

Crisis Lawyering

By David Zaring

Review of TO THE EDGE: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis, by Philip Wallach

Brookings Institution Press, 2015

The government's response to the financial crisis was an example of messy policymaking that occasioned a happy ending, although not everyone sees it that way. Some are unsure about the ending – they have decried the very modest meting out of punishment that followed the recovery of the economy. Others are unsure that the policymaking was messy – they are likely to think of the government's response to the financial crisis as an inevitable manifestation of executive preeminence as the doer of last resort, institutionally capable of acting when courts and legislatures cannot.

But I will take a stable economy over a few prison sentences, especially when it is possible that you can't have both at the same time. And you won't convince me that the things government officials did during the crisis – last minute deals, concluded late at night and paired with creative reimaginings of underused statutes and regular resorts to Congress for more legislation – was the mark of the smooth progress of an imperial presidency.

Philip Wallach's legal history of the financial crisis establishes that he is no imperial presidentialist. His book is animated by a sense that the law mattered in constraining what government officials could do to rescue the financial system. Its value lies in its commitment to the idea that it is worth understanding precisely how the law was used, or, in some cases, all but abused, as the financial sector began to collapse, in the effort to save it.

But what makes the book distinctive is Wallach's effort to figure out what else mattered in responding to that collapse. He wants to know how government policy attains legitimacy – a question that is by no means restricted to questions of financial regulation or crisis response. His answer – that legitimacy is wrought from a tincture of legality, legislative endorsement, trust, and accountability – is thought provoking, especially for those inclined to either venerate the law as law alone, or dismiss it as an important constraint during a crisis.

Wallach's perspective works well as a response to Eric Posner and Adrian's Vermeule's account of crisis response. Posner and Vermeule argue that crises empower executives, who alone have the capability, as first movers and last movers, to address matters like terrorist attacks or financial panics. They believe, like Carl Schmitt before them, that laws cannot be crafted to constrain executives in times of need, and nor would we want them to do so. Provided that we can vote on our leaders – Posner and Vermeule are willing to sacrifice legal constraints, but not political ones – we should generally prefer laws that enable, and not worry about enforcing laws that do not.

Wallach agrees that “officials in the executive branch cobbled together authorities where they could find them and often sought legitimacy as an afterthought.” But, as he observes, these efforts have hardly led to “the rise of a charismatic plebiscitary leader claiming to speak on behalf of the whole people.” (41)

Most of the book amounts to a legally informed tick-tock on how the government responded to the crisis. Do we need another blow-by-blow? Steven Davidoff Solomon and I wrote [one in 2008](#), and there have been others since, accounts both popular and academic.

But I was happy to see Wallach’s effort added to the financial crisis canon. Unlike other accounts of the crisis, Wallach takes law and governance very seriously, with careful attention to the legal powers of the agencies involved. He calls the initial response to the crisis governance by “ad hococracy,” and the label fits. I learned interesting crisis details – about, for example, the way the Federal Reserve opened its discount window to troubled institutions in the midst of the crisis, and the contortions involved in bailing out the enormous insurance company AIG. I’m a pretty careful student of the crisis, so it isn’t easy to teach me something new about it, so kudos to the book for that.

These insights are all played pretty straight, though. There is not a strong endorsement of the various government policies launched, or a strong critique, with the possible exception of dissatisfaction with the way that certain employment contracts were handled at AIG after its government takeover, and the publicity methods adopted by the special inspector general appointed to observe how the government spent the bailout dollars appropriated by Congress.

This means that some of the toughest cases to make with regard to legal constraint – the use of a pile of money designed to rescue the financial sector to bail out the auto industry, for example, or dispensing with shareholder approval for some of the shotgun bank mergers – get mentioned more than they are explored. Of course, Wallach’s view that the case for legitimacy can be made for popular, trustworthy actions that skirt the law might lead him to believe that he doesn’t have to take a position on the executive’s most egregious actions, but I wondered if he thought they were beyond-the-pale egregious, or like the creative legal interpretations that permitted the Fed to lend to investment banks, bail out money market funds, and so on. The tone is more dispassionate than judgmental, and I like some judgments.

Nor are these the only ways that Wallach keeps his cards close to his vest. His view of the crisis is bespoke, anthropological, and historical, which means that it would be difficult to know how to apply his legitimacy inputs – law, votes, trust, and accountability – to the next problem the government faces. Nor is it clear how outcomes affect legitimacy, although he acknowledges that the outcome of the government’s interventions in the wake of the financial crisis is one of the strongest points in its favor. And he concludes the book with a specific policy recommendation – that a financial crisis emergency fund be created for future bailouts – that seems disconnected with the project of discerning how governments can obtain legitimacy.

One does not want to be a nihilist, but sometimes I wonder why we need to solve the problems of administration posed by a great financial crisis. Are solutions even possible? Is it interesting to, say, call

for more congressional involvement next time, or more routinized accountability mechanisms? It may be that learning is possible only if it accompanied with a course for future action. But one of the reasons I like thinking about the financial crisis, and like reading books like Wallach's about it, is because it was an enormous almost-disaster that was averted for thousands of different, interlocking reasons. The government's response to it was both wise, unreflective, tremendously unfair, and highly successful, and a million other things as well.

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