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## 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 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 omniscience 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 her 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 muddled 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."

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**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.

