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## We The People's Executive

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# THE YALE LAW JOURNAL POCKET PART

ROSA EHRENREICH BROOKS

## We The People's Executive

Perhaps to no one's surprise, a recent survey found that most Americans know far more about television hits than they know about the United States Constitution. For instance, 52% of Americans surveyed could name at least two characters from *The Simpsons*, and 41% could name at least two judges from *American Idol*. Meanwhile, a mere 28% could identify more than one of the rights protected by the First Amendment.<sup>1</sup>

Surveys such as this help clear up one of the apparent mysteries of the last five years: How did we change so quickly from a nation in which the rule of law seemed deeply entrenched to a nation that has seen an astonishingly successful executive power grab?

The answer, I'm afraid, is that many Americans—including those who serve in Congress—neither know nor care very much about our constitutional system. Although the subject of constitutional checks and balances is a matter of endless interest to most of the people who populate America's law schools, the rule of law and the protection of constitutional rights turn out to be matters of extreme indifference to quite a few of our fellow citizens.

Over the past few years, President George W. Bush and his chief advisors have claimed a range of powers that would have turned Britain's King George III green with envy. Among them: the power to alter permanently the constitutional balance of power and vitiate the Bill of Rights through a series of more or less ritual incantations about war; the power to detain and interrogate American citizens indefinitely, without charge or access to counsel; and, of course, the power to ignore any legislation deemed inconvenient, such as the Foreign Intelligence Surveillance Act's restrictions on warrantless domestic

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1. Press Release, McCormick Tribune Freedom Museum, Characters from "The Simpsons" More Well Known to Americans than Their First Amendment Freedoms, Survey Finds (Mar. 1, 2006), [http://www.freedommuseum.us/assets/pdf/e4/pressrelease/museum.survey\\_release.pdf](http://www.freedommuseum.us/assets/pdf/e4/pressrelease/museum.survey_release.pdf).

spying or the McCain Amendment's prohibition of cruel, inhuman, and degrading treatment.

But the Bush Administration could not have made or sustained any of these claims without substantial help from outside the executive branch. The great post-9/11 executive power grab was enabled by a self-absorbed and somnolent populace and by a legislative branch that until recently seemed eager to cede power to the Bush Administration. From the hasty October 2001 Senate passage of the USA PATRIOT Act with only a single dissenting vote (Wisconsin Senator Russ Feingold) to the similar non-debate and lopsided vote that preceded congressional authorization to use force in Iraq, Congress has acted more like a lap dog than a legislature.

Like most other observers within the legal academy, I'm appalled by these developments. But they also underscore a point I have tried to make in my own scholarly writing: That though few of us lawyers care to admit it, the law on its own counts for practically nothing. Thus, the surprising thing is not that our constitutional system has been trampled on by the executive branch during the last five years, largely with popular and congressional acquiescence. The truly surprising thing is that our constitutional system lasted as long as it did, with the balance of powers envisioned by the Framers relatively intact.

What I mean by this is that without a strong and widely shared public commitment to sustaining the rule of law, the Constitution itself is of little but historical interest. In and of itself, our Constitution has never meant much. Its meaning has always lain in its use. For much of American history, the Constitution has functioned as a symbol of our shared commitment to the rule of law (and principles of executive restraint), but the Constitution mattered only when we had, in the executive branch, citizens deeply committed to the principle of limited executive power constrained by law, and citizens in Congress, the judiciary, the press, and the public committed to the same.

This should not surprise us. We have only to look at Iraq to see that no constitution can stave off political collapse in the face of centripetal societal forces, just as no constitution can keep a democracy from becoming a tyranny. This has always been true, everywhere. The various Soviet constitutions' lengthy lists of individual rights kept no one from the Gulag, and the constitution of apartheid South Africa did not prevent institutionalized discrimination, torture, or extrajudicial killings. Here in America, our Constitution infamously failed to resolve disputes over slavery and federalism. When antebellum political consensus fractured, it took a civil war to (temporarily) answer the Constitution's unanswered questions.

Just as a checkbook can't balance itself, our Constitutional system of checks and balances only works when most Americans share a disciplined and courageous commitment to making it work. And it's this shared commitment to checks and balances that we seem to have somehow lost during these past

five years—or perhaps we lost it much earlier, and just did not notice until now. The Bush Administration itself clearly has zero commitment to the limits the Constitution places on executive power—but who can blame them trying to circumvent a system that is apparently cherished by neither Congress nor the public?

As usual, the pragmatic and quotable Justice Jackson is apropos. In his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, the 1952 *Steel Seizure Case*, Jackson wrote:

“I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems . . . . If not good law, there was worldly wisdom in the maxim attributed to Napoleon that ‘The tools belong to the man who can use them.’ We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”<sup>2</sup>

In part, what I am saying is nothing new at all. It’s just another way of insisting that eternal vigilance is the price of liberty, and so on.

But I am also trying to say something more than this. One major moral of this particular story—the story of the Bush Administration’s successful power grab—is that law does not exist, and cannot be understood, within its own hermetically sealed universe. Law does nothing and means nothing outside of its cultural context.

As a result, those of us unhappy with the way our constitutional system is working today will not be able to fix the problem through strictly legal means—we already have, on paper, a perfectly workable constitutional system. If we want to roll back unconstrained executive power, we need to look beyond the law to the broader political culture, and work on changing that.

This has powerful implications for how law is studied, discussed, and taught within the legal academy. Legal scholarship has become increasingly technical, increasingly theoretical, and increasingly specialized. As Harvard Law Professor Bill Stuntz lamented recently in *The New Republic*, “Too many scholars write for an audience of dozens (if that—a good friend of mine says he writes for six people), and far too few write for thousands, fewer still for millions.”<sup>3</sup> This, unfortunately, is as true of constitutional law scholarship as it is of legal scholarship more generally.

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2. 343 U.S. 579, 654 (1952).

3. William J. Stuntz, *Summers and the Future of Higher Ed.: Future Shock*, TNR ONLINE, Feb. 27, 2006, <http://www.tnr.com/user/nregi.mhtml?i=wo6o227&s=stuntzo227o6>.

The result? When an issue comes along that arouses the deepest passions in those of us who study and write about the law, and we finally bestir ourselves to communicate some of our outrage to those outside the legal academy, we find, alas, that most of them aren't listening to us at all, and fewer still are moved by our concerns.

If the legal academy were to take seriously the notion that law is but a small part of culture writ large, we would do two things. First, we would alter our scholarly agendas and our curricula to reflect a commitment to studying law as a form of culture, striving not simply to develop neater and more original legal theories, but to understand the complex interrelationship between law and other political and social forces. And second, we would recall that in classical Greece and Rome, law was conceived as a close relation of rhetoric. Legal argument was seen not merely as a technical skill, but as a form of rhetorical art, one designed both to engage the mind and stir the passions and, ideally at least, to inspire civic virtue.

In a world of academic specialization and turgid, jargon-laden law review prose, this may seem an odd way to think about law. But if we lawyers and legal scholars value the rule of law, we should strive to reclaim the ancient notion of legal argument as a public-regarding form of rhetoric. Because if we can't convince our fellow citizens to know or care about our fragile constitutional system, which now lies in tatters, then little of what we do has any point at all.

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