

*Eric A. Posner**

*Kirkland & Ellis Professor
University of Chicago Law School*

DEFERENCE TO THE EXECUTIVE IN THE UNITED STATES AFTER SEPTEMBER 11 **

ABSTRACT

The deference thesis is that Congress and the judiciary should defer to the executive's policy judgments during national emergencies. Criticism of the deference theory draws on the analogy of the emergency room medical protocol to argue that emergencies call for rule-bound constraint of the executive rather than deference to it. However, this criticism rests on a misunderstanding of the tradeoff between rules and standards. This paper was proposed as an analysis of deference thesis and its criticism, it has been modified to cover the general issues regarding the thesis and how rules and standards are relevant for national emergencies, it draws upon on the question of how and when the rules applicable during emergencies should be developed and applied.***

INTRODUCTION

According to the “deference thesis,” legislatures, courts, and other government institutions should defer to the executive's policy decisions during national security emergencies.¹ In

* Kirkland & Ellis Professor, University of Chicago Law School. Thanks to Curt Bradley, Jack Goldsmith, Aziz Huq, Trevor Morrison, and Adrian Vermeule for very helpful comments; to Ellie Norton for research assistance; and to the Microsoft Fund and the Russell Baker Scholars Fund at the University of Chicago Law School for financial assistance.

** Reprinted from: Eric Posner, *Deference to the Executive in the United States after September 11: Congress, the Courts, and the Office of Legal Counsel*, originally published in 35 Harvard Journal of Law and Public Policy 213 (2012). Pages 213-244, <https://www.harvard-jlpp.com/vols-35-39/>. Reprinted with the permission of the Author. This article is not included under the Creative Commons Attribution (CC BY) 2.0 License of this Journal. This article is distributed under the terms of the Creative Commons Attribute Non-Commercial ShareAlike 3.0 (CC BY-NC-SA 3.0) licence (For more information: <http://creativecommons.org/licenses/by-nc-sa/3.0/>) which permits copy, distribution and transmission of the publication as well as remixing and adapting, provided it is only for non-commercial purposes, and the original publication is appropriately attributed, and is distributed under an identical licence. The Journal of Constitutional Law would like to express special gratitude towards Prof. Posner for personally granting the permission to reprint.

*** This abstract was taken from the working paper of the foregoing work, published on Chicago Unbound on September 22, 2011. It has been adapted and modified by the Editor of the Journal of Constitutional Law. Any adaptations to the paper were made by the Editor of the Journal of Constitutional Law, neither Author, nor Chicago Unbound or Harvard Journal of Law and Public Policy are responsible for the present publication.

¹ See ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY,

this Essay, I will address two criticisms of the deference thesis. The first argument, which has been developed most powerfully by Professor Stephen Holmes, is that rules dominate standards at moments of crisis.² An executive that is unconstrained, that is, not bound by rules, will make worse policy choices than an executive that is bound by rules.³ This type of argument is usually made in the context of urging legislatures and courts to constrain the executive during emergencies.⁴ Some commentators, however, doubt whether it is possible for legislatures and courts to constrain the executive during emergencies.⁵ These doubts have led to a second argument that the executive should be bound by institutions within the executive branch such as (in the United States) the Office of Legal Counsel,⁶ or through the construction of new institutions that review the executive branch's actions.⁷ Both arguments criticize the deference thesis but propose different solutions. The first argument proposes that Congress and the judiciary give the executive less deference; the second proposes that officials within the executive branch give the President less deference. Thus, we can distinguish external constraints on the executive and internal constraints on the President.

Both arguments are flawed. The external constraints argument gets the normal analysis backwards: rules are better for routine, recurring situations. Although some emergencies are, in fact, routine, the type of emergency that calls for deference is not. The internal constraints argument, as normally presented, makes the fatal assumption that the President can be bound by his own agents against his own perceived interest, and relies on other questionable premises about the structure of government in the United States.

I. THE DEFERENCE THESIS

The deference thesis states that during emergencies the legislature and judiciary should defer to the executive.⁸ It assumes that the executive is controlled by the President, but to the extent that the President could be bound by agents within the executive, the deference thesis also holds that those agents should follow the President's orders, not the other way around. In normal times, the three branches of government share power. For example, if the executive believes that a new, dangerous drug has become available, but possession of the drug is not yet illegal, the executive may not act on its own to detain and prosecute those who deal and use the drug. The legislature must first enact a statute that outlaws the drug. The execu-

AND THE COURTS 15–16 (2007) [hereinafter POSNER & VERMEULE, *TERROR IN THE BALANCE*].

² Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 CALIF. L. REV. 301 (2009).

³ Id. at 305, 354.

⁴ This is a more general argument. For present purposes, however, I will consider it only in the context of external constraints.

⁵ See Holmes, *supra* note 2, at 347–48; see also Harold Hongju Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 YALE L.J. 1255 (1988).

⁶ See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 32–34, 208 (2007).

⁷ See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 5–7, 10–12 (2010).

⁸ See POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 1.

tive also depends on the legislature for financial appropriations and other forms of support. The executive also faces constraints from the courts. If the executive arrests drug dealers and seeks to imprison them, it must first obtain the approval of courts. The courts ensure that the executive does not go beyond the bounds of the new law, does not violate earlier-enacted laws that have not been superseded by the new law, and does not violate the Constitution.

In emergencies, the executive often will contemplate actions that do not have clear legislative authority and might be constitutionally dubious. For example, after September 11, the U.S. government engaged in immigration sweeps, detained people without charges, used coercive interrogation, and engaged in warrantless wiretapping of American citizens.⁹ Many, if not all, of these actions would have been considered violations of the law and the U.S. Constitution if they had been undertaken against normal criminal suspects the day before the attacks. After September 11, both the legislature and the courts gave the executive some deference. The legislature gave explicit authorities to the executive that it had initially lacked;¹⁰ the courts did not block actions that they would have blocked during normal times.¹¹ But neither body was entirely passive. Congress objected to coercive interrogation and did not give the executive all the authorities that it requested.¹² After a slow start, the courts also resisted some of the assertions the executive made. There is some dispute about whether this resistance was meaningful and caused the executive to change policy or merely reacted to the same stimuli that caused the executive to moderate certain policies independently.¹³ In any event, no one disputes that the courts gave the executive a nearly free pass over at least the first five to seven years of the conflict with al Qaeda.

The deference thesis, then, can be strong-form or weak-form. This ambiguity has had unfortunate consequences for debates about post-September 11 legal policies. Few people believe that the courts should impose exactly the same restrictions on the executive during an emergency as during normal times. Indeed, doctrine itself instructs courts to balance the security value of a course of action and its cost to civil liberties, implying that certain actions might be legally justified to counter high-stakes threats but not to counter low-stakes threats.¹⁴ Nor does anyone believe that the executive should be completely unconstrained.

The debate is best understood in the context of the U.S. government's post-September 11 policies. Defenders of these policies frequently invoked the deference thesis — not so much as a way of justifying any particular policy, but as a way of insisting that the executive should be given the benefit of the doubt, at least in the short term.¹⁵ The deference thesis

⁹ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004) (describing detention of U.S. citizen without the filing of charges); Rebecca Cathcart, Immigration Officials Arrest 905 in California Sweep, N.Y. TIMES, May 24, 2008, at A15; David S. Cloud, Concerns Led to Revisions, Rumsfeld Says, N.Y. TIMES, Feb. 22, 2006, at A16 (describing United States use of coercive interrogation techniques); Carol J. Williams, Wiretapping Lawsuit May Have Its Day in Court, L.A. TIMES, Feb. 28, 2009, at A9.

¹⁰ See, e.g., GOLDSMITH, *supra* note 6, at 208 (noting eventual congressional authorization of military commissions, interrogations, and warrantless electronic surveillance).

¹¹ See, e.g., *Hamdi*, 542 U.S. at 507 (permitting detention of an American citizen without a full criminal trial).

¹² See GOLDSMITH, *supra* note 6, at 208–09.

¹³ See, e.g., Aziz Z. Huq, What Good is Habeas?, 26 CONST. COMMENT. 385, 401–05 (2010).

¹⁴ See, e.g., *Hamdi*, 542 U.S. at 531–34.

¹⁵ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism,

rests on basic intuitions about institutional competence: that the executive can act more decisively and with greater secrecy than Congress or the courts because it is a hierarchical body and commands forces that are trained and experienced in countering security threats. The other branches lack expertise. Although they may have good ideas from time to time, and are free to volunteer them, the ability of the executive to respond to security threats would be unacceptably hampered if Congress and the courts had the power to block it to any significant degree.

Secrecy is an important part of the argument. Policymaking depends on information, and information during emergencies often must be kept secret. Congress and the courts are by nature and tradition open bodies; if they were to act in secret, their value would be diminished. Meanwhile, the argument continues, the fear of an out-of-control executive who would engage in abuses unless it was constrained by the other branches is exaggerated. The President has strong electoral and other political incentives to act in the public interest (at least, in the United States). Even if the executive can conceal various “inputs” into counterterrorism policy, it cannot conceal the “output” — the existence, or not, of terrorist attacks that kill civilians.

Thus, it was possible for defenders of the Bush Administration’s counterterrorism policies to express discomfort with certain policy choices, while arguing nonetheless that Congress and the courts should not try to block executive policymaking for the duration of the emergency — at least not as a matter of presumption. Critics of the Bush Administration argued that deference was not warranted — or at least not more than a limited amount of deference was warranted, although again these subtleties often were lost in the debate—for a variety of reasons. I now turn to these arguments.

II. EXTERNAL CONSTRAINTS: THE PROTOCOL ANALOGY

A. MEDICAL PROTOCOLS

In an article published a few years ago, Professor Holmes uses the arresting image of the medical protocol as a device for criticizing the deference thesis — or, more broadly, the thesis that the executive should be “unconstrained” during emergencies. Holmes describes his own experience in an emergency room, where his daughter had been brought with a serious injury:

“At a crucial moment, two nurses rushed into her hospital room to prepare for a transfusion. One clutched a plastic pouch of blood and the other held aloft my daughter’s medical chart. The first recited the words on the bag, ‘Type A blood,’ and the other read aloud from the file, ‘Alexa Holmes, Type A blood.’ They then proceeded, following a prepared and careful-

118 HARV. L. REV. 2047 (2005); John Yoo, Unitary, Executive, or Both?, 76 U. CHI. L. REV. 1935 (2009) (book review).

ly rehearsed script to switch props and roles, the first nurse reading from the dossier, ‘Alexa Holmes, Type A blood,’ and the second reading from the bag, ‘Type A blood’.”¹⁶

To the layman, the repetitive actions of the nurses seem senseless. Why are they repeating themselves when the patient might die unless she receives the blood transfusion immediately? Surely, the nurses should depart from the script rather than follow it in a time of extreme medical urgency. Yet the protocol makes good sense. Experience has taught medical personnel that basic errors — the transfusion of the wrong blood — occur frequently, and that they can be avoided through the use of simple protocols. Although following the protocol uses valuable time, in practice the increased risk to the patient as a result of the loss of time is less than the risk caused by the errors that protocols are designed to prevent.¹⁷

The larger and more striking point of the example is that, even during emergencies, when the stakes are high and time is of the essence, agents should follow rules rather than improvise. In this way, agents should be constrained.¹⁸ This argument has potentially radical implications. Recall that the conventional objection to deference is that the risk of executive abuse exceeds the benefits of giving the executive a free hand to counter al Qaeda. Professor Holmes argues — although at times he hedges — that in fact the benefits of giving the President a free hand are zero: A constrained executive, like a constrained medical technician, is more effective than an unconstrained executive. If the benefits of lack of constraint are zero, then the deference thesis is clearly wrong. Constraints both prevent executive abuses such as violations of civil liberties and ensure that counterterrorism policy is most effective.

B. RULES AND STANDARDS

The arresting medical protocol example helps clarify the tradeoffs involved, but it remains merely an illustration of the familiar rules versus standards tradeoff that has been a staple of the legal literature since time immemorial.¹⁹ A rule is a norm that directs the decisionmaker to ignore some relevant policy considerations when deciding on a course of action; a standard is a norm that directs the decisionmaker to take into account all relevant policy considerations when deciding on a course of action. The familiar example is the speed limit. A sixty-mile-per-hour speed limit tells the driver that she does not face a legal sanction if she drives below sixty miles per hour, and that she does face a legal sanction if she exceeds that speed. A standard for example, “drive carefully” — tells the driver that she does not face a legal sanction if she drives carefully, but that she does if she drives carelessly. The standard, unlike the rule, directs the driver to take into account all relevant considerations — the weather, traffic congestion, her own skill and experience, the responsiveness of her car, and so on—when deciding how to drive.

¹⁶ Holmes, *supra* note 2, at 301–02.

¹⁷ See *id.* at 302.

¹⁸ See *id.* at 302–03.

¹⁹ See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 155–58 (tent. ed. 1958). The speed limit example below is drawn from this text. *Id.*

A skilled and experienced driver who drives at sixty-five miles per hour on a clear day on an empty, straight road poses little threat to anyone, and most people would regard her driving as careful. Thus, under the standard she could not be held liable, although under a rule she would be. Meanwhile, an inexperienced driver who drives sixty miles per hour on a congested, dangerous road, at night, in bad weather, would probably be regarded as careless. He would be held liable under a standard but not under the rule. It is in the nature of standards that we cannot be sure that he would be held liable; it depends on the biases, intuitions, and experiences of the legal decisionmaker.²⁰ Thus, we say that applying standards involves high decision costs. It is in the nature of rules that we can easily tell whether the driver would be held liable or not, but only because the legal decisionmaker is forced to ignore relevant moral and policy considerations that otherwise complicate evaluation. Rules are under- and over-inclusive; by design, they cause error.

These considerations lead to a basic prescription.²¹ Rules should be used to govern recurrent behavior, and standards to govern unusual behavior. Experience teaches us that if drivers obey certain rules (such as speed limits), the risk of accidents is greatly reduced, although judicious choice of (sometimes complex) rules ensures that error costs are low. When legislatures enact new rules, they can invest a great deal of time and effort determining the optimal rules, because the cost of the rules are then spread out over many instances of the behavior that the legislatures seek to regulate. Yet rules frustrate us because there always seems to be some new, unanticipated case where the application of rules leads to an injustice. The speed limit rule should not apply to the parent who rushes a badly injured child to the hospital. And there are many cases where rules can too easily be gamed. Tax rules, no matter how intricate, can be exploited: Lawyers set up tax shelters that evade the purpose of the rules. Congress reacted to this problem initially by creating ever more complex rules, but eventually trumped them with a standard that prohibited bad faith evasion of the tax laws.²²

The legal landscape is a complex mix of rules and standards, which often overlap. Drivers must obey both traffic rules like the speed limit and traffic standards like laws against reckless driving and tort norms against negligent driving. Indeed, one can think of traffic norms as complex rules with standards — where there are apparently bright-line rules (drive under sixty miles per hour) that are subject to muddy standards (unless there is an emergency).

Medical protocols are just one more example of a choice along the rules-standards continuum. The nurses Professor Holmes describes follow a protocol that ensures that they do not use the wrong blood in a transfusion. Likewise, doctors are instructed to clear the windpipe before staunching the wound.²³ These protocols, like the speed limit, reflect generalizations from past medical experience. Delaying the blood transfusion is less risky than permitting

²⁰ See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 588 (1993).

²¹ *Id.* at 621–23.

²² See Steven A. Dean & Lawrence M. Solan, *Tax Shelters and the Code: Navigating Between Text and Intent*, 26 VA. TAX REV. 879 (2007); see also Ellen Aprill, *Tax Shelters, Tax Law, and Morality: Codifying Judicial Decisions*, 54 SMU L. REV. 9 (2001).

²³ Holmes, *supra* note 2, at 305.

only one nurse to check the blood type. Letting the blood flow from the wound is less risky than leaving the windpipe blocked. In the absence of protocols, medical practitioners may misjudge the situation, or panic, or allow themselves to be distracted by irrelevant factors (the goriness of the wound calls out for attention while the blocked windpipe is hidden). It is important to see that these rules, like the speed limit, are mere generalizations, and in individual cases the generalizations might be wrong. The patient dies because of the delay before the transfusion, yet we instruct medical practitioners to follow the rules because otherwise they are likely to make worse or more frequent errors.

That uncompromising rules produce high error costs supports adopting sensible exceptions to rules. Indeed, medical practitioners may violate protocols. The reasons are obvious. Consider Professor Holmes's insistence that the rule "always wash your hands" is unalterable and written in stone.²⁴ This clearly cannot be the case. Suppose that, in the midst of an emergency involving a patient with a serious trauma, the staff is informed that the tap water is tainted, it is discovered that a patient has a rare allergy to the only soap available in the emergency room; or, for that matter, the emergency room runs out of soap. Common sense (which is just the application of the standard, "help the patient at minimal risk to him and oneself") will tell the doctors and nurses to deviate from the protocols when they clearly interfere with medical necessity. If they did not, they would be sued, and rightly so. The protocols, like many rules, turn out to be presumptions, which may be overcome by the press of events. That is why medical professionals are so highly trained; if one could really treat patients by following algorithms, one would not need doctors who have vast training and experience that supplies them with judgment and the ability to improvise.²⁵

In sum, medical protocols, like rules, provide a valuable service by simplifying the decision-making process at times of high stress, but, like rules, they unavoidably produce wrong results if they are not applied sensitively. Usually, when the stakes are high, rules and protocols create presumptions, but the decisionmaker is free to violate the presumption if circumstances suggest that the presumption is based on factual assumptions that turn out not to be true in the particular setting in which the decisionmaker finds himself.

C. RULES AND STANDARDS DURING EMERGENCIES

I now turn to the bulk of Professor Holmes's argument. Professor Holmes is right to identify confusion about the nature of emergency, and it is useful to distinguish a rule-development stage — which often but not always takes place before the emergency — and a rule-application stage — which takes place during the emergency. Holmes argues that during the emergency, rule application should be controlled by protocol, so the executive does not

²⁴ See Holmes, *supra* note 2, at 309.

²⁵ This problem is famous from labor relations. Workers who seek to pressure employers without going on strike (which in certain cases may be illegal) have frequently adopted the strategy of "work-to-rule," where they follow the rules or protocols of their job in a literal-minded way rather than use them as presumptions. The result is that they become extremely unproductive while maintaining deniability, though no one is fooled. See generally Karl O. Moene, Unions' Threats and Wage Determinations, 98 *ECON. J.* 471 (1988).

need (much) discretion; while pre-emergency, rule development does not need to be rushed and secret, so the executive can collaborate with Congress. The first problem with this argument is that during the emergency one can follow protocols rather than exercise discretion only if the emergency is the same as earlier emergencies. This was not the case for September 11, though it may be the case for other security threats. The second problem is that the rule-development stage cannot always take place during normal times. For example, September 11 required not only an immediate response to the newly discovered threat but also the development of new rules under the shadow of that threat. Those rules needed to be developed quickly and (for the most part) secretly, and these exigencies limited the ability of Congress to contribute. A final point is that Holmes ignores an important dimension of the problem: the difference between agents, who in theory can merely follow rules and protocols, and principals, who cannot. The Bush Administration did in fact recognize the value of protocols and used them frequently; it just did not apply them to itself.

1. *Two Concepts of Emergency*

Professor Holmes makes a valuable point, often neglected in the literature, that there are two distinct phases for addressing emergencies²⁶ — what I will call the stage of rule development and the stage of rule application. As we will see, the two stages can run together, but conceptually they are distinct. The rule-application stage comes when the patient is on the gurney. The doctors follow the protocols in the course of helping the patient. The rule development stage occurs earlier. Someone must decide what the protocols should be. Someone had to invent the rule that two nurses must check the blood type and that doctors should unblock the windpipe before staunching wounds — just as the legislature must determine the speed limit before drivers comply with it and police enforce it.

We might use the word “emergency” to refer to the time of rule application. As Professor Holmes points out, however, for the medical professionals, what seems like an emergency to a layperson is not an emergency at all.²⁷ They just apply the protocols that have been drilled into them, no different from assembly-line workers. Under this definition of “emergency,” it is hard to support the deference thesis and those who argue that the executive must be unconstrained during emergencies. If doctors are constrained during emergencies, why not executives?

If we refer instead to the time of rule-development, reliance on the idea of emergency seems even less appropriate. The doctors who develop emergency room protocols do not do so under time pressure but at their leisure. They also can do so in a large body, so as to take advantage of the perspectives of many different people, and in public, so that all stakeholders have a say. The executive can as well, the argument goes. When the executive determines the rules that will govern the response during a terrorist attack, it does so in advance, and it can, indeed should, do so in consultation with Congress and subject to judicial constraint.

Thus, executive deference is unnecessary. During rule development, there is no emergency,

²⁶ Holmes, *supra* note 2, at 309–10.

²⁷ See *id.* at 309.

and so the executive, Congress, and the courts can collaborate in developing appropriate rules that will govern during emergencies. They can do so openly, deliberately, and slowly, with full respect for constitutional norms. During rule application, there is an emergency, but the executive can merely follow the rules or protocols that were developed during the rule-development stage. Thus, in the rule-application phase, executive discretion is unnecessary. It follows that deference to the executive is also unnecessary. During rule development, Congress has no reason to defer to the executive. During rule application, courts also have no reason to defer to the executive, but should instead insist that the executive comply with the rules.

2. *Rule Application*

Let us consider the stages in reverse order. We already have addressed some of the problems with Professor Holmes's argument from protocols. Rules are seldom as bright-line as they first appear. They often turn out to be presumptions which are themselves subject to standards (drive under the speed limit unless there is an emergency). It is true that security threats, like medical emergencies, often fall into patterns and can be addressed in partially rule-governed fashion. Thus, when a gunman takes a hostage, the police follow certain rules: first clearing the area, then making contact with the gunman, and so on. Some officers will be given very simple rule-governed tasks ("don't let anyone cross this line"). But the rules quickly give out. Every hostage-taker is different, and the most highly trained police officers will be given a great deal of discretion to deal with him and to make the crucial decision to use force. But even these types of threats are simple compared with the scenario that opened up on September 11. The government knew virtually nothing about the nature of the threat. It did not know how many more members of al Qaeda were in the United States, what their plans were, what resources were at their disposal, what their motives were, or how much support they had among American Muslims.²⁸ Protocols were worthless because nothing like the attack had ever happened before. (The closest analogy seemed to be the absurdly irrelevant example of Pearl Harbor.) The government could not follow rules; it had to improvise subject to a vague standard — protect the public while maintaining civil liberties to the extent possible. Improvise it did — instituting detentions, sweeps, profiling, surveillance, and many other policies on an unprecedented (in peacetime, if that was what it was) scale.²⁹

For the rule-application stage, the deference thesis counsels Congress and the judiciary to (presumptively) defer. Congress simply cannot set about holding hearings, debating policy, and voting on laws in the midst of emergency. Either the problem will not be addressed, or Congress will end up voting on a bill that it has not written, debated, or even read.³⁰ For courts, too, the alternatives are unrealistic. If courts enforce rules developed for normal times, then they will interfere with the proper response to the terrorist threat, just as they

²⁸ President George W. Bush, Address to the Nation (Sept. 11, 2001) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>).

²⁹ But if al Qaeda launched another attack on U.S. soil tomorrow, the argument for deference would be weaker, because more is known about al Qaeda today than ten years ago.

³⁰ As occurred with the TARP law. See Eric A. Posner & Adrian Vermeule, Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008, 76 U. CHI. L. REV. 1613, 1625 (2009).

would if they required the U.S. military to comply with the Fourth Amendment on the battlefield. Alternatively, the courts could insist on applying a standard and halt executive actions that, in the courts' view, violated the standard described above — protect the nation while maintaining civil liberties to the extent possible. But here the courts are at a significant disadvantage. They do not have information about the nature of the threat.³¹ Courts can demand this information from the government, but the government will not give it to them because the government fears leaks (to say nothing of recalcitrance caused by rivalries among intelligence agencies). Moreover, judges are inexperienced in national security unlike the specialists in the executive branch.

None of this is to deny Professor Holmes's basic point that protocols can be valuable. Indeed, the Bush administration was as protocol-happy as any other institution. Consider the protocols for interrogation which were disclosed in a leaked OLC memo:

“In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated.”³²

So not even the Bush administration disagreed with Professor Holmes's argument that lower-level officials faced with recurrent situations should be subject to protocols where they are appropriate. In this sense, Professor Holmes's argument misses the mark entirely. The problem was not so much that protocols were not used; the problem, if it was a problem, was that they were developed, modified, and revised solely by the executive branch. This leads to the question of rule development.

3. *Rule Development*

Recall that Professor Holmes says that the argument that the executive can act more swiftly than Congress and the courts does not apply to the rule-development stage because the crisis is past even if the threat remains.³³ But if we think back to September 11, the crisis did not end on that day, even if the immediate threat of violence did. It was reasonable to believe that other plots had been put into action and that violence could erupt at any moment. As the weeks and months passed, these concerns faded. But it also became clear that al Qaeda had sympathizers in the United States, and that these people might strike at any time, possibly on

³¹ See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1405–08 (2009).

³² Memorandum from Jay S. Bybee, Assistant Att'y Gen., OLC, to John Rizzo, Acting Gen. Counsel, CIA, Re: Interrogation of al Qaeda Operative, 3–4 (Aug. 1, 2002) [hereinafter *Interrogation Memorandum*], available at <http://s3.amazonaws.com/nytdocs/docs/151/151.pdf>.

³³ See Holmes, *supra* note 2, at 310.

their own initiative, or volunteer for training that would later make them considerably more dangerous. The anthrax scare brought home the possibility that al Qaeda could use even more deadly weapons than hijacked airplanes. Every day brought another revelation of a hole in border security. Thus, it was a matter of urgency to develop new rules that would address the threat.

The government maintained the confidentiality of a constant supply of intelligence, for fear of exposing sources and methods.³⁴ Meanwhile, the government was already taking secret actions (many of which were later exposed), including tapping cell phone calls, tracking monetary transfers, and infiltrating terrorist organizations.³⁵ Optimal policy going forward necessarily depended on secrecy. Policy X, which might seem plausible given publicly available information, might turn out to be unnecessary, redundant, or even counterproductive in light of secret information about the activities of al Qaeda or secret Policy Y. Thus, although Congress could no doubt give useful advice, it seems hard to believe that it could have contributed much to the development of counterterrorism tactics, any more than it can contribute to military tactics (where to invade, where to bomb) during a regular war.

A set of constitutional protocols normally applies to the making of policy and its embodiment in government action. The executive must act with Congress, and it must respect the courts; it cannot act by itself. But these rules apply to normal times, and the medical protocol analogy is of little use here. Medical protocols do not need to be secret because patients have no incentive to game them — unlike terrorists who benefit greatly from knowing the methods that the United States uses to spy on them, capture them, and interrogate them. Furthermore, medical protocols are not based on secret information; they are based on widely available medical research. Thus, when medical researchers develop medical protocols at the rule development stage, they can do so publicly without undermining the purpose of developing the protocols in the first place.

By contrast, rules governing counterterrorism operations must be developed mostly in secret, and mostly on the basis of secret information. Hence the importance of keeping rule development as much as possible within the only branch that possesses the power to act against security threats. Those rules, of course, would constrain only lower-level executive agents, not the executive itself. There is an obvious reason for this; if the rules are wrong, they need to be corrected. It would similarly make little sense for doctors to develop emergency room protocols that could never be changed in the future as new technologies and new health problems rendered the old protocols worthless.

Professor Holmes argues that the executive becomes subject to groupthink and other decision-making pathologies when it makes policy itself rather than with Congress and other agents.³⁶ But the same point can be made about executive decision-making during regular

³⁴ See GOLDSMITH, *supra* note 6, at 81 (noting that officials were limited in their ability to reveal legal positions to avoid disclosing counterterrorism measures).

³⁵ See Jon D. Michaels, All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror, 96 CALIF. L. REV. 901, 904 (2008) (discussing wiretapping and money-transfer tracking programs).

³⁶ Holmes, *supra* note 2, at 344–47.

wars, when the risk of groupthink (if it is a risk) is tolerated because of the need for secrecy.

If Congress and the judiciary cannot constrain the executive during emergencies because of the problem of secrecy, then perhaps this problem can be overcome by putting the source of constraint in the executive branch itself, where norms of secrecy prevail.

CONCLUSION

Professor Holmes's medical protocol analogy does not provide any reason for doubting the deference thesis. Rules are valuable in many settings, including emergencies, but it does not follow from that observation that courts and legislatures rather than the executive should create and enforce the rules. Each institution has specific advantages; the executive's advantages are salient during emergencies.

The notion that the executive can be constrained by its own components is a paradoxical idea and has little to recommend it. In the end, someone must have discretion to respond to unforeseen events, and in the U.S. system that role has been given to the President. The theory that the OLC or some similar office within the executive branch could constrain the President rests on a confusion between rational self-binding, which the President may, albeit with difficulty, engage in, and external constraint, which the President will resist.