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The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law

INTRODUCTION

This Symposium Issue, a collection of twelve essays and four commentaries, addresses questions about the proper role and reach of executives at all levels of government. The uncertainty of the law, and even its absence, in this area presents a tremendous opportunity for legal scholars to think creatively about executive power in a way that is useful to legislators, policymakers, and average citizens alike. In an environment where the partisan roots of legal positions are frequently questioned, a symposium on executive power that limited itself to punditry and politicking would have been dangerous indeed.

With dual goals of ideological and topical diversity, we solicited papers that would consider executive power with a deeper structural question in mind: How can law both benefit from, and constrain, a power that is fundamentally lawless? Certainly, the question and its answers do not exist in a vacuum. Guantánamo, Iraq, warrantless wiretapping—every day the newspapers prove that no topic is more in need of a national discussion.

In the pages that follow, lawyers from the last two presidential administrations, as well as their adversaries in the courts, have done more than recapitulate their Supreme Court arguments and televised quips about the power of our elected leaders. Instead, with the advantage of first-hand experience and the clarity of hindsight, these lawyers have posed refreshing and even radical ideas about how to refine the relationship among the branches of our national government.

The last decade has also revealed that similar questions remain unanswered at the state and local levels. Executives in state capitols and city halls alike have seized new authority to manage affairs traditionally left to legislatures and have offered unique constitutional visions on behalf of their constituents. Executive power at these levels also poses novel questions about American federalism, as governors become increasingly important actors in foreign policy and as state

attorneys general assert independent authority to make political choices in and out of the courtroom. When Mayor Gavin Newsom ordered San Francisco to issue same-sex marriage licenses and when George W. Bush established the tribunal system in Guantánamo Bay, each man believed he was doing what was constitutional and what was right. It is this latter belief, that the executive speaks more clearly and courageously for the people than the legislature, that executives use to justify these novel uses of their power.

Executives across the country have made the similar claim that, in light of clogs in the legislature, the executive branch has become the most accessible, politically accountable force in government at the local, state, and national levels. The recent decision in *Hamdan v. Rumsfeld*¹ makes this claim more problematic, and today's lawmakers have begun to turn directly to legal scholars, including several whose work appears in these pages, for their advice.

We hope this Symposium will inspire those who make our laws, as well as those who live under them, to think differently about a persistent set of problems. Though this particular field of law may always seem uncharted, or may necessarily be unchartable, this Symposium Issue hopes to reaffirm the valuable role law journals can play in guiding its exploration.

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¹ 126 S. Ct. 2749 (2006).



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