

## BOOK REVIEW

### The Executive Unbound: After The Madisonian Republic

-Eric A. Posner & Adrian Vermeule

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#### ABSTRACT

*Is law the most effective tool for restraining or controlling the unwarranted use of presidential power? If it is then how do we measure where the presidential power becomes unwarranted? Eric A. Posner and Adrian Vermeule, professors of law at Chicago and Harvard, answer these questions in their book, "The Executive Unbound: After the Madisonian Republic". The idea of strong executive and its inevitability is presented by Posner and Vermeule to supersede the obsolete checks and balance system proposed by James Madison, fourth president of the United States and the founding father of American constitution. There is an attack on liberal legalism which is majorly based on the idea that executive functions as a mere facilitator to the laws passed by the legislature. The paper is divided into three parts, where the author shall first provide with the overview and central theme of the book, followed with the critical analysis and a holistic evaluation of the concepts of the book in the modern administrative world. Since the ideas studied in the book revolve around the factual history of the US executive structure, it might not be applied directly to other systems. However, the core remains the same and thus the theory being described through political structures of independent states, is open to comparison or investigation in different contexts.*

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**Key words:** Administrative law, strong executive, book review

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#### INTRODUCTION

Discourse over the perils of an excessively solid administrative state date back to the establishing of the United States. It has been the backbone of academic study on the administration and constitutional jurisprudence in the United States for a long while. In current times, the critiques over the administrative methods in the popular media range from

the usual conservatives like George Bush's rambunctious presidency, to the likes of conservatives singing the same song over the presidential methods of democrat Barack obama.<sup>2425</sup>

Eric A. Posner and Adrian Vermeule, professors of law at Chicago and Harvard, answer these questions in their book, "The Executive Unbound: After the Madisonian Republic"<sup>2426</sup>. Both Posner and Vermeule have been prolific in their works on the lines of the modern administrative state. This book serves as an extension to the legal scholarship that they have produced in administrative law.

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## Overview

In *The Executive Unbound*, professors of law Eric A. Posner (Chicago) and Adrian Vermeule (Harvard) arrive at a profoundly unique resolution: solid administrative state is inescapable and in actuality beneficial, so we should quit denouncing it and simply acknowledge it.

After addressing this central theme in the introduction part, the authors discuss the functions of Madisonian system of checks and balances in Chapter one. They trace the roots of the problem in the inadequately designed and planned structure, rather than holding any particular president liable or accusing the judiciary and legislature for their failure to respond. In simple words, they are blaming the founders of this political structure and not the branches of the federal structure. Every law student is taught that the separation of the three organs is impeccable as the constitution provides each of them with the powers to resist interference,

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<sup>2425</sup> Eric Posner & Adrian Vermeule, *Libyan Legal Limbo: Why There's Nothing Wrong with Obama Ignoring Some of His Own Legal Advisers on Libya*, SLATE (March 23, 2020), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/06/libyan\\_legal\\_limbo.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/libyan_legal_limbo.html).

<sup>2426</sup> THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC. By Eric A. Posner and Adrian Vermeule. New York, N.Y.: Oxford University Press. 2010. Pp.3, 249.

yet the claim in the book is that this Madison's plan never went according to the plan. To some extent, they state that this is on the grounds that the framework has no broad instrument guaranteeing that the decentralized choices of branches will deliver the ideal degree of checking. For example as an invisible hand strikes balance in prices in a perfect market, it doesn't exist here to ensure methodical coordination. It is also likewise in light of the fact that the framework's inadequacies are particularly articulated in the midst of emergency situations. Posner and Vermeule enthusiastically endorse Carl Schmitt's ideology that the other two branches always delay in acting in times of crisis where immediate action is needed, such that only executive is left to handle such situations. For example the 2008's depression and 9/11 terrorist attacks, both of which were handled first by the executive till the point the situation came under control.

In Chapter two, authors challenge the durability of modern liberal legalism to sustain the constitutional changes, regardless of any constitutional amendments or interpretations. Accordingly, it results in incidental inter-branch constitutional confrontations, which are eventually settled through political tools. Both of them see it as a failure of the system that is far beyond the idea of rule of law which is integral to liberal legalism.

In Chapter three, authors contend that the endeavors of the legislature to control the overabundances of the executive are not only ineffective but also counterproductive. There has been a continuous violation of 1973 War Powers Resolution by the US Presidents. Even the post-Watergate laws were similarly flouted and even empowered the very conduct that they attempted to prevent. This is exemplified by the justification of George W. Bush's underlying attempts to block the financial accounts of Al-Qaeda by a 1977 law that tried to keep presidents from holding onto private assets. The basic idea in the first three chapters emphasize on the argument that the executive is not constrained by law. Carl Schmitt, a Nazi legal scholar, is cited by the authors to presume that the executive remains the primary player in normal times because of its efficient capabilities to handle emergency situations.

In the fourth chapter, the discussion is shifted on how the executive can be constrained. The authors here argue that where constitutional standards fail to control the executive, politics comes to the rescue. The presidents cannot achieve their objectives without getting the support of the public, and hence had to make sure the people that they are well-motivated. The principal-agent relation can be applied here, where president acts as the agent of the people. They say that the American political system, elections, party system, etc,

limit the actions of the executive more than the rules made by the other two organs, and despite the fact that politics may not ensure the working of executive in public interest, it will definitely restrain the degree of executive malpractices. In this way, the presence of such non-official factors overshadows the absence of legal constraints.

In Chapter six, the authors move on to reject global liberal legalism's role in constraining the executive. International structures such as ICC and ICJ, along with the developments in the jurisprudence of international law and its interpretation across US constitution can be considered briefly, but since global liberalism is 'evanescent', its effect is largely non-existent. However, the tone of this chapter is less forceful since this field of law is not an expertise of both the scholars.

The final chapter addresses the tyrannical possibilities that an unconstrained executive can garner. The authors disagree with this view by contending that the executive can be controlled through political tools bringing about a plebiscitary administration responsible directly to the public, even if effective legal limitations are absent. Be that as it may, the alternate view is also discredited as they attempt an empirical investigation of it by utilizing information from 22 nations over 50 years. The observation is that the dread of despotism doesn't forestall the ascent of despotism. Rather, using what Aristotle has said, they argue that the presence of an enormous and financially agreeable working class is the best support against tyranny. Posner and Vermeule at that point go above and beyond and declare that the costs of dreading executive actions exceed the advantages of harboring such concerns. Along these lines, the book closes with the writers saying, "Don't worry, be happy."

## CRITICAL ANALYSIS

As a researcher and student from a legal background studying Administrative law, I ended up concurring with numerous parts of the book's analysis on the Madisonian limitations of the executive, yet not agreeing with the conclusion of the book to practically acknowledge this situation as both inescapable and gainful. There is no denial to the fact that the executive garners a great amount of power as it has extended the constitutional limits, and different branches have done an extremely poor work of reacting to it, however that doesn't really imply that it must be in this manner. Different analysts believing in Madison's idea of constitution will probably have a same response to the book.

To some extent, this may in light of the fact that the tone of the book is to some degree becomes sharp, and in a sense provocative. For instance, when the authors disparage the fright of presidential abundance as "tyrannophobia" and guarantee that is "overheated", "exaggerated", and "unreasonable", a few perusers are likely to become defensive. At the point when the authors recommend that contending against presidential excess powers might be ineffective as well as really counterproductive, that reaction of being protective may change to effectively complaining.

Posner and Vermeule's endorsement of presidential supremacy is premised on the idea that U.S. political framework is unequipped for reacting viably, which makes it necessary to violate its limitations so as to succeed; to put it plainly, the best way to win is to play messy. That skeptical view misrepresents a significant absence of confidence in the very framework that it indicates to cherish and protect. The constitutional structure has survived despite facing problems in the past, so unquestionably it can meet the challenge at hand without falling back on contradictory extra-legitimate easy routes.<sup>2427</sup>

Posner and Vermeule give their support to a Nazi jurist, Carl Schmitt, as someone to replace James Madison, who is considered as the father of US constitution. Carl Schmitt is introduced as the person who best comprehended the certainty of unchecked executive force in modern administration. He viewed law, a process which solved the problems of the past, has given up to the power of executive which hopes to work on the current crises without considering legal limitations. However, as Posner and Vermeule build up their contention, Schmitt blurs away, and is supplanted by a mixed dependence on game theory and rational actors.<sup>2428</sup>

A very crucial component of Madison's idea of constitution is missing from the book. For Madison, the principle threat tended to by the Constitution isn't the tyranny by executive but by the majority. Every legislature must address fear of abuse of power by those who holds it, and in a republic that would be the public. Madison was worried about the activities of majoritarianism and not the usurpation of power by the executive. He dreamt of a robust executive that would stand strong against the servile wishes of the people and the majority.

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<sup>2427</sup> Daniel Hoffman, *Madison's Nightmare: how executive power threatens executive democracy*, LAW AND POLITICS BOOK REVIEW, (March 24, 2020), <http://www.lpbr.net/2011/02/madisons-nightmare-how-executive-power.html>.

<sup>2428</sup> Benjamin Kleinerman, *Executive Unbound: After the Madisonian Republic*, LAWFARE, (March 24, 2020), <https://www.lawfareblog.com/executive-unbound-after-madisonian-republic-eric-posner-and-adrian-vermeule>.

For him, the kind of executive we perceive to be strong currently, in the picture of Andrew Jackson and Franklin Roosevelt is really powerless on the grounds that it energizes and advances the tyrannical wishes of the majority. Madison characterized 'responsibility' as the primary virtue of the members of the government towards the public. In any case, Posner and Vermeule ignore this temperance in their model and leave no space for 'responsibility'. They expect that lawmakers, complying with the principles of game theory, consequently follow the prompts of public opinion, and thus their reasoning is in reality comparatively more robotic than Madison's.<sup>2429</sup>

It may be the case that both the authors are realists, a school of law which is predominant in the education of modern law schools, which relies on the assumption that the law is always consequential to some greater force which is not the legal principles, but principles of economics (cost-benefit analysis) in their case.

## CONCLUSION AND EVALUATION

Between the legal utopia, where complying with constitutional standards and interpreting laws in good faith are considered of highest value, and the opposite vision of a system where presidents become autocrats when the application of law is highly unlikely, lie the complex relationship between the executive power and laws. It is rarely ever made public that the presidents blatantly defy the law, even though they sometimes disregard the limitations of legal compliance to pursue the policy aims. Perhaps, conditions may be such that even the people expect the president to act in a way to propagate the public policy even if it means acting against the existing law. However, the presidential credibility cannot be disregarded at the same time. This credibility is generally impacted and closely linked by the perceptions on the compliance of the laws. Similarly, public opinion is interlinked with the politics as well as the law. These relationships though do not ensure a perfect compliance of law, but provide an invisible control on the actions of the president to contradict the law.

The book is a complete and thorough explanation of the above assertion in which the use examples of different events in the United States' history to make the book more cogent

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<sup>2429</sup> Harvey Mansfield, *Is the Imperial Presidency Inevitable?*, THE NEW YORK TIMES, (March 24, 2020), <https://www.nytimes.com/2011/03/13/books/review/book-review-the-executive-unbound-by-eric-a-posner-and-adrian-vermeule.html>.

and accessible. Observing as a whole, the reasoning of the authors remains tight, highly organized, endorsed with relevant examples throughout the book. However, it is a matter of perception and ideologies of the reader to take the concepts of this book and accept its logical interpretation. It opens the gate for the readers to view picture from a completely different perception, which might be based on a more realistic threshold. But in doing so, it challenges the whole system on which the central structure remains based. This creates a fallacy in the minds of the believers of the constitutional system as well as the advocates of rule of law, by which the majority of the scholarship of legal sciences and jurisprudence is developed.

Thus, this book, even though presents a different way to look at the system, would most probably attract criticism and would hardly garner big support. Only few believers of Madisonian constitution will give any heed to the arguments of the authors and agree that politics remain as the only viable option to check and balance the executive. For the believers of the constitution, no option remains but to be vigilant and prepared to act as soon as there is any transgression to the constitutional setup, even when if it is against their own president.