

The Goldilocks Executive

THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC. By Eric A. Posner & Adrian Vermeule. New York, New York: Oxford University Press, 2010. 249 pages. \$29.95.

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*With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.*¹

In *The Executive Unbound*, Eric Posner and Adrian Vermeule claim that the two institutions Justice Jackson described—the Executive acting “under the law” and law made by assemblies—have passed away, at least at the federal level.² Yet we still have a free government—indeed, a far better government than the antiquated model to which Jackson mawkishly clung. It is better because our complex, fast-moving new world requires maximal executive flexibility of the sort that outdated, standing laws cannot supply.³ Though we have an executive unconstrained by law, our government is just as free because the President is now under a better master: the people themselves.⁴

We think *The Executive Unbound* is terrific—thought provoking and refreshing. It is a challenging must-read for those who believe that the Executive can or must be reined in by Congress or the courts and for those who believe that the Executive has improperly usurped the powers of the other branches, becoming the most roguish branch of government.

Yet we doubt the book’s central claim that we live in a post-Madisonian republic. First, the U.S. Executive is very much bound—by the Constitution,

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1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

2. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 3–5 (2010).

3. *Id.* at 32–33.

4. *Id.* at 14–15.

Congress's laws, and the courts. Though we cannot peer into the many minds populating the Executive Branch, we do not believe that executive officials regard themselves as above the law and the courts, answerable only to the people via elections and polls. The Executive Branch does not act this way, and most of its actions are consistent with its own sense of what the law requires and forbids (although, like most actors, it often reads the law to maximize its discretion). To be sure, the Executive Branch takes advantage of gaps and ambiguities in the law, as well as its speed, decisiveness, and access to information, all as *The Executive Unbound* describes.⁵ But the Executive does not systematically disregard orders from Congress or the courts nor does it usually exercise core powers that the Constitution assigns elsewhere; the Executive does not impose criminal punishments, spend money without authorization, or rule by decree.

Second, while we agree with Posner and Vermeule that public opinion colors Executive Branch decision making, we also believe that the public favors an executive bound by the law. So long as the public expects the law to constrain the Executive, the Executive will take into account this expectation and the public's sense of the law, even under Posner and Vermeule's own light. In other words, the public has a taste for the rule of law, a taste that the Executive Branch ignores at its peril.

We think the legal constraints on the modern Executive are so manifest that we wonder whether Posner and Vermeule's real project is more aspirational than descriptive. Perhaps their ultimate objective is to persuade us that we *should* have an unbound executive, not that we already have one. We hedge here because the book seems of two minds. In keeping with the title, most of the book forcefully argues that the Executive faces no material legal constraints. For instance, Posner and Vermeule write that "the legally constrained executive is now a historical curiosity"⁶ and that the Madisonian separation of powers has "collapsed."⁷ There is no equivocation here. Yet Chapter 6 argues that irrational fear of executive tyranny has prevented the Executive from obtaining powers needed to handle modern emergencies.⁸ Obviously this complaint assumes that there are constraints on the Executive. And the conclusion in particular appears to admit that the courts and Congress check the Executive—that the Executive is *bound* and that *the Madisonian republic lives on*.⁹

We are unsure what to make of the concession that the Executive is very much bound, coming as it does on the heels of chapters explaining why the

5. See, e.g., *id.* at 34–37 (describing the Bush Administration's counterterrorism policy).

6. *Id.* at 4.

7. *Id.* at 18.

8. *Id.* at 202–04.

9. See *id.* at 206 (noting that Congress "has subjected presidential lawmaking to complex procedures and bureaucratic checks" and that "the Supreme Court retains certain quasi-lawmaking powers, which it exercises by striking down statutes and blocking executive actions").

Executive is unbound. In any event, if Posner and Vermeule mean to argue for a new regime of legally unconstrained executive power, we doubt that they have proved their case. *The Executive Unbound* persuasively argues that a highly constrained executive is inconsistent with modern needs and that implausible fears of executive tyranny improperly color modern policy debates. But it does little to show that lifting the core constraints that remain is either safe or necessary.

As developed below, we think that Posner and Vermeule have shown that the modern Executive is much less bound by law than in the past and that in general this may be for the good. But they have not shown that the Executive is *unbound* by law, or that the Executive should be. Part I describes the book's central arguments and situates them within the broader literature on executive power. Part II discusses *The Executive Unbound*'s first several chapters as a description of the modern Executive and concludes that Posner and Vermeule substantially overstate the lack of constraint the Executive faces. Part III considers *The Executive Unbound* as a normative argument for adopting a legally unbound executive and finds the case not proven. We offer the tentative conclusion that separation of powers and related constraints play an important role in creating something of a "Goldilocks Executive": an executive neither much too strong nor much too weak, but about right.

I. *The Executive Unbound* and Its Place in the Literature

A. *The Book and Its Central Thesis*

The Executive Unbound's chief target is "liberal legalism"—the common belief, in its words, "that representative legislatures govern and should govern, subject to constitutional constraints, while executive and judicial officials carry out the law."¹⁰ As the book elaborates, "Liberal legalism is intensely anxious about executive power, and sometimes goes so far as to define tightly constrained executive power as an essential element of the rule of law."¹¹ Against this supposedly antiquated and futile view, the authors set their two central propositions: first, that given modern realities, the Executive is no longer meaningfully constrained by law; and second, that public opinion rather than law sufficiently checks the Executive.¹²

The first proposition unfolds in the book's initial three chapters. The first two chapters argue that the Founders' constitutional system of separation of powers is misconceived and irredeemably outdated.¹³ The third considers (and dismisses) modern attempts to fix or ameliorate the collapse

10. *Id.* at 3.

11. *Id.*

12. *Id.* at 15–16.

13. *Id.* at 15.

of constitutional checks through a series of feckless statutes purportedly limiting executive discretion.¹⁴

The second proposition is the focus of Chapters 4 and 6.¹⁵ Somewhat in tension with their title, the authors maintain that public opinion strongly binds the Executive.¹⁶ Thus, notwithstanding the breakdown of legal constraint, the Executive remains bound by political constraints.¹⁷ And the political constraints are effective enough, the authors believe, that fear of executive overreaching is wildly excessive and has led to “tyrannophobia.”¹⁸

Within this framework, the book advances four main arguments, two factual and two normative. The first claim is factual: the modern Executive makes policy subject to minimal oversight by Congress and the courts.¹⁹ Because Congress has limited capacity to monitor Executive Branch actions, Congress has ceded policy-making authority to the Executive via delegation and inaction.²⁰ Similarly, courts lack the will and expertise to overturn executive choices.²¹ Thus, the “Madisonian” separation of powers no longer describes how power is constitutionally allocated today, and a series of statutes—such as the War Powers Resolution (WPR) and the Administrative Procedure Act (APA)—designed to rein in the Executive have failed, either because they have generally been ignored (the WPR) or contain exceptions and ambiguities that allow executive discretion to flourish nonetheless (the APA).²² As the authors summarize,

Legislatures and courts . . . are continually behind the pace of events in the administrative state; they play an essentially reactive and marginal role, modifying and occasionally blocking executive policy initiatives, but rarely taking the lead. And in crises, the executive governs nearly alone, at least so far as law is concerned.²³

The book’s second main claim, a normative one, is that releasing the Executive from the bounds of law is a good and inevitable result.²⁴ The speed and complexity of modern events require executive discretion. Congress and the courts are slow and deliberative and hence unable to cope with our fast-paced, modern world, especially the increasingly frequent

14. *Id.*

15. *Id.* The somewhat oddly placed fifth chapter rejects the idea that, in the absence of domestic limits, international law can provide a legal check on the Executive. *Id.* at 16. We do not address that point, as it seems peripheral to the book’s central claims.

16. *Id.* at 15–16.

17. *Id.* at 15.

18. *Id.* at 176.

19. *Id.* at 25–29, 52–54.

20. *Id.* at 31–32.

21. *Id.* at 29–31.

22. *See id.* at 84–87 (explaining that statutes that are intended to constrain executive power often fail because they are not enforced or because they are flexible and exclude certain government actions from review).

23. *Id.* at 4.

24. *Id.* at 14–15.

crises.²⁵ The “unbound” Executive is, the authors say, not only descriptively accurate but normatively optimal: “Executive government is best in the thin sense that there is no feasible way to improve upon it, under the conditions of the administrative state.”²⁶ The natural conclusion is to reject liberal legalism’s misguided attempts to reform and constrain the modern Executive.²⁷

The third claim, again factual, is that “the major constraints on the executive, especially in crises, . . . arise . . . from politics and public opinion.”²⁸ Thus, “[a] central fallacy of liberal legalism . . . is the equation of a constrained executive with an executive constrained by law.”²⁹ To the contrary, “de facto political constraints . . . have grown up and, to some degree, substituted for legal constraints on the executive” such that “[t]he executive, ‘unbound’ from the standpoint of liberal legalism, is in some ways more constrained than ever before.”³⁰ In short, the (legally) unbound Executive is (despite the book’s title) not truly unbound, only bound in a different way than the Madisonian system envisions.

Fourth, while the book is at times circumspect about the effectiveness of political constraint—it denies that “political constraints necessarily cause the executive to pursue the public interest” and says only that “politics and public opinion at least block the most lurid forms of executive abuse”³¹—it contends that political constraints are sufficient to render fears of executive tyranny irrational: hence, “tyrannophobia.”³² Concerns about executive tyranny that permeate liberal legalism are counterproductive, for they prevent useful delegations to the Executive and promote irrational fears.³³ As a result, we should move beyond reflexive fears of executive government, not just because there is no alternative to it, but because irrational fears stoked by liberal legalists may hamper executive action with no countervailing benefit.

In sum, Posner and Vermeule say, an executive unconstrained by law but constrained by public opinion is the modern reality and the inevitable, best available solution to modern challenges. Their subtitle could have been, *How We Learned to Stop Worrying and Love the Unbound Executive*.³⁴

25. *Id.* at 25–26, 52–53.

26. *Id.* at 5.

27. *Id.* at 14–15.

28. *Id.* at 4.

29. *Id.* at 5.

30. *Id.*

31. *Id.*

32. *Id.* at 176–77.

33. *Id.* at 202–04.

34. With apologies to DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (Columbia Pictures 1964).

B. The Executive Unbound's *Place Within the Literature*

The Executive Unbound occupies an unusual space within the broader literature on executive power, whose scholarship tends to cluster around two nodes. The first we might call the “Despotic Executive” thesis, exemplified in recent books by Bruce Ackerman and by Peter Shane.³⁵ Ackerman and Shane generally share Posner and Vermeule’s descriptive conclusion that the Executive is unbound, but they differ from Posner and Vermeule on the normative implications. Like *The Executive Unbound*, the Despotic Executive thesis regards the modern Executive as unleashed from the bounds of law as a result of excessive delegation, congressional and judicial passivity, and relentless executive overreaching.³⁶ But these developments, it is said, produce a bad—indeed, an appalling—outcome that threatens democracy. The challenge for Despotic Executive theorists is to restore legal constraint upon the Executive—precisely the project that *The Executive Unbound* criticizes as hopeless, irrational, and counterproductive.³⁷

The Despotic Executive critique echoes Arthur Schlesinger’s classic *The Imperial Presidency* and an array of writings from the Nixon era.³⁸

35. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 32 (2010) (describing the evolution of the President from “an eighteenth-century notable . . . to a twenty-first-century demagogue, asserting extraconstitutional authority”); PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 158 (2009) (arguing that presidential control over “discretionary decision making by administrative agencies suggests a transformation of the President not only from overseer to decider, but from chief executive to chief lawmaker” and that such authority “would potentially give the President a single-handed role dwarfing the role of Congress in prescribing rules that Americans are compelled to obey”). Daryl Levinson and Richard Pildes offer a more modest view of executive overreach, arguing that the dangers of executive overreaching arise principally in periods where the branches of government are all controlled by the same political party and thus the checks of party rivalry—which they think have largely superseded Madisonian checks—are relaxed. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (arguing that the Madisonian system of checks and balances between institutions is largely effective only when the branches of government are controlled by different and competing political parties and suggesting reforms that might preserve checks and balances in eras of party-unified government).

36. See, e.g., SHANE, *supra* note 35, at vii (lamenting the abandonment of checks and balances for “a virtually unchecked presidency, nurtured too often in its political aggressiveness by a feckless Congress and obsequious courts”).

37. *The Executive Unbound* says of Shane and Ackerman:

Curiously, these books . . . go on to offer a series of prescriptions for reviving (some version of) liberal legalism and the Madisonian separation of powers. We believe that the diagnoses of decline are so convincing that the prescriptions for revival are futile; the very motivations, beliefs, and opportunities that these authors ascribe to political actors in their diagnoses, if true, rule out their prescriptions.

POSNER & VERMEULE, *supra* note 2, at 213 n.1.

38. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 377 (Mariner Books 2004) (1973) (declaring that the Nixon Administration’s belief “in its own mandate and in its own virtue . . . had produced an unprecedented concentration of power in the White House” and arguing that “[i]f this transformation were carried through, the President, instead of being accountable every day to Congress and public opinion, would be accountable every four years to the electorate” and that “[b]etween elections, the President would be accountable only through impeachment and would govern, as much as he could, by decree”).

Similar charges were laid against Franklin Roosevelt, Lincoln, Jackson, and even Washington in their days.³⁹ Posner and Vermeule are surely right to say that fear of an unconstrained Executive runs deep in the American psyche.⁴⁰

A strong countercurrent in modern discourse on executive power goes largely unmentioned in *The Executive Unbound*. This “Fettered Executive” thesis was associated most strongly in the George W. Bush Administration with Vice President Dick Cheney and his aide David Addington,⁴¹ but it dates back at least to the Reagan Administration.⁴² Its counter-narrative is that after Watergate, Congress and the courts have tied down the Executive, moved by a misguided legalism and a mistaken view of the constitutional meaning of executive power. In this account, Congress forced upon a weakened presidency a series of bad and unconstitutional laws—for example, the WPR, the Ethics in Government Act, the Presidential Records Act, and many others. At the same time, courts increasingly interfered in executive operations (*United States v. Nixon*,⁴³ and more recently, *Boumediene v. Bush*⁴⁴) and allowed Congress to interfere (*Morrison v. Olson*⁴⁵). Former Vice President Cheney argued: “In the aftermath of Vietnam and Watergate . . . there was a concerted effort to place limits and restrictions on presidential authority. . . . [These efforts] were misguided”⁴⁶

Like Posner and Vermeule, adherents of the Fettered Executive thesis believe that “given the world that we live in, . . . the president needs to have unimpaired executive authority” to meet the demands of modern governance.⁴⁷ Tying the Executive down with multitudes of laws, hearings,

39. POSNER & VERMEULE, *supra* note 2, at 184.

40. *See id.* at 176, 181–87 (declaring that “[t]yranny looms large in the American political imagination” and describing how perceptions of tyranny and dictatorship have influenced the development of American institutions and modern understandings of powerful presidencies).

41. *See* JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 84–98 (2007) (describing the Cheney–Addington view); *see also* JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 122 (2006) (claiming that the War Powers Resolution was an overreach by Congress into the President’s constitutional authority over foreign affairs).

42. *See* *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (exploring the legal constraints and institutional obstacles that hampered the Reagan Administration’s implementation of its desired policies); *see also* Saikrishna Bangalore Prakash, *Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV. 1021, 1025–26 (2008) (describing “the sense amongst some that Congress has subdued, even shackled the presidency” and citing additional sources).

43. 418 U.S. 683 (1974).

44. 553 U.S. 723 (2008); *see* A. Raymond Randolph, *The Guantánamo Mess*, in *CONFRONTING TERROR* 241, 242–43 (Dean Reuter & John Yoo eds., 2011) (criticizing *Boumediene* as setting in motion “an unprecedented wartime lawmaking exercise [by the courts] with broad implications for the future”).

45. 487 U.S. 654 (1988).

46. James Taranto, *A Strong Executive*, WALL ST. J., Jan. 28–29, 2006, at A8.

47. *Id.* (quoting Vice President Cheney). Fettered Executive partisans generally suppose that fettering the Presidency is unconstitutional because such constraints runs counter to the Constitution’s original conception of a robust and vigorous executive. *See generally* GOLDSMITH,

independent prosecutors, and judicial proceedings robs it of the energy, secrecy, and dispatch that Hamilton celebrated.⁴⁸ As a result, the Executive may be unable to offer decisive responses to complex, fast-moving modern challenges, especially in emergencies.

As noted, Posner and Vermeule do not discuss the idea that the Executive is unconstitutionally fettered. Presumably, they would dismiss it as descriptively wrong. But it is noteworthy that prominent voices have a strikingly different view of reality, even while agreeing with Posner and Vermeule about the need for executive discretion.⁴⁹

Thus, *The Executive Unbound* stakes out a position partially agreeing with, yet in sharp contrast to, both sides of the conventional debate over executive power. Like Despot Executive proponents, Posner and Vermeule think that, as a descriptive matter, the Executive is unbound by law. Like Fettered Executive adherents, Posner and Vermeule think an unbound executive is normatively preferable. Perhaps surprisingly, aside from their book, this space is largely unoccupied, at least in U.S. scholarship.⁵⁰ With its forceful argument, detailed-yet-accessible style, and carefully developed conclusions, *The Executive Unbound* is destined to be a classic statement of its position, one that cannot be ignored by future scholars of executive power.

Each of the three positions—Despot Executive, Fettered Executive, and Unbound Executive—have valid points and insights. Yet each seems overstated and not fully persuasive, either descriptively or normatively. Further, their alignment suggests three quadrants of a four-quadrant box: (1) executive power is unconstrained by law and that is bad (Despot Executive); (2) executive power is unconstrained by law and that is good (Unbound Executive); and (3) executive power is constrained by law and that is bad (Fettered Executive).

supra note 41 (discussing David Addington's views). Posner and Vermeule, in contrast, generally do not make constitutional claims.

48. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

49. It should be noted that Vice President Cheney believed that the Constitution constrained the Executive. This, too, separates him from Posner and Vermeule. See Taranto, *supra* note 46 (quoting Cheney as saying that Cheney's view "doesn't mean, obviously, that there shouldn't be restraints[;] . . . [t]here clearly are with respect to the Constitution, and he's bound by those, as he should be").

50. Outside of U.S. scholarship, this view is most closely associated with the Weimar and Nazi-era theorist Carl Schmitt. See generally CARL SCHMITT, CONSTITUTIONAL THEORY (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928); CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY (Ellen Kennedy trans., MIT Press 1985) (1923). For a response to Schmitt, see WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW 61–84 (1999). Posner and Vermeule rely on Schmitt to a limited extent in developing their criticism of the Madisonian framework. POSNER & VERMEULE, *supra* note 2, at 32–54. We do not address Schmitt's arguments, as we regard them as neither necessary to nor especially supportive of Posner and Vermeule's position. Schmitt wrote for his time and place, as Posner and Vermeule write for theirs. We think Posner and Vermeule's claims stand or fall on their own merit and that Schmittian references are largely a distraction.

Missing from this grid is a fourth position—the one we find most attractive. The modern Executive is constrained by law and that is good. We call this the “Goldilocks Executive,” where the Executive is neither too strong nor too weak. We are not so confident to believe that the Executive is “just right.”⁵¹ But it is about right, which is the best one can expect from the government. Table 1 illustrates the four positions.

Table 1. Views of the Modern Executive

	Executive Is Unbound	Executive Is Bound
Good	Unbound Executive (Posner & Vermeule)	Goldilocks Executive
Bad	Despotic Executive (Ackerman, Shane)	Fettered Executive (Cheney, Addington)

We develop this theory of the Goldilocks Executive in subsequent sections as a counterpoint to *The Executive Unbound*. As an opening sketch, consider the following. As Part II discusses, we find the Despotic Executive and Unbound Executive perspectives unpersuasive. Of course, the Executive is in many ways much *less* bound than at the founding. Posner and Vermeule are surely right that the growth of the military and the bureaucracy, the rise of delegation and the administrative state, and the pace and complexity of modern events have greatly altered and enhanced the Executive Branch. But less bound is not unbound. The Constitution’s core separation-of-powers constraints remain in place, in practice as well as in theory: the Executive cannot spend money, impose criminal punishments, or make law (outside of delegated areas) without the cooperation of the other branches. Further, other branches have gained power in other respects: for example, the post-World War II constitutional rights revolution empowered judicial oversight of executive operations beyond anything imagined in the eighteenth century. Indeed, the very existence of the Fettered Executive thesis and its adherents in the Executive Branch suggests the implausibility of the idea that the Executive faces no legal constraints—apparently the Executive Branch itself does not feel unbound. If Posner and Vermeule are descriptively accurate, they must not only counter tyrannophobia but also merinthophobia—the fear of irrational Executive Branch officials who imagine binding, even chafing, constraints when there are none.

We also find the Fettered Executive thesis overstated. The Executive retains substantial discretion even as it is subject to oversight, reporting requirements, and inspectors general. Posner and Vermeule’s claims are implausible only to the extent they try to describe an executive with *no*

51. See AMANDA GRAHAM & ANNIE WHITE, *GOLDILOCKS AND THE THREE BEARS* 5, 7, 9 (2008) (describing Goldilocks as finding some porridge, a chair, and a bed as “just right”).

meaningful legal constraints; as an account of the substantial power and discretion wielded by the modern President, *The Executive Unbound* seems entirely persuasive. Again, the existence of two diametrically opposed descriptive accounts of the modern Executive suggests that both greatly exaggerate. 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.

Turning to the normative side, we think that Posner and Vermeule would have excellent arguments if their arguments were deployed to support the moderately constrained Executive that actually exists as opposed to the wholly unconstrained Executive they think exists (or wish for). It is true that an effective executive needs flexibility and discretion to respond to fast-paced events—a point recognized in the founding era and (we believe) built into our constitutional system to some extent.⁵² The Founders had experience with extraordinarily weak executives—the feeble executive-by-assembly of the Articles of Confederation and the highly dependent, legislatively dominated governors and executive councils of the early state constitutions—and had judged them to be failures. A central point of the Constitution’s structure of executive power was to convey more “energy” to the Executive via unity and adequate powers.⁵³ As Posner and Vermeule recount, modern events have induced Congress to enhance executive energy to an extent the Founders never envisioned.⁵⁴ Congress has delegated its authority to the Executive, created a massive military and administrative bureaucracy, and remained passive in the face of executive initiatives. And the system has proved largely successful: the United States has weathered a series of crises in significant part thanks to energetic executive leadership; but despite recurrent refrains of impending executive tyranny—whether under Washington, Jackson, Lincoln, Franklin Roosevelt, or George W. Bush—tyranny never comes.

Finally, to say that the Executive requires flexibility and discretion (even more than the Founders envisioned) is not to say that the Executive requires flexibility and discretion wholly unlimited by law. The Founders also recognized the dangers of executive power and appreciated that forming

52. See, e.g., THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 48, at 423–31 (arguing that an energetic executive is necessary to respond to foreign attacks and administer the laws).

53. See MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 118–19 (2007) (“[T]hese developments reflected desire for an executive branch with ‘energy’ It is, therefore, incomplete to say that Americans feared unified executive power. . . . [T]hey also embraced unified executive power, as a means to get things done The Constitution’s provisions on presidential power . . . reflect an interplay between these two competing goals.”).

54. See POSNER & VERMEULE, *supra* note 2, at 41–51 (analyzing Congress’s role in relation to the Executive’s in the war-on-terror context and in the context of the 2008 financial crisis, and concluding that “[w]e are left with a picture of congressional (and judicial) passivity in the wake of the two major crises of the first decade of the twenty-first century[;] . . . [a]fter the crisis is under way, the executive seeks a massive new delegation of authority and almost always obtains some or most of what it seeks”).

an effective executive required balancing energy and constraint.⁵⁵ Even with the changes Posner and Vermeule point out, many of the Founders' central constraints remain in place. We are unsure whether Posner and Vermeule would prefer these constraints to be lifted—that is, that we should have an executive who, among other things, can ignore enacted law, impose criminal punishments, spend money without legislative authority, and rule by decree. Despite the book's title and several chapters about the unconstrained nature of the modern Executive, they make no arguments directed specifically against these familiar constraints. In any event, we doubt such arguments could be sustained. The Founders recognized an essential truth that modern events do not undermine: the need for a Goldilocks Executive, where the President wields significant power but is still constrained by law. Whether the Founders struck exactly the right balance, either for their time or ours, can be debated. But the idea that we would be better off with no legal constraints on the Executive strikes us as unproved.

II. Exaggerating Executive Power

A. *The Undeniable Growth of Executive Power*

We start with areas of accord. We agree that executive power has, in certain respects, swelled over the course of two centuries. The causes are both foreign and domestic. In part, the growth is a byproduct of the role that the United States has played in world events for the past seventy years. When a nation plays a dominant role on the world stage, its executive necessarily reaps additional power. Of the three branches, only the Executive is constantly on duty and built to react quickly to explosive foreign events, both military and diplomatic. The growth of the U.S. military, from a small army and no navy in 1789 to the massive force deployed worldwide today, reflects Congress's acceptance of this fact. When Helvidius complained that war was the “nurse of executive aggrandizement,”⁵⁶ he might have generalized his complaint and directed it at the whole realm of external relations.

Increased executive clout is also traceable to the federal government's unimagined domestic expansion across many fronts. As the federal government has taken on new tasks related to health care, poverty alleviation, and intrusive regulation of the economy, the Executive has typically been the one to implement these agendas. Generally speaking, the more federal rules and programs there are, the more power the Executive wields.

The expansion of federal power has not merely increased the size of the law-enforcement Executive. As Posner and Vermeule point out, delegation has increased the Executive Branch's role in crafting federal rules that serve

55. See, e.g., THE FEDERALIST NO. 51 (James Madison), *supra* note 48, at 320–25 (explaining the balance of powers and checks provided in the new system of government).

56. JAMES MADISON, HELVIDIUS NUMBER IV (1793), *reprinted in* THE PACIFICUS–HELVIDIUS DEBATES OF 1793–1794, at 84, 87 (Morton J. Frisch ed., 2007).

as substitutes for or complements to congressional legislation.⁵⁷ In an era of vast federal lawmaking, many people suppose that Congress cannot legislate with the specificity necessary, for it lacks the time and expertise. Thus, the need to delegate legislative authority to others arises. The Executive has been (and will continue to be) a beneficiary of these increasingly frequent and broad legislative delegations.

Posner and Vermeule also point to the “Chevronization” of parts of federal law as a reason for increased executive power.⁵⁸ The Supreme Court has concluded that it should defer to executive agencies’ reasonable constructions of federal law, either because Congress has required as much or because the Executive is more democratically legitimate than the courts that might second-guess its constructions of statutes.⁵⁹ Whatever the reason, courts permit the Executive to adopt any one of a number of reasonable readings of a federal statute, a stance that effectively cedes to the Executive broad authority over the statute’s meaning. Multiply this discretion across the thousands of statutes and programs, combine it with the express delegation of rulemaking authority in many areas, and the Executive may seem unbound, even unhinged.

Posner and Vermeule’s account of the rise of executive power seems generally persuasive. We agree that the President has gained power in ways that the Founders could not have imagined. But Posner and Vermeule claim not just that the President is *less* bound than was imagined at the founding, but that the President is *unbound*—that “the legally constrained executive is now a historical curiosity”⁶⁰ and that the Madisonian separation of powers has “collapsed.”⁶¹ That is a rather different claim, one that is inconsistent with the realities of modern practice.

As if to recognize the difficulties of their descriptive claim, Posner and Vermeule belatedly conclude their book with a peculiar admission. In their conclusion, they seem to concede that the Executive *is legally bound*:

Congress retains the formal power to make law. It has subjected presidential lawmaking to complex procedures and bureaucratic

57. See POSNER & VERMEULE, *supra* note 2, at 32–34 (“[L]egislatures are incapable of supplying the necessary policy adjustments at the necessary pace. . . . The result is that in the administrative state, broad delegations to executive organs will combine lawmaking powers with administrative powers . . .”).

58. See *id.* at 52–54 (explaining that courts tend to defer heavily to the Executive for reasons both pragmatic and political, such as a comparative lack of political legitimacy in times of crisis). Posner and Vermeule do not specifically use the term *Chevronization*, but their discussion of the ways in which federal courts defer to executive power because of perceived issues of democratic legitimacy aligns with the conclusions set forth in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

59. See *Chevron*, 467 U.S. at 866 (explaining that federal judges have a duty to respect the legitimate policy choices made by an agency when that choice is a reasonable interpretation of a statutory gap left by Congress).

60. POSNER & VERMEULE, *supra* note 2, at 4.

61. *Id.* at 18.

checks, and it has created independent agencies over which the president in theory has limited control. The federal courts can expect the executive to submit to their orders, and the Supreme Court retains certain quasi-lawmaking powers, which it exercises by striking down statutes and blocking executive actions.⁶²

This description comports with reality. Yet it is buried in the conclusion and stands at odds with the sweeping claims of the introduction, the first five chapters, and the book's bold title. Perhaps they ultimately flinched from their descriptive claims. Because we are uncertain what to make of this concession, if concession it is, we first consider their bold descriptive claim. Part III then discusses the possibility that they are primarily making a normative claim rather than a descriptive claim.

B. The Ties that Bind the Executive

In this subpart we turn to constraints on the Executive—constraints that Posner and Vermeule understate or substantially ignore. The Executive faces at least five core constraints: the Constitution, the Congress, the courts, the public, and party politics. Sometimes these constraints mutually reinforce each other, and other times they act at cross-purposes. The first three of these constraints are not foreign to the Madisonian system, but are part and parcel of it. The fourth was not built into the Constitution; rather, the Constitution presupposed that the public would be a check on all three branches, including the Executive. The fifth constraint is unanticipated because the Founders seem not to have envisioned the rise of political parties. Finally, we note a further phenomenon, although we are unsure whether it counts as a separate constraint or as good evidence of the existence of the first five: the Executive believes it is constrained by law.

1. The Constitution.—The Constitution explicitly and implicitly limits the President's authority. Most importantly, the President cannot make law using his constitutional authority alone. Article I, Section One says that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”⁶³ It is true that broad and frequent delegations of lawmaking power by Congress to executive agencies have undermined the implicit principle that the President is no lawmaker. But there is no universal delegation of lawmaking authority, and large areas remain nondelegated. Presidents understand this. They do not believe that they can, in the manner of Draco, create crimes or alter private rights by diktat. If presidents want to change law in nondelegated areas, they must go to Congress, and in so doing, they often surrender substantial initiative. President Barack Obama's 2010 health care reform is a striking example: it being a nondelegated area, the President

62. *Id.* at 206 (endnote omitted).

63. U.S. CONST. art. I, § 1.

needed Congress to pass a framework law to effect the reforms because he could not unilaterally impose the individual mandate, cut Medicare spending, or provide health insurance to those lacking it. Because congressional approval was necessary, the reform evolved in directions (such as the elimination of the so-called public option) that the President disfavored.

Similarly, in the fall of 2011, President Obama developed measures meant to lift the economy and relieve high unemployment. Yet he did not implement them himself; they took the form of proposed legislation recommended to Congress (as the Constitution envisions in Article II, Section Three). Though a majority of Senators wanted to bring the bill to a vote, they did not have enough votes to break a filibuster. Newspaper accounts concluded that the filibuster “kill[ed]” the President’s jobs bill, at least when considered as a package.⁶⁴ Although at least one congressman called on the President to take “‘extra-constitutional’ action” to respond to the “emergency,”⁶⁵ few regarded that as a serious suggestion, and of course the President did not act on it. Again, in nondelegated areas, Congress is the lawmaker; this is an important check on the President, one that serious people do not question.

The Constitution further says that money may only be drawn from the Treasury through appropriations made by law.⁶⁶ Recognizing that they lack power to make law, presidents do not suppose that they can unilaterally withdraw money from the Treasury and spend it. That is why they submit a proposed budget to Congress, not an actual one.⁶⁷ And although Congress requires the President to submit a budget, Congress often takes little guidance from the President on budgetary matters (reflected, for example, in the Senate’s unanimous rejection of President Obama’s 2011 budget).⁶⁸ The massive appropriations bills that Congress enacts every year are mostly a product of congressional priorities. There is no doubt that were he solely responsible, the President would have different spending priorities.

Another recent example vividly demonstrates that the President’s constitutional authority (or lack of it) matters: the semi-comical fight over the debt limit. In July 2011, President Obama and the congressional leadership conducted tough negotiations about the conditions under which Congress

64. E.g., Andrew Taylor & Ben Feller, *Senate Republicans Vote to Kill Obama’s Jobs Bill*, BLOOMBERG BUSINESSWEEK (Oct. 11, 2011), <http://www.businessweek.com/ap/financialnews/D9QACO500.htm>.

65. Nicholas Ballasy, *Rep. Jackson: Obama Should ‘Declare a National Emergency,’ Add Jobs with ‘Extra-constitutional’ Action*, DAILY CALLER (Oct. 12, 2011), <http://dailycaller.com/2011/10/12/jackson-obama-should-declare-a-national-emergency-add-jobs-with-extra-constitutional-action/>.

66. U.S. CONST. art. I, § 9.

67. By law, Congress has imposed upon the President the obligation to submit a budget. 31 U.S.C. § 1105(a) (2006). The law makes clear that the President is to make proposed appropriations for the upcoming fiscal year. *Id.* § 1105(a)(5).

68. Alexander Bolton, *President’s Budget Sinks, 97-0*, HILL (May 25, 2011), <http://thehill.com/homenews/senate/163347-senate-votes-unanimously-against-obama-budget>.

would raise the debt ceiling.⁶⁹ This bargaining was meaningful on the widely held assumption that the President otherwise lacked authority to issue more debt. Some people argued that the President had independent authority, but that was because they read the Constitution (Section Four of the Fourteenth Amendment in particular) to grant such authority to the President.⁷⁰ Notably, Posner and Vermeule, in newspaper commentary, urged the President to raise the debt ceiling unilaterally regardless of his legal authority.⁷¹ We admire their consistency, for having argued for an unbound executive in their book, they continued the argument in the public square. But their argument fell on deaf ears, likely because everyone else believed the President was bound by law. And rather than raising the ceiling unilaterally, the President accepted what he clearly regarded as a distasteful compromise with Congress.

The recent intervention in Libya might suggest that the President is unbound by the Constitution in one of the most consequential of areas: war. This intuition will prove most powerful amongst those who believe (as we do⁷²) that the Constitution gives the power to initiate conflict to Congress. Yet here too the President's legal advisors made legal claims about Libya, asserting that the President had constitutional authority to act.⁷³ Though we regard such claims as mistaken, what is notable for present purposes is the attempted *legal* justification. No one in the Executive Branch seems to have argued that the Executive could launch attacks on Libya at his discretion, irrespective of law. On the Posner and Vermeule account, this legal justification was unnecessary because the President was unbound: the justification was as gratuitous as a defense that the President's actions satisfied the Prime Directive, a frequent theme of the *Star Trek* series.⁷⁴ Further, the Executive Branch's justification acknowledged limits, suggesting that a substantial conflict involving U.S. ground forces might require congressional authorization.⁷⁵ Notably, President Bush did seek

69. Carl Hulse & Jackie Calmes, *Boehner and Obama Nearing Deal on Cuts and Taxes*, N.Y. TIMES, July 22, 2011, available at <http://www.nytimes.com/2011/07/22/us/politics/22fiscal.html>.

70. E.g., Adam Liptak, *The 14th Amendment, the Debt Ceiling and a Way Out*, N.Y. TIMES, July 25, 2011, available at <http://www.nytimes.com/2011/07/25/us/politics/25legal.html>.

71. Eric A. Posner & Adrian Vermeule, Op-Ed., *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/22/opinion/22posner.html> (arguing that the President should raise the debt ceiling based on his "role as the ultimate guardian of the constitutional order").

72. See generally Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

73. Authority to Use Military Force in Libya, 35 Op. O.L.C. (2011), available at www.justice.gov/olc/2011/authority-military-use-in-libya.pdf.

74. E.g., *Star Trek: Bread and Circuses* (NBC television broadcast Mar. 15, 1968).

75. See Authority to Use Military Force in Libya, *supra* note 73 (suggesting that conflicts constituting "war" in the constitutional sense need congressional authorization and applying factors to conclude that Libyan conflict was not such a war).

In a recent commentary on the Libya intervention, Professor Posner argues that because the Executive must interpret the law in order to enforce it, the Executive is also a lawmaker. See Eric

congressional authority for the 2003 Iraq invasion despite some advice that such authorization was unnecessary.⁷⁶

In sum, the Constitution establishes a basic framework that limits executive initiative. As a general matter, the President cannot make law or otherwise alter private rights, spend money, or impose criminal punishments without the cooperation of one or more independent branches.⁷⁷ This is the core of the Madisonian design.⁷⁸ Some modern arrangements, including delegations and assertions of independent presidential power in wartime, may weaken this framework in particular areas. The scope and force of such arrangements may be debated. But the basic structure remains operative.

2. *Federal Statutes.*—We do not believe that the Executive is unbound from the laws of Congress. Evidence for this proposition comes from Congress and the President. In Congress, the drawn-out legislative process—crafting, debating, and passing bills—presupposes that the entire enterprise leads to meaningful results. To be sure, not every resolve matters; unfortunately, many do not. But by the same token, no one thinks that Congress is an expensive debating society. New laws and new delegations matter because they often cede new discretion to the Executive, discretion that it would otherwise lack. New laws are also meaningful because what

Posner, *Stop Complaining About Harold Koh's Interpretation of the War Powers Act*, NEW REPUBLIC (July 1, 2011), <http://www.tnr.com/article/politics/91166/harold-koh-war-powers-john-yoo-libya> (“Once again, in the area of foreign relations, the president’s authority prevails.”). We see his point, even if we might quibble with his terms. But for our purposes what is interesting is that Posner does not adopt the view that what happens in Congress is irrelevant because laws do not matter: “The question now is whether Congress, other U.S. institutions or officers, or the public will try to force President Obama to back down There are just not the votes to compel the president to withdraw from Libya” *Id.* He seems to concede here that Congress might have forced the President to back down, via appropriations or otherwise.

76. BOB WOODWARD, *PLAN OF ATTACK* 167 (2004).

77. Theodore Roosevelt claimed the President had authority to do anything not prohibited by law. See THEODORE ROOSEVELT, *AN AUTOBIOGRAPHY* 504 (1913) (arguing that “occasionally great national crises arise which call for immediate and vigorous executive action,” that in such crises the President “is the steward of the people,” and that “the proper attitude for him to take is that he is bound to assume that he has the legal right to do whatever the needs of the people demand, unless the Constitution or the laws explicitly forbid him to do it”). Importantly, however, Roosevelt admitted that legal prohibitions constrained the President. He did not claim that the President was beyond the law.

78. The President is also constrained because the states are independent power centers. It is true that the states’ independent authority has been diluted by the expansion of federal constitutional power. But many things are still left to the states. Under modern doctrine, Congress decides what residual authority is left with the states. The President cannot unilaterally command the states, even in an area of clear federal interest. See *Medellín v. Texas*, 552 U.S. 491, 528–30 (2008) (holding that President Bush’s determination that the United States would follow an International Court of Justice decision did not compel Texas to do so); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 328–29 (1994) (dismissing arguments that executive actions proscribing a certain method of state income taxation were relevant because it is Congress, not the President, that is given the relevant powers under the Constitution).

Congress gives, it can take, leaving less authority and discretion for the Executive.

The President cares about what transpires in Congress because he recognizes that its laws matter. The Constitution presumes as much because it arms him with a veto. The veto is not a relic of a bygone era, for it affects legislative dynamics. Even when presidents do not routinely veto, the possibility influences the kinds of legislation Congress takes up and passes.⁷⁹ That is so because the President signals his intentions early in the legislative process as a means of avoiding having to veto presented bills. Administrations routinely issue Statements of Administration Policy regarding bills that sometimes say that the cabinet heads would recommend a veto or that the President would exercise a veto.⁸⁰ There would be no reason for this signaling if bills were necessarily inconsequential because the President could do whatever he wished anyway. More generally, the veto itself would be irrelevant in a world where the underlying legislation imposed no constraint. Debating societies never grant someone a veto to nullify one side's victory, precisely because little turns on who wins.

Further, consider presidential signing statements, much criticized during the Bush Administration. Why do the words in those statements cause heartburn in some quarters? Because they purport to define words and phrases found in statutes in ways that some find objectionable and because the President claims power to decline to enforce statutes that he believes are unconstitutional. Such statements only matter against a backdrop where everyone supposes that the Executive has to follow the law. If the law is irrelevant to what presidents do, both signing statements and opposition to them are rather pointless.

Once laws are enacted, presidents routinely act as if Congress produces meaningful products. For example, the Administrative Procedure Act imposes considerable procedural hoops that the Executive must jump through

79. For example, even though the Republican “cut, cap and balance” plan had almost no chance of passing the Democrat-controlled Senate, President Obama still threatened a veto. *Obama Threatens To Veto Republican Budget Plan*, REUTERS (July 18, 2011), <http://www.reuters.com/article/2011/07/18/usa-debt-veto-idUSWNA390520110718>.

80. See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1867—NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012 (2011), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf (listing at least eleven separate parts of the bill to which the Administration objected, stating for example that “[t]he administration strongly objects to the military custody provision of section 1032, which would appear to mandate military custody for a certain class of terrorism suspects” and declaring that “[a]ny bill that challenges or constrains the President’s critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the Nation would prompt the President’s senior advisers to recommend a veto”). Notably, the provisions of the bill against which the statement aimed the most forceful objections included proposed limits on the President’s detention authority. *Id.* at 1. These are aspects of the war on terror in which one might think the President is the most unbound—yet the President appeared concerned that limits contained in the proposed bill would impose substantial and unacceptable constraints upon him. *Id.*

before exercising rulemaking discretion. Posner and Vermeule argue that these statutes have enough flexibility built into them that the Executive can ultimately achieve its goals. Perhaps so, but the Executive nonetheless expends time and expense to comply with them, as if they (and the entire system of laws) mattered.

Similarly, laws create independent agencies and limit the President's removal authority. While some scholars believe these laws to be unconstitutional,⁸¹ presidents rarely dismiss commissioners within these agencies and never purport to exercise the authority granted to these agencies. Indeed, we might say that with respect to law execution, the President's power has diminished over time, at least in the sense that there were no independent agency fiefdoms at the founding.⁸²

This is not to say that presidents never take matters into their own hands. If they feel there is legal authority for acting on their preferences, they will take the actions they desire and avoid asking permission from Congress where they believe none is necessary.⁸³ But when they sense they lack authority, they do not just argue that the public is the ultimate arbiter of their actions and that existing laws are irrelevant. We think there are countless episodes of a President refraining from implementing his policies because he concluded that existing laws did not permit him to do so.

What of those instances where the President seems to act contrary to law, provoking a hue and cry against his lawlessness? Again, our point is not that the President never does anything beyond the law. In a world full of law, where people have reasonable disagreements about what the law means, the Executive inevitably will take measures that seem to violate the law. Our point is that when the Executive acts, it almost always believes that its actions are consistent with its understanding of the law. Whatever others might think about the Executive, the Executive almost always believes that it has acted lawfully. The Executive never claims that the laws passed by Congress are irrelevant in the way that the laws of Mexico or Japan are irrelevant to the actions of the U.S. Executive.

3. *The Courts.*—The courts constrain the Executive, both because courts are necessary to the Executive imposing punishments and because courts can enforce the Constitution and laws against the Executive. It is true, as Posner and Vermeule say, that courts often operate *ex post* and that they

81. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 581 (1994) (arguing that the Constitution grants executive power to the President alone and that Congress is given no power to create subordinate entities that exercise executive power).

82. See Prakash, *supra* note 42, at 1051 (“Unlike modern statutes, which expressly proclaim that various entities are ‘independent’ of the executive branch . . . , no early statute ever declared that an officer or department would be ‘independent’ of the President.”).

83. William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 417–18 (2005).

may defer to executive determinations, especially in sensitive areas such as national security. But these qualifications do not render the courts meaningless as a Madisonian constraint.

First, to impose punishment, the Executive must bring a criminal case before a court. If the court, either via jury or by judge, finds for the defendant, the Executive does not suppose that it can nonetheless impose punishment (or even, except in the most extraordinary cases, continue detention). This is so even if the Executive is certain that the court is mistaken and that failure to punish will lead to bad results. As a result, the Executive's ability to impose its policies upon unwilling actors is sharply limited by the need to secure the cooperation of a constitutionally independent branch, one that many suppose has a built-in dedication to the rule of law.⁸⁴ And one can hardly say, in the ordinary course, that trials and convictions in court are a mere rubber stamp of Executive Branch conclusions.

Second, courts issue injunctions that bar executive action. Although it is not clear whether the President can be enjoined,⁸⁵ the rest of his branch surely can and thus can be forced to cease actions that judges conclude violate federal law or the Constitution.⁸⁶ As a practical matter, while courts issue such injunctions infrequently, injunctions would be issued more often if an administration repeatedly ignored the law.

Third, courts' judgments sometimes force the Executive to take action, such as adhering to a court's reading of a statute in areas related to benefits, administrative process, and even commission delivery. Though the claim in *Marbury v. Madison*⁸⁷ that courts could issue writs of mandamus to executive officers was dicta,⁸⁸ it was subsequently confirmed in *Kendall v. United States ex rel. Stokes*,⁸⁹ a case where a court ordered one executive officer to pay another.⁹⁰

Finally, there is the extraordinary practice of the Executive enforcing essentially all judgments. The occasions in which the Executive has refused to enforce judgments are so few and far between that they are the stuff of legend. To this day, we do not know whether Andrew Jackson said, "John

84. A limited exception to this generalization is the ability of military commissions to try alleged enemies in wartime. This process, though somewhat judicial in nature, takes place within the Executive Branch and thus without interbranch checks. But military commissions are extremely rare and extremely controversial, highlighting the extent to which, in the ordinary course, the President relies upon an independent branch for conviction and punishment.

85. Compare *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867) (holding that the President cannot be enjoined), with *United States v. Nixon*, 418 U.S. 683 (1974) (concluding that the President can be subpoenaed).

86. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–89 (1952) (affirming a preliminary injunction against the Secretary of Commerce for an unconstitutional seizure of property).

87. 5 U.S. (1 Cranch) 137 (1803).

88. *Id.* at 169–72.

89. 37 U.S. (12 Pet.) 524 (1838).

90. *Id.* at 608–09.

Marshall has made his decision, now let him enforce it.”⁹¹ Lincoln’s disobedience of Chief Justice Taney’s writ of habeas corpus is so familiar because it was so singular.

Yet to focus on actual court cases and judgments is to miss the broader influence of the courts. Judicial review of executive action matters because the knowledge of such review affects what the Executive will do. Executives typically do not wish to be sued, meaning that they often will take measures designed to stave off such suits and avoid actions that raise the risk of litigation. The ever-present threat that someone will take a case to court and defeat the Executive acts as a powerful check on executive decision making. The Executive must take account of law, including *law* defined as what a court will likely order.

4. *Public Opinion.*—As noted, we agree with Posner and Vermeule that the public checks the Executive. We agree with them so much that we wonder if their title oversells their claim. Even under their view, the Executive is checked in a meaningful way, just not by law and lawyers. A more appropriate title would have been “The Executive Unbound by Law but Tied Down by Public Opinion.” Although their title is punchier, it comes with a risk of confusion for those unfamiliar with the book’s contents.

Though we agree that the public checks the Executive, we find their description of public preferences a bit truncated. They write as if the public only has preferences about substance (guns, butter, civil liberties) and that the Executive acts inconsistently with these preferences at his peril. This ignores another important public preference. The public has not only substantive preferences but also a commitment to a system where the Executive is not at liberty to do exactly what any particular majority coalition wants at any given time. Moreover, the public believes in the separation of powers at some basic level and expects that the Executive will act consistent with standing laws, the Constitution, and judicial orders. In short, the public expects compliance with the Madisonian Constitution.

If we are right about the public’s preferences for an executive under the law, it supplies a solution and a dilemma for Posner and Vermeule. The solution comes in the form of rehabilitating their descriptive claim that the President is not bound by law. They could combine our assertion that the President acts consistent with the law and our claim that the public has a preference for the Executive following the law. By doing so, they could maintain that the President follows the law not because he is bound to do so but only because he feels constrained to satisfy his actual master, the public. So, perhaps their best response would be to say that the President acts as if the law binds him because that is what the public brainwashed by a Madisonian ethos expects of him. In a sense, the Executive would be playing

91. See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 518 (1996) (noting that although Jackson was reported to have made that statement, he probably did not).

the part of a Madisonian executive for public consumption, when in fact he is an elective Schmittian dictator.

The public's preference for an executive under the law also solves another problem. Though Posner and Vermeule say the public is the only check on the Executive, they never say why the President does not merely take the Gallup Poll and implement the preferences it reveals, at least where those preferences cohere with his own. Why does the President not just raise marginal tax rates on millionaires if that is what he and the people want? It seems that the President clearly should raise those marginal rates if the people had only substantive preferences and they were his only masters. But if the public also has a preference for an executive under law and that preference generally takes precedence over the public's substantive policy commitments (more guns, less butter, etc.), we know why the President does not always act unilaterally whenever he and the public share policy preferences.

Unfortunately, this theory creates its own dilemma. Should Posner and Vermeule concede that the Executive follows the law and that the public has an appetite for an executive constrained by law, it becomes rather difficult for them to say with certainty *why* the Executive follows the law. We admit that we cannot prove that the Executive follows the law because it feels obliged to adhere to the rule of law, an obligation that does not merely arise because the public expects it. Yet we would say that if the Executive looks as if it is bound by law, acts as if it is bound by law, and speaks as if it is bound by law, we think it safe to presume that it believes itself to be bound by law and is bound by law, even as it also faces other pressures and constraints. Those who might espouse the view that the Executive is insincere when pledging fealty to the rule of law face the onus of establishing that insincerity.

5. *The President's Party.*—During the George W. Bush Administration, those critical of the President's wartime policies lamented Congress's unwillingness to check the President. Some went so far as to proclaim that what really mattered was separation of parties across branches and not the separation of powers itself.⁹²

The tendency to find flaws in a system increases when the system produces results that one deems flawed. But if one succumbed to the temptation to find flaws in this manner, one would find systemic flaws whenever one disliked the products of the system. Libertarians would find the process that generated social welfare programs like Social Security and the Great Society fatally flawed because Congress did not say "no" enough to Franklin Roosevelt and Lyndon Johnson. And liberals would find the

92. Levinson & Pildes, *supra* note 35, at 2329–30.

system of checks and balances flawed because they abhorred Congress's failure to check George W. Bush.

We think that the Executive's party is not just an enabler or a silent partner in the Executive's agenda, but can sometimes thwart presidential initiatives. The separation of powers reinforces that tendency because the President, despite his office, is not the sole leader of his party. Party leaders in Congress (and in the states) have positions and powers independent of the President and, regardless of party affiliation, will not always go where he tries to lead.

For example, consider President George W. Bush's initiative to revamp Social Security through the use of private accounts. Despite securing reelection with a sizable margin and despite a Republican Congress, Bush's proposal went nowhere. Republicans rushed to the microphones to reject it. Bush never even got a vote on it in either chamber.⁹³ The Republican Party had checked the Republican President, showing that separation of parties is not necessary across the branches. The Republicans essentially decided they were unwilling to touch the third rail of American politics, notwithstanding the fact that it was a signature issue for Bush, one that he ran on in 2004.⁹⁴ Something similar happened in 1993, when Democrats, who controlled both chambers of Congress, balked at President Clinton's health care plan.⁹⁵ To paraphrase Madison, ambition had countered ambition.⁹⁶

Our point is not that parties are a reliable check on the Executive, only that the President cannot get too far out in front of his party. When he does, he finds himself isolated, with little chance of a legislative success. Though politicians typically feel an allegiance to a President of the same party, they rarely will fall on their sword to further his agenda. And their refusal to do so frustrates the President's policies, because the President (for separation-of-powers reasons) often cannot achieve his goals unilaterally.

6. *The Executive's Perception of Legal Constraint.*—A final feature of modern practice that is inconsistent with Posner and Vermeule's description is that the Executive Branch feels constrained by law. In part this can be seen from the way it behaves. As discussed above, the Executive Branch asks Congress to enact legislation and make appropriations rather than doing

93. See Richard W. Stevenson, *Many Hurdles for Bush Plan*, N.Y. TIMES, Mar. 2, 2005, at A1 (discussing political resistance to the proposal).

94. See STEVEN E. SCHIER, PANORAMA OF A PRESIDENCY: HOW GEORGE W. BUSH ACQUIRED AND SPENT HIS POLITICAL CAPITAL 44 (2009) (describing how Bush spoke of creating private accounts at the Republican nominating convention).

95. See, e.g., Michael Kramer & Janice Castro, *The Political Interest: Pat Moynihan's Healthy Gripe*, TIME, Jan. 31, 1994, available at <http://www.time.com/time/magazine/article/0,9171,980052,00.html> (quoting influential Democratic Senator Daniel Patrick Moynihan as saying "anyone who thinks [the Clinton plan] can work in the real world as presently written isn't living in it").

96. See THE FEDERALIST NO. 51 (James Madison), *supra* note 48, at 322 ("Ambition must be made to counteract ambition.").

so independently. The Executive Branch brings alleged wrongdoers before courts for punishment rather than punishing independently. The Executive Branch obeys court orders to act or refrain from acting, as implicitly required by the Constitution.

But also of significance is the Executive Branch's internal recognition of legal constraints. The President employs an enormous and growing staff of lawyers spread among all executive offices and agencies. Anecdotal evidence suggests that legal determinations made within the Executive Branch have the effect of constraining Executive Branch action. In one particular episode in the Bush Administration, the Office of Legal Counsel (OLC) reportedly refused to approve the legality of a surveillance program strongly favored by the White House, culminating in a showdown in the Attorney General's hospital room.⁹⁷ Apparently, when the Attorney General backed the OLC conclusions, the President acquiesced. More generally, Trevor Morrison argues that OLC legal conclusions are reached with a sense of independence from presidential policy preferences and have substantially influenced presidential decision making.⁹⁸ To be sure, Executive Branch lawyers often may seek to justify presidential actions under law. They may identify with the Executive and hope to expand its legal discretion. But that role in itself undermines Posner and Vermeule's claims, for if the President is truly unbound by law, why expend resources dealing with the law's non-existent bounds?

We accept that the President's lawyers search for legal arguments to justify presidential action, that they find the President's policy preferences legal more often than they do not, and that the President sometimes disregards their conclusions. But the close attention the Executive pays to legal constraints suggests that the President (who, after all, is in a good position to know) believes himself constrained by law. Perhaps Posner and Vermeule believe that the President is mistaken. But we think, to the contrary, it represents the President's recognition of the various constraints we have listed and his appreciation that attempting to operate outside the bounds of law would trigger censure from Congress, courts, and the public.

C. The Executive Unbound's *Discussion of a Bound Executive*

The idea that the President is generally unbound by law is mistaken. A more plausible view is that the President is *relatively* unbound in particular

97. See Andrew Zajac, *Ashcroft Ex-aide Details Wiretap Infighting*, CHI. TRIB. (May 16, 2007), http://articles.chicagotribune.com/2007-05-16/news/0705151141_1_gonzales-and-then-white-gen-john-ashcroft-alberto-gonzales (detailing the confrontation between Attorney General Ashcroft and top Justice Department officials as Ashcroft lay ill in a Washington hospital in March 2004).

98. Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1708 (2011) (book review); see also GOLDSMITH, *supra* note 41, at 90 (describing the "daily clash inside the Bush administration between fear of another attack, which drives officials into doing whatever they can to prevent it, and the countervailing fear of violating the law, which checks their urge toward prevention").

areas, such as military and national security matters. Presidents have made something like this claim, and in arguing for the Unbound Executive, Posner and Vermeule draw examples not from the ordinary times but from emergencies, specifically the war on terror and the 2008 financial crisis.

Even if these episodes are valid examples of an unbound executive, they do not prove the more general collapse of the Madisonian system. At most they are aberrations from a pattern.⁹⁹ But in any event, we think Posner and Vermeule's examples actually prove the opposite, illustrating constraints upon the Executive.

Posner and Vermeule argue, for example, that the Supreme Court's war-on-terror cases have not meaningfully checked the Executive because the courts have never finally ordered anyone to be released.¹⁰⁰ Yet that hardly makes their case, for the question is what the Executive would have done in a world with no judicial review of the claims of alleged enemy combatants. The Executive's goal has been to thwart attacks in the United States and to blunt attacks on U.S. forces overseas. Given this goal, the Executive's incentive is to detain anyone (especially foreigners) who might plausibly appear to be involved in terrorism against the United States. Members of al Qaeda and the Taliban generally cannot vote in the United States, and the costs visited upon them will not enter the Executive's calculus. Despite this incentive to detain the enemy indefinitely, the Executive released many suspected enemy combatants once held in Guantanamo, some of whom have taken up arms against the United States.¹⁰¹ Why did the Bush Administration release detainees knowing that it was likely that some would take up arms against the United States? We surmise it was done to stave off judicial release orders. There is little doubt that the prospect of judicial review and release had an *in terrorem* effect on the Executive Branch.¹⁰²

Posner and Vermeule also invoke Congress's 2001 Authorization to Use Military Force (AUMF) against al Qaeda as an example of a broad delegation proving that the Executive is unbound.¹⁰³ Yet they admit that the Executive did not get the sweeping authorization it sought.¹⁰⁴ Congress modified the Administration's proposal in various respects meant to reduce the discretion ceded to the Executive.

99. To be clear, we do not deny the existence of aberrational contexts in which the Executive operates to some extent beyond the bounds of law.

100. POSNER & VERMEULE, *supra* note 2, at 34–37.

101. See John Mintz, *Released Detainees Rejoining The Fight*, WASH. POST, Oct. 22, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A52670-2004Oct21.html> (“At least 10 detainees released from Guantanamo Bay prison after U.S. officials concluded they posed little threat have been recaptured or killed fighting U.S. or coalition forces in Pakistan and Afghanistan, according to Pentagon officials.”).

102. See GOLDSMITH, *supra* note 41, at 123–25 (discussing the implications of Supreme Court threats to review one of the Bush Administration's terrorism policies).

103. POSNER & VERMEULE, *supra* note 2, at 34–35.

104. *Id.* at 35.

The Troubled Asset Relief Program (TARP) bill sent by Treasury Secretary Henry Paulson to Congress in 2008 similarly received a congressional rewrite designed to put checks in place.¹⁰⁵ What started off as a bill slightly bigger than a blank check ended up a law hundreds of pages long, full of limits and deadlines.¹⁰⁶ In the interim, the bill was defeated, only to be resurrected in a different form after the stock markets dived.¹⁰⁷

Posner and Vermeule might respond that even with the added restraints the Executive still got blank checks from Congress. We disagree. But even if one assumed that these statutes gave the President *carte blanche*, it begs the question why the Executive went to Congress in the first place, for on their descriptive theory, *he did not need to go to Congress at all*, either for the war on terror or for TARP. While some in the Administration thought congressional authorization for the wars on al Qaeda and Saddam Hussein was unnecessary, no one argued that the President could bail out financial institutions without first obtaining appropriations.

More generally, the existence of multiple delegations across dozens of substantive areas implies something left nondelegated. If the Executive had all the authority it needed and was unconstrained by law, Congress would have had nothing to do in its various sessions but pass resolutions creating National Asbestos Awareness Week. Yet every year Congress passes laws—often quite meaningful ones—related to, among other things, the environment, employment discrimination, and the military.

Put another way, Posner and Vermeule are right that delegations may unbind the Executive in particular areas and in particular ways. Yet because there is no universal delegation of all lawmaking authority, these delegations hardly show that the Executive is unbound. Rather, they demonstrate that the Executive is at least legally bound in areas that lack a delegation in the sense that when neither the Constitution nor statutes delegate authority, the Executive has none. And there are many nondelegated areas.

The authors' claim about delegations is not the only instance in which arguments meant to show unboundedness inadvertently prove the opposite. For instance, they fret about tyrannophobia and what Congress might do in response.¹⁰⁸ But if law does not matter and cannot constrain the Executive,

105. *Id.* at 39.

106. Compare *Treasury's Bailout Proposal*, CNNMONEY.COM (Sept. 20, 2008), http://money.cnn.com/2008/09/20/news/economy/treasury_proposal/index.htm (a 3-page bill), with Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (a 169-page act).

107. See David M. Herszenhorn, *Bush Signs Bill*, N.Y. TIMES, Oct. 4, 2008, available at <http://www.nytimes.com/2008/10/04/business/economy/04bailout.html> (reporting that the initially rejected TARP bill was passed by a higher-than-expected majority in the House of Representatives due to "fears of a global economic meltdown" and "old-fashioned political inducements added by the Senate").

108. See POSNER & VERMEULE, *supra* note 2, at 196–98 (considering the effects of tyrannophobia and the possibility that it might affect the risk of dictatorship).

Congress really cannot do anything of consequence whether or not tyrannophobia exists. If Posner and Vermeule truly believe that law does not constrain the Executive, maybe tyrannophobia should matter insofar as it affects the public's tolerance for rule by the Executive and thereby leads the Executive to make decisions that are suboptimal in order to avoid stoking tyrannophobic fears. But even here, it is not obvious how tyrannophobia would matter in a President's second term. Not having to face the electorate again, a President in his second term should not care about the public's tyrannophobia, at least under their argument. We think the President cares because he still has a policy agenda that requires the cooperation and assistance of Congress, an agenda that will be crippled by the sense that he is (or might become) a tyrant.

* * *

Posner and Vermeule's claim that law does not bind the Executive is inconsistent with how our system actually works. The Executive rarely acts as if it is above the law or has power to do whatever it thinks best. At most, the Executive only claims to be unbound in particular areas (such as military operations) and, even so, employs an army of lawyers to comply with the laws of war and the laws of Congress. To be sure, the Executive is routinely criticized for violating the law. But to say that someone has violated the law hardly establishes that they have no regard for it. Whenever someone claims that the Executive has transgressed the law, the Executive replies that it is acting consistent with the true sense of the law, not that it imagines that it stands above the law. And when courts conclude the Executive has violated the law, the Executive invariably complies with their judgments. This compliance itself is a recognition that the President operates under the Madisonian framework where Congress creates *ex ante* statutory constraints and the courts enforce those restraints (and constitutional ones) *ex post*.

While we agree with Posner and Vermeule that the public checks the Executive, we also believe that the public has a preference for an executive under law. When one combines this preference with a tradition and a constitutional system that presupposes an executive under the law and presidents generally desirous of complying with that tradition and system, one has an executive very much bound by law.

III. The Continuing Relevance of Separation of Powers

A. The Executive Unbound as *Descriptive* or *Aspirational*?

The Executive Unbound purports to be a description of the modern Executive and an antidote for antediluvian law professors who mistakenly believe that reality mirrors the Madisonian and Montesquieuan framework that animated the Constitution's framers. Yet as discussed in the prior part, the book's portrait of reality seems mistaken. The Executive is *less* bound than it was 200 years ago; it is not unbound. The Madisonian system has been diluted from its initial design by delegations and emergencies. But its

basic structure remains—a framework that checks the Executive in numerous ways. Posner and Vermeule’s purported description of reality seems so mistaken that it forces us to consider the possibility that the book is at least in part meant to be aspirational rather than descriptive.

At times, we think the authors mean to say that the world would be a far better place if the Executive faced only the considerable constraints that come from public opinion and not the checks emanating from the Constitution or federal laws. And we think they might prefer a world in which the public ignores the legality of executive actions and instead focuses on whether those actions generate good results.

This perspective is especially notable in Chapter 6, which seems difficult to reconcile with the rest of the book. Chapter 6’s central theme is “tyrannophobia”—the irrational fear of executive dictatorship.¹⁰⁹ The main problem with tyrannophobia, according to the authors, is that it prevents the Executive from being given important powers necessary to deal with modern emergencies.¹¹⁰ Indeed, Chapter 6 should be read in conjunction with Posner and Vermeule’s prior work, *Terror in the Balance*, which, among other things, objects to statutory and constitutional restrictions on the President’s conduct of the war on terror.¹¹¹ As Posner and Vermeule explain, “Americans . . . overestimate the risk of executive power and hence recoil against even reasonable moves toward greater executive authority. . . . Americans . . . are reluctant to support legislative and constitutional changes that could increase executive power. . . .”¹¹² Or as they say even more directly (and with even more evident frustration) later, “Elsewhere, we have described a range of institutions and policy initiatives that would increase welfare by increasing executive power, . . . but that are blocked by ‘libertarian panics’ and tyrannophobia.”¹¹³ And as noted earlier, the book’s conclusion also identifies constraints on the Executive, often in a lamenting tone.

But these discussions are sharply inconsistent with the claim advanced in early chapters that the Executive is *already* legally unbound. We do not know which argument the authors really favor. We suspect that, given the implausibility of the legally unbound Executive, the authors’ most heartfelt argument rests on the normative or aspirational claim. Perhaps what is most important to them is not what is, but what should be.

109. *Id.* at 176.

110. *Id.* at 196–98.

111. ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); *see also* Adrian Vermeule, *Libertarian Panics*, 36 RUTGERS L.J. 871, 872 (2005) (criticizing the “widespread and thoroughly irrational, even hysterical, reaction to small legal changes adopted after 9/11”).

112. POSNER & VERMEULE, *supra* note 2, at 195.

113. *Id.* at 203; *see id.* at 242 n.93 (citing *Terror in the Balance* “[f]or examples of ‘tangible security harms’ resulting from civil-libertarian rules that constrain executive power”).

What they seem to desire is an elected dictator who may do as he sees fit for as long as his term lasts—what they call the “plebiscitary presidency.”¹¹⁴ The dictator is benign because his ability to go rogue is constrained by his need to keep the public on his side. Public support is necessary for the Executive’s reelection, for his party’s electoral prospects, and for the success of his policy agenda.

Undoubtedly, Posner and Vermeule’s preferred system has features that some would find attractive. An executive unbound by law might be more responsive to the public because there would not be multiple institutions that collectively thwart or impede majority sentiment. The system maximizes flexibility, minimizes response time, and concentrates responsibility—features often needed in a rapidly changing world. Their regime is unconcerned with constitutional checks, many of which may have outlived their usefulness. Moreover, an elective dictatorship is not without precedent. England has been described as an elective dictatorship¹¹⁵ because Parliament can (or could until recently) act without limit. And of course, ancient Rome had elected dictators. Even the United States has had elective dictators, when some state legislatures made temporary dictators of their executives during the Revolutionary War.¹¹⁶

In sum, the most significant contribution of *The Executive Unbound* may not be its description of the modern Executive (which we think is overstated, perhaps for effect) but its invitation to abandon existing checks in the interest of more efficient government. Hence, even if we are right descriptively, if Posner and Vermeule are right about the prescription, then the book carries an important message: we should dismantle the checks that exist by (for example) letting the President appropriate money, punish suspects, dispense with enacted law, and rule by decree.

Posner and Vermeule’s normative account has two components. First, checks on the Executive are counterproductive because they cause the Executive to pursue suboptimal policies. Second, checks on the Executive yield no benefits because, under modern circumstances, executive tyranny is chimerical. As a result, under any rational cost–benefit analysis, the Unbound Executive is superior. Below we analyze these claims separately. Our conclusion is that there is little evidence of the first proposition, so their argument largely stands or falls on the second. And here, although Posner and Vermeule make important claims, we find them unpersuasive.

114. *Id.* at 206.

115. Lord Hailsham, *Elective Dictatorship*, LISTENER, Oct. 21, 1976, at 496, reprinted in THREE POLITICAL SYSTEMS: A READER IN BRITISH, SOVIET AND AMERICAN POLITICS 70 (Martin Burch et al. eds., 1985).

116. See MARGARET BURNHAM MACMILLAN, THE WAR GOVERNORS IN THE AMERICAN REVOLUTION 75–76, 91 (1943) (noting that South Carolina and Pennsylvania granted extremely broad powers to their executives).

B. Separation of Powers and the Goldilocks Executive

We do not claim to know the optimal level of legal constraints on the Executive, nor do we fully defend the precise set of legal constraints that make up the modern system. But we think the Goldilocks Executive functions reasonably well within the Madisonian framework and that Posner and Vermeule do not show otherwise.

To restate, by *Madisonian framework* we mean generally (1) a Constitution with checks on all three branches, including the Executive; (2) a legislature with responsibility for lawmaking, taxing, and appropriations; (3) a judiciary with power to check executive actions to ensure the Executive honors the constitutional and statutory bargains related to criminal punishment, appropriations, and individual rights; and (4) an executive responsive to enacted law and court orders and who generally lacks powers allocated to the courts and legislature. From the outside, the public checks all three branches. Despite the adjective, we do not mean a system that looks exactly as Madison imagined, just a system that approximates what he (and others) had in mind.

We think our federal government has been, over the course of two-plus centuries, generally Madisonian, including periods of relatively weak presidents, such as the mid-nineteenth century, and periods of relatively strong executive power during the Civil War and the modern era. Under this Madisonian system, the President enjoys substantial independent power, often receives open-ended and wide-ranging delegations from Congress, and benefits from considerable judicial deference on some matters.¹¹⁷ For our purposes, the key characteristic is a relatively robust executive materially constrained by law.

The Executive so constructed and bounded reflects the enduring tension noted by the Framers: the need for a strong (but not too strong) executive. An executive too strong might lead to a Caesar. An executive too weak might lead to disintegration and a failed state, as almost occurred because of the weak plural executive (the Continental Congress) established by the Articles of the Confederation. Leading Framers knew the history of previous republican experiments and saw recurring patterns. Thus, their creation of a robust executive nested within a system of separated powers was not an accident or a matter of pure theory.

Given this preference, the principal aim of the Constitution was not (contrary to what is often said) to tie down the Executive. The design was more complicated: to empower the Executive—certainly as compared to the ineffective state executives and the plural, deliberative, and often absent executive authority of the Articles—while retaining familiar and tested

117. We do not mean to suggest that Madison (or the other Founders) would have approved of every feature of this system, especially the modern trend. Moreover, even as we believe that the modern Goldilocks Executive is about right, we do not endorse all of its features.

limits. It was to create, as it were, a Goldilocks Executive. We agree with Posner and Vermeule that it is hard to say whether the Framers chose the optimal balance for their own time, much less for ours. The key point, however, is that the Framers' design reflected an intermediate ground, one reflecting two competing objectives. While it is impossible to identify precisely the ideal balance between these objectives, an intermediate position of some sort (which is what we have) seems preferable to either extreme.

A second key point is that, in spite of complaints, the Framers' system of separated powers has withstood the test of time, allowing strong-willed presidents to respond to great emergencies without a slide into permanent dictatorship or widespread loss of freedom (despite repeated alarmism on the latter point). It is true, as Posner and Vermeule note, that our greatest presidents have been those who used the power of their offices to respond to crises—Washington, Jackson, Lincoln, Roosevelt, etc. But for the most part, these presidents achieved greatness by managing the crises within the rule of law, not by overthrowing it. With some well-known exceptions (well-known precisely because they were unusual and later condemned), these presidents did not become plebiscitary dictators, and when the crises receded, executive power receded as well.¹¹⁸ Despite complaints from both the Ackermans and the Cheneys, this pattern remains true today. George W. Bush successfully managed the war on terror (despite concerns that he might have been too bound) without lasting and atypical executive overreaching (despite concerns that he might have been too unfettered). Much of what President Obama has done—continuing Bush policies across a range of issues—is what one would expect of any wartime President operating under the Madisonian framework.

Against this argument from history, Posner and Vermeule counter with changed circumstances. Modern conditions, they contend, have softened or eliminated the tension the Framers perceived.¹¹⁹ Fettered executive power is now more of a threat, and legally unbound executive power now less of a problem, than in times past.

As noted, this claim has two components. The first is that legal limits on executive power are much more problematic in the modern age. Because of the speed and complexity of events, only the Executive has the capacity to respond to them. Anything that materially slows the Executive or limits its range of action threatens a suboptimal national response. Neither Congress nor courts have the institutional capacity to understand the exigencies, and hence, their interference would necessarily be counterproductive.¹²⁰

118. Indeed, Professor Vermeule has spoken of “libertarian panics” and the fear that once the government acquires powers or invades rights in times of crisis, it never cedes them back. See Vermeule, *supra* note 111, at 871.

119. See POSNER & VERMEULE, *supra* note 2, at 62 (arguing that in today's administrative state, “the rate of change in the policy environment is high and plausibly accelerating over time, making constitutional rules set down in past generations particularly suspect” (endnote omitted)).

120. *Id.* at 25–29, 52–54.

Yet on this point *The Executive Unbound* provides surprisingly little support. The authors do not offer examples of limited executive power leading to bad results in the modern age. They do not point to episodes in which the Executive refrained from some useful action because of the Madisonian system. Of course, they are in a bit of a bind here, because they claim that as a matter of fact the Executive is not really bound; thus, offering examples of the bad effects of limited executive power would advance their prescriptive claims only at the cost of their descriptive ones.

Because they do not support their normative claim about the desirability of an executive unbound and because we think well of our Madisonian system, we offer some comments on its recent functioning. As discussed, we think President Bush, during the war on terror, operated within a system of bounded discretion, facing material but not crushing constraints. He sought approval from Congress for the attacks against al Qaeda and the Taliban in the AUMF and in repeated spending authorizations. He also sought approval for military action in Iraq, though initially he hesitated to do so. He had to defend his policies in court; he lost some cases and would have lost others had he pursued his power to its practical limits. He acted knowing that the courts might second-guess his decisions, a knowledge that affected his decision making. He faced the possibility that Congress would limit his authority on various dimensions, and on occasion Congress did. Yet he made a robust, we would say largely effective, response to the challenge of terrorism, at least if we use the substantial disruption of terrorist networks and the absence of a subsequent substantial terror attack on the United States as a yardstick. Facing similar constraints and incentives, President Obama also has acquitted himself well in the war against al Qaeda.

To be clear, we concede that substantial, even colossal, mistakes were made in the war on terror. But the leading ones do not seem to have resulted from legal constraints upon executive power. For example, after initial success in Afghanistan in overthrowing Taliban rule, the President failed to consolidate the position of the new Afghan government, allowing the Taliban to regroup as a powerful opposition force. Instead, the President opened a new front in Iraq. Again, after initial success in displacing Saddam Hussein, the Administration failed to deploy enough troops to secure the country (at least until the “surge” in 2007). By some accounts, the distraction of Iraq harmed the fight against al Qaeda, including by delaying the targeting of Osama bin Laden.¹²¹ Whether these are fairly counted as presidential

121. See RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR*, at ix (2004) (“[T]he administration . . . squandered the opportunity to eliminate al Qaeda and instead strengthened our enemies by going off on a completely unnecessary tangent, the invasion of Iraq.”).

failures, they are not ones attributable to legal constraints on the Executive, meaning that they could have occurred even under an unbound executive.¹²²

Perhaps President Bush would have accomplished more had he not faced a Madisonian system. And perhaps he could have acted with even greater secrecy, dispatch, and success had not Congress and the courts been looking over his shoulder.¹²³ We are not in a position to evaluate such counterfactuals at a detailed level. But we think there is little case to be made for very substantial costs attributable to executive constraint, even in the context of a crisis such as the war on terror. Of course, one may speculate that in future crises, or future aspects of the continuing war on terror, executive constraint may prove highly detrimental. But we see this as no more than speculation.

Because Posner and Vermeule's arguments about the advantages of an unbound executive are speculative, we spend more time on their second proposition—that there is little danger of executive tyranny. Indeed, this point—developed in Chapter 6—becomes, we believe, the book's animating and most interesting claim. According to Chapter 6, there is no possibility under current circumstances that the Executive will become a tyrant (hence, tyrannophobia, or irrational fear of tyrants).¹²⁴ If that is true, then it is silly to worry about imposing checks on the Executive to stave off a phantom menace. The checks are worthless, at best. Moreover, it is unnecessary to develop strong evidence that checks on the Executive yield bad results. If the checks serve no purpose, even plausible speculation that they could have bad effects should cause us to abandon them.

Here is the core of their argument:

The best explanation for the lack of dictatorship in America—at least in America today, as opposed to the nineteenth century—is neither psychological nor institutional, but demographic. Comparative evidence suggests that wealth is the best safeguard for democracy. Equality, homogeneity, and education matter as well. How does the United States, circa 2011, fare on these dimensions? Ethnic, religious, and linguistic homogeneity have declined, and inequality has risen, but because of its high performance on other margins, there is little cause for concern about American democracy. The United States has an enormously rich, relatively well-educated population and multiple overlapping cleavages of class, race, religion, and geography. Simply by virtue of its high per capita income, the likelihood of dictatorship in the United States is very low, at least if the historical pattern reflects causation.

122. One possible counterexample is the President's decision not to bomb Iranian nuclear facilities in 2007, which may be attributable, at least in part, to perceptions that the legal basis for such an attack was subject to substantial debate.

123. See *supra* note 48 and accompanying text.

124. POSNER & VERMEULE, *supra* note 2, at 176–77.

....

The modern economy, whose complexity creates the demand for administrative governance, also creates wealth, leisure, education, and broad political information, all of which strengthen democracy and make a collapse into authoritarian rule nearly impossible. . . . The modern presidency is a fishbowl, in large part because the costs of acquiring political information have fallen steadily in the modern economy, and because a wealthy, educated, and leisured population has the time to monitor presidential action and takes an interest in doing so.¹²⁵

In support, *The Executive Unbound* marshals statistics to show, principally, that national wealth correlates with support for democracy. As the authors explain, “Probably the most robust result of cross-country empirical work on dictatorship is that the best safeguard for democracy is wealth. No democracy has collapsed in a nation whose average per capita income was greater than a little over \$6,000 in 1995 dollars.”¹²⁶ Since the United States is well above this amount, they conclude that all is well.¹²⁷

We take less comfort in such statistics. The cross-cultural study covered a relatively short period of history and a small number of countries.¹²⁸ Moreover, we presume that most of the countries with per capita GDPs over \$6,000 have some form of a separated-powers system or at least are not plebiscitary dictatorships. To make their point, Posner and Vermeule would need to show that truly *unbound* executives rarely become tyrants, not that legally constrained executives rarely do.

Relatedly, Posner and Vermeule argue, very plausibly, that there is little chance of executive tyranny in the United States: “The high-water mark of the modern presidency’s approach to domestic dictatorship—Nixon’s ‘third-rate burglary’ of the offices of his political opponents—was pathetic stuff in historical and comparative perspective, and immediately put Nixon on the path to disgrace.”¹²⁹ This is all true, of course, but Nixon operated in a separated-powers system that was in part responsible for his downfall: an independent Court that ordered release of the tapes; an independent Congress that demanded an investigation and wielded the threat of impeachment; and ultimately a public that flatly refused to accept Nixon’s view (and it seems also Posner and Vermeule’s preference) that when the President does something, that means it is not illegal—that is, a public preference for an executive constrained by law.

125. *Id.* at 200–02.

126. *Id.* at 189.

127. *See id.* at 189–91 (concluding that if the relationship between national wealth and support for democracy is causal, the United States is “unlikely to become a dictatorship in the foreseeable future”).

128. *See id.* at 190 tbl.6.1 (reflecting data covering twenty-two countries over a period spanning from 1950 to 2007).

129. *Id.* at 200–01.

We agree that the chances of slipping into tyranny are low, but that does not prove Posner and Vermeule's point because (despite their efforts to argue otherwise) the United States retains the core of a Madisonian system that imposes legal limits on the President. We have less confidence that, were those legal limits to be lifted, the chances would not appreciably increase. It is true that Posner and Vermeule offer various plausible and specific ways that public opinion constrains the President, but while the particular methods of checking the Executive through public opinion seem important when linked with a Madisonian system (as Part II says), they do not seem all that persuasive without it. At minimum, what would happen if the constraints were lifted seems open to speculation.

Perhaps most importantly, we do not think the separated-powers constraints on the President are solely (or even mainly) designed to avoid full-scale executive tyranny. There can be executive abuses and material losses of freedom without all-encompassing abuses and total loss of freedom. A "soft" dictatorship is also to be feared. By putting the focus on "tyranny," the book's Chapter 6 sets up a bit of a straw man. Of course, a bloodthirsty dictator of the Hitler model is to be feared. But perhaps of more practical concern is a Hugo Chavez-type figure who operates to some extent within the constitutional framework but also abuses his authority and frequently overreaches to punish opponents and achieve his ends.

Posner and Vermeule admit that the soft dictatorship is a more plausible fear,¹³⁰ but they do little to assuage it. They believe that "an educated and leisured population, and the regular cycle of elections, will themselves check executive abuses."¹³¹ Yet elsewhere they say only that "politics and public opinion at least block the most lurid forms of executive abuse."¹³² In particular, one may doubt the effectiveness of majority opinion to check abuses against political minorities and unpopular views, and a legally unconstrained executive may be able to reward supporters and punish dissent in ways that make organizing popular opposition (even by a majority) difficult. Of course, the Madisonian system is not a sure check on such abuses either. But legal constraints that offer some hope of protection to dissenting views, and at least force a potentially abusive or self-dealing executive to work in conjunction with independent branches, seem to offer materially better assurance than the purely unconstrained Executive.

Of course, it is impossible to prove that the core Madisonian constraints have protected against executive tyranny (of the soft or hard kind) in the past. Perhaps, as Posner and Vermeule suggest,¹³³ the United States has merely been lucky, or its great wealth and other advantages have allowed it to

130. *See id.* at 203–04 (acknowledging that tyrannophobia can more plausibly be justified "as a deterrent to low-level executive abuses").

131. *Id.* at 204.

132. *Id.* at 5.

133. *Id.* at 196–202.

overcome structural disadvantages in its political system. And it is equally speculative to say what might happen if the Madisonian constraints were removed. But, to harness a different cliché, we suggest that “if it’s not broken, don’t fix it.” We do not see evidence that legal constraint renders the U.S. Executive fatally ineffective. Without opining about incremental changes to executive power, we doubt that a substantial case can be made for the legally unbound Executive that Posner and Vermeule appear to favor.

Conclusion

The Executive Unbound rests on four claims, two descriptive and two normative. The descriptive claims are the book’s most prominent ones—that the modern Executive is unbound by law but bound by public opinion. The normative claims are more challenging and provocative—that a legally unbound executive is desirable because legal constraints generate suboptimal executive policies and that legal constraints are unnecessary because the restraints of public opinion are sufficient.

As a description of the modern Executive, we think the book greatly overstates. It is true that the Executive wields greater power today than 200 years ago. The reasons for executive expansion are well described in the book. But enhanced executive power does not equal unbound executive power. The basic Madisonian framework remains intact: the Constitution limits the powers the President can exercise; Congress and the courts wield powers that potentially or actually check the President. We agree that public opinion constrains the President, but even here, the book may overstate by failing to appreciate the public’s preference for an executive bound by law. Because of this preference, public opinion reinforces legal constraints on the President while also providing additional political constraints. Thus, if the authors mean to say, as they appear to say in the conclusion, merely that legal constraints have weakened, we agree (but we do not think that claim is especially novel). If they mean to say—as they appear to say in the introduction—that legal constraints have vanished, we think their claim is manifestly implausible.

Stripped of its main descriptive point, the book becomes a normative argument for dismantling existing legal constraints on the Executive. This, it is said, will lead to better outcomes, especially in crises. But the book provides few, if any, concrete examples of constrained executive power leading to bad results. More significantly, the book argues forcefully that legal constraints on the Executive are worthless because there is no danger of executive tyranny. We remain skeptical. The book employs social science data to suggest that tyranny does not occur in wealthy democracies. But we find the data inconclusive and the historical record thin. And in any event, the concern is not just tyranny but executive overreaching and abuse.

In contrast, the current system of modest constraints on an energetic President seems the safer course. We are not persuaded that the trade-off

between executive energy and executive constraint that the Framers identified has been rendered obsolete by modern developments. Although there will be various views of how the balance should be struck, some attempt to balance the two seems preferable to adopting one extreme. A system with a series of checks on a robust executive has stood the test of time, giving us something of a Goldilocks Executive. It should, we think, take powerful evidence for us to abandon it. Posner and Vermeule simply do not provide that powerful evidence. So while we might be better off with a stronger executive, and public opinion might be enough to prevent tyranny, we, at least, are unwilling to make the leap.