

## Why is this greyhound smiling?

Click here to find out!

Protecting Greyhounds Nationwide GREY2K USA

## **Foolish Deference**

A new book makes the best case yet for unilateral executive power -- but it's not good enough.

AZIZ HUQ | March 9, 2007 | web only

Terror in the Balance: Security, Liberty, and the Courts by Eric A. Posner and Adrian Vermeule (Oxford University Press, 328

<u>Terror in the Balance: Security, Liberty, and the Courts</u> by Eric A. Posner and Adrian Vermeule (Oxford University Press, 328 pages)

Talk of emergencies and their consequences has been thick in the air since 9/11. The Bush administration insists that the current fight against terrorism -- a situation it has an interest in depicting as a continuous crisis -- requires the courts and Congress to take a back seat. But the White House's claims of omnicompetence starkly conflict with mounting evidence of negligence and malfeasance. From the stacks of cash gone astray in Iraq to the embarrassing criminal proceeding against CIA agents in Germany for the erroneous "rendition" of an innocent man, the news for mavens of centralized executive authority is hardly comforting.

The time, indeed, is ripe for a sophisticated defender of executive prerogatives to make his or case. To date, defenders of the executive branch's aggrandizement have mainly offered thin analytic gruel. (Here's an example.) Eric Posner and Adrian Vermeule, law professors at Harvard and the University of Chicago respectively, aim to fill this gap. Their book, *Terror in the Balance*, makes a case for executive unilateralism based on the unerring predicates and logic of rational choice economics. While their defense of executive primacy is by far the most sophisticated offered to date, it nonetheless fails to convince.

Posner and Vermeule come from a rational choice economic school of analysis that is generally aligned in the academy with right-of-centre laissez-faire economics. Among law students and professors, the approach offers a crisp, comforting sense of certainty. It is, to be sure, not without its valuable insights. But its very presumptions raise more questions than answers. Can the model of rational actors be translated successfully to the complexity and muddied eddies of the real world?

Posner and Vermeule's basic argument is simple: Executive branches make mistakes, but they are no more likely to make mistakes in times of crisis than at any other time. Courts, however, are *more* likely to strike the wrong balance in times of crisis than at other times. Therefore, courts should defer and delegate to the executive during moments of emergency

This point matters, argue Posner and Vermeule, because there are tradeoffs between security and liberty to be made. Indeed, they argue, American government has reached a point where there is doubtful any "slack" left -- opportunities to make gains in security without a tradeoff in liberties elsewhere.

Even at this point, the limitations of Posner and Vermeule's starting premises begin to show. The idea that the executive alone, or the executive acting in tandem with the legislature, has identified and eliminated all possible inefficiencies and all points of policy friction during times of emergency and stress is untenable. After all, almost three years after the 9/11 Commission issued its report, a legislative menu of its proposals still lingers on Capitol Hill. Governing is complex enough, and the play of interest groups sufficiently chaotic, that it simply cannot be said that the legislative policy process yields anything approaching adequate results.

Nevertheless, even assuming there is some slack in the policy framework, Posner and Vermeule would still contend that we are best off putting our faith in the executive branch. They identify three critiques of executive unilateralism that rest, they argue, on insufficiently examined premises: first, that executive responses to emergencies are driven by irrational panic; second, that an executive elected by a democratic majority will impose disproportionate costs on minorities; and third, that emergencies have a "ratchet effect," permanently increasing executive power in incremental stages.

Posner and Vermeule present cogent arguments against each of these propositions, and apply their points to interrogation, military trials, and other security problems. But many readers will come away from *Terror in the Balance* with a queasy feeling.

In part, this is because of a certain legerdemain accomplished by its authors. Posner and Vermeule insist that their argument draws from first principles, and that they have "no opinion about the merits of particular security policies" and "no brief to defend the Bush administration's choices." Yet their conclusions in later chapters, on specific topics, list unerringly toward the Administration's positions. It's no surprise that in news articles they have defended the Justice Department's memo authorizing torture as "standard lawyerly fare, routine stuff."

1 of 3

It is, of couse, not unusual for legal academic work to reflect authors' substantive commitments. As the philosopher Ronald Dworkin argued decades ago in *Taking Rights Seriously*, it's hard to avoid value judgments in the law. Yet it is always appreciated when authors spell them out rather than deny any such the connection in their work.

In *Terror in the Balance*, the slippage between abstract macro-perspective arguments and the view from the trenches of contemporary political fights may well jar with readers because of another strategy the authors employ. Even as the authors show a willingness to draw on real-world examples (for example, Philip Rumney's study of coercive interrogation in the Israeli context), they have structured their argument at a high enough level of abstraction to be able to reject criticism based on *other* specific examples.

At the heart of the book's argument is the claim that the executive branch, because of its greater access to information, its greater expertise, and its ability to act with speed, is more likely to make good decisions than courts and the lawyers that brief them. But it is far from clear than this disparity in institutional competence actually exists, or that it is especially pertinent in the realm of civil liberties during times of national security emergency.

Start with the claim of executive hypercompetence. It would be superfluous and rather tedious to rehearse here the sorry road to Baghdad for *Prospect* readers. (Indeed, we may get to see a rerun in any case in Iran this summer). It is worthier pondering whether the effort to eradicate Islamist terrorism, most importantly represented by al-Qaeda, were optimally served by diverting resources away from the place where bin-Laden and Zawahiri hid, as well as away from the only country in the world to have a smuggling ring for nuclear materials. *This* executive, at least, has used the advantages of speed, initiative, and information control to push through controversial policies that have little to do with counter-terrorism and much to do with agendas that pre-dated 9/11.

This administration's record surely demonstrates that however chock full of experts the executive branch might be, there is simply no reason to believe that those expert will be effectively deployed or utilized. (This is why, for example, Congress would doubly be fools for accepting this White House's *ipse dixit* on Iran.)

Moreover, why should the courts be written off as useless? A <u>recent decision</u> of the Canadian Supreme Court, invalidating a system of indefinite detention, is instructive: The court identified and discussed several ways in which courts could either accrue experience in national security matters or use expert advisors to the same effect. Indeed, our system of issuing warrants in national security cases establishes precisely such a security-focused and expert panel of judges.

Furthermore, why should the case for deference be stronger in national security matters than in other areas? Sixty years ago, Justice Robert Jackson spoke of the courts' "modest estimates of our competence" in education matters -- and yet he voted to strike down the compulsory recitation of the Pledge of Allegiance. As Jonathan Simon has <u>recently argued</u>, many courts have shown the kind of deference advocated by Posner and Vermeule regarding executive law enforcement decisions -- with the consequence of massive overincarceration and the evisceration of many communities of color.

The special case for executive competence, in short, has yet to be made in any field, let alone one, like national security, where the importance of fair procedures is paramount. Until then, we may well be better off sticking to the Constitution's original formula: Divided powers, and governing through checks and balances.

Aziz Huq directs the Liberty & National Security Project at NYU School of Law's Brennan Center for Justice. He is co-author of Unchecked and Unbalanced: Presidential Power in a Time of Terror and was a 2006 Carnegie Scholars Fellow.

\* \* \*

If you enjoyed this article, subscribe to *The American Prospect* <u>here</u>.

Support independent media with a tax-deductible donation here.





**Aziz Huq** directs the Liberty & National Security Program at the Brennan Center for Justice at NYU, and is an associate professor of law at NYU. His book, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (with Fritz Schwarz) will be out in paperback in 2008.

2 of 3

3 of 3