% of Democrats approved of the Bush surveillance program while 64% approve of Obama's, and that 75% of Republicans approved of Bush's program but only 52% approve of Obama's).

81. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A01, available at <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.

82. *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 216 (2007) (statement of James B. Comey, former Deputy Att'y Gen., Dep't of Justice), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg35800/pdf/CHRG-110shrg35800.pdf>.

legal concerns affecting national security policy—in areas ranging from covert operations (Goldsmith, pp. 88–89) and CIA activities (Goldsmith, pp. 93–94) to signals intelligence (Goldsmith, pp. 106–07) and detainee treatment (Goldsmith, pp. 120–21)—sometimes through purely intra-executive debate, and other times when one executive branch faction leveraged external allies in defense of legality.<sup>83</sup>

The extent of law's power—even in the executive branch, even during wartime, and even after September 11—is exemplified by the JAG Corps' resistance to illegal elements of the Bush Administration's counterterrorism policies. Members of the Corps fought hard and they fought effectively, relying on internal challenges, public testimony, and press leaks to bolster Goldsmith's policy-altering synopticon (Goldsmith, p. 176). And on Goldsmith's account, they were motivated precisely by the intrinsic value of legality as a central component of American morality. “[C]entral to the military's self-understanding as honorable warriors” in the wake of an elaborate post-Vietnam “regeneration strategy” were the twin “pillars of U.S. military discipline”: the Uniform Code of Military Justice and the international law of war (Goldsmith, pp. 126, 175). Essential to the self-conception of JAG lawyers as “guardians of these laws” was an obligation to defend that tradition against lawless outsiders (Goldsmith, pp. 125–28, 175). It was on this background that they “push[ed] back hard against what they viewed as the Bush administration's disregard of military law and traditions,” a “direct affront to the JAG view of the world” (Goldsmith, pp. 175–76). If the content of law can be stubbornly resistant to manipulation, it turns out that those who defend it can be too.

#### D. *Prescriptive Descriptivism*

The cultural force of law seems so obvious that it is hard at first to explain how Posner and Vermeule could miss it. Their dismissiveness, however, turns out to be at least in part a conscious act of advocacy.

They are remarkably explicit about this intention. Positioning themselves as “midwives to the postliberal order of executive government,” their express purpose is to “make executive governance . . . popular and broadly credible among the citizenry” (Posner & Vermeule, p. 16). It is through this lens that we must understand *The Executive Unbound's* drumbeat mantra that the Madisonian rule of law project “has largely failed,” “is broken,” “is obsolete,” and “has collapsed.”<sup>84</sup> This conception of analyst-as-midwife

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83. Goldsmith, pp. 230–32. Cf. GOLDSMITH, *supra* note 30, at 37–38 (describing “the norms of detachment and professional integrity that permeate OLC and that transcend particular administrations,” driven by “a powerful professional concern to ‘do the right thing’”). Notably, this internalized embrace of law as one component of moral duty need not be universal for it to be effective. Accounting for the bureaucratization of the national security apparatus and the remainder of Goldsmith's synopticon, even a minority of executive branch actors who genuinely care about the law can at least sometimes constrain the executive branch as a whole.

84. Posner & Vermeule, pp. 10, 15, 17–18. So too with their repeated claim that “[l]iberal legalism[ ] . . . overestimates the need for the separation of powers and even the rule of law.”

nically captures Posner and Vermeule's effort to damage the very force they are examining—to chip away at the privileged cultural value of law with a focused message of disrespect and even disdain, and thereby gradually to replace a cherished cultural totem with the view that law is nothing more than “a special kind of politics.”<sup>85</sup>

In this project, their most potent weapon might be neither descriptive diagnosis nor normative argumentation but rather a sunny mood of unwavering good cheer. While “law cannot hope to constrain the modern executive,” there is no point in worrying about it because “[t]he administrative state generates the cure for its own ills” by promoting widespread economic prosperity, which in turn “generates political substitutes for legal constraints on executive power” (Posner & Vermeule, pp. 5, 14–15, 189–92).

Framed as a statement of observable fact, their claim that “fears of executive tyranny are overblown” (Posner & Vermeule, p. 15) rests on an attempt “[t]o test this hypothesis” by an empirical analysis of “quantitative proxies for tyrannophobia” that regresses various indicators of political liberty for twenty-two countries against survey data on the degree of anxiety about executive overreach (Posner & Vermeule, pp. 188–90). This analysis fails to “find statistically significant correlations,” suggesting that “[a] tyrannophobic public (as measured by answers to the survey questions) is just as likely to live in a nondemocracy as in a democracy” (Posner & Vermeule, pp. 14–15, 180–92). Perhaps sensing the limits of this “evidence” (Posner & Vermeule, p. 180), they then give extended stage time to elementary models of executive action intended to demonstrate that, at least in American society, electoral checks are the only kind that we really need (Posner &

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Posner & Vermeule, p. 14. Compare SCHMITT, *DICTATORSHIP*, *supra* note 7 (critiquing the taboo on dictatorship), with FRANZ L. NEUMANN, *The Concept of Political Freedom*, 53 COLUM. L. REV. 901, 902 (1953) (“A theory [in the hands of activists] then becomes an ideological statement which, if repeated often enough, will by its own weight change the political situation and produce victory.”).

85. Posner & Vermeule, p. 67. Posner and Vermeule are at their rhetorical best in “regretful truths” mode, as hard-headed realists disinclined to be seduced by fantabulating rhetoric from our credulous forefathers. But at the same time they tell us that radically executive-centric government is inevitable, they also seek to suppress Madisonian accountability innovations threatening to blunt that trend. *E.g.*, POSNER & VERMEULE, *supra* note 46, at 89 (advocating minimal scrutiny for laws affecting citizens during emergency); *id.* at 165 (criticizing Ackerman’s “supermajoritarian escalator” approach to emergency powers); *id.* at 212 (opposing “warrant”-style judicial regulation of coercive interrogation); *id.* at 271–72 (advocating judicial deference to executive interpretation of international law); *cf.*, *e.g.*, Posner & Vermeule, p. 56 (describing the Court’s doctrine on congressional interference with the executive branch as “latitudinarian”); Posner & Vermeule, p. 108 (describing the Supreme Court attempting to “move[ ] in for the kill” in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)); Posner & Vermeule, p. 171 (describing the Founders’ Constitution as “excessively burdened with liberal legalism”). In a similar vein is their disinclination to distinguish for “inevitability” purposes between structural characteristics of modern politics and contingent ideological choices about legal doctrine. This includes, at a minimum, the unconstitutionality of the legislative veto and the strength of presidential privilege, two doctrines that do heavy lifting in their claims about the inevitable collapse of congressional checking. *E.g.*, Posner & Vermeule, pp. 26, 42–45.

Vermeule, pp. 133–53, 189–205). There are moments where they concede the limits of such speculation (Posner & Vermeule, pp. 21–24) but many more where the confidence of their thinly sourced assertions strains credulity, including an instant classic of the genre: “hence the cost of tyrannophobia exceeds the benefit.”<sup>86</sup> QED.

Back-of-the-envelope cost–benefit assessments aside, Posner and Vermeule know perfectly well that their faith in power has nothing to do with American constitutional tradition.<sup>87</sup> For starters, their suggestion that majoritarian politics substitute for legal constraint in restraining the executive ignores our tradition’s persistent anxiety about the tyranny of that very majority. More fundamentally, each of the political checks on which they so optimistically rely—the demands of popularity, credibility, historical legacy, and popular scrutiny (Posner & Vermeule, pp. 114–53)—applied in substantial measure to Bad King George. On their understanding, even elections seem less significant as a channel of majoritarian political will than—like a palace coup—as an ex ante disincentive to the worst excesses of executive power (Posner & Vermeule, pp. 114–17). By the time you reach their tepid endorsement of dictatorship as a contextually plausible model of governance, at least for the developing world, it actually seems to follow quite logically from the preceding discussion (Posner & Vermeule, p. 180). Such are the consequences of the executive unbound.

And that, perhaps, is the whole point. If law is nothing more than politics by another name, then it has no special claim on our attention—and certainly not on the attention of those actually in power. Whether this description is accurate is almost beside the point. If outlandish claims are repeated often enough, what previously seemed unthinkable may become not just plausible but perhaps even attractive.<sup>88</sup>

### III. AN OUNCE OF EXPERIENCE

About a decade ago, Eric Posner coauthored a book about international law grounded in a theoretical framework that is strikingly similar to the one now advanced in *The Executive Unbound*. His coauthor was Jack Goldsmith.<sup>89</sup> That book relied on a highly materialist rational-actor account of

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86. Posner & Vermeule, p. 177. Cf. Don Herzog, *Externalities and Other Parasites*, 67 U. CHI. L. REV. 895 (2000) (reviewing ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* (2000)), and DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* (1996)).

87. It is not just that they disclaim interest in the Founding arrangements. They treat even Burkean conservatism as a pathological cousin of the “naturalistic” or “status quo” fallacy. See, e.g., POSNER & VERMEULE, *supra* note 46, at 145.

88. Posner and Vermeule’s discussion of what they call “constitutional showdowns” suggests that they are acutely aware of this dynamic. Posner & Vermeule, pp. 62–83. See also Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (discussing the role of interpretive community in constraining legal interpretation); compare *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591–93 (2012) (imposing new limits on the Necessary and Proper Clause in the wake of an advocacy campaign).

89. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

state motivation, rejected the view that law had analytically significant compliance pull on state behavior, and noted in an aside that any particular population's cultural commitment to law fit the model essentially by merging with other forms of self-interest.<sup>90</sup> The problems with that framework prefigure, to a telling degree, the difficulties with Posner and Vermeule's newer work on executive power. The Posner–Goldsmith book too had an inadequate appreciation for the disaggregated nature of political institutions. It too aimed to dash a pail of cold water on the quaint conceits of legal eras past. And it too was palpably uninterested in the tenacious psychological pull of law and legality.

It is hard not to reflect how widely these coauthors of a reductive account of international law have diverged in the years since it appeared. Where Posner hews to their earlier work in regarding law talk as insubstantial smoke that serves only to shroud hard material interests, Goldsmith now devotes entire chapters to examining the remarkable effect that transinstitutional networks of like-minded actors can have on the behavior of powerful institutions. Where Posner sticks with a largely unitary model of executive behavior, much of what Goldsmith says might as well be pulled directly from the international law literature on norm entrepreneurs and the disaggregated state.<sup>91</sup> There are certainly differences between international and constitutional law, and there is good reason to think that norms might be more readily internalized when they're home-cooked. But it is hard not to be struck by the contrast.

Perhaps Goldsmith's intervening experience as a government lawyer has something to do with this divergence. At least, there is reason to think so. Because one of the crowning virtues of *Power and Constraint* is that it emerges from an engagement with reality. Goldsmith grounds his insightful and important book not only in his own personal service in the Bush Administration's Departments of Defense and Justice but in dozens of interviews with "senior political, military, and intelligence officials in the Bush and Obama administrations," as well as with "members of Congress and their staffs, federal judges, government lawyers and watchdogs, national security journalists and their editors, human rights activists, and academic experts" (Goldsmith, pp. xiii–xiv). In short, rather than making arid theoretical pronouncements or pushing vector arrows around a flowchart, Goldsmith grounds his analysis first and foremost in the reality of governance. In

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90. *Id.* at 7–10 ("We consistently exclude one preference from the state's interest calculation: a preference for complying with international law. . . . It is unenlightening to explain international law compliance in [these] terms. . . . Such an assumption says nothing interesting. . . .").

91. For notable examples, see BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS* (2009); ANN-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); and Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002). It is an interesting coincidence—but perhaps only that—that Goldsmith recently coauthored an article comparing constitutional and international law. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

that sense, his latest work is a model for serious thinking about law and power in the executive branch. And the picture it shows of a people's jealous concern for the law remains true, for now.