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The Priority of Morality:  
The Emergency Constitution's Blind Spot

by  
*David Cole*

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## Essays

### **The Priority of Morality: The Emergency Constitution's Blind Spot**

**David Cole<sup>†</sup>**

#### INTRODUCTION

In the wake of the terrorist attacks of September 11, Attorney General John Ashcroft announced a campaign of aggressive preventive detention. Invoking Robert Kennedy, the Attorney General announced that just as Kennedy would arrest a mobster for “spitting on the sidewalk,” so he, Ashcroft, would use every law in his power, including the immigration laws, to apprehend “suspected terrorists,” lock them up, and prevent the next terrorist attack.<sup>1</sup> As of January 2004, the government had detained more than 5000 foreign nationals through its antiterrorism efforts.<sup>2</sup> By any measure, the program has been spectacularly unsuccessful. None of these

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<sup>†</sup> Professor of Law, Georgetown University Law Center. I am indebted to Matt Dubeck, Melissa Duffy, Evan Nordby, and Steve Vladeck for research assistance, and to the editors of *The Yale Law Journal*, especially Holly A. Thomas, for their comments. Unless otherwise noted, all translations are those of the editors of *The Yale Law Journal*.

1. Attorney General John Ashcroft, Prepared Remarks for the US Mayors Conference (Oct. 25, 2001), at [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_25.htm).

2. In the first seven weeks of the campaign, the government admitted to detaining 1182 suspected terrorists, and virtually every time Ashcroft made a public statement he would give an update on the number of “suspected terrorists” detained. When people began to question why none of the 1182 persons had been charged with a terrorism-related crime, the Justice Department shifted gears and announced that it was too difficult to maintain a running total of detainees, so it would offer no further cumulative totals. Since then, however, the government has admitted to subjecting another 3900 people, virtually all foreign nationals, to preventive detention in antiterrorism initiatives in the United States, totaling more than 5000 in all. See DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 24-25 (2003).

detainees has been determined to be involved with al Qaeda or the September 11 conspiracy. Only three have been charged with any terrorism-related crime, and two of those three were acquitted of the terrorism charges.<sup>3</sup> The lone conviction—for conspiring to support some unspecified terrorist activity in the unspecified future—has been called into question by the revelation that the prosecution failed to disclose evidence that its principal witness had lied on the stand.<sup>4</sup>

In June 2003, the Justice Department's own Inspector General issued a sharply critical report on the preventive detention campaign, finding, among other things, that people were detained and treated as "of interest" to the September 11 investigation on such information as an anonymous tip that there were "too many" Middle Eastern men working in a convenience store.<sup>5</sup> Many were initially arrested without charges at all; over seven hundred of the arrests remain secret to this day; and more than six hundred detainees charged with immigration violations were tried in secret, without any showing that any information involved in their immigration hearings was classified.<sup>6</sup> The vast majority were not only not charged with a terrorist crime, but were affirmatively cleared of any connection to terrorism by the FBI.<sup>7</sup> Virtually all of the detainees were from predominantly Arab countries.<sup>8</sup>

Prior mass preventive detention campaigns have been similarly unsuccessful and constitutionally suspect. In 1919, after terrorist bombs exploded virtually simultaneously in eight different cities across the United States, the Justice Department rounded up several thousand foreign nationals in what are now known as the Palmer Raids. They were herded into bullpens, interrogated without lawyers, and charged with technical immigration violations and association with various communist parties. Hundreds were eventually deported. Not one was found to have been

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3. The three charged with a terrorist crime were tried in Detroit in 2003, along with a fourth man who was not subjected to preventive detention, but was arrested only after he had been charged. See Dan Eggen & Allan Lengel, *Alleged Leader of 'Sleeper Cell' Arrested in N.C.*, WASH. POST, Nov. 15, 2002, at A28 (reporting the arrest of a fourth man, and noting that the first three were arrested within one week of September 11, 2001); Danny Hakim, *2 Arabs Convicted and 2 Cleared of Terrorist Plot Against the U.S.*, N.Y. TIMES, June 4, 2003, at A21.

4. Danny Hakim, *Inquiries Begun into Handling of Detroit Terror Cases*, N.Y. TIMES, Jan. 29, 2004, at A23.

5. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 17* (2003), <http://www.usdoj.gov/oig/special/0306/full.pdf> [hereinafter *OIG REPORT*].

6. COLE, *supra* note 2, at 26-31.

7. *Id.* at 240 n.15; *OIG REPORT*, *supra* note 5, at 69-70 (discussing the government's "hold until cleared" policy, pursuant to which foreign nationals were detained until affirmatively cleared by the FBI of terrorist connections).

8. See *OIG REPORT*, *supra* note 5, at 21. Those detained in the Special Registration and Absconder Apprehension Initiatives were singled out precisely *because* they were from nations with predominantly Arab or Muslim populations. COLE, *supra* note 2, at 49-51.

involved with the bombings.<sup>9</sup> And in the most infamous preventive detention campaign in American history, 110,000 persons—U.S. citizens and foreign nationals alike—were rounded up and interned during World War II simply because of their Japanese ancestry. None was found to have engaged in sabotage or espionage, the stated justifications for the internment.<sup>10</sup>

Thus, the three principal preventive detention experiences in the United States over the last century all resulted in the mass incarceration of people who turned out *not* to pose the national security threat that purportedly justified their detention in the first place. Moreover, each campaign was characterized by widespread constitutional abuse. Freed of the ordinary requirement that they demonstrate objective, individualized evidence of dangerousness or flight risk in order to detain suspects, law enforcement officials resorted instead to political association, racial and ethnic identity, and religion as proxies for suspicion. The Palmer Raids and the Japanese internment are widely acknowledged as two of the most shameful moments in American history; the detention of thousands of Arabs and Muslims after September 11 deserves a place in that dubious pantheon.

These examples are not selectively chosen; there are *no* mass preventive detention success stories in our history. In light of this history, some searingly recent, Bruce Ackerman's proposal to legitimate the practice of suspicionless preventive detention during emergencies<sup>11</sup> is strikingly ill-advised. History suggests that we ought to do everything we can to *restrict* suspicionless preventive detention, not to *expand* it. While individual instances of preventive detention, predicated on objective showings of danger or flight risk, undoubtedly serve an important security function, there is no reason to believe that *suspicionless* preventive detention serves any legitimate purpose. Our Constitution already permits the suspension of habeas corpus in highly restricted settings,<sup>12</sup> so restricted that it has been resorted to only four times—most famously by President Lincoln in the Civil War; by President Grant, to deal with the Ku Klux Klan during Reconstruction; by President Theodore Roosevelt, in the Philippines in 1905; and by President Franklin Delano Roosevelt, in Hawaii during World War II.<sup>13</sup> Ackerman's proposal would greatly expand the circumstances in which habeas corpus could in effect be suspended, without any showing that the "public safety requires it." Yet he offers no reason to

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9. See COLE, *supra* note 2, at 116-28.

10. See *id.* at 88-104; see also PETER IRONS, *JUSTICE AT WAR* (1983).

11. See Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029 (2004).

12. U.S. CONST. art. I, § 9, cl. 2.

13. See MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 3-112 (1991) (discussing Lincoln's suspension of the writ); see also WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 178 n.190 (1980) (noting subsequent suspensions of the writ).

believe that such measures would make us more secure, and no response to the compelling historical record of abuse.

Of course, Ackerman offers preventive detention only as an example of an emergency power under his “emergency constitution.” His ambition is not simply to design a preventive detention scheme; he calls for nothing less than a “sweeping revision of the emergency power provisions currently found in many of the world’s constitutions.”<sup>14</sup> His basic idea is to give the Executive extraordinary emergency powers—including suspicionless preventive detention—while conditioning the state of emergency on a political process check—the “supermajoritarian escalator”—designed to forestall “permanent” emergencies. Inspired by South Africa’s constitution, Ackerman proposes that a majority vote be required to continue the emergency for the first two to three months, that a sixty-percent vote be required to extend the emergency two more months, that seventy percent be required for the next two months, and eighty percent thereafter.<sup>15</sup> Under such a scheme, emergencies would be unlikely to last more than six to seven months in the absence of truly extraordinary consensus.

Ackerman’s attempt to impose a meaningful but flexible time constraint on emergency powers is laudable: Undoubtedly *one* problem with “states of emergency” and their attendant powers is that they have a way of dragging on far longer than the actual emergency does. His insight that political process safeguards are critically important in checking emergency powers is perceptive and important, as is his sense that we should think about emergency powers *now*, before the next attack sends us into panic mode again. His solution is creative and, if adopted, might even work: The supermajoritarian escalator might actually succeed in putting an end to states of emergency in a timely manner. But time limits are only *one* problem with emergency powers, and a solution to the durational issue leaves unanswered the more difficult question of precisely what substantive powers ought to be assigned to the government for the duration of the emergency.

The sweeping breadth of Ackerman’s title, approach, and stated ambition—to revise the world’s constitutions—appears to assume that all emergency powers issues in all constitutional systems are subject to a single elegant solution: His title is not *A Preventive Detention Law for the United States*, but *The Emergency Constitution*. But all emergency powers are not alike. Preventive detention is one possible response to the emergency posed by a terrorist attack, but there are many others. In the wake of September

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14. Ackerman, *supra* note 11, at 1031.

15. *See id.* at 1047-49. South Africa is not the only nation to incorporate supermajoritarian rules into the authorization of emergencies. *See* Oren Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, 33 *ISR. Y.B. ON HUM. RTS.* 13, 31 n.95 (2004) (citing supermajoritarian requirements in the constitutions of Greece, Germany, South Africa, and India).

11, for example, we have seen in the United States, to name just a few measures: increased reliance on surveillance and identification regimes; increased cooperation among foreign intelligence and domestic law enforcement agencies; efforts to limit access to potential targets; development of human intelligence sources; data mining; ethnic profiling; expanded criminal sanctions; the use of administrative measures to combat financing of terrorist groups; and increased use of the military to capture, hold, and try the “enemy.” Each of these initiatives raises distinct normative issues regarding the tradeoff between security and liberty, and few of those issues would be resolved by a “supermajoritarian escalator.” Rather, each initiative requires a direct assessment of distinct substantive value judgments. Like many process scholars before him, Ackerman seeks a magic bullet where there is none.

Ackerman’s failure to confront the difficult substantive tradeoffs that specific emergency powers present manifests itself in several ways in his preventive detention proposal. He would eliminate contemporaneous individualized judicial review of the need for any given instance of preventive detention, in order to “authorize[] the government to detain suspects without . . . probable cause or even reasonable suspicion.”<sup>16</sup> Instead, he would substitute an ill-conceived compensation scheme, whereby “innocent detainees” would not be released, but would be paid for being locked up. Yet this solution fails to reconcile a fundamental contradiction in his proposal: Ackerman wants to authorize detention *without suspicion*, but at the same time wants to deter detention of *innocent* persons. The problem is that if detention without suspicion is expressly authorized, there is nothing illegal about detaining innocent persons. And by the same token, if it is wrong to detain innocent persons, as Ackerman’s compensation scheme seems to imply, why dispose of the threshold requirement of suspicion in the first place?

Ackerman’s rationale appears to be that preventive detention does a public service (regardless of who is detained) by “reassuring” the public in times of “panic.” Ackerman’s “reassurance rationale” justifies preventive detention as a means of conveying the message that the state has matters “under control.”<sup>17</sup> It is quite possible, as a purely descriptive matter, that preventive detention is reassuring in this way, especially when those being incarcerated are seen as different from the majority—say, communists, aliens, Japanese, or Arabs and Muslims. The public may well have been reassured by the Justice Department’s frequent announcements of how many hundreds of “suspected terrorists” it had apprehended in the weeks after September 11. But as the records of the Ashcroft and Palmer raids and

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16. Ackerman, *supra* note 11, at 1037.

17. *Id.* at 1031.

the Japanese internment all demonstrate, such reassurance is a fiction paid for by innocents.

At bottom, what is most troubling about Ackerman's proposal is that in his fascination with the idea of the "supermajoritarian escalator," he never addresses the fundamental normative question presented by his proposal. As a normative matter, it is one thing to say, as the Framers did, that in response to a "rebellion" or "invasion," habeas corpus may be suspended when "the public safety may require it"; it is another thing entirely to argue, as Ackerman does, that we should empower the Executive to incarcerate individuals for up to two months without suspicion, even in the absence of any threat to the nation's existence, merely to "reassure" a public in "panic." Putting innocent people who pose no danger behind bars to reassure a panicked public is normatively unacceptable, no matter what "supermajoritarian escalator" has been put in place, and no matter how much we "compensate" them after the fact. Ackerman seems to have been carried away by what he calls "the priority of checks and balances."<sup>18</sup> While a political process check may be an important *supplement* to a regime of limited emergency powers, it is no *substitute* for the hard work of striking an appropriate normative balance between liberty and security. Call it the priority of morality.

My Essay takes on three aspects of Ackerman's thesis—its premises, its efficacy, and its morality. Part I critiques three of Ackerman's premises—his underestimation of courts and overestimation of legislatures as guardians of liberty, his misguided belief that the supermajoritarian escalator provides a one-size-fits-all solution to the conundrum of emergency powers, and his contention that the short-lived character of emergencies makes it sensible to cede to a minority of our popular representatives control over critically important and largely unpredictable decisions concerning the appropriate duration of emergency powers.

Part II turns to the details, and finds fatal shortcomings in the proposed implementation of Ackerman's scheme. First, the limits it prescribes would do nothing to respond to the preventive detention abuses so evident in the post-September 11 roundup; with the exception of three individuals held as "enemy combatants," all the domestic detentions were accomplished without resort to any "emergency" powers. Second, Ackerman's after-the-fact compensation scheme fails to confront the basic question of who deserves compensation and why. As a result, the scheme would not have the deterrent effect he claims and, on the contrary, would legitimate detention of innocent people. Third, despite Ackerman's purported quid pro quo of preventive detention authority for a supermajoritarian escalator check, many and perhaps most preventive detentions would never be

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18. *Id.* at 1057.

affected by the supermajoritarian escalator, as they would typically occur in the initial weeks following the attacks, before the escalator kicks in.

Part III contends that Ackerman has failed to confront the central normative questions presented by his proposal—namely, whether it is ever justified to incarcerate innocent people without suspicion, whether reassuring a public in panic is an acceptable justification for such suspicionless detention, and whether preventive detention without prompt judicial review ought to be countenanced outside a battlefield. Ackerman proposes to do away with the two guarantees essential to any acceptable system of nonwartime preventive detention—a threshold requirement of objective suspicion and access to prompt judicial review. Eliminating either guarantee would violate fundamental commands of both American constitutional law and international human rights law. Indeed, detaining people without suspicion in the name of reassuring a panicked public violates basic commitments of a moral society by treating individuals not as ends in themselves, but as means to a dubious public relations end. Such a scheme can be defended, if at all, only on the crudest utilitarian grounds, grounds that Ackerman himself in earlier work has strongly and correctly condemned.<sup>19</sup> Even from a utilitarian perspective, moreover, it is not clear how *suspicionless* preventive detention would maximize overall utility, as a detention scheme that eliminates suspicion as a predicate for detention should reassure no one.

Perhaps September 11 “changed everything,” including Ackerman’s own moral judgments, but I hope it did not alter our common commitment to treat people as ends in themselves. If that commitment continues, the desire to reassure a public in panic cannot justify dispensing with suspicion and timely judicial review, the necessary prerequisites to any sensible and normatively acceptable system of preventive detention. My claim is *not* that preventive detention is never justified, for it clearly is under appropriate conditions; my claim is that preventive detention without suspicion and without judicial review is not justified in the name of making the public feel better.

### I. PREMISES

Ackerman’s thesis rests on a chilling description of the threat posed to civil liberties in the post-September 11 world. He predicts that we are likely to see increasingly frequent terrorist attacks with increasingly powerful weapons, and that each attack will be seen as evidence that prior expansions of government power didn’t go far enough. In effect, each attack will shift

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19. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 343 (1980); see also *infra* text accompanying notes 188-190.



the baseline in the tradeoff between liberty and security, leading to further and further inroads on basic civil liberties.<sup>20</sup>

Echoing conventional wisdom, Ackerman maintains that we cannot rely on courts to stem the tide, because in times of crisis and on matters of national security, judges have generally been overly deferential to executive national security claims.<sup>21</sup> He sensibly recommends taking “some of the load off judges in managing front-line legal responses, and creat[ing] new constitutional structures that will more reliably respond to the recurring tragedies of the coming century.”<sup>22</sup> His solution, outlined above, is to grant emergency powers subject to the “supermajoritarian escalator.” In this way, the Executive may be granted sufficient authority to deal with the emergency at hand, subject to a political process safeguard designed to limit the duration of such emergency powers.

Ackerman’s concerns about the threat of terrorism are legitimate and widely shared. Terrorists’ access to increasingly destructive weapons, the spreading phenomenon of suicide terrorism, and the possibility that September 11 has dramatically raised the bar for the scale of carnage that terrorists are willing to inflict all pose real threats to our security and in turn to our liberty. The tendency of states of emergency to outlast the

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20. Ackerman, *supra* note 11, at 1029-30.

21. *See id.* at 1042-43. Many have made this point before him. Clinton Rossiter, in an influential study of the Court in wartime, concluded:

[T]he courts of the United States, from highest to lowest, can do nothing to restrain and next to nothing to mitigate an arbitrary presidential-military program suspending the liberties of some part of the civilian population . . . . Whatever relief is afforded, and however ringing the defense of liberty that goes with it, will be precious little and far too late.

CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 52-53 (expanded ed. 1976).

Judge Learned Hand similarly concluded that one cannot rely on the courts in times when the people do not fight for their own rights:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes. . . . Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.

LEARNED HAND, *The Spirit of Liberty* (May 21, 1944), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 189-90 (Irving Dilliard ed., 3d ed. 1960).

And in *Korematsu*, Justice Jackson similarly warned:

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. . . . If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

*Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

22. Ackerman, *supra* note 11, at 1044-45.

emergency, and that of judges to defer to the Executive in times of crisis, have long been noted.<sup>23</sup>

But Ackerman's proposal rests on three questionable premises. He is too dismissive of the role of courts and too optimistic about the role of legislatures in checking emergency powers; he places too much faith in the ability of a single process—the "supermajoritarian escalator"—to solve the multiple problems that emergency powers pose; and his notion that we should precommit to be bound by a twenty-one-percent minority assumes without foundation that terrorist threats are likely to be short-lived.

#### A. *Courts and Legislatures*

The basic tradeoff Ackerman proposes is to eliminate contemporaneous judicial review of the legality of detention in exchange for a supermajoritarian escalator. To do so is not to give up all that much, he suggests, because courts are largely ineffectual on matters of national security. There is substantial and familiar evidence to support that charge. The Supreme Court did not question Lincoln's suspension of habeas corpus and reliance on martial law until after the Civil War had ended.<sup>24</sup> It upheld criminal convictions for antiwar speech during World War I<sup>25</sup> and the Japanese internment in World War II.<sup>26</sup> And it permitted the harassment of communists in the Cold War until years after Senator Joe McCarthy had been censured.<sup>27</sup>

But this conventional wisdom is often overstated. It rests on a kind of closeup snapshot view of the role courts have played. When one pans back and reviews the influence of judicial decisions over time on emergency measures, the picture is decidedly less bleak. The Supreme Court eventually adopted rules that prohibit punishment for subversive speech and guilt by association,<sup>28</sup> and these decisions essentially take those options off the table for future emergencies, thereby protecting those who would otherwise have

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23. See, e.g., WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218-25 (1998); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1034, 1070-71 (2003).

24. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

25. See *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

26. See *Korematsu*, 323 U.S. 214; see also *Hirabayashi v. United States*, 320 U.S. 81 (1943).

27. See ARTHUR J. SABIN, *IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY* (1999); William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 *SUP. CT. REV.* 375.

28. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (subversive speech); *United States v. Robel*, 389 U.S. 258 (1967) (guilt by association); see also *Scales v. United States*, 367 U.S. 203 (1961) (noting that guilt by association violates the First and Fifth Amendments, but upholding a conviction on the basis of proof of specific intent to further the unlawful ends of a group).

been the subjects of such sanctions. Were the government to detain an individual for his speech, his race, or his membership in a political organization today—as was routinely done during prior crises—one would fully expect courts to step in and overrule such initiatives. That expectation largely precludes reliance on these tactics, the favorites of past emergencies, in future emergencies.<sup>29</sup>

Thus, even if courts often appear overly deferential in the midst of an emergency, they play an important function over time in limiting what can be done in the next emergency. Courts are well-suited to this role for several reasons. They continue to review and rule upon emergency measures long after the immediate crisis has passed, and therefore often have the advantage of hindsight. The common law method permits adjustments based on the lessons of experience, as illustrated by the evolution of increasingly protective standards for subversive speech, culminating in *Brandenburg v. Ohio*.<sup>30</sup> Courts take up issues of emergency powers not in the abstract—as Ackerman has done in his essay, and as legislatures generally do—but in the context of specific cases. Unlike the political branches, which can and do ignore the claims of those without power, courts have an obligation to hear the grievances of all those who claim to have been harmed. Courts must give reasons for their decisions, which, by the force of stare decisis, restrict what can be done in the next emergency. And the availability of contemporaneous judicial review to enforce the lessons learned from past emergencies constrains what the Executive can do in future ones.<sup>31</sup>

Of course, courts do not always do the right thing. Ackerman points to *Korematsu* as his leading example, and asks, “If Hugo Black fell down on the job, will his successors do any better?”<sup>32</sup> I think the answer is quite likely yes, not because I have more faith in the current members of the Supreme Court, but because it is now so widely acknowledged that Justice Black and the rest of the *Korematsu* majority did fall down on the job. Contrary to Justice Jackson’s prediction that *Korematsu* would lie about like a “loaded weapon,”<sup>33</sup> the decision has been invoked subsequently only as an object lesson in what *not* to do with respect to emergencies. Eight of

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29. This is not to say that judicial decisions prevent government officials from repeating past mistakes. See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (arguing that the government has repeated many of the same tactics that it employed in past crises by slightly altering its methods to avoid direct confrontation with legal precedents). But constitutional doctrine does preclude some options and provides important arguments for challenging new tactics that come too close to prior practices.

30. For an analysis of this evolution, see David Cole, *Agon at Agura: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986).

31. I develop this point in David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003).

32. Ackerman, *supra* note 11, at 1043.

33. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

the nine sitting Supreme Court Justices have condemned it,<sup>34</sup> a lower court has vacated Korematsu's conviction,<sup>35</sup> and Congress has issued a formal apology and paid reparations to the survivors.<sup>36</sup> And while often overlooked, the same day that the Court issued its decision in *Korematsu*, it also ruled, in *Ex parte Endo*,<sup>37</sup> that the government was obligated to release internees found *not* to pose a danger of sabotage or espionage. While *Endo* rested on statutory and regulatory grounds, the Court's rationale was plainly driven by constitutional concerns.<sup>38</sup> Thus, while *Korematsu* should give us pause, it should not cause us to dismiss the courts altogether.

To be sure, Ackerman does not propose eliminating judicial review. He seeks only to bar courts from assessing the legality of detention while it is ongoing, in order to permit the government to hold individuals without establishing any objective basis for suspicion. He would limit the detention to forty-five to sixty days, and permit only after-the-fact judicial evaluation of its legality.<sup>39</sup> Given the courts' record of performing better in assessing national security measures after the emergency has passed, it is conceivable that this after-the-fact approach might even lead to greater legal protection for detainees over the long haul. But as I show in Part II, because Ackerman would expressly authorize detention without any objective basis for suspicion, it is not at all clear what an "illegal" detention would be. The only examples Ackerman posits—those driven by personal animus or based exclusively on race—are likely to be so rare as to be entirely inconsequential. Since the whole point of Ackerman's proposal is to authorize detention *without suspicion*, even wholly arbitrary detentions

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34. See *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (placing *Korematsu* on par with *Dred Scott*); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (O'Connor, J.) (writing for the majority, in an opinion joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, that "*Korematsu* demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification. Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future" (internal quotation marks omitted)); *id.* at 244 n.2 (Stevens, J., dissenting) (referring, in an opinion joined by Justice Ginsburg, to the "shameful burdens" that the government imposed upon Japanese Americans during World War II, some of which the Court upheld in *Korematsu*); *id.* at 275 (Ginsburg, J., dissenting) (characterizing *Korematsu*, in an opinion joined by Justice Breyer, as a decision in which "scrutiny the Court described as 'most rigid,' nonetheless yielded a pass for an odious, gravely injurious racial classification" (citation omitted)); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 633 (1990) (Kennedy, J., dissenting) (concluding, in an opinion joined by Justice Scalia, that "[e]ven strict scrutiny may not have sufficed to invalidate early race-based laws of most doubtful validity, as we learned in *Korematsu*"), *overruled on other grounds by Adarand*, 515 U.S. 200.

35. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting a writ of coram nobis to vacate Korematsu's conviction).

36. Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989-1989d (2000).

37. 323 U.S. 283, 302 (1944).

38. See *id.* at 299-300; REHNQUIST, *supra* note 23, at 202.

39. See Ackerman, *supra* note 11, at 1070-71.

would appear to be permissible, so long as they were not based solely on personal or racial animus.

Substituting a political safeguard for a judicial safeguard also seems unwise in light of the history of legislative action during emergencies. If anything, legislatures seem even less reliable than courts as protectors of liberty during times of crisis. The legislature generally rallies around the President, spurs him on, grants him expansive powers, and ratifies his initiatives: While a judicial decision comparing the Executive's conduct during the Palmer Raids to that of a "mob"<sup>40</sup> was instrumental in checking this abuse of power,<sup>41</sup> Congress's only response to the raids was to threaten impeachment of Acting Secretary of Labor Louis Post when he intervened to overturn many of the resulting deportations.<sup>42</sup> During World War II, Congress repeatedly appropriated funds to run the Japanese internment camps.<sup>43</sup> And during the Cold War, Congress—and especially the House Committee on Un-American Activities—was a principal driving force behind McCarthyism.<sup>44</sup>

Congress has performed no more courageously in the current crisis. Six weeks after the attacks of September 11, it passed the USA PATRIOT Act,<sup>45</sup> giving the Executive expansive new powers to conduct searches, freeze assets, criminalize speech, and detain and deport foreign nationals.<sup>46</sup> Since then, Congress has been silent on the issue of emergency measures, while the President has unilaterally assumed broad new powers without congressional approval.<sup>47</sup> The tendency of a collective to avoid hard choices

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40. *Colyer v. Skeffington*, 265 F. 17, 43 (D. Mass. 1920), *rev'd sub nom. Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922).

41. COLE, *supra* note 2, at 124.

42. *Id.* at 123-24.

43. *See Endo*, 323 U.S. at 303 n.24 (noting the various congressional appropriations).

44. *See* MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* (1977); ROBERT K. CARR, *THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945-1950* (1952); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998).

45. *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (to be codified in scattered sections of 8, 12, 18, 21, 22, 28, 31, 47, and 50 U.S.C.).

46. *See Humanitarian Law Project v. Ashcroft*, No. CV 03-6107 ABC, 2004 WL 547534 (C.D. Cal. Mar. 17, 2004) (declaring void for vagueness the USA PATRIOT Act's criminalization of the provision of "expert advice and assistance" to designated terrorist organizations). In the interest of full disclosure, I should note that I am counsel for plaintiffs in this suit. *See also* NANCY CHANG, *SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES* 43-66 (2002); STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11*, at 29-54 (2002).

47. Shortly after September 11, the Executive issued a military order permitting terrorists to be tried and executed by military courts with no independent judicial review, *Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001); asserted the power to hold "enemy combatants" indefinitely and incommunicado, *see, e.g., Padilla v. Rumsfeld*, 352 F.3d 695, 710 (2d Cir. 2003),

is at its zenith in periods of crisis. In addition, the political reality for both the Executive and the legislature is that they will take a bigger political “hit” if another terrorist attack occurs under their watch than if they violate the constitutional rights of innocent persons—especially if, as is so often the case, the violations are largely directed at foreign nationals and shrouded in secrecy.<sup>48</sup> There is unfortunately little basis for believing that Congress will ever be a safeguard for liberty in dangerous times.

Even where Congress has acknowledged its institutional shortcomings and enacted a framework statute to attempt to offset some of these weaknesses, as Ackerman proposes here, its efforts have failed. The War Powers Resolution, passed to end unilateral executive warmaking, requires the withdrawal of troops within ninety days of the President introducing them to imminent hostilities absent congressional approval<sup>49</sup>—but with a single exception, Congress has never acted to enforce that requirement.<sup>50</sup> The National Emergencies Act of 1976, designed to put an end to indefinite states of emergency, requires Congress to meet and confer on any declared state of emergency every six months,<sup>51</sup> yet Congress has *never* done so.<sup>52</sup> Thus, if the courts are no guarantee of courageous rights protection, the legislature may be even worse.<sup>53</sup>

In theory, were the legislature ever to work up the will to act, its checks on executive power might be more effective than a judicial decision. The President might be more inclined to ignore a judicial ruling, as did President Lincoln when Supreme Court Chief Justice Taney held his

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*cert. granted*, 124 S. Ct. 1353 (2004) (No. 03-1027); issued a regulation authorizing monitoring of attorney-client communications without judicial approval, National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,063 (Oct. 31, 2001) (codified at 28 C.F.R. pts. 500-01); and engaged in a massive preventive detention campaign using immigration law, in which foreign nationals were arrested in secret, held without charges or any showing of dangerousness or flight risk for extended periods, and tried in secret, *see* HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES (2002), <http://www.hrw.org/reports/2002/us911/USA0802.pdf>; *see also* OIG REPORT, *supra* note 5.

48. *See generally* COLE, *supra* note 2, at 4-5, 228-33.

49. Pub. L. No. 93-148, § 5(b), 87 Stat. 555, 556 (1973) (codified at 50 U.S.C. § 1544(b) (2000)). The Act has a base requirement that the Executive seek congressional approval within sixty days, but permits a thirty-day extension “if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.” *Id.* § 1544(b)(3).

50. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1413-15 (1989). The lone exception was a joint congressional-executive compromise over the Lebanon crisis in the early 1980s. *See id.* at 1415 n.159.

51. Pub. L. No. 94-412, § 202(b), 90 Stat. 1255, 1256 (codified as amended at 50 U.S.C. § 1622(b)).

52. Lobel, *supra* note 50, at 1415-16.

53. This problem is not limited to the United States. *See* Gross, *supra* note 15, at 41 (observing the same problem in Israel); *see also* GAD BARZILAI, A DEMOCRACY IN WARTIME: CONFLICT AND CONSENSUS IN ISRAEL 247-60 (1992) (same); BRUCE RUSSETT, CONTROLLING THE SWORD: THE DEMOCRATIC GOVERNANCE OF NATIONAL SECURITY 34-38 (1990) (same).

unilateral suspension of habeas corpus illegal in *Ex parte Merryman*,<sup>54</sup> than to ignore Congress, a politically responsive branch with the power of the purse. But that assumes Congress would in fact act to check the President. Precisely because it is politically responsive, the legislative branch is generally likely to be less willing to stand up to the President than are the courts in times of crisis, when the easy political course is to trumpet the necessity for broad national security measures.

It is also possible to argue that a legislative process check is preferable to judicial review precisely because the legislature's decisions are *not* subject to stare decisis. The legislature's decision to continue a particular emergency, for example, will have no adverse precedential effects, while a court's decision to distort the Constitution in order to uphold a given emergency power may do lasting damage. But the only determination Ackerman would give to the legislature during the course of an emergency is whether the state of emergency continues—a decision that, no matter who makes it, is likely to be highly fact- and context-specific, and to have relatively little precedential value. On the substantive question of what the government may do during an emergency, if Ackerman were to have his way our Constitution (and indeed all of the world's constitutions) would affirmatively authorize suspicionless preventive detention without timely judicial review. That would be a precedent far worse, and far less susceptible to common law adjustment and reevaluation, than a judicial decision on the legality of a specific detention.

It is especially unwise to dismiss the courts when it comes to the state's power to lock up human beings. As a general rule, detainees tend not to have much political influence or public sympathy; if they did, they would not be detained in the first place. Detainees therefore are unlikely to get the attention of the political branches; the only detainees who got President Lincoln's attention during the Civil War were those few with influential political connections.<sup>55</sup> For a person behind bars, the courts are generally the *only* hope, because the courts are the only branch of government obligated to consider the legality of his detention. The "great writ" of habeas corpus reflects precisely this understanding. In my legal career, I have watched eleven clients walk free from jail because judges refused to countenance government claims that national security concerns about terrorism required their detention on secret evidence.<sup>56</sup> In none of those cases were we able to generate sufficient interest from Congress to assist the detainees, despite substantial efforts. For these individuals, as for most people behind bars, it was the courts or nothing.

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54. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, Circuit Justice).

55. See NEELY, *supra* note 13, at 117.

56. See David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267 (2000-2001) (recounting these cases).

Consider also the cases of Jose Padilla and Yaser Esam Hamdi, the two U.S. citizens being held in military custody incommunicado, indefinitely, and without charges or trial, as “enemy combatants.” They have each been incarcerated for over two years, and largely because they are citizens, their cases have received extensive attention in the media. Yet Congress has taken *no action whatsoever* to respond to their plight. The courts, by contrast, have seriously grappled with Padilla’s and Hamdi’s cases. While the judicial record (especially that of the U.S. Court of Appeals for the Fourth Circuit) has been far from exemplary, all the courts have thus far rejected the government’s most sweeping assertions of unilateral authority to detain.<sup>57</sup> Against the government’s wishes, the Supreme Court has agreed to review the detentions of Hamdi and the foreign nationals held on Guantánamo.<sup>58</sup> Courts are of course no panacea; like all human institutions,

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57. The Fourth Circuit rejected the government’s initial claim that habeas corpus review did not lie, *Hamdi v. Rumsfeld (Hamdi II)*, 296 F.3d 278, 283 (4th Cir. 2002), although it subsequently rubber-stamped the detention on what it characterized as the “undisputed” fact that Hamdi was captured on the battlefield in Afghanistan, *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450, 459 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004) (No. 03-6696). The district court in *Hamdi* correctly refused to treat this fact as “undisputed” (it could not be undisputed, as no one had ever heard from Hamdi) and insisted that the government make a detailed showing that Hamdi was in fact fighting for the enemy. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 534 (E.D. Va. 2002), *rev’d*, 316 F.3d 450. Dissenting from the Fourth Circuit’s denial of rehearing en banc, Judges Michael Luttig and Diana Gribbon Motz also noted that treating the circumstances of Hamdi’s capture as “undisputed” was wholly unjustified. *Hamdi v. Rumsfeld (Hamdi IV)*, 337 F.3d 335, 360-61 (4th Cir. 2003) (Luttig, J., dissenting from denial of rehearing en banc); *id.* at 371-72 (Motz, J., dissenting from denial of rehearing en banc).

In Padilla’s case, the district court ruled that it had authority to review the assertions made by the Executive for treating Padilla as an enemy combatant, and further held, over vociferous objections by the government, that Padilla had the right of access to a lawyer for any such hearing. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). After adhering to the decision on reconsideration, *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), the district court certified the case for appeal to the Second Circuit, *Padilla ex rel. Newman v. Rumsfeld*, 256 F. Supp. 2d 18 (S.D.N.Y. 2003). The court of appeals held that the President lacked authority to hold American citizens, and ordered Padilla’s release. *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004) (No. 03-1027).

58. *See Hamdi*, 124 S. Ct. 981 (granting certiorari); *Al Odah v. United States*, 124 S. Ct. 534 (2003) (mem.) (granting certiorari). The Court has also granted review in Padilla’s case, at the government’s request. *See Padilla*, 124 S. Ct. 1353. Even if, as is quite possible, the Supreme Court ultimately defers to the Executive’s claims to some extent in these cases, the very fact that it agreed to hear the cases appears to have put pressure on the Bush Administration to temper its positions. After the Supreme Court announced that it would review the Guantánamo cases, making it almost a foregone conclusion that it would also review the detentions of Hamdi and Padilla, the government announced plans to release a large number of the Guantánamo detainees and to allow Hamdi and Padilla eventual, controlled access to their lawyers. Anthony Lewis, *The Justices Take on the President*, N.Y. TIMES, Jan. 16, 2004, at A21. It subsequently released several juveniles held at Guantánamo, explained for the first time its internal processes for identifying enemy combatants, and announced that it would provide annual parole-like hearings for the Guantánamo detainees. *See Vernon Loeb, U.S. To Assess Detainees’ Cases*, WASH. POST, Feb. 15, 2004, at A1; John Mintz, *U.S. Releases 3 Teens from Guantanamo*, WASH. POST, Jan. 30, 2004, at A1. At an earlier stage, the government abandoned arguments that courts have no power whatsoever to review the detentions of U.S. citizens as enemy combatants, after the U.S. Court of Appeals for the Fourth Circuit, the most conservative court of appeals in the country, had rejected



they are subject to immense political pressure in times of crisis. But courts are surely less susceptible to those pressures than the politically responsive legislature and Executive, and thus there may well be no better alternative. We should be extremely hesitant to write courts out of their historic role of assessing the legality of executive detention. The writ of habeas corpus is guaranteed for a reason.

B. *One Size Does Not Fit All*

The second problematic premise underlying Ackerman's proposal is that emergency powers are all alike, and that therefore the supermajoritarian escalator is somehow a solution to the problem of emergency powers writ large. In fact, emergency powers take almost as many forms as emergencies do, and raise a host of difficult and distinct civil liberties questions, very few of which would be solved by a supermajoritarian escalator. The escalator addresses only one problem with emergency powers—their tendency to last beyond the period of the actual emergency. But duration is by no means the only—or even the principal—problem that states of emergency pose. Ackerman's solution is partial at best, and at worst it fails to grapple with the truly difficult questions posed by the war on terrorism's effect on civil liberties.

Consider our experience with preventive detention, which Ackerman calls “the core of the emergency power.”<sup>59</sup> The problem with the Palmer Raids, the Japanese internment, and the Ashcroft roundup was *not* that emergency power was unjustifiably extended. The Palmer Raids were carried out over a couple of months, and its detentions lasted in most cases less than a year.<sup>60</sup> The Japanese internment did not extend beyond the war.<sup>61</sup> And the vast majority of those swept up in Ashcroft's preventive detention campaign were released within several months of their detention.<sup>62</sup> What was wrong with these schemes was not the *duration* of detention but the fact that detention was for all practical purposes *suspicionless*: Thousands of people who posed no danger were nonetheless rounded up, not based on objective, individualized suspicion, but often based in significant part on their perceived racial, ethnic, religious, or political identities. Developing

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that proposition. See *Hamdi II*, 296 F.3d at 283. These actions demonstrate that the very possibility of judicial review plays a checking role that we ought not lightly discount.

59. Ackerman, *supra* note 11, at 1062.

60. See generally LOUIS F. POST, *THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY: A PERSONAL NARRATIVE OF AN HISTORIC OFFICIAL EXPERIENCE* (1923); WILLIAM PRESTON, JR., *ALIENS AND DISSIDENTS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933* (1963).

61. The internees were released shortly before the Supreme Court decided *Korematsu v. United States*, 323 U.S. 214 (1944), and *Ex parte Endo*, 323 U.S. 283 (1944). See IRONS, *supra* note 10, at 344.

62. OIG REPORT, *supra* note 5, at 105.

rules to limit the duration of emergency powers is thus necessary but hardly sufficient to the design of an emergency regime. No matter how long they last, emergency powers pose a host of difficult tradeoffs, between values of liberty, privacy, autonomy, and equality on the one hand, and those of efficacy, efficiency, and security on the other. Those tradeoffs cannot be sidestepped or solved by supermajoritarian escalators.

This shortcoming in Ackerman's approach is curious, given that his theory is expressly built on the insight that all emergencies are not alike. He argues, correctly, that terrorist threats are different from "existential" threats, and that natural disasters calling for emergency relief efforts are different from terrorist emergencies that invoke calls for preventing the next attack.<sup>63</sup> He cites with approval Canada's constitution, which recognizes four different types of emergency.<sup>64</sup> Yet paradoxically, while Ackerman insists that all *emergencies* are not alike, he seems to assume that all emergency *powers* are alike. As its title indicates, his essay purports to address not preventive detention in particular, but emergency powers in general. With respect to preventive detention itself, Ackerman fails to adequately address why suspicionless preventive detention is justified as a normative matter, as I show in Part III. But other emergency powers would pose entirely different issues, even less susceptible to resolution by the supermajoritarian escalator.

Ackerman's choice of preventive detention as a paradigm may have been driven by the fact that it is at least theoretically susceptible to the time limits that his escalator is designed to impose. At least one salient issue raised by detention is its duration, and a detention authority expressly tied to enforceable time limits may therefore pose less serious due process concerns than the prospect of indefinite detention.<sup>65</sup> But even where strictly limited to emergency periods, a preventive detention scheme is likely to have significant spillover effects that extend far beyond the emergency. For example, in the Emergency Detention Act of 1950, enacted at the height of the Cold War, Congress authorized an emergency scheme permitting preventive detention of persons deemed dangerous in specified emergency situations.<sup>66</sup> The law remained on the books until 1971, when Congress

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63. Ackerman, *supra* note 11, at 1057-58, 1061.

64. *Id.* at 1061-62. Ackerman cites only Canada's constitution and Germany's Basic Law as recognizing different types of emergency, but such recognition is not at all unusual. In fact, in a survey of seventy-nine national constitutions, Oren Gross found that the majority of them "differentiate among several types of emergencies." Gross, *supra* note 15, at 21.

65. *Compare* *Zadvydas v. Davis*, 533 U.S. 678 (2001) (noting that serious due process concerns would be raised by indefinite detentions), *with* *Demore v. Hyung Joon Kim*, 123 S. Ct. 1708 (2003) (distinguishing *Zadvydas* and finding no due process violation where an immigration statute imposed mandatory but not indefinite detention).

66. Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II, § 103, 64 Stat. 1019, 1021 (1950) (repealed 1971).

repealed it and barred the detention of any U.S. citizen except where expressly authorized by statute.<sup>67</sup> Although Congress appropriated funds to build detention centers, the emergency detention statute was never invoked because no emergency was declared. But that does not mean that it did no damage to civil liberties. The FBI used the existence of this detention authority to justify extensive political spying in order to compile, maintain, and update lists of “dangerous” persons to be detained in the event an emergency was declared. In 1954, the FBI’s “Security Index” included 26,174 persons.<sup>68</sup> In the 1960s, the FBI’s list included civil rights leaders such as Dr. Martin Luther King, Jr.<sup>69</sup> Toward the end of that same decade, the FBI instructed its agents generally to investigate for potential inclusion on the list not only the student activist group Students for a Democratic Society (SDS), but all persons living in communes.<sup>70</sup> The supermajoritarian escalator would do absolutely nothing to limit such conduct, undertaken in preparation for emergencies to come, and the resulting damage to civil liberties would be done even if an emergency were never declared.

For a host of other emergency powers posing threats to civil liberties, the supermajoritarian escalator would be not merely insufficient, but largely irrelevant. This is because many of the responses necessitated by the threat of terrorism are simply not susceptible to time limits. For example, the widely acknowledged need for better and more extensive intelligence and surveillance in order to identify and track terrorists who blend into the civilian population is not temporary. The changes we adopt today to respond to that concern are likely to be viewed as necessary forever. Thus, the threat that intelligence authorities pose to privacy cannot be resolved by resort to the supermajoritarian escalator.<sup>71</sup>

For example, one of the most common diagnoses of the government’s failure to uncover and preempt the September 11 conspiracy holds that there were too many barriers between domestic law enforcement and foreign intelligence agencies.<sup>72</sup> This problem cannot be solved by ceding

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67. 18 U.S.C. § 4001(a) (2000). *See generally* Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL’Y REV. 153 (2004) (finding, in the context of the history of executive detention in the United States, that § 4001(a) manifests a constitutional mandate requiring congressional authorization of any extrajudicial detention).

68. COLE, *supra* note 2, at 102.

69. *Id.*

70. *Id.*

71. And as with preventive detention, even if one could posit a role for extraordinary intelligence authorities limited to declared states of emergency, the existence of those authorities on the books would likely have substantial spillover effects on normal times. If we know, for example, that our private records may be subject to secret surveillance when emergencies arise, our expectation of privacy is reduced not only during the emergency, but permanently, as we can no longer rely on an expectation that what we do will remain private.

72. *See, e.g.*, MARKLE FOUND., PROTECTING AMERICA’S FREEDOM IN THE INFORMATION AGE (2002), [http://www.markletaskforce.org/documents/Markle\\_Full\\_Report.pdf](http://www.markletaskforce.org/documents/Markle_Full_Report.pdf). *But cf.* Malcolm Gladwell, *Connecting the Dots: The Paradoxes of Intelligence Reform*, NEW YORKER,

short-term emergency powers to the Executive subject to a political process check; it requires a long-term solution. The stakes are considerable. In the past, we operated under two different paradigms—one for foreign intelligence directed at keeping track of foreign governments, agents, and powers, and a very different and much more restricted one for domestic law enforcement. While we may not want the CIA to be hemmed in by constitutional constraints in spying on foreign countries and agents abroad, the abuses revealed by the Church Committee investigation in 1976 illustrate that we also do not want the FBI using CIA tactics to spy on domestic political dissenters.<sup>73</sup> At the same time, the foreign/domestic distinction, while important to protecting civil liberties at home, may also impede coordinated efforts to track international terrorists, who are a legitimate subject of *both* foreign intelligence and domestic law enforcement. Reasonable people will differ about how to resolve this problem without unduly endangering political freedoms, but one thing should be indisputable: The supermajoritarian escalator is no solution at all.

Cutting off funding for terrorist organizations, another major initiative in the post-September 11 world, is also not likely to be susceptible to a temporal political process solution. The goal here is to deprive violent groups of the support they need to survive.<sup>74</sup> The danger is that penalizing all support to such groups, rather than restricting the prohibition to types of support that further terrorist activity, imposes guilt by association.<sup>75</sup> Currently, both criminal law and executive orders ban all support to a long list of groups and individuals that the government has labeled “terrorist,” without regard to the intention or effect of the support in question.<sup>76</sup> These laws treat identically someone who sends coloring books to a day-care center and someone who sends a radiological bomb to a military unit, as

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Mar. 10, 2003, at 83 (noting the benefits of competition and the risks of hierarchical coordination in intelligence gathering and analysis).

73. See SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, FINAL REPORT OF THE SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755 (1976).

74. See, e.g., William F. Wechsler, *Strangling the Hydra: Targeting Al Qaeda's Finances*, in HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR 129 (James F. Hoge, Jr. & Gideon Rose eds., 2001).

75. See COLE, *supra* note 2, at 58-64; David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203.

76. See 18 U.S.C.A. § 2339B (West 2003); International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (2000); Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten To Commit, or Support Terrorism, Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); COLE, *supra* note 2, at 75-78; Remarks on United States Financial Sanctions Against Terrorists and Their Supporters and an Exchange with Reporters, Remarks of President George W. Bush in the Rose Garden, 2001 PUB. PAPERS 1149 (Sept. 24, 2001); Press Release, U.S. Department of the Treasury, Progress in the War on Terrorist Financing 1-2 (Sept. 11, 2003), <http://www.ustreas.gov/press/releases/js721.htm> (noting that 315 individuals and entities had been named as specially designated global terrorists).

long as both recipients are under the aegis of a group the government has labeled “terrorist” in a secret and largely unreviewable process.<sup>77</sup> Such laws would criminalize even the actions of those who assist a group in human rights advocacy in order to encourage it to use peaceful rather than violent means to resolve its conflicts.<sup>78</sup> Yet the government contends that if it is required to prove that donors specifically intend to further a group’s unlawful activities, it will be unable as a practical matter to stop a great deal of financial and other support. Here, too, the difficult issues of security and liberty cannot be solved by resorting to a political process safeguard. The focus on financing requires a long-term systemic response; it will not work if it is limited to five- to seven-month “states of emergency” following terrorist attacks.

Consider, finally, the use of military authority to capture and detain persons fighting for the other side during a military campaign—the hotly disputed issue of “enemy combatants.” Here, of course, there is a role for time limits, but it has nothing to do with supermajoritarian escalators. The power to detain during wartime can and should be limited to the duration of the conflict. As the war on terrorism illustrates, however, the duration of the conflict may be extremely difficult to define, and may indeed be indefinite. Few dispute that under the laws of war, presidents in wartime have the power to detain the enemy incident to the Commander-in-Chief power, at least as applied to enemy forces on the battlefield. The difficult issues concern how far the authority extends—geographically and temporally—in an unconventional war, and what procedural and substantive rights are owed to those captured. Again, however one comes out on these issues, one thing is certain: A supermajoritarian escalator does not provide the answer.

The general point should be clear. The need to respond effectively to terrorist threats presents a host of difficult and distinct civil liberties issues. A precommitment to limiting the time period during which emergency powers can be exercised not only fails to provide a global solution to the problem Ackerman identifies, but on many issues *does not provide any solution at all*. In addition, even on the issue the escalator does address—the duration of emergency powers—we might reach different

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77. See COLE, *supra* note 2, at 75-78.

78. I represent a human rights organization, the Humanitarian Law Project, which had been providing human rights advocacy training and assistance to the Kurdistan Workers Party, the principal political representative of the Kurds in Turkey. The Project did so precisely to encourage the Party to pursue its grievances through nonviolent, lawful means. When the Secretary of State designated the Kurdistan Workers Party a “terrorist organization,” however, it became a crime for the Project to continue to provide such assistance. We brought suit in federal court, and the courts thus far have held that the statute’s bar on the provision of “training,” “personnel,” and “expert advice or assistance” is unconstitutional. See *Humanitarian Law Project v. U.S. Dep’t of Justice*, 352 F.3d 382 (9th Cir. 2003); *Humanitarian Law Project v. Ashcroft*, No. CV 03-6107 ABC, 2004 WL 547534 (C.D. Cal. Mar. 17, 2004).

judgments for different powers. We might be willing, for example, to permit the use of the military domestically for certain very short-term emergency responses, but be willing to allow nonmilitary responses to an emergency situation to continue for longer periods. It is not obvious, in other words, that all emergency powers ought to have the same “shelf life.” So we might need to adopt a whole series of emergency-power-specific supermajoritarian escalators of varying lengths for different emergency powers. If so, any truly fruitful emergency constitution will be far less elegant and more complicated than Ackerman’s approach acknowledges.

Ackerman might object that some of the above measures are not technically “emergency” powers, but nonemergency “national security” measures. Yet from the standpoint of the concerns animating Ackerman’s piece, that would be mere semantics. His stated concern is for the fate of civil liberties in a world in which terrorist attacks are a frequent phenomenon. That fate will be affected as much, if not more, by nonemergency than by emergency measures. Indeed, just as the threat of international terrorism seems to have exploded the distinction between domestic law enforcement and foreign intelligence, so the “war on terrorism” has substantially obliterated the distinction between emergency and nonemergency powers. Vice President Dick Cheney has called the current climate “a new normalcy.”<sup>79</sup> The threats to civil liberties posed by responses to a terrorist attack need not take the form of “emergency” powers. Without employing formal emergency powers, the administration has adopted sweeping measures since September 11 that infringe on rights of speech, association, privacy, and due process, the right to counsel, criminal trial rights, and equal protection of the law, to name just a few.<sup>80</sup> If we are to solve the problem Ackerman identifies—a continuing threat to civil liberties presented by the likelihood of recurring terrorist attacks—Ackerman’s emergency constitution is patently insufficient.

### C. *Times of Emergency*

Finally, Ackerman’s supermajoritarian escalator rests on an unproven and unprovable premise that emergencies are likely to be short-lived. Absent that premise, it would make no sense to precommit to a scheme that will terminate emergency powers after a period of several months even where seventy-nine percent of the legislature believes that the need for emergency authority continues. Ackerman confidently claims that “[o]ur constitutional problem is not that the government will be too weak in the

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79. Bob Woodward, *CIA Told To Do “Whatever Necessary” To Kill Bin Laden; Agency and Military Collaborating at “Unprecedented” Level; Cheney Says War Against Terror “May Never End,”* WASH. POST, Oct. 21, 2001, at A1 (internal quotation marks omitted).

80. See generally COLE, *supra* note 2, at 17-82 (discussing the response to September 11).

short run, but that it will be too strong in the long run.”<sup>81</sup> But how do we know *ex ante* that the error will *always* be to overestimate the length of time emergency authority is needed, so much so that we should commit to being legally bound by a twenty-one-percent minority on the question? In the face of a threat, denial may be as powerful an irrational response as panic. What happens if the twenty-one-percent minority is in denial and underestimates the threat?

In fact, there is substantial evidence that emergencies are not likely to be as short-lived as Ackerman posits. Consider the post-September 11 experience in the United States. More than two years after the attacks, Osama bin Laden remains at large, al Qaeda continues to pose a deadly threat, new security measures are adopted almost weekly, and the government has repeatedly had to issue heightened alerts and cancel many airplane flights (despite suffering substantial criticism each time it does so). The reality is that as long as a trained and devoted organization of terrorists has designs on killing as many innocent civilians as it can, the threat continues. As the aftermath of September 11 illustrates, even when we devote massive military, intelligence, and law enforcement resources to the job, the notion that a clandestine terrorist organization will be defeated and neutralized in a matter of months is patently unrealistic. Perhaps we could be confident that we would obtain eighty-percent consensus on the continued need for extraordinary measures, but it is unclear why we should rest our faith on that proposition.

Other nations’ experiences further illustrate the potential for long-term emergencies. Israel has been in a state of emergency since its founding in 1948,<sup>82</sup> and while one can reasonably ask in what sense a fifty-six-year emergency is truly an emergency, news reports remind us almost daily that Israel continues to confront a very real and all-too-often-realized threat of terrorist attacks. The United Kingdom operated for thirty years under a state of emergency triggered by its struggle with the Irish Republican Army.<sup>83</sup> Ackerman criticizes Poland’s choice to impose a strict time limit on emergency power as creating a “gap between law and reality,”<sup>84</sup> but his own regime is vulnerable to the same critique. The eighty-percent requirement means that after six to seven months, twenty-one percent of the nation’s representatives could disband emergency powers even when seventy-nine percent agree that emergency conditions continue. As Alexander Hamilton recognized long ago, the very nature of emergencies is that they are unpredictable: “[I]t is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent &

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81. Ackerman, *supra* note 11, at 1040.

82. Gross, *supra* note 23, at 1073.

83. *Id.* at 1074.

84. Ackerman, *supra* note 11, at 1054.

variety of the means which may be necessary to satisfy them.”<sup>85</sup> Especially when it comes to inherently unpredictable emergencies, why would the majority ever precommit to such a scheme?

In sum, the premises for Ackerman’s proposal are open to question in three fundamental respects: He is too pessimistic about courts and too optimistic about legislatures; his “political process” one-size-fits-all solution resolves very little about the appropriate extent of emergency powers; and his view of the likely duration of emergencies is simply unrealistic.

## II. EFFICACY

How would Ackerman’s plan actually work in practice? A brief examination of the details of Ackerman’s proposal suggests that his faith in supermajoritarian escalators has blinded him to the difficult practical and normative questions posed by preventive detention. In this Part, I offer three criticisms of his proposal. First, it fails to address in any way the existing preventive detention tactics employed in the wake of September 11 and, as a result, would do little to regulate preventive detention on the ground. Second, having abandoned any threshold requirement of suspicion for detention, it proposes an awkward and ill-conceived compensation scheme for “innocents” that would deny compensation to many who deserve it while compensating others who do not. Finally, despite Ackerman’s heavy reliance on the escalator as a *quid pro quo* for emergency authority, the proposal as formulated creates a stunning disconnect between the emergency power granted—suspicionless preventive detention—and the political process safeguard that Ackerman champions. Many if not most instances of preventive detention would never even be affected by the supermajoritarian escalator, as the detentions would terminate after forty-five to sixty days, before the supermajoritarian requirements were even triggered. For these detainees, Ackerman’s supermajoritarian political process safeguard would not only be insufficient, but meaningless.

### A. *Preventive Detention by Any Other Name*

Even if Ackerman’s proposal were to become law, it would likely do little to restrain the actual practice of preventive detention in emergencies. It would have had literally no effect, for example, on the Ashcroft and Palmer roundups, because it leaves in place the legal regimes these Attorneys General exploited to effectuate mass preventive detention.

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85. THE FEDERALIST NO. 23, at 106-07 (Alexander Hamilton) (Terence Ball ed., 2003).



Palmer's and Ashcroft's campaigns show that preventive detention does not require a formal emergency regime, but can be effected through existing nonemergency immigration and criminal justice provisions. Given those provisions, left entirely unaddressed by Ackerman's essay, it is not clear why the President would invoke Ackerman's framework statute or constitutional amendment if it were on the books. By exploiting the discretion the Executive already enjoys under existing law, he could engage in preventive detention without declaring an emergency, and would not need to worry about the supermajoritarian escalator or Ackerman's other checks.

Consider, in this regard, the fate of section 412 of the USA PATRIOT Act.<sup>86</sup> This controversial provision creates a congressionally authorized regime of preventive detention for "terrorist aliens." It allows the Attorney General to detain any foreign national, even a lawful permanent resident, simply by certifying that he has "reasonable grounds to believe" that the individual "is described in" the immigration law's antiterrorism provisions.<sup>87</sup> Those provisions in turn define terrorism so broadly as to include the provision of any material support to any group that the Secretary of State or the Attorney General labels a terrorist organization—even if the purpose, intent, and effect of the individual's support was solely to further lawful, nonviolent activity.<sup>88</sup> The immigration law's definition of terrorism also encompasses virtually any use or threat to use a weapon against person or property, conceivably covering a permanent resident woman who picks up a kitchen knife and threatens her abusive husband in a domestic dispute, or a foreign national who breaks a beer bottle and threatens another in a barroom brawl.<sup>89</sup>

Section 412 allows such persons to be held without any charges for up to seven days, but at Congress's insistence it also requires that thereafter the detainee either be charged with an immigration violation or released. If charged with an immigration violation, no matter how minor, the foreign national is then subject to indefinite detention on the Attorney General's say-so. He is subject to continued detention even if he is granted relief from removal, that is, even if he *prevails* in his deportation proceeding, and is lawfully permitted to remain in the United States.<sup>90</sup> This is akin to keeping a prisoner locked up after he has been pardoned. However, again at

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86. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 350-52 (2001) (to be codified at 8 U.S.C. § 1226a(a)).

87. 8 U.S.C.A. § 1226a(a)(3) (West 2003).

88. *Id.* § 1182(a)(3)(B)(iv)(VI)(cc), (vi)(II); COLE, *supra* note 2, at 61.

89. *See* 8 U.S.C.A. § 1182(a)(3)(B)(iii)(V)(b); COLE, *supra* note 2, at 65-66. While there is no evidence of deportations under these provisions for such garden-variety threats of violence yet, the examples illustrate how sweeping the power given to the Attorney General is.

90. 8 U.S.C.A. § 1226a(a)(2).

Congress's insistence, section 412 does provide for habeas corpus review in the federal courts.<sup>91</sup>

When Congress was considering section 412, the administration insisted that this authority was necessary in order to detain suspected terrorists. Yet more than two years after its enactment into law, the Attorney General has never invoked section 412. He has been able to subject over 5000 foreign nationals to preventive detention without resort to its provisions, by instead using preexisting immigration and criminal law authorities.<sup>92</sup> Many of those detainees were arrested and held without charges for much longer than seven days.<sup>93</sup> And many were held for months on end without any judicial review.<sup>94</sup> Under preexisting immigration law, the Attorney General has discretion to detain foreign nationals charged with immigration violations pending the outcome of their removal proceedings, although such detention generally requires proof that the individual poses either a risk of flight or a danger to the community.<sup>95</sup> The Justice Department used that discretionary detention authority to deny bond to all immigration detainees deemed "of interest" to the September 11 investigation, without regard to whether it had any evidence whatsoever that they were dangerous, a flight risk, or in any way connected to terrorism.<sup>96</sup> It interfered with their access to attorneys and sought delays and continuances in bond hearings to disguise the fact that it had no evidence justifying detention without bond.<sup>97</sup> It promulgated a rule, subsequently declared unconstitutional by five federal judges, that permits immigration prosecutors to keep foreign nationals detained even after an immigration judge rules that there is no basis for denying bond.<sup>98</sup> And it kept individuals in detention for months after their immigration charges were fully resolved, not because it had any affirmative evidence that they

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91. *Id.* § 1226a(b).

92. COLE, *supra* note 2, at 23-25.

93. OIG REPORT, *supra* note 5, at 30.

94. HUMAN RIGHTS WATCH, *supra* note 47, at 52-53; OIG REPORT, *supra* note 5, at 1-7; *see also* Second Amended Class Action Complaint and Demand for Jury Trial ¶¶ 1-2, 4-5, 70-73, *Turkmen v. Ashcroft* (E.D.N.Y. filed June 18, 2003) (No. 02 CV 2307 (JG)), [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/TurkmenSecondAmendedComplaint.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/TurkmenSecondAmendedComplaint.pdf). I am counsel for plaintiffs in this case.

95. 8 U.S.C. § 1226a (2000); *In re Drysdale*, 20 I. & N. Dec. 815, 817 (B.I.A. 1994) ("Once it is determined that an alien does not present a danger to the community or any bail risk, then no bond should be required.").

96. OIG REPORT, *supra* note 5, at 76; *see also* COLE, *supra* note 2, at 18-21, 30 (discussing one such detainee, Ali Al-Maqtari, and the ordeal of 738 others).

97. OIG REPORT, *supra* note 5, at 78-80.

98. Custody, 8 C.F.R. § 1003.19 (2004). This regulation has been declared unconstitutional in *Zavala v. Ridge*, No. C04-00253 JSW, 2004 U.S. Dist. LEXIS 3620 (N.D. Cal. Mar. 1, 2004); *Ashley v. Ridge*, 288 F. Supp. 2d 662 (D.N.J. 2003); *Uritsky v. Ridge*, 286 F. Supp. 2d 842 (E.D. Mich. 2003); *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446 (D. Conn. 2003); and *Almonte-Vargas v. Elwood*, No. CIV.A. 02-CV-2666, 2002 U.S. Dist. LEXIS 12387 (E.D. Pa. June 28, 2002).

posed any danger, but simply because the FBI had not gotten around to “clearing” them.<sup>99</sup>

Where a person “of interest” could not be charged with an immigration violation, prosecutors searched for a criminal charge—any charge. Individuals were charged with lying to FBI agents and the grand jury, credit card fraud, “trespassing” in a hotel room they were renting, and carrying a knife one-quarter inch longer than permitted under state law.<sup>100</sup> Where neither a criminal nor an immigration charge was available, the Justice Department invoked the material witness statute.<sup>101</sup> This statute permits detention without probable cause of any criminal activity, on a showing that the individual has testimony material to a criminal trial or grand jury proceeding and would not be likely to appear if served with a subpoena.<sup>102</sup> The Justice Department appears to have used this statute to hold people whom it suspected while it investigated them further. Much about the material witness detentions is secret; the government will not even say how many material witnesses it has detained. In November 2002, however, the *Washington Post* had identified forty-four such persons, almost half of whom had never been called to testify in any proceeding.<sup>103</sup>

Through these tactics, all relying on preexisting immigration and criminal authority, the Attorney General was able to effectuate a mass preventive detention campaign without ever invoking section 412. As a result, he was able to evade the restrictions—including federal court review—that Congress had insisted upon adding to section 412 before giving the Attorney General that authority.<sup>104</sup>

Future Attorneys General would likely take much the same approach to Ackerman’s proposal were it to become law. Rather than invoke an authority subject to the supermajoritarian escalator, they might well prefer to use preexisting laws to carry out preventive detention. If so, Ackerman’s

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99. OIG REPORT, *supra* note 5, at 71.

100. COLE, *supra* note 2, at 35.

101. 18 U.S.C. § 3144 (2000); *see also* COLE, *supra* note 2, at 35-39.

102. *See generally* United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003) (sustaining the use of the material witness statute to detain potential grand jury witnesses after September 11).

103. Steve Fainaru & Margot Williams, *Material Witnesses: Law Has Many in Limbo: Nearly Half Held in War on Terror Haven’t Testified*, WASH. POST, Nov. 24, 2002, at A1.

104. Similarly, in 1996 Congress gave the Attorney General authority to deport “alien terrorists” using secret evidence that neither the foreign national nor his attorney could confront or rebut. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1258-68 (codified at 8 U.S.C. §§ 1531-1537). The law creates a special “Alien Terrorist Removal Court” with an Article III federal judge to conduct the hearing, and provides a number of safeguards for the foreign national. This provision has never been invoked. The INS repeatedly used secret evidence against foreign nationals in immigration proceedings after the 1996 law was enacted, but consistently did so outside the Alien Terrorist Removal Court, where the safeguards provided by the 1996 law did not apply and the adjudicator was not an Article III judge, but an immigration judge who lacked the power to declare immigration laws and regulations unconstitutional.

provision would be as ineffectual in regulating preventive detention as section 412 has been.

Ackerman claims that his proposal would affect at least one case of post-September 11 preventive detention—that of Jose Padilla, the American citizen arrested at O’Hare Airport and held since June 2002 as an “enemy combatant.” Ackerman asserts that if his law were on the books, Padilla’s case would be a “no-brainer,” because the courts would hold the President to the more limited detention authority that Ackerman’s law would provide.<sup>105</sup> But that is not at all self-evident. Ackerman’s law would not change the Bush Administration’s argument, namely that Congress’s authorization to use military force against al Qaeda<sup>106</sup> inherently includes the authority to detain the enemy until the military conflict ends—a traditional exercise of military authority expressly authorized by the Geneva Conventions and the customary laws of war.<sup>107</sup> Padilla’s case is admittedly a stretch, but the Supreme Court has already upheld the detention of United States citizens captured here as enemy combatants in wartime.<sup>108</sup> And few would dispute the administration’s authority to hold Zacarias Moussaoui, an *admitted* al Qaeda member arrested in Minnesota, as a prisoner of war if it so chose.

Unless Ackerman’s law were understood to preempt military detention of enemy soldiers in military conflicts, it would not resolve Padilla’s case. The existence of a more limited form of preventive detention authority for nonwartime emergencies in the form of Ackerman’s proposed statute (or even constitutional amendment) would not supersede the longstanding wartime authority absent an express indication to that effect.<sup>109</sup> Ackerman

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105. Ackerman, *supra* note 11, at 1081-82.

106. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (to be codified at 50 U.S.C. § 1541 note).

107. See *Petition for a Writ of Certiorari* at 14, *Rumsfeld v. Padilla*, 124 S. Ct. 1353 (2004) (No. 03-1027), 2004 WL 113598; COLE, *supra* note 2, at 39-46 (discussing enemy combatant designation authority); John C. Yoo & James C. Ho, *The Status of Terrorists*, NAT’L SEC. L. REP., Dec. 2003, at 1; see also *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3568 (U.S. Mar. 3, 2004) (No. 03-1245); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353; *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004) (No. 03-6696); Vladeck, *supra* note 67, at 181-92 (surveying the authority issues in *Padilla*).

108. See *Ex parte Quirin*, 317 U.S. 1 (1942).

109. Ackerman points to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and asserts that “[i]f the branches resolved such sensitive matters [as emergency powers] through a framework statute, there would be little question that the Court would hold subsequent presidents to the terms of the deal.” Ackerman, *supra* note 11, at 1082 n.128. But although Congress did just that in the War Powers Resolution, courts have in fact consistently declined to hold the President to the terms of that deal. See generally JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 61-63 (1993); Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715, 761-65 (1984) (discussing *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff’d per curiam*, 720 F.2d 1355 (D.C. Cir. 1983)). Moreover, there is no reason to think that the

never argues that his law is meant to supersede the authority to hold prisoners of war; if he did, the law would be even less likely to be adopted. Thus, Ackerman's law would not in fact resolve the one case of preventive detention he asserts it would affect. Moreover, Ackerman does not even claim that his law would have any bearing on the vast majority of the war on terrorism's enemy combatant detentions, most of which stem from battlefield captures in Afghanistan.

Thus, at best, Ackerman's proposal might theoretically affect one of the over 5000 domestic preventive detentions and countless more overseas detentions thus far imposed in the war on terrorism. If his goal is to halt the abuse of basic civil liberties associated with preventive detention, the proposal fails on its face.

#### B. *What's Innocence Got To Do with It?*

Ackerman seems deeply ambivalent as to what makes preventive detention lawful. On the one hand, he describes his proposal as authorizing "the government to detain suspects without the criminal law's usual protections of probable cause or even reasonable suspicion,"<sup>110</sup> acknowledges that "[t]here will be dragnets sweeping up many innocent people,"<sup>111</sup> and declares that the principal purpose of his proposal is to reassure a public in panic (notably, not to catch terrorists).<sup>112</sup> On the other hand, he insists that the proposal should include financial compensation for all "innocents who will be caught up in dragnets launched under the government's emergency powers of detention."<sup>113</sup>

But Ackerman's concept of innocence is far from clear. He says that he would limit compensation to those who are not convicted,<sup>114</sup> but never specifies what a sufficient conviction would be. What about someone detained without any basis for suspicion whatsoever, but subsequently convicted of credit card fraud, hiring an undocumented domestic worker, using a false Social Security number, or lying to an FBI agent? What about

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"terms of the deal" Ackerman proposes would include forfeiting the traditional executive authority to detain the enemy in military conflicts.

The Second Circuit, by a 2-1 margin, recently ruled that the President lacks authority to hold U.S. citizens captured far from the battlefield as "enemy combatants," in light of Congress's express statement that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Padilla*, 352 F.3d at 718 (quoting 18 U.S.C. § 4001(a)). Whether that holding will withstand Supreme Court review remains to be seen. But § 4001(a) is quite different from Ackerman's proposed law, as it bars detention of U.S. citizens absent express statutory authorization. Nothing in Ackerman's proposal would do so.

110. Ackerman, *supra* note 11, at 1037.

111. *Id.* at 1062.

112. *Id.* at 1037.

113. *Id.* at 1045-46.

114. *Id.* at 1065 n.88.

someone not convicted at all, but deported for overstaying his visa or failing to file a notice of change of address within ten days of moving? It appears that Ackerman would not treat these persons as “innocent” and would therefore deny them compensation. Absent any basis for suspicion, however, there is no justification for their preventive detention. Surely the accident of discovering a nonterrorist law violation after the fact ought not retroactively justify the initial suspicionless preventive detention. But because Ackerman would turn compensation *not* on the absence of any objective grounds for suspicion at the time of detention, but on ultimate innocence, his proposal would seem to have precisely that effect. Thus, Ackerman’s scheme would deny compensation to many persons arbitrarily detained, simply because some law violation, no matter how technical, was later discovered.

At the other extreme, what about someone detained on a showing that amounted to probable cause of involvement in a terrorist plot, but who then turned out to have been innocent? Under any rational preventive detention scheme, we would want that person, even if ultimately innocent, to have been detained in the first place. But if that is the case, there is nothing “wrong” with his preventive detention, and he should not receive compensation. Just as a search based on probable cause is not rendered unlawful by the fact that it comes up empty, so an arrest based on probable cause does not become illegal if the arrestee ultimately turns out to be innocent. Ackerman notes that American law generally denies compensation to such persons in the criminal justice system, as well as to those who are arrested and detained as material witnesses (who are generally not charged with any crime).<sup>115</sup> He does not question these precedents. But these precedents make clear that compensation should turn not on *ultimate innocence*, but on whether the detention was *legally authorized at the outset*.

Ackerman contends that preventive detention that ensnares innocents through an “erroneous legal process” is different, and therefore should trigger compensation.<sup>116</sup> But like his discussion of “innocence,” this claim begs the question of what makes the process “erroneous.” If his law expressly permits detention *without any objective basis for suspicion*, on the understanding that it reassures the general public, there is nothing “erroneous” about detaining a person who turns out to be innocent. Where detention is legally justified without any showing of suspicion, detention of “innocents” is not an error, but a fully contemplated, legally authorized result.

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115. *Id.* at 1063 n.81 (discussing *Hurtado v. United States*, 410 U.S. 578 (1973)).

116. *Id.*

Ackerman does suggest two substantive constraints on the preventive detention decision. It could not be based on personal animus, nor could it be based *solely* on the detainees' race, color, sex, language, religion, or social origin.<sup>117</sup> But the former is largely unenforceable, especially where no objective basis for suspicion is required, as no one will admit to personal animus. And the latter constraint is almost entirely ineffectual—even the Japanese internment was not based *solely* on race, but on race and *location* on the West Coast. Under Ackerman's statement of the standard, detaining all Muslim men between the ages of eighteen and fifty-five after the next terrorist attack would be perfectly permissible, because it would not be based on personal animus, nor *solely* on religion or sex.

The legal process Ackerman proposes for detention similarly reflects a failure to think through the consequences of permitting detention without any objective evidence of suspicion. Ackerman insists that during the detention period, federal courts would have no power to review whether there is a factual basis for holding any given detainee. Indeed, as we have seen, his express goal is to authorize detention *without* any individualized suspicion. At the same time, however, he would require the government to appear at a hearing at the outset of the detention to state "the grounds of suspicion that support the detention."<sup>118</sup> But if no individualized suspicion is required for the detention, and the court has no power to act on the statement in any event, why must there be any statement of grounds? Ackerman maintains that the obligation to offer reasons will deter bad faith detentions and facilitate after-the-fact assessments of the legality of the detention. But again, if no basis for suspicion is required, what would such an after-the-fact assessment assess? Ackerman claims that these statements might be used as the basis for punitive damages suits against the government after detention has ended.<sup>119</sup> But if the detention need not be justified by any objective basis for suspicion, it would seem that any statement whatsoever—short of "I arrested him because I don't like him" or "I arrested him solely because he is Arab"—would be legally sufficient to avoid governmental liability.

Ackerman argues that substituting after-the-fact financial incentives for contemporaneous judicial review will deter officials from detaining innocents in the first place. But as shown above, whether someone ultimately turns out to be innocent of a criminal or immigration violation has little or nothing to do with whether there was a basis for fearing that he posed a danger sufficient to warrant preventive detention, and thus whatever deterrence is created would likely be counterproductive.

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117. *Id.* at 1075-76.

118. *Id.* at 1075.

119. *Id.*

Compensating “innocents” will deter the detention of apparently dangerous persons who might ultimately turn out to be innocent—persons who probably ought to have been detained. At the same time, it will fail to deter the detention of persons who pose no terrorist threat whatsoever but are likely to have committed a minor crime or immigration violation—persons who ought not to have been preventively detained. Thus, turning compensation on ultimate innocence does not rationally regulate detention at the outset.

Moreover, Ackerman exacerbates these deterrence problems by proposing that all detainees be compensated initially, leaving the government to try to “claw back” the compensation from those who turn out to be guilty.<sup>120</sup> As any defense lawyer will attest, recovering debts from convicted criminals is notoriously difficult, so in practice this rule would likely compensate everyone, even the guilty. If officials know that as a practical matter *everyone* will be compensated, what incentive does the proposal give them to distinguish the innocent from the guilty? If the money could be recovered, this compensation scheme would create an incentive to vigorously investigate and prosecute all preventive detainees, on even the most minor offenses, in order to avoid a subsequent ruling that the detainees were “innocent.” But do we really want to encourage the kind of overzealous and vindictive prosecution that the military demonstrated recently in charging Captain James Yee, the Muslim chaplain at Guantánamo Bay, with adultery and possession of pornography when its sensational “espionage” claims appeared to be evaporating?<sup>121</sup>

Ackerman also does not explain why, as a deterrence matter, a financial compensation scheme would be an improvement over direct judicial review of the grounds for detention at the time of arrest. Putting aside the obvious fact that compensation can never adequately remedy the irreparable injury of losing one’s liberty, an after-the-fact compensation scheme is likely to either overdeter or underdeter. Substantial compensation would risk overdeterrence, causing officials *not* to arrest persons who ought to be detained; the risk that the person might turn out to be innocent in the end would not make the detention worthwhile, even if otherwise objectively justified.<sup>122</sup> If, as is more likely given the lessons of history that Ackerman

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120. *See id.* at 1065 n.88.

121. When pressed, the government ultimately dropped all charges against Captain Yee. For a discussion of the background and the government’s changing position, see Neil A. Lewis, *Charges Dropped Against Chaplain*, N.Y. TIMES, Mar. 20, 2004, at A1; and Neil A. Lewis & Thom Shanker, *As Chaplain’s Spy Case Nears, Some Ask Why It Went So Far*, N.Y. TIMES, Jan. 4, 2004, at A1.

122. *Cf.* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991) (arguing that proposed tort schemes for remedying Fourth Amendment violations would similarly pose problems of overdeterrence and underdeterrence, as compared to the exclusionary rule, which deters by removing the benefit of the violation).



reviews,<sup>123</sup> the compensation were not substantial, the payments would not only underdeter, but might well have the opposite effect of *encouraging* unnecessary detentions by legitimating them—“Yes, we locked you up despite your innocence and despite lacking any evidence to establish that you were suspicious, but we paid you for it.”

C. *What’s the Supermajoritarian Escalator Got To Do with It?*

The core of Ackerman’s idea is to offer the Executive substantial emergency power in exchange for the political safeguard of a supermajoritarian escalator. It therefore comes as a surprise to learn, when one works through the details of Ackerman’s preventive detention regime, that the supermajoritarian escalator would have *no effect whatsoever* on many and probably most preventive detentions. The stated quid pro quo for granting the Executive preventive detention authority is that it is subject to the supermajoritarian escalator. Yet when Ackerman turns to the specifics of his detention authority, he proposes a rigid forty-five- to sixty-day preventive detention period.<sup>124</sup> Outfitting this regime with “an adaptation of the ‘double jeopardy’ principle to block . . . transparent abuse,” he insists that preventive detention will never last longer than two months.<sup>125</sup>

It is likely that the vast majority of preventive detentions will take place in the weeks immediately following a terrorist attack. For those individuals, the supermajoritarian escalator is likely to do no work whatsoever. The initial sixty-percent escalator is not triggered until the emergency has lasted two to three months; the eighty-percent escalator does not kick in until six to seven months have passed. What will lead to the release of most detainees is not the escalator, but the rigid forty-five- to sixty-day time limit that Ackerman would impose.

Thinking through the actual implementation of Ackerman’s proposal reveals a host of structural flaws and internal contradictions. It is possible that these are simply drafting errors, details to be ironed out in committee once the basic outlines of Ackerman’s proposal are accepted. But in my view, they reflect a deeper flaw: the failure to come to terms with why preventive detention is authorized, when it should be permitted, and for what reasons. As this Part has illustrated, the supermajoritarian escalator offers little help in resolving these difficult normative issues. It is to those questions that I now turn.

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123. See Ackerman, *supra* note 11, at 1063-64.

124. See *id.* at 1075.

125. *Id.* at 1074.

### III. MORALITY

At bottom, what is most troubling about Ackerman's proposal is its implicit normative judgment: that it is permissible to lock up human beings without any showing that they are actually dangerous in order to "reassure" the American public in the wake of a terrorist attack. Given the serious deprivation that incarcerating a human being entails, our manifest inability to predict the future, and the history of abusive mass preventive detention campaigns in the past, we should be extremely reluctant to authorize detention in the absence of a threshold showing of dangerousness, and we should insist on prompt procedural protections designed to reduce the likelihood that persons who pose no risk of danger will be detained. Yet in his zeal for the supermajoritarian escalator, Ackerman has advocated up to two months of suspicionless detention, without any opportunity for release as long as the emergency continues. Under Ackerman's emergency powers, an indisputably innocent person detained without any objective basis for suspicion would have no way of obtaining his release, and at best would receive (an undetermined amount of) compensation if the authorities are unable to find some charge within those two months that can stick.

This proposal has three significant normative flaws. First, while preventive detention is undoubtedly warranted under certain circumstances, Ackerman has advanced no good reason for authorizing *suspicionless* preventive detention. To authorize preventive detention without suspicion is in effect to authorize lawlessness, and the offer of compensation if the authorities cannot drum up a criminal or immigration violation after the fact does not cure the infirmity. In essence, Ackerman would authorize arbitrary detention, a clear violation of both American constitutional law and international human rights law. Second, any acceptable scheme of preventive detention must provide for prompt judicial review while the detention is ongoing—yet Ackerman would deny that review until the detention has ended. Here, procedure and substance merge, because in order for preventive detention to be normatively acceptable, it must be subject to meaningful judicial review—that is, review that can free a person who is wrongly detained. Third, while it is difficult to imagine *any* justification for detention without suspicion, it is certainly not justified by Ackerman's claim that detention might "reassure" a public in panic. This essentially therapeutic rationale fails to treat people as ends in themselves, presumptively deserving to be free, and instead treats them as means to the end of reassurance—as objects whose liberty can be taken without regard to any threat they pose. Such a practice violates even Ackerman's own

principles of social justice, advanced in his book *Social Justice in the Liberal State*.<sup>126</sup>

Let me be clear, because Ackerman's response<sup>127</sup> appears to rest on a misunderstanding. My normative or moral claim is not that preventive detention in all forms is unacceptable. Preventive detention has long been a legitimate part of our legal landscape. When justified by sufficiently serious harms and subject to fair judicial review procedures to minimize erroneous deprivations of liberty, there is nothing wrong with preventive detention. Nor is there anything wrong with *reducing* the threshold criteria for suspicion under certain circumstances, where necessary to avert serious harm. My claim is that it is normatively unacceptable to impose preventive detention, as Ackerman's proposal would, (1) without any basis for suspicion, (2) without any meaningful opportunity for release of wrongfully detained persons, and (3) for the purpose of "reassuring" a public in panic.

#### A. *The Necessity for Suspicion*

Preventive detention implies that there is something to prevent. It is normatively and constitutionally acceptable only where there is reason to believe that an individual left free poses some serious danger. In wartime, for example, one army can detain the other's soldiers as prisoners of war on the ground that an enemy soldier by definition poses a danger to one's own troops.<sup>128</sup> In the criminal and immigration settings, preventive detention is warranted where there is reason to believe that a charged individual will either abscond or do harm to the community while awaiting resolution of the charges against him.<sup>129</sup> And civil commitment is justified only on a strong showing of both dangerousness and a mental defect rendering the detainee incapable of controlling his dangerous conduct.<sup>130</sup> In each setting, the sine qua non for preventive detention is objective evidence establishing that the individual to be detained poses a risk that warrants preventing.

Ackerman would do away with this definitional requirement of objective suspicion. But if detention is not justified by objective grounds to suspect that the individual to be detained poses a danger, it literally serves no "preventive" purpose. It would be one thing to contend that in an emergency, the standard for suspicion ought to be reduced—say, from probable cause to reasonable suspicion, or by permitting the government to

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126. ACKERMAN, *supra* note 19.

127. Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004).

128. *Cf.* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

129. *See, e.g.*, *Demore v. Hyung Joon Kim*, 123 S. Ct. 1708, 1719-22 (2003); *United States v. Salerno*, 481 U.S. 739, 748-49 (1987).

130. *See, e.g.*, *Kansas v. Crane*, 534 U.S. 407, 412-13 (2002); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

establish a risk of danger by a preponderance of the evidence rather than by clear and convincing evidence. The stakes in an emergency may well justify temporary detention on a less stringent showing of dangerousness than would be required during normal times. But to dispense altogether with the threshold requirement of suspicion makes no sense.

Where people are detained without any objective basis for suspicion, the possibility that their detention will serve the national security is no more than random, as the Palmer Raids, the Japanese internment, and the post-September 11 detentions dramatically illustrated.<sup>131</sup> Indeed, eliminating the requirement of objectively reasonable suspicion is more likely to hinder than to further security. History suggests that when government officials are freed of the obligation to offer objective evidence of suspicion, they are likely to resort to crude stereotypes. Even where there may be some rational basis for the stereotype, as in the supposition that al Qaeda is likely to consist predominantly of Arab and Muslim men, such profiling is, in most cases, vastly overbroad, and inevitably incurs resentment in the targeted group. That resentment in turn reduces the likelihood that members of the targeted group will cooperate in helping to locate the truly bad actors, while fueling recruits to the cause against us.<sup>132</sup> The Justice Department's targeting of Arabs and Muslims in the wake of September 11 has identified few terrorists, but it has alienated large segments of the Arab and Muslim communities, both here and abroad.<sup>133</sup> Thus, suspicionless preventive detention has no more than a random chance of furthering security, and poses a significant likelihood of actually undermining security.

Current doctrine accords with these sentiments: Constitutional and international law both reject suspicionless preventive detention. The U.S. Supreme Court has upheld preventive detention in only very limited circumstances, starting from the proposition that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment’s Due Process] Clause protects.”<sup>134</sup> The Court has upheld preventive detention *only* where an individual (1) is either in criminal or immigration proceedings and has been shown to be a danger to the community or a flight risk,<sup>135</sup> (2) is dangerous because of a “harm-threatening mental illness” that impairs his ability to control himself,<sup>136</sup> or

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131. See *supra* text accompanying notes 1-10.

132. See COLE, *supra* note 2, at 47-56.

133. *Id.* at 189-97.

134. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); see also *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997); *Foucha*, 504 U.S. at 80; *Salerno*, 481 U.S. at 746.

135. See, e.g., *Zadvydas*, 533 U.S. at 688 (citing 8 U.S.C. § 1231(a)(6) (1994)); see also *Salerno*, 481 U.S. at 752-53; *Carlson v. Landon*, 342 U.S. 524, 541-42 (1952).

136. *Zadvydas*, 533 U.S. at 690; see also *Kansas v. Crane*, 534 U.S. 407, 412-13 (2002); *Hendricks*, 521 U.S. at 357.

(3) is an enemy alien during a declared war.<sup>137</sup> The first two situations require a showing of objectively based suspicion of dangerousness. The third is more problematic. Detention of “enemy aliens” rests on a categorical presumption that in wartime, citizens of the state with which we are at war are, for that reason alone, potential risks—an assumption that the Japanese internment experience calls into serious question. In all of these settings, however, the justification for detention turns on the potential danger posed by the individual to be detained.

In 2003, the Supreme Court upheld categorical preventive detention of so-called “criminal aliens”—foreign nationals charged with being deportable for having been convicted of specified “aggravated felon[ies].”<sup>138</sup> Pointing to findings that foreign nationals in this category often fail to show up for their hearings and commit further crimes, the majority in *Demore v. Kim* reasoned that Congress could make a broad determination that all persons falling into this category posed a sufficient risk of flight or danger to the community to justify a limited period of preventive detention.<sup>139</sup> But while the *Demore* majority dispensed with the requirement of *individualized* risk assessments, it did so only on objective evidence that a specifically defined category of offenders posed risks of flight and danger. And the Court stressed that the mandatory detention statute permits individuals who claim they do not fall within the legislatively defined category an immediate hearing to assert that claim.<sup>140</sup> Ackerman’s proposal is based on no finding of categorical risk and provides no prompt review for those wrongly detained.

Ackerman might contend that the “reassurance rationale” in a time of emergency constitutes a new “special and narrow circumstance” warranting preventive detention in emergencies. But the Supreme Court’s treatment of

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137. *Ludecke v. Watkins*, 335 U.S. 160, 171-73 (1948) (upholding the Alien Enemy Act of 1798, 50 U.S.C. §§ 21-24 (2000), which allows suspicionless detention of “alien enemies” during a declared war).

The government may also impose preventive detention where an individual has testimony material to a criminal proceeding and is likely to abscond if served with a subpoena. 18 U.S.C. § 3144. The Supreme Court has never opined on the constitutionality of that power, but lower courts have generally upheld it, including courts in the aftermath of September 11. *See, e.g.*, *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003); *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971); *In re Application of the U.S. for a Material Witness Warrant, Pursuant to 18 U.S.C. § 3144, for John Doe*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002). Material witness detention requires an individualized showing to a court that the detainee poses a risk of flight necessitating detention. 18 U.S.C. § 3144.

138. *Demore v. Hyung Joon Kim*, 123 S. Ct. 1708, 1712 n.1 (2003) (quoting 8 U.S.C. § 1227(a)(2)(A)(iii)).

139. *Id.* at 1714-16, 1720-21. In my view, *Demore* is wrongly decided; preventive detention should always require an *individualized* showing of flight risk or danger to the community. If an individual poses no danger or flight risk, there is literally nothing to prevent, and detention would be arbitrary. *See id.* at 1731-33 (Souter, J., dissenting); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1007 (2002).

140. *Demore*, 123 S. Ct. at 1712 & n.3 (discussing the so-called *Joseph* hearing).

civil commitment suggests that it would not countenance such a general rationale. In *Kansas v. Crane*, the Court warned that civil commitment must not “become a ‘mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment.”<sup>141</sup> If general deterrence is an impermissible justification for civil detention, the equally general “reassurance rationale” also ought to be off the table—not because it is a function of the criminal law, but because it is arbitrary to incarcerate individuals who have done nothing wrong and pose no danger, simply to “reassure” others.

Other nations also reject suspicionless preventive detention, even in response to terrorism. Israel, for example, which for years has confronted the frequent terrorist attacks that Ackerman posits we might face in the future, does not permit preventive detention without an objective basis for suspicion. As Israel’s High Court of Justice recently ruled, even in the occupied territories in the context of an antiterrorist military campaign, preventive detention “demands that the detaining authority possess an evidentiary basis sufficient to establish suspicion against the individual detainee.”<sup>142</sup> It noted that arbitrary detention is a violation of both Israeli and international law, and that “[d]etentions that are not based upon the suspicion that the detainee endangers, or may be a danger to, public peace and security, are arbitrary.”<sup>143</sup> Israel’s Supreme Court has also ruled that detainees who do not pose a security risk may not be held as “bargaining chips” for negotiation with a terrorist group, further confirming the necessity for a showing of dangerousness.<sup>144</sup>

The United Kingdom, also a victim of a long line of terrorist attacks, authorizes warrantless arrests, but only of a person whom the “constable . . . reasonably suspects to be a terrorist.”<sup>145</sup> Canada permits preventive detention of citizens only on suspicion that the detainee would commit a terrorist act, and of permanent residents only on certification that

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141. 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)). Similarly, in *Foucha v. Louisiana* the Court invalidated a Louisiana statute that authorized civil commitment on a finding of dangerousness without any finding of mental illness, stressing that “our present system . . . with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.” 504 U.S. 71, 83 (1992).

142. H.C. 3239/02, *Marab v. IDF Commander in the W. Bank*, 57(2) P.D. 349, 364.

143. *Id.* at 366; *see also id.* at 366-67 (“The circumstances of his detention must be such that they raise the suspicion that he—he individually and no one else—presents a danger to security.”).

144. Cr.A. 7048/97, *Anonymous v. Minister of Def.*, 54(1) P.D. 721, 743; *see also Emanuel Gross, Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right To Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT’L & COMP. L. 721 (2001).

145. Terrorism Act, 2000, c. 11, § 41.

there are “reasonable grounds to believe [he or she] is a danger to national security.”<sup>146</sup>

International law categorically prohibits “arbitrary detention,”<sup>147</sup> and detention without suspicion is the very definition of arbitrary. The Council of Europe has provided that “[a] person suspected of terrorist activities may only be arrested if there are reasonable suspicions.”<sup>148</sup> This principle holds even in emergencies, and the U.N. Human Rights Committee, interpreting the International Covenant on Civil and Political Rights, has stated that “arbitrary deprivations of liberty” violate a peremptory, nonderogable norm of international law, and therefore are *never* justified, even in times of emergency.<sup>149</sup> Taken together, these authorities suggest a uniform consensus that detention without any basis for suspicion is unjustifiable, even in response to terrorism, and even in times of emergency. Ackerman’s proposal to amend the world’s constitutions would require revising this fundamental international norm.

To maintain that suspicionless preventive detention is not normatively acceptable is not to be an “absolutist” who contends that “[n]o matter how large the event, no matter how great the ensuing panic, we must insist on the strict protection of all rights all the time.”<sup>150</sup> That caricature of civil libertarians, found at the beginning of Ackerman’s essay, is a straw man. I have heard no one since September 11 argue that “we must insist on the strict protection of all rights all the time,” even if it means “governmental paralysis.”<sup>151</sup> Very few individual liberties are absolute; virtually all require some sort of balancing and permit infringement where sufficiently important government interests are advanced. Thus, under constitutional

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146. Immigration and Refugee Protection Act, ch. 27, § 82(1), 2001 [II] S.C. at 37.

147. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 9, para. 1, S. EXEC. DOC. E, 95-2, at 26 (1978), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) (“No one shall be subjected to arbitrary arrest or detention.”). Article 5 of the European Convention on Human Rights also prohibits arbitrary detention. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953). And Article 7 of the American Convention on Human Rights prohibits “arbitrary arrest” and requires prompt judicial review for “any person detained.” American Convention on Human Rights, *opened for signature*, Nov. 22, 1969, art. 7, paras. 3, 5-6, 1144 U.N.T.S. 123, 147; *see also* NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE* 379 (2002) (“Detention is arbitrary if it is ordered without an objective assessment of its necessity.”); *id.* at 380 (“If there are no criteria, express or implied, which govern the exercise of a discretion, detention resulting from the exercise of such discretion is arbitrary.”).

148. COMMITTEE OF MINISTERS, COUNCIL OF EUROPE, *GUIDELINES ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM* art. VII(1) (2002), [http://www.coe.int/T/E/Human\\_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf).

149. U.N. GAOR Human Rights Comm., General Comment No. 29, 56th Sess., Supp. No. 40, para. 11, U.N. Doc. A/56/40 (2001); *see also* International Covenant on Civil and Political Rights, *supra* note 147.

150. Ackerman, *supra* note 11, at 1030.

151. *Id.*

doctrine, the protection for speech gives way when advocacy is intended and likely to produce imminent lawless action,<sup>152</sup> the right of political association gives way when a member specifically intends to further the unlawful activities of the group,<sup>153</sup> and the writ of habeas corpus may be suspended when “in Cases of Rebellion or Invasion the public Safety may require it.”<sup>154</sup> Privacy must give way to “[r]easonable” searches and seizures,<sup>155</sup> and the process due when the state deprives one of life, liberty, or property turns on a balancing of individual interests, the risk of erroneous deprivation of such interests through procedures used, and government interests.<sup>156</sup> Even racial discrimination may be justified if narrowly tailored to further compelling state interests.<sup>157</sup> Each of these core constitutional rights, including the right to physical liberty, acknowledges circumstances in which infringements are justified in the name of compelling government interests. Emergencies may well justify striking the balance differently than in ordinary times. *Reducing* the threshold required for preventive detention in emergencies may sometimes be warranted, but *eliminating* the requirement of suspicion altogether would violate core principles of constitutional and international law.

#### B. *The Necessity of Judicial Review*

The second flaw in Ackerman’s preventive detention scheme is procedural—the deferral of any judicial review of the legality of detention until after the detention has been completed. But here process and substance are joined: Any acceptable system of domestic preventive detention must allow the detainee to seek judicial review while he is detained, at least absent the sort of extreme emergency envisioned by the Suspension Clause. The failure to provide prompt judicial review, moreover, would be a fatal flaw even if Ackerman were to impose some objective threshold of suspicion as a substantive matter, because without judicial review, any such substantive standard would be unenforceable.

Ackerman admittedly would only defer, not eliminate, judicial review. Under his proposal, the courts would eventually review the legality of

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152. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

153. See *United States v. Robel*, 389 U.S. 258 (1967) (prohibiting guilt based on association except where the government proves specific intent to further illegal ends of the group); *Scales v. United States*, 367 U.S. 203 (1961) (noting the constitutional prohibition on guilt by association, but upholding a conviction where the government proved specific intent to further the illegal ends of a group).

154. U.S. CONST. art. I, § 9, cl. 2.

155. *Id.* amend. IV.

156. See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

157. See *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (holding that affirmative action based on express consideration of race satisfies strict scrutiny under certain conditions).



detention, *after* the detention period of up to two months had been completed. But because the loss of liberty is irreparable,<sup>158</sup> to defer judicial review until the detention is concluded is to deny a meaningful remedy at a meaningful time. And as noted above, because Ackerman's preventive detention authority would not require any objective basis of suspicion for detention in the first place, it is unclear what post hoc judicial review would accomplish.

Deferring judicial review until after the detention has been completed runs counter to constitutional and international law. Where the U.S. Supreme Court has upheld preventive detention, it has consistently emphasized the critical importance of a prompt adversarial hearing on whether the conditions warranting detention are present.

In the civil commitment and criminal bail settings, the Court has made clear that the process due when the state deprives a person of his liberty includes prompt judicial review. Thus, in *United States v. Salerno*, the Court found that the Bail Reform Act satisfied substantive due process because detention without bail required both a showing of probable cause for arrest for "a specific category of extremely serious offenses," and *also* required clear and convincing evidence, established in a "full-blown adversary hearing," that "no conditions of release can reasonably assure the safety of the community or any person."<sup>159</sup> Procedural due process was satisfied only because of extensive safeguards, including the defendant's rights to counsel, to testify, to proffer evidence, and to cross-examine witnesses; the government's obligation to prove dangerousness by clear and convincing evidence; and the obligation that an independent judge guided by "statutorily enumerated factors" issue a written decision subject to "immediate appellate review."<sup>160</sup> In its recent decision upholding preventive detention of "criminal aliens" in the immigration setting, the Court again stressed the availability of a prompt hearing for any person who claimed he or she did not fall within the category subject to detention.<sup>161</sup> Thus, without prompt judicial review, preventive detention violates both substantive and procedural due process.

The fundamental importance of judicial review to any lawful system of preventive detention, like the requirement of objective grounds for suspicion, is widely acknowledged by other nations and international law as well. The European Court of Human Rights has ruled that the United Kingdom violated the European Convention on Human Rights when it

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158. See *Martin v. Young*, 134 F. Supp. 204, 209 (N.D. Cal. 1955) ("That such a loss of liberty is irreparable is so clear as to require no further statement.").

159. 481 U.S. 739, 750 (1987).

160. *Id.* at 751-52.

161. *Demore v. Hyung Joon Kim*, 123 S. Ct. 1708, 1712 & n.3 (2003).

failed to bring detainees before a judge for four days and six hours.<sup>162</sup> The U.N. General Assembly in 1988 ratified the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, which provides that “a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.”<sup>163</sup> The U.N. Human Rights Committee has interpreted this to bar delays beyond “a few days.”<sup>164</sup> Both the Human Rights Committee and the Inter-American Court of Human Rights have provided that the right to challenge the legality of detention promptly is nonderogable, even in emergencies.<sup>165</sup> As Israel’s High Court of Justice has stated, noting these international precedents, “Judicial review is the line of defense for liberty, and it must be preserved beyond all else.”<sup>166</sup>

Canada requires those arrested on suspicion of terrorism to be brought before a judge within twenty-four hours.<sup>167</sup> The United Kingdom requires that such suspects be brought before a judge within forty-eight hours.<sup>168</sup> Israel’s High Court recently held that detaining individuals without judicial review for twelve days violates basic principles of Israeli and international law.<sup>169</sup> And the U.S. Supreme Court has interpreted the Constitution to require those arrested without a warrant to be brought before a judge for a

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162. *Brogan v. United Kingdom*, 145-B Eur. Ct. H.R. (ser. A) (1988); *see also Koster v. Netherlands*, 221 Eur. Ct. H.R. (ser. A) (1991); *McGoff v. Sweden*, 83 Eur. Ct. H.R. (ser. A) at 28 (1984); HUMAN RIGHTS LAW AND PRACTICE 121-22 (Lord Lester of Herne Hill & David Pannick eds., 1999); NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 340 (2d ed. 1999) (arguing that “general international law” requires prompt judicial review of detention).

163. *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43d Sess., 76th plen. mtg., Supp. No. 49, princ. 11.1, at 298, U.N. Doc. A/43/49 (1988).

164. *Report of the Human Rights Committee*, U.N. GAOR Human Rights Comm., 37th Sess., Supp. No. 40, at 95, U.N. Doc. A/37/40 (1982). In *Kalenga v. Zambia*, U.N. GAOR, Hum. Rts. Comm., Communication No. 326/1988 (July 27, 1993), U.N. Doc. CCPR/C/48/D/326/1988 (1993), the U.N. Human Rights Committee ruled that Zambia violated Article 9 of the International Covenant on Civil and Political Rights when it held a person for almost one month without informing him of the charges against him or bringing him promptly before a judge. Yet Ackerman would routinely allow individuals to be held up to forty-five to sixty days without charges and without any meaningful access to a judge to challenge the legality of the detention and seek release.

165. The Human Rights Committee noted that “[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished [in all emergencies except for in armed conflict].” U.N. GAOR Human Rights Comm., *supra* note 149, para. 16; *see also* INT’L BAR ASS’N’S TASK FORCE ON INT’L TERRORISM, *INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES* 66-69 (2003).

166. H.C. 2320/98, *El-Amla v. IDF Commander in the Judea and Samaria Region*, 52(3) P.D. 346, 350; *see also* H.C. 3239/02, *Marab v. IDF Commander in the W. Bank*, 57(2) P.D. 349, 368-69 (“Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law.”).

167. Criminal Code, R.S.C., ch. C-46, § 83.3 (1985).

168. Terrorism Act, 2000, c. 11, § 41(3).

169. *Marab*, 57(2) P.D. at 368.

prompt probable cause hearing, presumptively within forty-eight hours of arrest.<sup>170</sup>

Critical to any acceptable scheme of preventive detention, in other words, is prompt judicial review to assure that those who are not dangerous are not locked up.<sup>171</sup> As a result, preventive detention authority is arbitrary absent prompt and meaningful judicial review. As the Israeli High Court explained, “Judicial review is not ‘external’ to the detention. It is an inseparable part of the development of the detention itself.”<sup>172</sup> The International Covenant on Civil and Political Rights expressly requires that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention *and order his release* if the detention is not lawful.”<sup>173</sup> Yet Ackerman proposes a scheme under which meaningful judicial review is denied until the preventive detention is complete. Such a scheme is in clear contravention of international and constitutional law.

The problems with Ackerman’s preventive detention proposal are brought into relief by comparing it to another eminent law professor’s recent proposal for emergency powers—Alan Dershowitz’s torture warrant.<sup>174</sup> In his essay, Ackerman joins the chorus of critics who have condemned Dershowitz’s proposal to authorize torture in “ticking time bomb” scenarios through a judicial warrant process.<sup>175</sup> Ackerman argues that torture warrants would legitimate lawlessness.<sup>176</sup> But the problem with Dershowitz’s proposal is not that it is “lawless”; it is fully cloaked in the formalities of the rule of law. He would permit torture only after investigators had made a compelling individualized showing to an independent judge that the person to be tortured has information that would save lives and that torture was the only way to obtain it.<sup>177</sup> Thus,

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170. *County of Riverside v. McLaughlin*, 500 U.S. 44, 45 (1991); *see also* *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975).

171. *See* *United States v. Salerno*, 481 U.S. 739, 751 (1987).

172. *Marab*, 57(2) P.D. at 373.

173. International Covenant on Civil and Political Rights, *supra* note 147, art. 9, para. 4, S. EXEC. DOC. E, 95-2, at 26-27, 999 U.N.T.S. at 176 (emphasis added).

174. ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 142-63 (2002).

175. *See, e.g.*, Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003); John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743 (2002); Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513 (2003); Chanterelle Sung, Book Review, *Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, 23 B.C. THIRD WORLD L.J. 193 (2003) (reviewing DERSHOWITZ, *supra* note 174).

176. Ackerman, *supra* note 11, at 1072-73.

177. DERSHOWITZ, *supra* note 174, at 158-61.

Dershowitz would require objective, individualized evidence subject to independent judicial review applying, in essence, strict scrutiny.

The infirmity in Dershowitz's proposal lies not in its failure to provide for the rule of law, but in the substantive notion that torture can be legitimated if wrapped in sufficient procedure. The fundamental constitutional problem with torture is one of *substantive* due process, not *procedural* due process. Torture violates core norms of human decency and respect, and no amount of procedural protections can justify it.

Preventive detention plainly does not fall into the same category as torture. But *suspicionless* or *arbitrary* detention comes close. As the Human Rights Committee has noted, arbitrary detention, like torture, violates a peremptory norm of international law, meaning that it cannot be justified even in emergencies. Preventive detention is not arbitrary where narrowly circumscribed to meet a sufficiently compelling need. But Ackerman's proposal, which would permit suspicionless detention of innocents while barring any opportunity to seek release, is entirely arbitrary, and even more susceptible to a charge of lawlessness than Dershowitz's.

### C. Therapeutic Detention

Ackerman does not seek to justify preventive detention on the ground that it will make us safer. He argues only that it will make us *feel* safer. That "reassurance rationale," he maintains, is enough to warrant detaining people without individualized suspicion. In my view, placing people behind bars without a basis for suspicion in order to make other people feel better is not a normatively acceptable justification for detention—in emergency or nonemergency times.

Ackerman concedes that the threat terrorists pose to a nation is typically not "existential," but rather a threat to its "effective sovereignty."<sup>178</sup> Even attacks on the previously unthinkable scale of September 11 do not threaten the existence of the United States or its government. Rather, Ackerman maintains, they place the state's "effective sovereignty in doubt" by spreading panic.<sup>179</sup> Such emergencies require not the defense of the existence of the nation, as would an all-out war, but measures that will "reassure" the public that the sovereign is in charge and can respond effectively. Sounding disturbingly like Attorney General Ashcroft himself,

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178. Others have also recognized this feature of terrorist attacks. See, e.g., Oren Gross, *Cutting Down Trees: Law-Making Under the Shadow of Great Calamities*, in *THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL* 39, 40-42 (Ronald J. Daniels et al. eds., 2001); Paddy Hillyard, *In Defence of Civil Liberties*, in *BEYOND SEPTEMBER 11: AN ANTHOLOGY OF DISSENT* 107, 111 (Phil Scraton ed., 2002) ("[W]hile political violence poses a threat to democracy the more important threat comes from the response to it by attacking the very principles on which it is based.").

179. Ackerman, *supra* note 11, at 1037.

Ackerman writes that “government must act visibly and decisively to demonstrate to its terrorized citizens that the breach was only temporary, and that it is taking aggressive action to contain the crisis and to deal with the prospect of its recurrence.”<sup>180</sup>

It is useful to compare the reassurance rationale to the rationale the Framers considered sufficient to warrant suspension of habeas corpus. The Suspension Clause, the Constitution’s only explicit “emergency” provision, permits suspension only “when in Cases of Rebellion or Invasion the public Safety may require it.” On the Framers’ view, habeas corpus was to be suspended only in very specific and threatening situations, and even then only where *necessary to public safety*. In Ackerman’s hands, this provision would effectively be rewritten to permit suspension “when in times of panic the public psyche would be reassured by it.” In my view, this therapeutic rationale is simply not an acceptable moral justification for depriving a person of his liberty. In fact, I doubt that Ackerman himself really believes this to be a normatively acceptable justification—his ambivalence about “innocents” and “error” discussed in Part II above hints at his own misgivings. Yet in his zeal to offer something in exchange for the supermajoritarian escalator, he has advocated just that.

In light of the disastrous precedents of the Palmer and Ashcroft raids and the Japanese internment, it is striking that all Ackerman can say in favor of his preventive detention scheme is that it might “reassure” a panicked public. Nowhere does he claim that preventive detention will *in fact* make us safer. But upon reflection, the absence of any discussion about actual security gains from preventive detention may not be an accident. Where preventive detention is not predicated on any objective evidentiary basis for suspecting that the detainee in fact may be dangerous, it cannot plausibly serve *any* purpose other than the symbolic one that Ackerman identifies.

In his response, Ackerman suggests that my critique may be based on a misunderstanding, because the stated purpose of his preventive detention scheme is “to reassure the public that the situation is under control, and that the state is taking effective short-term actions to prevent a second strike.”<sup>181</sup> Ackerman italicizes the last clause, and contends, for the first time, that “this is a two-prong test,” and that I “entirely ignore[] this second prong.”<sup>182</sup> If Ackerman now suggests that the government would be permitted to employ his scheme only where it could make an affirmative showing that suspicionless preventive detention is an “effective short-term action to prevent a second strike,” I am encouraged. But nowhere in his original

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180. *Id.*

181. Ackerman, *supra* note 127, at 1880 (emphasis and internal quotation marks omitted).

182. *Id.*

essay did he suggest that such a showing would be required, nor does he now suggest to whom or how such a showing would be made. The passage Ackerman quotes from his original essay states only that the purpose is to “reassure the public” that the state is taking effective steps, not to ensure that the steps are *actually* effective. Moreover, if proof of effectiveness were truly an independent predicate to invocation of Ackerman’s scheme, the scheme could *never* be invoked, because a *suspicionless* preventive detention scheme could never satisfy any real test of effectiveness. Some basis for suspicion would seem to be the absolute minimal prerequisite to any truly effective preventive detention scheme, yet it is precisely that requirement that Ackerman proposes to eliminate.

Ackerman’s example of a quarantine, offered in his response as refuting my moral objections to suspicionless preventive detention for reassurance purposes, only proves my point. Ackerman hypothesizes an outbreak of a “new killer virus” with a lengthy latency period, no way to identify it during latency, and the capability of generating an epidemic chain reaction if not immediately contained. He argues that if preventive detention of “the surrounding residents most likely to be infected” would be acceptable under these circumstances—and of course it would be—then my moral objections are undermined.<sup>183</sup> But preventive detention under Ackerman’s hypothetical would be reasonable precisely because it relies on an objective basis for suspicion—proximity to the released virus—and because by hypothesis that is the *only* way to avert a catastrophic harm. Objective suspicion and necessity to avert serious harm are *precisely* what make preventive detention normatively and constitutionally acceptable. Yet Ackerman proposes to do away with any requirement of suspicion, and makes no claim that his scheme is necessary to make us safe, but only that it will provide the psychic benefit of making people feel “reassured.”

Symbols are, of course, important. And the perception of safety is undoubtedly a valuable public good. But incarcerating people without any objective evidence of suspicion simply to make the public feel better can be justified, if at all, only on the crudest utilitarian grounds. That justification would violate Kant’s Categorical Imperative, by condoning official treatment of human beings as means rather than ends in themselves.<sup>184</sup> It would also violate more sophisticated versions of utilitarianism, as John Rawls has shown. In *Two Concepts of Rules*, Rawls rejects the contention

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183. *Id.* at 1881.

184. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS WITH CRITICAL ESSAYS 52 (Robert Paul Wolff ed. & Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785). (“Now, I say, man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. In all his actions, whether they are directed to himself or to other rational beings, he must always be regarded at the same time as an end.”); *id.* at 54 (“The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”).

that a strict utilitarian might favor punishment of an innocent where it is for the greater good of society.<sup>185</sup> He reasons, essentially from a rule-utilitarian perspective, that creating an institution that permitted such punishment (or as Rawls calls it, “telishment”) would have disastrous effects. He asks, “How is one to avoid giving anything short of complete discretion to the authorities to telish anyone they like?”<sup>186</sup> And in such a system, he notes, people would have no basis for knowing whether a detained person had been punished (for committing a crime) or telished (to make the society feel better), and would have to worry about whether they would be the next to be detained. Indeed, he points out, precisely for these reasons, such a system would be unlikely to advance the public good, and thus could not even be justified on utilitarian grounds.<sup>187</sup>

The same critique can be leveled at Ackerman’s system. In order for preventive detention to reassure the public, the public must believe that the government is detaining persons who actually pose a terrorist threat, that is, people as to whom there are objective grounds for suspicion. If the public knows that the legal regime permits detention of *anyone*, regardless of any objective basis of suspicion, then there would be nothing reassuring about the fact that the government had detained a large number of people, as detaining innocents protects nobody, and implicitly threatens all who are innocent with the possibility that they too might be detained.

Indeed, suspicionless preventive detention to reassure the public appears to violate even Ackerman’s own framework for a morally just political order. In *Social Justice in the Liberal State*, Ackerman criticizes utilitarianism along neo-Kantian lines, maintaining that it “conceives each individual as if he were merely an instrument for the greater fulfillment of the idea of happiness that is dominant in the community at a particular time.”<sup>188</sup> Ackerman advocates instead a “neutrality” principle, pursuant to which the state could never “reduc[e] some citizens to powerlessness simply because others find this a pleasing prospect.”<sup>189</sup> Unequal sacrifice, he argues, “is legitimate only if it can fairly be said to enrich the rights of *all* citizens.”<sup>190</sup> Yet it is hard to see how incarcerating innocents without an opportunity for release for up to sixty days in order to make the public feel better does not reduce those detainees to “powerlessness simply because others find this a pleasing prospect.” And this unequal sacrifice clearly could not be said to enrich the rights of “all citizens.”

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185. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

186. *Id.* at 12.

187. *Id.*

188. ACKERMAN, *supra* note 19, at 343.

189. *Id.* at 344.

190. *Id.*; *see also id.* at 313.

In sum, the reassurance rationale fails to meet basic requirements of morality. It holds that an innocent person, who objectively poses no danger to anyone, may be detained for up to two months in order to serve the general needs of reassuring the public and sending a message that the government remains in control. Without more, such general symbolic purposes are an impermissible basis for taking an innocent individual's liberty.

#### CONCLUSION

*The Emergency Constitution* seeks to respond to a real problem—the tendency of emergency powers to last well beyond the emergency itself. Its proposal to condition emergency powers on ever-increasing supermajority approval from the legislature might well succeed in ensuring that states of emergency do not last far beyond the emergency that called them into being. That in itself would be an important contribution to the problem of emergency powers.

But in its effort to solve that problem at the global level, for all the world's constitutions and for all emergencies sparked by terrorist attacks, Ackerman's proposal suffers from its own ambition. It would not provide a solution to most of the threats to civil liberties that the "war on terrorism" entails, because most of the necessary responses to terrorism are not susceptible to strict time limitations. The need for better and more coordinated intelligence, more stringent limits on access to weapons of mass destruction and to potential targets of terrorist attacks, and restrictions on funding of terrorist conspiracies, for example, pose serious challenges to civil liberties, but those challenges cannot be solved by sharply limiting the time period during which such responses could be invoked. Moreover, even where emergency powers are susceptible to time limits, their effects on civil liberties are not, as illustrated by the FBI's extensive political spying in the 1950s and 1960s, justified by a never-invoked preventive detention scheme. Thus, while Ackerman presents his proposal as a universal remedy for all nations and all emergency powers, his proposal does not even begin to address most of the threats to civil liberties that the war on terrorism has raised.

The only specific emergency power Ackerman actually addresses is preventive detention. But here his solution would create more problems than it would solve. His emergency constitution would do little or nothing to remedy the abuses that characterized the preventive detention campaign that followed September 11, in which thousands of people having no connection to terrorism were detained as "suspected terrorists" using immigration law, criminal law, and the laws of war. Far from responding to any of these abuses, Ackerman's proposal would simply add yet another



tool for preventive detention, this one imposing no requirement of suspicion, and expressly barring any opportunity for innocent persons to seek their release. By legitimating preventive detention without requiring any threshold of individualized suspicion, Ackerman's proposal would *encourage* the detention of innocents. Ackerman acknowledges this "cost" but insists that it is warranted in order to reassure a public in panic, and that it can be offset by compensation after the fact. While the threat of future terrorism may well warrant rethinking constitutional structure, detaining innocent human beings to reassure a panicked public is not the sort of "sweeping revision" the world, or the United States, should adopt.