Keynote Address

BOUND BY LAW? ALIEN RIGHTS, ADMINISTRATIVE DISCRETION AND THE POLITICS OF TECHNICALITY: LESSONS FROM LOUIS POST AND THE FIRST RED SCARE

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This paper is dedicated to the memory of Michael Rogin

> Nothing is more striking to the European traveler in the U.S. than the absence of what we term Government, or the Administration. Written laws exist in America and one sees that they are daily executed; but although everything is in motion, the hand which gives the impulse to the social machine can nowhere be discovered.
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> Alexis de Tocqueville

> [The new science of administration] is not of our making; it is a foreign science, speaking very little of the language of English or American principle. It employs only foreign tongues; it utters none but what are to our minds alien ideas. . . If we would employ it, we must Americanize it . . . radically, in thought, principle, and aim as well. It must learn our constitutions by heart; must get the bureaucratic fever out of its veins; must inhale much free American air.
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> Woodrow Wilson

Against the Exceptionalism of the State of Exception

Emergencies are one of the occasions on which governmental power and prerogative are expanded. Critics of such government expansion tend to appeal to courts to resist executive power's new reachings. But, historically, courts in the U.S. have had little impact on executive emergency power and the Supreme Court mostly defers on such matters to executive branch claims of national security needs.[1] This deference is one of the reasons liberal and legal theorists tend to think of emergency politics as exceptional.

The tendency to treat emergency politics as exceptional is also encouraged by Carl Schmitt's term for the phenomenon: the state of exception. This is a condition in which ordinary law is legally suspended and sovereign power operates unfettered, by way of decision. Schmitt's apparent defense, and even celebration, of decisionism combined with his own known Nazi party involvement, have led many to criticize him for promoting a dangerously immoral and warlike conception of politics.[2]

But to say that the state of exception is that in which decision takes over need not mean that all powers redound to a single unaccountable sovereign dictator, though that is the term Schmitt himself used, and that was his apparent meaning. Nor, contra Schmitt, need it necessarily mean that sovereignty is unified in and by way of the singular decision. In the context of American liberal democracy, decisionism takes a different course. Emergency politics occasion the creation of new administrative powers and the redistribution of existing powers of governance from the more proceduralized domains of courts to the more discretionary domains of administrative agency.[3] Such agencies are decisionistic by design: Highly discretionary, relatively unaccountable, for the most part ungoverned by the requirements of due process, and even possessed of law-making power of their own, they are referred to by their proponents (like the Progressives) as efficient, flexible agents of good political judgment and by their critics as dictatorial and unaccountable.

A focus on administrative decisionism takes emergency politics out of their exceptionalist context and sets them in the context of larger daily struggles over governance that have marked American liberal democracy for over a century. From this perspective, emergency-occasioned debates about the "trade-offs" between security and rights can be seen to belong to larger, ongoing debates about the risks and benefits to democracies of administrative versus judicial power, rule of man versus rule of law, efficiency versus fairness, speedy versus fully deliberative decision-making, outcome versus process orientations and secrecy versus transparency or publicity.[4] The focus on security versus rights, to which we are driven by the government's use of its powers to imprison, detain, deport and de-naturalize in times of emergency tends to deflect attention away from the more fundamental issue: the emergency-occasioned (re-)distribution of governing powers and the mechanisms by which they may or may not be held accountable. The liberty versus security debate is important, to be sure, but it is the tail, not the dog.

The to and fro between administrative and judicial governance is a quotidian jurisidictional jockeying among bureaucrats, administrative political appointees, judges, lawyers, and civil libertarians, as well as citizens and activists from all across the political spectrum. In this struggle, critics of administrative discretion and civil libertarians tend to respond to Executive expansions of discretionary power not with counter-politics, per se, but with claims of rights. They try to re-judicialize the terrain in two ways: They turn to courts and contest the relocation of decision-making power from normal judicial settings to administrative sites.[5] And (or) they press for the expanded judicialization of non-judicial sites by, for example, claiming that people have procedural rights of due process even in non-judicial settings.[6] Such causes seem obviously worthy of support but they offer no guarantees. For one thing, historically, even when courts have maintained jurisdiction, they have tended nonetheless to suspend

their jurisdictional autonomy and to defer to executive branch claims in times of emergency, a tendency metaphorized for most Americans by the name Korematsu. And second, proceduralization itself cuts many ways: For example, after 9/11, Alan Dershowitz called for the proceduralization or judicialization of torture. Since torture will go on anyway, he argued, we may as well bring it into law's fold and secure, both for ourselves as a society and for those being 'interrogated,' the protections and benefits of judicial procedure.[7]

For those who want to put human rights and the dissenting politics they are meant to protect onto more certain ground, merely participating in the to and fro of judicialized processes versus administrative discretion will not be adequate. It may be necessary, but it will not be sufficient. I seek a third option, by way of Louis F. Post, Assistant Secretary of Labor during the First Red Scare. Because he fought for procedural rights and due process during the arbitrary round- ups of the Palmer Raids, Post is often lauded as a principled proceduralist who anticipated later Court rulings on the rights of non-citizens. But Post was no mere proceduralist. He began his career in post-Civil War S. Carolina, documenting the testimonies of KKK members detained under President Grant's suspension of habeas corpus. About Grant's decision to suspend habeas corpus to break the Klan, Post never protested. For Post, a champion of proceduralism in 1919-20, proceduralism was not a good in itself – it was simply one of law's many mechanisms, a mechanism whereby all sorts of political aims could be pursued.

Louis Freeland Post and the First Red Scare

On April 28, 1919, a homemade mail bomb arrived at the office of Ole Hanson, the Seattle mayor who had crushed a strike by shipyard workers just three months earlier. A day later, another bomb arrived at the home of former Senator Thomas Hardwick, exploding and maiming the unfortunate person who opened the package on Hardwick's behalf. Postal authorities located thirty-two other bomb packages before they were delivered. (Sixteen had been held back for insufficient postage, an oversight that also stalled some of 2001's anthrax mailings).

The April bombings were followed by another round 6 weeks later, in June, when a new series of bombs exploded in eight different cities at the same hour. One of these – a suicide bomber, an Italian anarchist from Philadelphia — damaged Attorney-General Palmer's house hurting no person but himself. "Terrorism had come to America's own doorstep . . . During the latter half of 1919, the threat of terrorism sent Americans into a frenzy of fear." [8]

In response to the bombings, the Justice Dept. led by Attorney General Palmer and his underling, J. Edgar Hoover (in his first job as head of Palmer's General Intelligence Division), engineered round ups soon known as the Palmer

Raids and sought summary deportation of 5-10,000 aliens (estimates differ) under the 1918 Sedition Act. Louis Post, Assistant Secretary of Labor at the time, took it upon himself to resist the Justice Department's initiatives.

Until 1920, John W. Abercrombie, solicitor general for the Dept. of Labor, worked in tandem with Palmer and Hoover, going so far as to issue them and the Immigration Bureau five thousand blank deportation warrants. When in March, Abercrombie left the Labor Dept. to run for the Senate, Louis Post took charge of deportation oversight and stopped cooperating. Taking advantage of the language of the Act that created the Dept. of Labor, Post usurped, in accordance with the law, the de facto power of the Commissioner of Immigration to decide the fates of detained aliens. Post "asserted the right to decide deportation cases without prior briefing [i.e. by Caminetti or his agents] and ordered that all records be sent to Washington for his personal review."[9] Having claimed jurisdiction and the power of decision, Post then began to whittle away at the category of deportability.

First, he persuaded Labor Secretary Wilson that the Communist Labor party was more moderate than the Communist Party of America. Since only the latter did not disavow the use of violence, it could only be membership in the latter that was, strictly speaking, a deportable offence, *contra* Hoover.[10]

Second, Post decided, again contra Hoover, that "automatic membership" was not grounds for deportation. Automatic membership meant that a person was taken to be a member of the Communist party if his name was found on their rolls. But the party padded its rolls, listing inactive or unpaid former members and borrowing names from lists of other related but non-identical organizations. Post insisted that no one could be deported simply for having his or her name on a list.

Third, and most radically, Post differed from Caminetti, Palmer, and Hoover, who claimed that the constitutional guarantees of right to counsel, to confront one's accuser, reasonable bail, and habeas corpus were not applicable to non-citizens in an administrative setting.[11] Post argued that deportation, even if it is an administrative matter, must be fairly administered, and so it made sense to subject the process to the rules and procedures (the criminal law's due process, etc.) that, in other venues, serve as proxies for fairness.[12] For example, he ruled that aliens' self-incriminating statements could not be used against them if those statements had been made without benefit of counsel.[13]

Finally, Post used all his powers of reasoning and all of the law's resources to find in favor of aliens marked for deportation whenever possible. He employed the distinction between political and philosophical anarchism to the benefit of those charged (only the former was actionable under the law). And he second-guessed the self-incriminating statements of detainees. Here is his account of his

decision in the case of a self-professed anarchist, a well-known activist from Mexico named Flores-Magon:

When asked about his political beliefs, Flores-Magon said he was a "communist anarchist." But Post did not take him at his word. As Post later explained:

> I considered what his saying he was an anarchist meant. And if I had stopped there I should have been obligated to deport him . . . I should have done as I did in the case of Emma Goldman, whose case stood wholly on that one word. She said she was an anarchist and I deported her and I should have done the same in his case. But I found on reading further [the record of Flores-Magon's interview] his meaning of the word did not tally with the definitions of anarchism as anyone who has investigated the subject knows; and because it did not tally, I came to the conclusion he was a man in favor of government and not opposed to government and that determined the case. . . . I decided to cancel [the warrant] because he was not an anarchist within the meaning of the law[14]

It will be apparent from this line of reasoning that almost anyone (with the exception of the unfortunate Emma Goldman) could in such a way be found not to be an anarchist, or at least not to be in violation of the law. Post used the law and the rule of law's procedural requirements to create technicalities that would undo or counteract the Sedition Act's intended (at least its deniably intended) and unintended effects.

In this way, in three months, Post and two assistants, working 10 hour days and deciding as many as 100 cases per day, managed to free 2-3,000 or perhaps even as many as 6,000 (estimates differ) detainees. One historian refers to Post's actions as an "insurrection against Palmer." Indeed it was and Palmer knew it.[15] He "demanded that Post be fired for his 'tender solicitude for social revolution.'"[16]

Post was not fired but he was called before the House Committee on Rules to answer Palmer's charges.[17] Was Post implementing the Sedition Act or was he using his discretionary power to undo it?[18] The public's impression and that of the members of the Committee was that when Post canceled a deportation warrant, he was in effect freeing an "alien after he was found guilty and ordered deported." (Indeed, one of his antagonists at the hearing of the House Committee on Rules snipped: "We have given you time to empty the jails as far as you could" [Mr. Johnson, Chair of the House Committee on Rules, *HT*, 254]). Post countered with the legally more precise claim that "Cancelling [sic] a deportation warrant is nothing more than finding a verdict for the defendant." That is, a warrant (which is all Palmer and Hoover could issue) was merely a charge, not a

finding. It began a process of investigation, rather than marking the end of one. This clarification turned the tide of public opinion in Post's favor.[19] The Committee was not so quickly won over, though, and moved to take issue with Post's most radical invention: the rules under which Post decided the cases of the charged aliens.

A Democratic Administrative Power?

Post's discretionary decision to apply the more stringent criminal procedure rules to an administrative process was one of the core issues before the Committee on Rules. Post defended himself, deploying ideals of Americanism, constitutionalism, separation of powers, and limited government, appealing to an ideal of self-limiting administrative power that could otherwise be limitless in its reach, arbitrary in its application, despotic in its actions.[20]

My contention is that when the executive department of the Government is the absolute judge of whether a man shall remain in this country or not, and the courts will not interfere, we should see to it that no injustice is done to the man . . I have drawn from the criminal law its principles which recognize the rights of the individual and especially his right to a fair trial, to a fair decision as to whether he is guilty or not, before he is penalized in any way. And to send a man who has been here 10 or 15 or 20 years — to take him away from his family and send him out of the country on an administrative warrant, a mere police warrant, until it gets to the Secretary of Labor, is to penalize him and to penalize him in a very drastic and very un-American way[21]

Post emphasized the administrative character of the warrant to underline the finality of the judgments involved: "we should be all the more careful in judging these cases because he [the alien who has lived here ten or fifteen years] has no redress in the courts when an administrative judgment is given."[22]

Post's appeal to an ideal of a self-limiting executive power did not immediately persuade. Congressman Garret persisted: "'Congress has passed this act; it has made it administrative; and it has put it in the hands of executive officers to enforce . . . I would say that it was a fair presumption that Congress intended, in the passage of that act, irrespective of the differences between the rights of aliens and the rights of citizens under the Constitution of the United States, to eliminate the rules that would be applicable in court." To this Post responded, (in what must have been at least partly mock horror): "In other words, the United States Government – because this is the exact point – when a complaint is made against a man under this law and the case comes before the Secretary of Labor, he must deport the man, whether the man is innocent or guilty? You did not mean that?" Garrett demurred, of course, but Post went on: "That is the issue, however . . . The issue is: Not whether those who violate the law shall be

deported, for we are deporting them . . . but whether those who have not violated the law shall be deported".[23]

And then there were the borderline cases. Throughout, Post admitted that although his own decisions were fully within the law, another might have decided the same cases another way, even using the same criteria (e.g. pp. 68, 230, 248, HT). Having usurped the power of decision, and having legally defined the boundary of decision as narrowly as possible and embraced the ensuing 'constraints,' Post took full responsibility for the decision that remained, even owning a certain inclination to favor people facing hardship[24] : He also sought to humanize those whom Palmer and Hoover had demonized, while making clear to the committee that he had sometimes felt bound by law to do things he felt were wrong:

> I could not sleep at night for thinking of some of the cases where the man had to be sent out. They were good, hard-working and useful men, who would have made good American citizens; but it was proved that they were members of this organization, even though they did not know what its purpose was; even though they thought they were joining an organization of men from their own country; even though they thought that they were going to school. I have deported such men, because the evidence showed that it was clear that they belonged to the organization.[25]

But Post knew that humanism, counter-Americanism and oratory were not enough Post knew the law well and he exploited its resources to the best of his abilities, which were considerable. Reviewing thousands of cases in a matter of weeks, he almost always found the detail, technicality, or doubt that might warrant a detainee's release.

Palmer and Hoover cast Post as an arbitrary, untrustworthy administrator whose aim was to undo the law. They claimed, by contrast, to be law's servants, operating in adherence to the requirements of the Sedition Act and the will of the legislators who passed it. Post responded by casting himself as law's strictest adherent and casting his opponents as arbitrarians and securitarians whose own decisionism was poorly cloaked by pseudo-legality.

The Politics of Technicality – Or, Law Knows No Limits

Post's use of technicality to limit the range of the Sedition Act is reminiscent of the strategy whereby rabbinical interpreters in effect abolished the death penalty in Judaism. Working with Biblical law, divinely authored, the rabbis could not simply change the law. Instead, they *proceduralized* the death penalty out of existence, as follows:

They required that the culprit be warned by two witnesses immediately before he committed the unlawful act carrying the death penalty (after all he may not know the act is illegal or punished so severely and how can you hold him liable for death for transgressing a law that he never knew?); that he respond, 'Even so, I am going to do it' (because he may not have heard the warning), that he commit the act within three seconds of hearing the warning (for otherwise he might have forgotten the law he had just heard and therefore could not be held responsible); that the witnesses not be related to each other or to the culprit; and that there be at least one judge on the court who votes to acquit him (for otherwise the court might be prejudiced against him . . .). [26]

These requirements are familiar to any student of the rule of law: publicity, intentionality, evidentiary requirements, impartiality, and so on.[27] But the rabbis extend them, comically, to the point of cartoonishness. Here interpretation, upon which the law depends for its animation, preservation, and application, is (also) used to undo the law.

Without interpretation, law, which is general and broad, can never be applied, implemented, or understood.[28] Without interpretation, law is insensitive to particularity and nuance. Such sensitivity, however, can lead to the creation of technicalities, which seem to violate the basic premises of the rule of law: Technicalities are rarely public because they are usually the products of arcane professional knowledge. Technicalities tend to be discovered or invented post hoc, they are not normally broadcast in advance.[29] Often they apply only to an individual case, and not to a general class of cases and so they violate the rule of law's generality requirement. In short, technicality is both a necessary presupposition of the rule of law (an outgrowth of interpretation and implementation), and a threat to the rule of law. [30]

This doubleness of technicality is explored weekly (actually, now daily, no — hourly) on the television show, *Law and Order*, whose title suggestively both couples and severs the relation between its two terms — law and order. The "and" severs and couples. The title's doubleness is apt because the show's recurring theme is the district attorney's efforts to outwit defendants by creatively finding in law hitherto unsuspected traps, resources, and incentives – technicalities — by way of which order (but perhaps not law, at least not in the rule of law's usual sense of the term) can be maintained and the guilty punished. The ample literature on overcharging documents such practices in the real world.[31]

The ambiguous tactics of *Law and Order*'s infinitely creative and sometimes unprincipled (or overly principled) D.A. are presented as heroic, for the most part, though sometimes fatally flawed by his immoderate pursuit of justice's strictest requirements. In popular discourse, however, the term technicality has only a bad name. It brings to mind not a mechanism whereby order or justice might be secured but rather a mechanism whereby law's aims

are subverted by sly criminals or their lawyers, as in: "he got off on a technicality." But technicality, no less than proceduralism itself, is a device available for capture by parties from all sides with a wide variety of agendas, a device whereby all sorts of ends, just or unjust, might be sought, as indeed they are on *Law and Order*. The instrument itself (technicality) does not prejudge nor predetermine the worth of the end in question. In Post's hands (and in those of the rabbis), technicality was used, in my view, to good ends, as was administrative power (about which the rule of law's advocates are always wary and dubious). As aliens subject to administrative power, the detainees lacked the rights Post attributed to them. Post used his administrative powers to grant them rights they did not have juridically.

He also advised them to invoke the writ of habeas corpus while in detention, even though he knew courts would unlikely to side with them.[32] He knew that law cannot be pressed into new directions unless claims, even— or especially — illicit ones, are made in its name and using its terms. And then Post acted as if these rights, which had no juridical existence apart from his own contestable administrative rulings, bound him. All by itself, the rule of law did not secure nor mandate that outcome. And Post never implied that it did. He was inaugurating a new discourse, or re-establishing an old one and he seems to have understood that the only way to succeed was by claiming to be bound by the very thing he was trying to bring into being. In so doing, he repeated the operation performed by the American founders when they declared independence in the name of *we, the people* when that people, in advance of the new republic's constitution, did not yet exist.[33]

In the end, the fact that the Justice Dept. had failed to "find more than four firearms and a few tons of propaganda pamphlets in the possession of the four thousand supposedly violent revolutionaries they arrested," only helped establish Post's case that aliens were people too and perhaps even good Americans (even if not citizens).[34] Moreover, after Post's testimony before the Committee on Rules, the public came to share Post's doubts about the arbitrary administrative powers used by the Justice Dept.

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It is often said that the First Red Scare ended when the country chose hedonism over politics, shifting its focus from Italian anarchists to American flappers, from homemade bombs to homemade whiskey.[35] But couldn't we just as well say, shouldn't we just as well say, that the country chose democracy over despotism, and fairness over arbitrariness in the exercise of governmental power? Because that is what happened (for one brief moment, anyway: Sacco and Vanzetti were yet to come).[36] The Committee on Rules found in Post's favor. Soon after, Palmer's political career was destroyed (he had been planning to run for the

presidency) when he testified, much less effectively than Post, before the Committee regarding the Justice Dept.'s handling of what Post came to call (and many others came to think of as) the "deportations delirium."[37] It was a huge victory for Post. But J. Edgar Hoover survived and went on to thrive.[38]

It is tempting to think the whole history of the American state's development into a national security state over the course of the 20th century can be summed up by simply doing the math: Post was 71 years old at the time of these events; Hoover was 24 and lived for a half century after Post, perfecting and using the policing and surveillance techniques he first developed as head of Attorney General Palmer's anti-radical division. Hoover was in this period already keeping files on various liberals, including Post, Brandeis, and Frankfurter, as well as black leaders like Marcus Garvey and labor leaders as well. It would be only 4 years until Hoover got the opportunity he needed to institutionalize his techniques and the demonological perspective that animated them. In 1924, Hoover was made head of the Federal Bureau of Investigation. Post died just five years later and his initiatives, by contrast, were never institutionalized. They passed out of the Dept. of Labor with him, months after the hearings, when the president he served left office. It is ironic that, of these two administrative exercisers of discretion, the man who stood up boldly for the rule of law never succeeded in institutionalizing his ideals so that they could survive, law-like, in his absence, while the man who stood for discretionary Executive power eventually succeeded in creating an institution that would, even well after his own death and for a very long time to come, exercise power arbitrarily, in ways consonant with his own personal, often paranoid, vision.[39]

Until now, I have treated Hoover and Post as villain and hero, respectively. But my aim is not simply to write a history of great men. If Post and Hoover are of interest to us now, it is not only because the story of their engagement may inspire us to act well in challenging settings, but also because they name and order twin impulses in American political culture that may be in conflict but nonetheless together drive our national responses to emergencies (real or imagined). American political culture has within it elements that are both demonological and inclusive, particularistic and universalistic, securitarian and willing[40] to take risks, in favor of both discretionary and proceduralized power, and oriented toward both a centralized powerful administration and a fractured or divided and chastened sovereignty. The challenge for democratic activists is how to mobilize the energies of the latter in each of these pairings, in order to offset and balance, not necessarily thwart, the former. The problem we face is that our contemporary political scene is dominated largely by impulses personified by Hoover and no longer also by those personified by Post. We are living in an era that is, as it were, *post*-Post because of the particular way the two impulses traced here played themselves out. The rights-centered future of American politics won out in the period after Post's victory, a period in which Post was blackballed

from the public lecture circuit by supporters of Palmer and Hoover. It was not the chronological facts of the matter (Post's age; Hoover's youth) but rather the political battles that were won and lost after Wilson's departure from office that paved the way toward that future – our present. We are left with the civil libertarianism that animates the courageous rights-centered arguments of people like David Cole, but without the Progressivism and Henry George'ism that breathed life into Post's. We are left, in short, with only the shadows of the rights for which Post fought. Some of those rights are now more firmly entrenched juridically than they were then and this has led many to talk about how much "progress" the last century witnessed regarding rights. But none of these rights is lodged in anything like what Post had – a visionary counter-politics that sought to stand up to executive power over-reachings in the settings of everyday as well as emergency politics. Denuded of such a context, contemporary liberal rights – fought for by lawyers, legal elites, and decided upon by courts — are important but inadequately able to generate the forms of collective action needed to counter the color-coded, securitarian, emergency politics of governance with which democratic citizens in the U.S. have been confronted since 9-11.

Conclusion: Law's Agency – Or, The Limits of Law

Louis Post is said by one historian to have "anticipated Supreme Court rulings of half a century later."[41] Non-citizens facing administrators (in non-emergency settings) do now have some of the procedural rights that Post discretionarily granted to Palmer's detainees in 1920. But the term "anticipation" operates in an end-of-history temporality that credits law with all the agency and leaves to people like Post only the perspicacity or good fortune to line up on the right side of the law before (or after) the law has spoken (or in anticipation of its one day doing so).[42] But Post did not anticipate the law. He used all the law's resources and even invented some in order to render the constitution more democratic, that is to say, to render it more responsive to the needs, rights, and views of the actually existing people over whom government power was brought to bear.[43] And, for better or worse, the law — through the agency of other interpreters, administrators, judges, and activists — eventually found its way to some of the democratic commitments and ideals that so moved Louis Post.

Post pursued many substantive Progressive goals while at Labor. Specifically, he sought to develop labor arbitration procedures so as to diminish strike violence and to improve the Labor Dept's services to black labor. His innovations were short-lived. They were swept aside when he was pushed into the defense of proceduralism — as we all are — by the demands of emergency and demonological politics, which made survival rather than world-building a priority. (Or, better: in the context of demonological politics, proceduralization *is* world-building, albeit what is built is a barer world than we might otherwise seek.) In the realm of proceduralization, a dangerous realm in 1920, as now,

Post took advantage of the ambiguity that left others in doubt as to whether it was he or the law that was the primary agent of his controversial administrative decisions. If some concluded that the 'law made him do it,' then so much the better for both him and the law.

But the question of whether Post made law or acted at law's behest can only take us so far. It is important also to pose the critical questions that lie beneath it: What is at stake in depicting Post as either bound by law or as law's author? In other words, for those who turn to it, what problem is law's agency supposed to solve?

Attributing agency to law is a way to hold fast the distinction between the rule of law and the rule of man. Faced with the undeniable impact of variable human agency on the rule of law's supposedly univocal, predictable governance, scholars of law and legal historians seek to excise or domesticate those elements of the rule of law that appear dangerously decisionistic (e.g. interpretation, implementation, technicality). One solution is institutional: Authorized or sanctified in one way or another, or legitimated by their norms or practices, institutions like the Rabbinical Sanhedrin or the American Supreme Court interpret or make law through authorized processes, forms, and norms that are said to transcend and bind mere human agency.[44]

The historian, Lucy Salyer takes this institutional approach in her book, *Laws Harsh as Tigers*, which seeks to explain why hostile, nativist lower court judges decided cases in favor of Chinese petitioners seeking entry to the U.S. at the turn of the century. Salyer casts law as possessed of an agency of its own — the judges were "'captives of law,'" she says — but she also locates that agency in particular institutions: The judges were constrained, by "the court's norms and traditions" and moved by their "institutional mission."[45] She is undoubtedly correct. Institutions do set expectations, generate grammars, and set out norms that are internalized by their members. But individuals then go on to act variously upon those norms and, in their variety, they at some point "decide."[46]

Salyer's allusions to the courts' institutional mission occur within a larger theoretical framework that works, perhas unwittingly, to shore up and re-legitimate judicial power, insulate it from the charge of decisionism, and direct that charge instead at administrative power. In this framework, in which Salyer as well as other diverse proponents of the judicialization of procedure operate, (e.g., Martin Shapiro, Andrew Arato, Jurgen Habermas), *the rule of law*, which is identified with law-disciplined judges, norm-bearing lawyers or legal elites, and rights-bearing clients, is juxtaposed to *the rule of man*, which represents arbitrary power exercised over rightless persons by unaccountable administrators with too much discretion and a focus on efficient outcomes not justice.[47] Yet, the rule of law as a system of governance postulates both judicial and administrative power.[48] And

the binary distinction between rule of law and rule of man is overdrawn and misleading.

To question the binarism of the distinction between the rule of law and the rule of man as it operates in contemporary scholarship is *not* to deny the important differences between administrative and judicial settings. People have access to a wider array of procedural rights and protections when confronting state power in judicial arenas than when confronting state power in administrative arenas. Those procedural rights and protections may be nugatory or they may be invaluable; it depends on the political and legal context in which we try to claim or (re)take them.[49] Either way, however, the real differences between administrative and judicial settings do not underwrite the longer list of binaries that structures the arguments of those who champion the rule of law over its demonized, administrative other: efficiency versus justice, outcome versus process, decision or discretion versus norms, caprice versus regularity. These do not map neatly onto administrative versus judicial power. Some unholy mix of all these considerations informs administrators and justices alike in their exercises or easements of state power. Administrators can be nuanced, careful and even self-limiting, while judges can be brutal, ambitious and over-reaching, as we well know. Proper judicial procedures don't always secure just outcomes. And courts are not the only public institutions guided by norms. Public administration, (particularly as practiced by the Progressives), is no less structured by ideals, norms and grammars than are courts. True, the ideals, norms and grammars that motivate the two institutions may differ (hence the different rights and privileges possessed by their respective petitioners) but those difference exceed and confound the binary demands of the opposition - rule of law versus rule of man – in which the former is assumed to be superior to the latter.[50]

The logic of what Michael Rogin called demonological thinking is very much at work here.[51] Legal scholars and political theorists take something that is unsettlingly inside of the rule of law, (variable, fallible interpretation, application, implementation, invention, technicality), cast it outside, and call it decisionism so that the rule of law is kept pure of its de-legitimating taint. Decisionism is then identified with emergency politics, the state of exception, and its very foreign proponent, the legal theorist turned Nazi jurist, Carl Schmitt; or it is identified with the rule of law's other Other, administrative power, whose partnership role with more judicialized institutions in the U.S. is largely disavowed and whose position in relation to the rule of law is (re)cast as simply adversarial, rather than supportive or supplementary. Similarly, the so-called state of exception is disavowed, rendered exceptional, marked as a suspension of law rather than seen as part (even if an extreme part) of the daily rule-of-law-generated struggle between judicial and administrative power.

A politics of foreignness is deeply at work here. A confident sense of the alienness of administrative power in relation not just to the rule of law but also to the U.S. is furthered by sentiments like those voiced by Tocqueville and Woodrow Wilson in the quotations that opened this paper. Wilson, (President at the time of the Palmer raids and responsible for the appointment of Post and other Progressives to Executive branch agency positions), in particular, suggests that administration is itself a foreign practice and therefore guided (if guided at all) by principles developed elsewhere and in need of Americanization.[52] The contrast with France's centralized bureaucracy, in particular, is striking. But the contrast is also misleading insofar as it suggests wrongly that although the U.S. has some administrative machinery, it is really a rule of law state, not (also) a bureaucratic one.[53] Or better, it suggests (wrongly) that one can have the rule of law without being implicated in mechanisms of governance: administration, implementation and decision.[54]

Unfortunately, efforts to insulate law (and the U.S.) from the Others of decision and administration themselves contribute to the rule of law's undoing, for the rule of law is partly legitimated by its claim to be an instrument of self-rule, after all, and so it depends upon (or as Oakeshott would say, it postulates) the very human agency that many of the rule of law's proponents are committed to disabling or marginalizing for the sake of the equity, regularity, and predictability that the rule of law is also said to require and deliver.[55] With the disavowal of all that goes by the name decisionism, with the quest to bind ourselves everywhere by law, we disavow something else too: our human inaugural powers, which law *refuses but also offers* to its subjects: It refuses human agency when it aspires to regulate, command, and police us while also, of course, remaining dependent upon us, its subjects, to what it must also offer us – the responsibility and opportunity to interpret and implement and even undo the law (perhaps even as its [co]authors). Lest this promisingly undecidable dimension of law be obscured, liberal democratic regimes need a third way, or perhaps a better way of thinking about the two that we have. Perhaps somewhere between the rule of law and the rule of man, or on the terrain of their jurisdictional struggle, we might, together with Louis Post, find or enact the rule of men or people: plural and riven, plainspoken and arcanely technical, lawlike and lawless, all at the same time.

Notes

This paper was commissioned for a volume titled *The Limits of Law*, (Stanford: Stanford UP, 2005), ed., Austin Sarat, Lawrence Douglas and Martha Umphrey, all of whom provided valuable commentary on an early draft. Early versions of this paper were presented at the University of Missouri at St. Louis, The Johns Hopkins University, Berkeley, UCLA, Amherst College, the 2003 American Political Science Association convention, the American Bar Foundation, and

finally as a lecture at the Ohio Valley Philosophy of Education Society meetings in the fall of 2004. This last presentation occasioned the invitation to republish an abbreviated version of the essay here. It was also the occasion of my introduction to the philosophy of education literature's own investigations into the promise and limits of administrative power as political power. For this, I am very grateful to the OVPES audience generally, in particular to Natasha Levinson who invited me to speak at the meeting, and to Cris Mayo, for her wonderful, illuminating response to the lecture. Bonnie Honig's essay, "Bound by Law" is reprinted by permission of Stanford University Press.

1. The classic example is the majority decision in *Korematsu* (*Korematsu v. U.S.*, 323 U.S. 214) as well as the Jackson dissent in that case. The earlier decision in *Milligan* (which found, contra Lincoln, that where civilian courts are open, military courts cannot be used) was issued in 1866, after the war's end. The decision, ex parte Merriam, issued in Maryland court by Taney, was issued during wartime, 1861, and did challenge Lincoln's suspension of habeas corpus, arguing that the possibility of suspension, listed in Article I, should be seen therefore as a Congressional power, not an executive one. Since Merriam was decided in 1861, during the Civil War, it is one of several exceptions to my claim that courts *generally* defer to executive power in times of emergency. But Taney's decision had no impact on Lincoln's conduct. (See Rossiter, Clinton, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Brunswick: Transaction Publishers, 1948, 2002) Part IV.)

2. Typical and among the most unrelieved in his criticism is William Scheuerman. (See *Between the Norm and Exception*, [Cambridge: MIT Press, 1994] Ch 1.)

3. Analogously, and prior to this struggle between judicial and administrative power, courts themselves were disciplined into the predictable and proceduralized institutions demanded by the rule of law as we have now come to understand it. In the post-revolutionary United States, military courts were used to break the independence and unruliness of jural freedom, an institution that was once, in Akhil Amar's words, a fourth branch of government. See Shannon Stimson's wonderful and now timely *The American Revolution in the Law* (London: Macmillan, 1990) and Amar's *Bill of Rights* (New Haven: Yale UP, 1998).

4. Such "settings" include both emergency times and spaces because *contra* Carl Schmitt and Clinton Rossiter, emergency powers are not just temporal; they may be spatial. Or, better, even when they are temporal, they are also always spatial: For example, in a time of national emergency, we are not all equally subject to emergency rule – some have the wealth or power or profile to opt out of many constraints and remain uncriminalized and even uncriminalizable by new security measures.

5. See Arato, Andrew, "The Bush Tribunals and the Specter of Dictatorship," *Constellations* 9:4 (winter 2002) and David Cole, *Enemy Aliens*.

6. In *Laws Harsh as Tigers*, Lucy Salyer studies the process whereby Chinese would-be immigrants sought the expansion of judicial protections while dealing with highly discretionary and not very accountable administrators of the Chinese Exclusion Act. I discuss Salyer's book in more detail below. The literature on scholarly calls to proceduralize discretionary administrative agency is glossed in and exemplified by Martin Shapiro in *Who Guards the Guardians? Judicial Control of Administration* (Athens: U of Georgia P, 1988).

7. Dershowitz, Alan, *Why Terrorism Works* (Yale UP, 2002) Chapters 4 and 5.

8. Bruce Watson, "Crackdown!", *Smithsonian* 32, no. 11 (February 2002):52.

9. Dominic Candeloro, "Louis Post and the Red Scare of 1920," *Prologue: The Journal of the National Archives* Vol. II, no. 1 (Spring 1979):41-55. Caminetti resisted the takeover, of course, but Post replied that "power over deportation matters had never been given to the bureau [of immigration] and that Caminetti was merely an agent who had been assigned to brief cases for him." As Post later put it in his testimony before the Committee on Rules, "The Commissioner General of Immigration is not the dictator to the Secretary of Labor in warrant cases. It has been assumed by the committee that makes this complaint [the charges made by the Committee on Rules] that he is the dictator in effect, and that the Assistant Secretary [Post himself] was culpable for overruling him." But this assumption was wrong, Post insisted over many hours of testimony, in which he repeatedly characterized the Immigration commissioner as a "sheriff" to the Dept. of Labor and as a mere advisor and, finally and most brutally, as possessed of "no more authority than the private secretary of a Secretary would have" (p. 227, "Investigation of Administration of Louis F. Post, Assistant Secretary of Labor, in the Matter of Deportation of Aliens", CIS-NO: H247-4, House Committee on Rules, Apr. 27, 30 and May 7, 8, 1920, henceforth: House Testimony or *HT*). Cf: Candeloro, Dominic, "Louis Freeland Post: carpetbagger, single-taxer, progressive." Dissertation: Thesis PhD – University of Illinois, Urbana-Champaign, 1970, pp. 155-165 inter alia.

10. Secretary of Labor Wilson held open hearings on this matter and "stunned Hoover and the Justice Dept." when he ruled "that membership in the Communist Labor party was not a deportable offense because members were not required to know of or subscribe to the Party's goals or tactics as a condition of membership; he flatly rejected Hoover's brief and argument on the subject" (Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover* [New York: Free Press, 1987]118.)

11. Candeloro, *Prologue*, 46.

12. Post said he had Court decisions backing him in this view but none finessed the question (discussed below) of whether it was incumbent on an administrative procedure to hold itself to the more stringent requirements of criminal law. Thus, it is in some sense true, as Charles Howard McCormick says, that Post's legal position *anticipated* later court rulings; (McCormick, 1999, cf. Candeloro, who says that "Post's dedication to upholding the procedural rights of the defendants anticipated Supreme Court rulings of half a century later" [p. 46; Candeloro, 1970], though I will quarrel with that term — "anticipation" — below. McCormick mentions specifically *Wong Yang Sun v. McGrath* [1950] and *United States v. Brignoni –Ponce* [1975]. Post himself invoked an eighth circuit Court of Appeals case, *Whitfield v. Hanges*, when he said in his testimony, "an alien, once lawfully admitted and resident in this country . . . has the same constitutional rights, except as to voting and purely citizenship rights . . . that the citizen has," and Post added, this "is good American doctrine" [*HT*, 223; emphasis added]).

13. Regarding his disregard for statements made by aliens without benefit of counsel, Post said to the House Committee: "If there is any objection to that stand that I took, the quarrel is with the United States district judge in the West and with the Supreme Court of the United States in its unanimous decision. I based that on the principle of the case of Re Jackson, in the United States District Court for Montana, in which the decision was by Judge Bourquin; and on the case of Silverthorn *v.* The United States, which was an appeal taken to the Supreme Court and decided January 28, 1920" (*HT*, 78).

Post's ruling on this matter directly reversed an earlier change introduced by Hoover: In response to a pamphlet that advised aliens not to answer questions without benefit of counsel, Hoover amended immigration regulations "to delay the right to a lawyer until the case 'had proceeded sufficiently in the development of the facts to protect the Government's interests.' The amendment took effect on Dec. 31, 1919, one business day before the raids began" (Cole, *Enemy Aliens*,120 and passim.).

14. Post, *HT,* 230. Two other considerations entered into the case for Post, which he mentions at other times at the hearings: Magon had 6 American born children dependent upon him and, as a dissident, would very likely have been killed had he been returned to Mexico. Thus, Post said that even had he found Magon deportable, he would have imprisoned him in the U.S. until such time as he could be assured of the man's safety in Mexico.

15. Leuchtenburg, p. 79. Cf. McCormick, op. cit.

16. Leuchtenburg, op. cit., p. 80. (Cf. Watson, 2002) Leuchtenburg says that thanks to Post, of the 5000 arrest warrants sworn out in late 1919, "only a few more than 600 aliens were actually deported" (81).

17. Salyer (239), Cole (123), and others suggest Post was impeached or "brought up on impeachment charges," referring to the hearings referred to here. In fact, he was not impeached. An impeachment resolution was introduced "unostentatiously," by Kansas congressman Homer Hoch. But the resolution "did not come formally before the House" and although it should then have gone to a preliminary inquiry by the Committee on the Judiciary, "the Speaker referred it to the Committee on Rules," (whose record is here referred to as House Testimony [HT]). In Post's view, the Speaker took a wise course: "[T]he Judiciary Committee is a judicial branch of the House. It could not gracefully dispose of such a resolution without reporting its judgment. But the Committee on Rules is a political branch which could, without any breach of judicial deportment, smother the whole proceeding if it discovered that the impetuous Mr. Hoch had gone off on a false scent. Like the nearsighted hunter of the familiar anecdote, the Speaker aimed to hit if the object were a deer, but to miss if it were a calf," (Post, *The Deportations Delirium* [Chicago: C.H. Kerr, 1923]: 232-4). Thanks to Stephen Daniels for pressing me to clarify this point.

18. This, in a nutshell, is the recurring question in the literature regarding administrative power: Lucy Salyer parses it by way of a quotation from attorney Max Kohler, who criticized the Bureau of Immigration's exercises of administrative power under Commissioner Williams (1911), "The discretion wielded by men like Williams to interpret law turned immigration officials from 'law-enforcers' into 'self-constituted law-maker[s]" (154).

19. Even such "unfriendly" witnesses as the *Spokesman-Review*, (a newspaper so characterized by Post) were entirely persuaded by this clarification. (See Post, *The Deportations Delirium*).

20. Thirty years later, Hannah Arendt articulated one of the insights that motivated Post: That there was something seriously wrong when an innocent but stateless person subject to administrative state power could paradoxically improve her position by breaking the law and gaining thereby the scrutiny but also the procedural protections to which those accused of criminal law violations are subject or have a claim. (*Origins of Totalitarianism*, p. 286)

21. Post, *HT*, 80-81. Post here meets Hoover on his own ground, vying with him for the right to be called the truest American and casting his opponents' violations of proceduralism as un-American. Post found support in this from the rhetoric of District Court Judge George W. Anderson, who reviewed Justice Dept. activities in hearing *Colyer v. Skeffington*, and said: "Talk about Americanization! What we need is to Americanize people that are carrying out such proceedings as this. We shall forget everything we ever learned about American Constitutional liberty if we are to undertake to justify such a proceeding as this," (quoted in Salyer, *Laws Harsh as Tigers*, 238).

Note too Post's key phrase above — "on an administrative process warrant, a mere police warrant until it gets to the Secretary of Labor." Post signals here his determination to divide the role of accuser from judge in deportation cases. He was very aware that a 'police mentality' "develops in institutions such as the Immigration Bureau, in which those who issue the warrants are the very same people as those who ultimately decide the cases (*HT*, 229 and 239 ff.) Unsurprisingly, then, and largely for these structural reasons, the whole spirit of the Bureau, he said, "was the police office spirit of keeping the alien out or putting him out without much regard to facts" (229). "Most of the men in this service that I have come into contact with are perfectly honorable and honest men and intend to be good officials" [239]. And later "I am not making any imputation against the man: it is human nature – he would naturally feel that it was up to him, if he has asked for a warrant, to see that that warrant was not asked for thoughtlessly, and so as a rule he would be very apt to find that the man whose arrest he had asked for had, upon examination, turned out to be what he had supposed he was in the beginning. Consequently, a police spirit develops naturally. . . .The effect of that is to turn that inspector into a police investigator." [246]). In short, the problem was partly structural and so was the solution: separation of investigative and decision powers.

22. Post, *Deportations Delirium*, 254, emphasis added. Notably, with the phrase "strongest reason," Post leaves room for emergency/state of exception considerations.

23. Post, *HT*, 80-81. That is not the *only* issue, however. Another is the separation of powers. Post's first response to Garrett's first iteration of the question cited above lights on this: "For myself, I do not see how Congress can compel the executive department of the Government to do anything other than execute the law that it passes" (*HT*, 81). (i.e. presumably, Congress cannot compel the executive to implement the law in any *particular* [as Oakeshott might say] *adverbial* fashion.)

24. Post, *HT*, 78.

25. Post, *HT*, 78-79; emphasis added.

26. Interestingly, Elliot Dorff and Arthur Rosett point out, this requirement of a divided bench "is the exact opposite of the requirement in American law for a unanimous jury"(*A Living Tree: The Roots and Growth of Jewish Law* (Albany: State University of New York Press, 1988),225. I am indebted to Bob Gibb of the University of Toronto for calling this text to my attention).

27. As Dorff and Rosett point out, some of these requirements (I would say all of them) are "extensions of principles that are reasonable in a different form" (226). Even basic inference is precluded lest it corrupt the chain of direct sense data evidence. The testimony of witnesses who saw a man with a knife enter a

room and then saw him leaving minutes later with the same knife, bloody, in his hands, is insufficient for a capital conviction. Only the most empirically indubitable sense data are acceptable and the result, of course, is that nothing that meets these evidentiary and procedural standards will ever be found in the empirical world. The rabbis knowingly defend their amendments (not of the death penalty but of death penalty judgments and the procedures whereby they are reached) as a reasonable requirement given the severity of the punishment in question, but in so doing they call attention to the indefensibility of capital punishment itself, not to any real evidentiary or procedural rigor — ("*Even so, I am going to do it*" — ?).

28. See Austin Sarat and Thomas Kearns for a useful summary of the debates among Hart, Dworkin and others on the need of law for interpretation ("A Journey Through Forgetting: Toward a Jurisprudence of Violence," in *The Fate of Law*, ed. Sarat and Kearns (Ann Arbor: University of Michigan Press, 1991), 236, 247 and passim). Note that since it is the generality and breadth of law that set the stage for the problem/solution of interpretation and technicality, generality and breadth cannot *per se*, *contra* William Scheuerman, serve simply as the solutions to the problem of arbitrary administrative power ("Between Radicalism and Resignation: Democratic Theory in Habermas' *Between Facts and Norms*," in *Habermas: A Critical Companion*, ed. Peter Dews [Oxford: Blackwell, 1999]. Cf: *Between the Norm and the Exception*, 1994).

29. This is contrary to the example of the rabbis, which is unusual in this regard: they did broadcast the technicalities in advance. That is because they did not do case law, per se, they debated matters of interpretation apart from particular cases, using hypotheticals, mostly unlikely and fanciful ones intended precisely to stretch the law and test its capaciousness. These contrived hypotheticals are the very sort that R.M. Hare charges utilitarianism's critics (such as Bernard Williams) with using deliberately and unfairly to discredit that moral and political theory (Hare, *Moral Thinking* [Oxford: Clarendon Press, 1981]).

30. On the various requirements of the rule of law, see Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) and William Scheuerman's discussion, by way of Locke, in *Between the Norm and the Exception*, 1994. For a recent case of the political use of technicality, see "The Way We Live Now," *New York Times Magazine*, Sunday, Sept. 28 2003, 19.: "Librarians Unite: Three Technically Legal Signs for Your Library" (regarding the Patriot Act): — We're sorry! Because of national security concerns, we are unable to tell you if your Internet-surfing habits, passwords, and e-mail are being monitored by federal agents; please act appropriately. – The F.B.I. has not been here. (Watch very closely for the removal of this sign). – Q. How can you tell when the F.B.I. has been in your library? A. You can't. The Patriot Act makes it illegal for us to tell you if our computers are monitored; be aware! (From www.librarian.net.)"

31. Thanks to Laura Beth Nielsen on this point.

32. "The Supreme Court has held that Congress has turned this whole matter over to our administrative department of the Government; that the question of whether an alien shall be allowed to continue to reside in the United States is a question of sovereignty and belongs on the Executive side of the Government and not on the judicial side. Consequently the courts have refused, on writs of *habeas corpus*, to interfere with the decisions of the administrative side of the Government in these cases unless there is absolute lack of jurisdiction. Where there is no evidence at all to support the case for deportation, the courts will interfere on *habeas corpus*. But they will not review the merits of the case, because they say, it is a question of sovereignty turned over to the Executive department of the Government and they have no right to cross the line" (Post, *Deportations Delirium*, 253).

33. That is, he broke the vicious circle of founding, or sought to. On this problem as a problem of founding or inauguration, see Jacques Derrida's "Declarations of Independence," New Political Science, CITE and my own "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic," *APSR* 1991 CITE, as well as my "The Foreigner as Founder," Chapter Two of *Democracy and the Foreigner* (Princeton: Princeton UP, 2001).

34. Candeloro, "Lawrence Freeland Post", 50.

35. Leuchtenburg makes a move in this direction when he says "The election of Warren G. Harding, amiable but bumbling Republican presidential candidate in 1920, marked a desire for release from political turmoil and a chance to enjoy the pleasures of peace . . .The 1920's, despite their chauvinism and conservatism, were hostile to the spirit of the Red Scare; the decade was one when interest in politics was at its lowest ebb in half a century, and Palmer was defeated less by liberal opponents than by the hedonism of the age" (Leuchtenburg, 81).

36. Since the Sacco and Vanzetti case was just months away and their execution a full seven years later, this statement of mine risks appearing at best Panglossian. I don't mean, however, to imply that with Post the forces of democratic good triumphed over evil, merely to say that a lot rides on how we render these moments in American history and to call attention to the anti-political scripts that govern our reception of these events now. Did Americans abandon Palmer because they preferred to party? Or (did they prefer to party, as it were) because they were disgusted by his methods? Or both?

37. *The Deportations Delirium* is the title of the book Post wrote about his role in the events recounted here.

38. Though it was thought and actually hoped that Hoover, who replaced the corrupt Billy Burns, would, as one reporter put it, ""forget the teachings of Mr.

Palmer under the more intelligent leadership of Mr. Stone [who had fought Palmer's crusade and was the new Attorney General charged with cleaning up government after the Teapot Dome scandal]. It would be worth a great deal to the American people to be assured that the Department of Justice is what the name signifies and not the Department of Hysteria and Intolerance" (Powers, 146). In short, it was hoped, ironically, that Hoover would prove to be more Post than Palmer. This must have irked Hoover who lost every direct, public battle he had with Post. One of Hoover's responses was to save a 9-stanza poem (excerpted below) about Post in a scrapbook along with a colored-in newspaper photo of Post. Says Powers, "Hoover may have been the artist, he may have been the poet" (pp. 121-22). The poem was titled "The Bully Bolsheviki" and was " Disrespectfully dedicated to 'Comrade' Louie Post." It begins "In every city and town

To bring on Revolution

And the old USA to down."

The sixth stanza says:

"And when he's lost his nice fat job

And is looking around for some work

They'll ask him to come to Russia

With the Bolsheviks he'll lurk"

The poem instantiates the demonology Rogin studied. Here was Post, a Declaration of Independence radical, tarred as a Bolshevik for standing up for procedural fairness and depicted as Russian for his efforts to limit executive power in a divided government system that is supposed to be committed to such institutional (self-) limitation. I guess Hoover saw the truth of what I am arguing here – that Post was no mere proceduralist, that he was using proceduralism and technicality as ways to pursue substantive political goals with which Hoover was very much in disagreement.

39. Salyer might see less irony here than I do. She admires Post and his actions, but not so the Progressives'. Of them in the 1900's she says: "Even Progressives who were sympathetic to immigrants' concerns failed to endorse the proceduralist definition of the rule of law, advocating instead better personnel and more elaborate administrative review," (xviii). In this as in most other things, Post defies our categories; he was a Progressive, but a qualified one — he championed proceduralism in a way most Progressives did not. On the other hand, Post's version of proceduralism was, as I remarked above, hardly absolute and it was dependent on his own administrative discretion. Perhaps then, Salyer's view would be that it is fitting rather than ironic that Post's efforts to proceduralize

Executive branch agency were never institutionalized. In the end, Post's innovations were (she might say) too or still dependent upon the good will of a beneficent administrator and insufficiently located in law and the judicial branch. I would add only that that dependence is always there, regardless of the rule of law's supposed guarantees. I discuss Salyer in a bit more detail below.

41. Candeloro, 46. Cf. P. 55: "Post's legal training and human sympathies allowed him to anticipate the judicial trend toward greater attention to the rights of the accused."

42. This picture of law as its own agent, with lawyers and other legal actors just along for its progressive ride, is well conveyed by the movie, *Civil Rights and Wrongs: The Fred Korematsu Story*.

43. Candeloro attributes Post's steadfast refusal to be swept up in the anti-red hysteria to his "deep roots in the democratic radicalism of the Declaration of Independence and the Bill of Rights" (op. Cit., p. 55).

44. Hence the arguments in legal and political theory about how judicial deliberation is more than mere preference-based voting. Similarly, deliberative democrats distinguish aggregative from deliberative democracy: in the former, raw preferences are added up, while in the latter, preferences are transformed and authorized to rule by a legitimating deliberative process. See Iris Young, *Inclusion and Democracy* (Oxford: Oxford UP, 2000) on the distinction between aggregative and deliberative democracy, and arguments for the superiority of the latter.

45. Salyer, *Laws Harsh as Tigers*, 85.

46. See David Millon who concludes that all judicial interpretation, therefore, is always political (see review of Stimson, *The Revolution in American Law* in *Law and Social Inquiry*.) See also Ludwig Wittenstein, on rule-following in *Philosophical Investigations* (trans. G.E.M. Anscombe. [Oxford: Blackwell Publishers, 2000])).

47. See Shapiro, *Who Guards the Guardians*?,.

48. Michael Oakeshott is one of the few theorists of the rule of law who owns the enforcement and policing traits of the rule of law, calling the former "postulates" of the latter in his essay, "The Rule of Law " (*On History and Other Essays* [Totowa: Barnes and Noble, 1983]) and in *On Human Conduct* (Oxford: Clarendon Press, 1975).

49. As I have argued elsewhere, such "taking" is a quintessential democratic practice. See Chapters Four and Five of *Democracy and the Foreigner* (Princeton: Princeton UP, 2001).

50. On the differing and overlapping institutional norms of judges and administrators, see Donald Horowitz, *The Jurocracy: Government Lawyers, Agency Programs and Judicial Decisions* (Lexington: Lexington Books, 1977).

51. Rogin, Michael. "American Political Demonology: A Retrospective" in *Ronald Reagan, the Movie* (Berkeley: U of California P, 1987). My debt to Michael Rogin's work in this essay is large. Indeed, I hope this essay can function as a response to an obituary for Rogin written by Stephen Greenblatt shortly after 9-11. Greenblatt appreciates Rogin's substantial contributions to our thinking about the role of paranoia in American politics, but then adds: "I want, with an urgency I have never felt before, to phone Mike Rogin. I want to know what he makes of the massive intensification of the national security state. I want to know what happens to his concept of political demonology when there actually are deadly enemies, when they seem genuinely demonic, and when American boundaries have indeed been revealed to be permeable" ("In Memory of Michael Rogin," *London Review of Books*, January 3, 2002). With this, Greenblatt undermines what I take to be Rogin's most important insight: Demonology has little to do with the reality (or not) of one's enemies. Although the term *demonology* seems to suggest that one's enemies are the products of a popular or cultural imagination, the exteriorized reflections of some internal disorder, phantoms cast out and then disavowed, this need not be the case. One's enemies can be real and external and one can still demonize them, or not; one can make one's real enemy stand for a range of things that are opposed to one's idealized self-image, or not. Demonology has to do with how one experiences enmity, how one lives it, how one's politics are branded or warped by it. Demonology involves projecting all that we fear onto an other and representing ourselves as pure of any such demonic traits, even as we exhibit behavior startlingly like that of our foe (which we justify by saying we have to counter their subversion using their weapons or lose). In short, just because someone is really out to get you, does not mean you are not paranoid; and just because our enemy is really real does not mean we have not also demonized our foe. Perhaps the best way to answer Greenblatt's question and to gain some perspective on our own particular challenges, is to recall the lived reality of earlier enmities which Rogin called demonological or counter-subversive not because they were false (they were not) but because of how they were lived. This is one of my aims in writing about Post here.

52. Wilson, "The Study of Administration," *Political Science Quarterly*, 56, no. 4 (Dec., 1941): 481-506. Recall that Judge George Anderson's inspiring indictment of the Justice Dept. also played the foreignness card in this way – see n.34 above.

53. See Sheldon Wolin, *Politics and Vision* (Boston: Little Brown, 1960) , for a democratic perspective on bureaucracy's ills and also for an exploration of a

middle way between rule of law versus rule of man, by way of Calvin's ideal magistrate, On the latter point, on which I expand elsewhere, I am indebted to Eldon Eisenach.

54. The same demonological or purifying logic is discernable in Ronald Dworkin's work as well, in which certain 'decisionistic' elements of judicial procedure are excised, undone or tamed by way of an emphasis on the ineluctable workings of norms in the practice of legal interpretation and, in Dworkin's later work, on the importance of moral rules. (Oakeshott too, his account of law's postulates notwithstanding, gives a purified account of what the rule of law is. Others stress the effects of the norms of the legal profession, or bemoan their ineffectiveness, for the same reasons). Austin Sarat and Thomas Kearns note this dimension of Dworkin's arguments, rightly capturing the domesticative effect of his interpretative norms. They counter by identifying the law in its entirety with the decisionism that Dworkin seeks to excise by way of interpretative norms. Then, since law is now all decision, they charge that law, as such, is violent (247, passim). But, oddly, insofar as the intent of Sarat and Kearns is to criticize the rule of law's ideological self-presentation, they repeat the terms of that self-presentation. They repeat the rule of law's prejudice, according to which decision, or the rule of man, is as such violent. They only contest the claim that goes with that, the claim that the rule of law, by contrast, is not.

55. Although of course, regularity and predictability are no less available for capture by diverse parties than is technicality. For example: Former Attorney General John Ashcroft's defenders said that it is on behalf of regularity and predictability – uniformity – that he issued in Sept., 2003 a new directive limiting the use of plea bargains in federal prosecutions. The directive required federal prosecutors to charge defendants with "the most serious, readily provable offense" in every case and, with some exceptions, not to engage in plea negotiations thereafter. Reactions to the directive replayed the binaries studied here: According to William W. Mercer, the United States attorney in Montana, fairness is precisely what the directive should achieve. "It's meant to minimize unwarranted sentencing disparities among similarly situated defendants." But one man's fairness is another's efficiency. For Alan Vinegrad, a former United States attorney in Brooklyn, the change represented a philosophical shift from "a focus on justice [to] more of a focus on efficiency." In the space between directive and implementation lies . . . discretion: "if history is any guide," the *New York Times* reported, "local prosecutors will retain substantial flexibility but will exercise it quietly and early, before rather than after charges are filed." In other words, every directive, like every law, has its nuances and technicalities, available for exploitation by law's users (Adam Liptak and Eric Lichtblau, "New Plea Bargain Limits Could Swamp Courts, Experts Say,", *New York Times*, September 24, 2003).