

Essay

The Emergency Constitution

Bruce Ackerman[†]

INTRODUCTION

Terrorist attacks will be a recurring part of our future. The balance of technology has shifted, making it possible for a small band of zealots to wreak devastation where we least expect it—not on a plane next time, but with poison gas in the subway or a biotoxin in the water supply. The attack of September 11 is the prototype for many events that will litter the twenty-first century. We should be looking at it in a diagnostic spirit: What can we learn that will permit us to respond more intelligently the next time around?

If the American reaction is any guide, we urgently require new constitutional concepts to deal with the protection of civil liberties. Otherwise, a downward cycle threatens: After each successful attack, politicians will come up with repressive laws and promise greater security—only to find that a different terrorist band manages to strike a few years later.¹ This disaster, in turn, will create a demand for even more

[†] Sterling Professor of Law and Political Science, Yale University. I presented earlier versions of this Essay at the Cardozo Conference on Emergency Powers and Constitutions and the Yale Global Constitutionalism Seminar. I am much indebted to the comments of Stephen Holmes and Carlos Rosenkrantz on the former occasion, and to a variety of constitutional court judges who participated in the latter event. Ian Ayres, Jack Balkin, Yochai Benkler, Paul Gewirtz, Dieter Grimm, Michael Levine, Daniel Markovits, Robert Post, Susan Rose-Ackerman, Jed Rubenfeld, and Kim Scheppelle also provided probing critiques of previous drafts. Thanks finally to a fabulous group of Yale law students for research assistance: Lindsay Barenz, Ivana Cingel, Inayat Delawala, David Gamage, Markus Gehring, Anand Kandaswamy, Thomas Pulham, and Amy Sepinwall.

1. There has been a vast outpouring of work analyzing the USA PATRIOT Act and the unilateral actions undertaken by President Bush and Attorney General John Ashcroft after September 11. For a representative sampling and further citations, see DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF*

repressive laws, and on and on. Even if the next half-century sees only four or five attacks on the scale of September 11, this destructive cycle will prove devastating to civil liberties by 2050.

It is tempting to respond to this grim prospect with an absolutist defense of traditional freedom: No 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. I respect this view but do not share it. No democratic government can maintain popular support without acting effectively to calm panic and to prevent a second terrorist strike. If respect for civil liberties requires governmental paralysis, serious politicians will not hesitate before sacrificing rights to the war against terrorism. They will only gain popular applause by brushing civil libertarian objections aside as quixotic.

To avoid a repeated cycle of repression, defenders of freedom must consider a more hard-headed doctrine—one that allows short-term emergency measures but draws the line against permanent restrictions. Above all else, we must prevent politicians from exploiting momentary panic to impose long-lasting limitations on liberty. Designing a constitutional regime for a limited state of emergency is a tricky business. Unless careful precautions are taken, emergency measures have a habit of continuing well beyond their time of necessity. Governments should not be permitted to run wild even during the emergency; many extreme measures should remain off limits. Nevertheless, the self-conscious design of an emergency regime may well be the best available defense against a panic-driven cycle of permanent destruction.

This is a challenge confronting all liberal democracies, and we should not allow American particularities to divert attention from the general features of our problem in institutional design. Nevertheless, the distinctive character of the U.S. Constitution does create special problems, which I discuss separately when the need arises. My argument proceeds in two stages: The first is diagnostic, the second prescriptive. The exercise in diagnosis involves a critical survey of the conceptual resources provided by the Western legal tradition: Are our basic concepts adequate for dealing with the distinctive features of terrorist strikes? Part I suggests that we cannot deal with our problem adequately within the frameworks provided by the law of war or the law of crime. This negative conclusion clears the

NATIONAL SECURITY 147-87 (2d ed. 2002); STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11* (2002); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002); Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375 (2002); and Kim Lane Scheppele, *Law in a Time of Emergency: Terrorism and States of Exception*, 6 U. PA. J. CONST. L. (forthcoming 2004). My Essay does not aim to contribute to this burgeoning literature. Instead, I hope to consider how further cycles of repression may be avoided.

conceptual path for another way to confront the problem: the “state of emergency.” The paradigm case for emergency powers has been an imminent threat to the very existence of the state, which necessitates empowering the Executive to take extraordinary measures.

Part II urges a critical reassessment of this traditional understanding: September 11 and its successors will not pose such a grave existential threat, but major acts of terrorism can induce short-term panic. It should be the purpose of a newly fashioned emergency regime 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. This reassurance rationale, as I call it, requires a sweeping revision of the emergency power provisions currently found in many of the world’s constitutions.

But it requires something more: a reconsideration of the self-confident American belief that we are better off without an elaborate set of emergency provisions in our own Constitution, and that we should rely principally on judges to control our panic-driven responses to crises. Part III takes up this common law prejudice, and suggests why it will no longer serve us well under the conditions likely to prevail in the twenty-first century.

This is the point at which cultural diagnosis gives way to constitutional prescription. If I am right that the threat of terrorism cannot be cabined within the traditional categories of war and crime, that we cannot rely on judges to manage the panic-reactions likely to arise, and that existing constitutional provisions do not focus on the reassurance rationale, we have our work set out for us. What should a proper emergency constitution look like?

I offer a three-dimensional approach. The first and most fundamental dimension focuses on an innovative system of political checks and balances, with Parts IV and V describing constitutional mechanisms that enable effective short-run responses without allowing states of emergency to become permanent fixtures. The second dimension—Part VI—integrates economic incentives and compensation payments into the system. Finally, Part VII moves from political economy to the legal realm—proposing a framework that permits courts to intervene effectively to restrain predictable abuses without viewing judges as miraculous saviors of our threatened heritage of freedom.

Part VIII confronts some American political realities. Something like my design may prove attractive in countries that already possess elaborate emergency provisions. Given the formidable obstacle course presented by Article V of the U.S. Constitution, my proposal is a nonstarter as a formal amendment. Nevertheless much of the design could be introduced as a “framework statute” within the terms of the existing Constitution. Congress took a first step in this direction in the 1970s when it passed the National

Emergencies Act.² But the experience under this Act demonstrates the need for radical revision. The next few years may well create a political opening for serious consideration of a new framework statute, especially if the Supreme Court acts wisely in some great cases coming up for decision in the next year or two.

We shall see.

I. BETWEEN WAR AND CRIME

Our legal tradition provides us with two fundamental concepts—war and crime—to deal with our present predicament. Neither fits.

A. *War?*

The “war on terrorism” has paid enormous political dividends for President Bush, but that does not make it a compelling legal concept. War is traditionally defined as a state of belligerency between sovereigns. The wars with Afghanistan and Iraq were wars; the struggle against Osama bin Laden and al Qaeda is not.³ The selective adaptation of doctrines dealing with war predictably leads to sweeping incursions on fundamental liberties. It is one thing for President Roosevelt to designate a captured American citizen serving in the German army as an “enemy combatant” and try him without standard scrutiny by the civilian courts;⁴ it is quite another for President Bush to do the same thing for suspected members of al Qaeda.⁵

2. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651 (2000)); *see also infra* Section VIII.A (discussing two exemplary framework statutes of the twentieth century).

3. Traditional definitions hold that a state of warfare exists when “states through the medium of their armed forces, such forces being under a regular command, wearing uniform or such other identifiable marks as to make them recognisable at a distance . . . conduct[] their hostilities in accordance with the international rules of armed conflict.” L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 54-55 (2d ed. 2000). For the evolution of the laws of war, see *THE LAWS OF WAR* (W. Michael Reisman & Chris T. Antoniou eds., 1994); and *LAWS OF WAR AND INTERNATIONAL LAW* (René van der Wolf & Willem-Jan van der Wolf eds., 2002). The ongoing crisis of definition posed by the existence of guerrilla and terrorist groups is the subject of much recent scholarship. *See* BRUCE HOFFMAN, *INSIDE TERRORISM* 13-44 (1998) (finding that a definitional difficulty arises from confusion over the meaning of “terrorism”); *cf.* LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 164 (2002) (noting the uncertainty over the status in international law of internal armed opposition groups).

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

5. The most notorious example of presidential unilateralism involves the decision to place Jose Padilla, the alleged “dirty bomber,” under indefinite detention in a Navy brig. *See Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *aff’g in part, rev’g in part, Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *cert. granted*, No. 03-1027, 2004 WL 95802 (U.S. Feb. 20, 2004); *see also* Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen “Enemy Combatants,”* 112 *YALE L.J.* 961 (2003) (outlining the background of *Padilla* and the legal issues at stake); *infra*

The difference is obvious and fundamental: Only a very small percentage of the human race is composed of recognized members of the German military, but anybody can be suspected of complicity with al Qaeda. This means that all of us are, in principle, subject to executive detention once we treat the “war on terrorism” as if it were the legal equivalent of the war against Germany.

War between sovereign states also comes to an end; some decisive act of capitulation, armistice, or treaty takes place for all the world to see. But this will not happen in the war against terrorism. Even if bin Laden is caught, tried, and convicted, it will not be clear whether al Qaeda has survived. Even if this network disintegrates, it will likely morph into other terrorist groups. Al Qaeda is already collaborating with Hezbollah,⁶ for example, and how will anybody determine where one group ends and the other begins? There are more than six billion people in the world—more than enough to supply terrorist networks with haters, even if the West does nothing to stir the pot. So if we choose to call this a war, it will be endless. This means that we not only subject *everybody* to the risk of detention by the Commander in Chief, but we subject everybody to the risk of *endless* detention.⁷

If the President is allowed to punish, as well as to detain, the logic of war-talk leads to the creation of a full-blown alternative system of criminal justice for terrorism suspects. This system is already emerging in the military, and we are beginning to argue about the way it should be constructed: How little evidence suffices to justify how much detention?

notes 131-132 and accompanying text. Although the Second Circuit recently ruled for Padilla, *see infra* note 7, the Supreme Court will have the final word on this case.

6. *See* Dana Priest & Douglas Farah, *Terror Alliance Has U.S. Worried*, WASH. POST, June 30, 2002, at A1; Susan Schmidt & Douglas Farah, *Al Qaeda's New Leaders*, WASH. POST, Oct. 29, 2002, at A1.

7. In an important opinion, the Second Circuit recently offered the most significant judicial resistance yet to presidential pretensions to extraordinary powers in the “war” against terrorism. It denied that the President’s position as Commander in Chief enabled him, without explicit statutory authorization, to sweep American citizens into military prison for indefinite detention simply by declaring them “enemy combatants.” *See Padilla*, 352 F.3d 695. Perhaps to compensate for this strong holding, the court’s opinion is full of extravagant dicta that seek to conciliate the President to his defeat. In particular: “We . . . agree that whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts.” *Id.* at 712 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950)). But *Eisentrager* involved the status of enemy aliens overseas who were engaged in the service of a government at war with the United States. It is a big stretch to use *Eisentrager* as the source of a political question doctrine in support of presidential power to declare that citizens living in America are “enemy combatants” even though they are not in the service of any hostile government. The power of the Executive to expand the category of war to include such groups as al Qaeda is much too important a question to be treated in such casual dicta. It should be deferred for critical consideration until such time as it is squarely raised by the facts of a real case.

Can detainees ever get in touch with civilian lawyers? Can these lawyers ever scrutinize the evidence, or must it remain secret?⁸

These are important questions, but it is even more important to challenge the war-talk that makes the entire enterprise seem plausible.⁹ The only legal language presently available for making this critique—the language of the criminal law—is not entirely persuasive. But it is powerful.

B. *Crime?*

For the criminal law purist, the “war on terrorism” is merely a metaphor without decisive legal significance, more like the “war on drugs” or the “war on crime” than the war against Nazi Germany. Al Qaeda is a dangerous conspiracy, but so is the Mafia, whose activities lead to the deaths of thousands through drug overdoses and gangland murders. Conspiracy is a serious crime, and crime fighters have special tools to deal with it.¹⁰ But nobody supposes that casual talk of a “war on crime” permits us to sweep away the entire panoply of criminal protections built up over the centuries. Why is the “war on terrorism” any different?

Recall too the experience of the Cold War. There was pervasive talk of a Communist conspiracy—and in contrast to al Qaeda, the shadowy cells of grim-faced plotters were supported by a great superpower commanding massive armies with nuclear weapons. American presidents also had substantial evidence of links between domestic Communist cells and the Soviet GRU, which was a military organization.¹¹ For decades, we were

8. The American Bar Association’s Task Force on Terrorism and the Law has issued a report on the military commissions proposed by the Bush Administration. Although the Task Force supports the President’s general authority, it recommends against using the tribunals without the explicit authorization of Congress to prosecute people who are in the United States legally. It also argues that the United States, as a signatory to the U.N. International Covenant on Civil and Political Rights, should abide by its obligations under Article 14 to ensure that the tribunals are generally open to the public and to the media, that the trials are not unnecessarily delayed, and that prisoners have the right to obtain habeas corpus relief from a U.S. court. *See* ABA TASK FORCE ON TERRORISM & THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS 16-17 (2002).

9. For further cautions about the abuse of the war metaphor, see PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 19-36 (2003).

10. For a thoughtful reappraisal of conspiracy law, see Neal Kumar Katyal, *Conspiracy Theory*, 112 *YALE L.J.* 1307 (2003). For a critical assessment of statutory enhancements to the armory of prosecutorial tools against conspirators, see Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 1-2), 87 *COLUM. L. REV.* 661 (1987).

11. Throughout much of the Cold War, there were two main Soviet intelligence-gathering operations. One was the KGB and its many predecessor organizations. The other was the GRU, the Chief Directorate for Intelligence of the Red Army’s General Staff. GRU officers interacted with members of the Comintern, which supervised the Communist Party of the United States, and also supervised Communist Party agents within the U.S. government. *See* VENONA: SOVIET ESPIONAGE AND THE AMERICAN RESPONSE, 1939-1957, at viii-ix (Robert Louis Benson & Michael Warner eds., 1996). For a historical account of the GRU’s early activities in the United States, see DAVID J. DALLIN, *SOVIET ESPIONAGE* 402-13 (1955).

only minutes away from an incident that could lead to nuclear holocaust. From a legal point of view, domestic Communist cells were virtually front-line troops in something very close to a classic war between sovereign states.

Yet no president ever suspended the normal operation of the criminal law by calling domestic Communists “enemy combatants.”¹² The Communist conspiracy was treated as a Communist *conspiracy*; the accused were provided all the traditional protections of the criminal law. If Cold War anxieties did not overwhelm us, why should war-talk justify extraordinary military measures against small bands of terrorists who cannot rely on the massive assistance of an aggressive superpower?

These are powerful questions that provide a crucial context for questioning the remarkable success of the present administration in persuading the public that wartime emergency measures are appropriate responses to our present predicaments.¹³ Richard Hofstadter warned Americans long ago that they were peculiarly vulnerable to the paranoid style of political leadership.¹⁴ We are succumbing yet again.¹⁵

Despite the excessive rhetoric and repressive practices, there is one distinctive feature of our present situation that distinguishes it from the scares of the past. Begin with the criminal law purist’s normative benchmarks: the traditional legal response to the Mafia and other wide-ranging conspiracies. The purist rightfully emphasizes that the criminal law has managed to contain antisocial organizations within tolerable limits without the need for arbitrary police-state measures. Nonetheless, the reassurance such analogies offer is distinctly limited.

Even the most successful organized crime operations lack the overweening pretensions of the most humble terrorist cell. Mafiosi are generally content to allow government officials to flaunt their symbols of legitimacy so long as gangsters control the underworld. Whatever else is

12. This presidential restraint is especially noteworthy since statutory authority could have been stretched to support such actions. See Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II, §§ 102-103, 64 Stat. 1019, 1021 (repealed 1971) (authorizing the detention, during an “Internal Security Emergency,” of persons for whom there was a “reasonable ground” to believe that they would “probably” commit, or conspire to commit, espionage or sabotage). The repeal of these provisions makes it far more difficult to sustain President Bush’s actions to detain American citizens as “enemy combatants,” especially in light of the Code provision accompanying the repeal. See 18 U.S.C. § 4001(a) (2000); see also *infra* notes 130-131 and accompanying text.

13. For a probing critique along these lines, see David Luban, *The War on Terrorism and the End of Human Rights*, PHIL. & PUB. POL’Y Q., Summer 2002, at 9. On the potential for strategic manipulation of the categories of war and crime, see Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457 (2002).

14. RICHARD HOFSTADTER, *The Paranoid Style in American Politics*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 3 (1965).

15. For a historical account of civil liberties crises in the Republic, see Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 23 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

happening in Palermo, the mayor's office is occupied by the duly elected representative of the Italian Republic. But the point of a terrorist bomb is to launch a distinctly political challenge to the government. The deaths caused by terrorists may be smaller in number than those caused by the drug-dealing Mafia. Nevertheless, terrorists' challenge to political authority is greater. The only way to meet this challenge is for the government to demonstrate to its terrified citizens that it is taking steps to act decisively against the blatant assault on its sovereign authority.

The political dimension of the terrorist threat makes the lessons from the McCarthy era more relevant, but once again there is a difference. For all the McCarthyite talk of the Red Menace, the danger remained abstract to ordinary people. While the Cuban Missile Crisis brought us to the brink of World War III,¹⁶ it did not conclude with an event, like the toppling of the Twin Towers, that dramatized America's incapacity to defend its frontiers.

The risk of nuclear devastation during the Cold War might well have been much larger than the terrorist danger today.¹⁷ But we were lucky, and the threat of nuclear holocaust remained a threat. In contrast, the changing technological balance in favor of terrorists means that events like September 11 will recur at unpredictable intervals, each shattering anew the ordinary citizen's confidence in the government's capacity to fend off catastrophic breaches of national security.¹⁸

Paradoxically, the relative weakness of terrorists compared to the Communist conspiracy only exacerbates the political problems involved in an effective response. If the Cold War threat of nuclear annihilation had been realized, it would have meant the end of civilization as we know it. The survivors would have been obliged to build a legitimate government from the ground up. This will not be true in the new age of terrorism. It may only be a matter of time before a suitcase A-bomb obliterates a major American city, but there will be nothing like a Soviet-style rocket assault leading to the destruction of all major cities simultaneously. Despite the horror, the death, and the pain, American government will survive the day

16. For the classic study, see GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971).

17. See JOHN LEWIS GADDIS, *WE NOW KNOW: RETHINKING COLD WAR HISTORY* 86 (1997) ("Even if this taboo on nuclear use should someday break down—a possibility the proliferation of nuclear technology will make more and more likely over the years—the end of the Cold War has made it most *unlikely* that a global conflagration, of the kind those who lived through the Cold War so greatly feared, would be the result."). Paul Pillar also provides an exceptionally sober assessment of the terrorist threat that punctures many of the hysterical bubbles of the moment. See PAUL R. PILLAR, *TERRORISM AND U.S. FOREIGN POLICY* 22 (2001) ("Given such challenges, development of a CBRN [chemical, biological, radiological, or nuclear] capability to cause mass casualties would require a major, sophisticated program that is well beyond the reach of the great majority of terrorist groups.").

18. For a useful introduction to the social-psychological mechanisms generating mass panic, see Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 *J. RISK & UNCERTAINTY* 121 (2003).

after the tragedy. And it will be obliged to establish—quickly—that it has not been thoroughly demoralized by the lurking terrorist underground.

C. *Reassurance*

So neither of the standard legal rubrics is really adequate. The rhetoric of war does express the shattering affront to national sovereignty left in the aftermath of a successful terrorist attack. But when translated from politics to law, it threatens all of us with indefinite detention without the traditional safeguards developed over centuries of painful struggle. The rubric of the criminal law has proved itself adequate (with ongoing fine-tunings) to protect fundamental rights while handling serious criminal conspiracies, but only within a social context that presupposes broad-ranging confidence in the government's general capacity to discharge its sovereign functions. When this premise is called into question by a successful terrorist attack, a distinctive interest comes into play.

Call it the *reassurance function*: When a terrorist attack places the state's effective sovereignty in doubt, 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. Most importantly, my proposal for an emergency constitution authorizes the government to detain suspects without the criminal law's usual protections of probable cause or even reasonable suspicion. Government may well assert other powers in carrying out the reassurance function, but in developing my argument, I shall be focusing on the grant of extraordinary powers of detention as the paradigm.

My aim is to design a constitutional framework for a temporary state of emergency that enables government to discharge the reassurance function without doing long-term damage to individual rights.

Easier said than done.

II. RE-RATIONALIZING EMERGENCY

Written constitutions typically deal with states of emergency, though sometimes in a rudimentary fashion. Before descending into the details, it is more important to reconsider the fundamental rationale guiding traditional efforts.

Call it the *existential rationale*: It is invoked by the threat of an enemy invasion or a powerful domestic conspiracy aiming to replace the existing regime. The state of emergency enables the government to take extraordinary measures in its life-and-death struggle for survival.

These apocalyptic scenarios suggest great caution in limiting the scope of emergency powers on those occasions—hopefully rare—when they are

legitimately deployed. For example, Article 16 of the French Constitution of the Fifth Republic authorizes the President “[to] take[] the measures required by these circumstances,” and refuses to declare anything off-limits during the struggle for survival.¹⁹

The French solution is undoubtedly extreme, but it cannot be categorically rejected within the horizon framed by the existential rationale. A constitution’s framers cannot know the details of the particular apocalyptic threat endangering the regime before it happens. Given their ignorance, any effort to restrict emergency powers may deprive the government of the very tools it needs to counter the threat to its survival.²⁰ Abraham Lincoln said it best when referring to the suspension of habeas corpus: “[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?”²¹

But Lincoln’s one-liners do not resolve all doubts.²² A grant of carte

19. Article 16 of the French Constitution authorizes the President of the Republic to exercise emergency powers “[w]hen the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and when the proper functioning of the constitutional public powers is interrupted.” CONST. art. 16, *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: FRANCE 6 (Gisbert H. Flanz ed., 2000). The President not only decides whether a particular threat qualifies under the two conditions, but also how long the state of emergency endures. *See* FRANÇOIS SAINT-BONNET, L’ÉTAT D’EXCEPTION 15 (2001); MICHÈLE VOISSET, L’ARTICLE 16 DE LA CONSTITUTION DU 4 OCTOBRE 1958, at 26 (1969). Worse yet, both conditions may be interpreted to authorize presidential powers in situations falling far short of genuine existential threats. For example, the working group of the Ministry of Justice convened to comment on the draft constitution suggested that Article 16 might be invoked to protect against a general strike that effectively endangered “la vie de la nation.” VOISSET, *supra*, at 22 (citing official records of the constitutional deliberations). Similarly, Article 16 does not envision the total incapacitation of governmental operations, but only their partial disruption. This is implied, for example, by a textual provision permitting Parliament to convene and remain permanently in session during the period of the emergency—a condition inconsistent with total paralysis. *See* CONST. art. 16; *see also* VOISSET, *supra*, at 31-32 (citing Jean Lamarque, *La Théorie de la Nécessité et l’Article 16 de la Constitution de 1958*, 77 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L’ÉTRANGER 558 (1961)). Article 16 has been invoked only once—by President de Gaulle in 1961 in response to an attempted military insurrection in Algeria. This seems to have been an appropriate response to the crisis, though the President was much criticized for his decision to continue the state of emergency for months after the putsch had been suppressed. *See* VOISSET, *supra*, at 26. The constitutional text provides abundant potential for this sort of abuse.

20. This rationale for the French approach is explicitly presented by François Saint-Bonnet. *See* SAINT-BONNET, *supra* note 19, at 16.

21. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

22. Daniel Farber provides a modern defense of Lincoln’s apologia. At one point, he suggests that Lincoln’s actions are “consistent with our current views of legitimate executive power.” DANIEL FARBER, LINCOLN’S CONSTITUTION 163 (2003). At another point, he remarks:

In short, on careful reading, Lincoln was not arguing for the *legal* power to take emergency actions contrary to statutory or constitutional mandates. Instead, his argument fit well within the classic liberal view of emergency power. While unlawful, his actions could be ratified by Congress if it chose to do so (“trusting, then as now, that Congress would readily ratify them”). The actions were also morally consistent with his oath of office (“would not the official oath be broken . . . ?”).

Id. at 194.

blanche poses obvious risks of abuse, and many thoughtful constitutionalists have insisted on protecting core civil and political liberties during even the most severe crises. The modern German Constitution, for example, adopts this view,²³ reflecting the catastrophic role that the Weimar Constitution's broad emergency provisions played in the Nazi ascent to power in the 1930s.²⁴

Our present problem requires us to move beyond this classic debate. Terrorist threats do *not* trigger the existential rationale, but require the articulation of a different framework for emergency power. To make the key point, distinguish between two different dangers posed by terrorism: the physical threat to the population and the political threat to the existing regime.

Future attacks undoubtedly pose a severe physical threat: The next major strike may kill hundreds of thousands, or even millions. But they do not pose a clear and present danger to the existing regime. Even if Washington or New York were decimated, al Qaeda would not displace the surviving remnants of political authority with its own rival government and police force. The terrorists would remain underground, threatening a second strike, while the rest of us painfully reconstructed our traditional scheme of government on the ground—providing emergency police and health services, filling vacancies in established institutions, and moving forward, however grimly, into the future.

I am a liberal, but I reject Farber's "classic liberal view" of emergency power in the brave new world inaugurated by September 11. We should not content ourselves with retroactive congressional approval. We should insist, instead, upon ongoing legislative review and reauthorization of extraordinary powers. See *infra* Part IV. For a more nuanced view of Lincoln's conduct, see J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118-39 (1926).

23. The German emergency provisions broadly authorize the central government to establish public order without regard to the powers normally reserved to the states or the limitations normally imposed on military operations. But they endorse only very limited incursions on fundamental rights—namely, the detention of individuals for up to four days without judicial hearings and the confiscation of property without compensation or other normal safeguards. See GRUNDGESETZ art. 115c(2)(1)-(2). As a further safeguard, the constitution (known as the Basic Law) explicitly provides that "[n]either the constitutional status nor the performance of the constitutional functions of the Federal Constitutional Court or its Judges may be impaired." *Id.* art. 115g, translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 87 (Gisbert H. Flanz ed., 2003). For further discussion, see *infra* notes 25, 54-55.

Among more recent constitutions, that of South Africa is notable for the broad range of fundamental rights it expressly protects against infringement during emergencies. See S. AFR. CONST. § 37(5)-(6) (providing explicit safeguards regarding "Equality," "Human Dignity," "Life," "Freedom and Security of the person," "Slavery, servitude and forced labour," "Arrested, detained, and accused persons," and certain rights of children, as well as extensive protections for persons detained without trial during the emergency). The Polish, Portuguese, and Slovenian Constitutions also provide noteworthy enumerations of protected rights. See KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ art. 233; CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA art. 19(6)-(7); CONSTITUCIÓ D'ESLOVÈNIA art. 16.

24. See CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP 29-73 (Transaction Publishers 2002) (1948).

Government will not disintegrate in the face of a terrorist threat, but politicians will have a powerful incentive to abuse the reassurance function. In their eagerness to calm the prevailing panic by taking effective steps against a second strike, they will destroy civil and political liberties on a permanent basis. Our constitutional problem is not that the government will be too weak in the short run, but that it will be too strong in the long run.

This diagnosis sets a different challenge for constitutional design. According to the existential rationale, it seems a great luxury to worry too much about the long-run fate of civil and political liberties: If the constitutional order disintegrates, it will be up to somebody else to worry about the long run. According to the reassurance rationale, however, the regime is going to stagger onward, and the challenge is to provide it with the tools for an effective short-run response without doing unnecessary long-run damage.

This means that French-style emergency regimes are *categorically* inappropriate models for the terrorist threats confronting the mature democracies of the twenty-first century. The last thing we want is to authorize the President to do whatever he considers necessary for as long as he thinks appropriate. This makes it far too easy for him to transform the panic following a horrific attack into an engine of sustained authoritarian rule and bureaucratic repression. We should be searching instead for innovative designs that make it difficult for emergency actions to spiral out of control, destroying the framework of limited government that they were supposed to protect.

This common project will assume different forms in different constitutional cultures. Many countries around the world already possess rather elaborate provisions for emergency power, but these have been largely designed with the existential rationale in mind. If they are of the French type, they should be thoroughly revised; if they are of the more restrictive German sort, they should be rethought. Existing constitutional limitations may not make sense within the new framework.²⁵ In marking the way forward, it will not suffice to classify existing provisions after a canvass of the legal status quo. A more fundamental analysis is required, beginning with first principles: What should an emergency constitution look like if it systematically focuses on the reassurance function as its *raison d'être*?

25. Germany, for example, has an elaborate set of emergency provisions, but none was fashioned with terrorism in mind. Article 35, which concerns threats to public order, may readily apply, *see* GRUNDGESETZ art. 35, but it is a rather weak provision authorizing special assistance between the federal and state governments. The Basic Law's other emergency provisions do not seem to apply at all. They involve threats to the very existence of the state—either from internal forces, *see id.* art. 91, or external enemies, *see id.* art. 115a. Some of these provisions contemplate the operation of political checks and balances before they may be exercised. *See infra* notes 54-55.

In seeking a comprehensive answer to this question, we will find that other countries—most notably Canada and South Africa—have already come up with partial solutions that warrant worldwide attention.²⁶ But only systematic model-building will enable us to identify the innovative bits and pieces swirling about in a sea of law shaped by the existential rationale. If this initial exercise is successful, it can provoke a broader multinational debate that may help motivate sustained reconsideration of existing emergency provisions in the years ahead.

I expect a more skeptical reception to my model-building efforts in countries, like the United States, that do not already possess a complex constitutional text regulating emergency power. Within these constitutional cultures, my call for the self-conscious creation of a new emergency framework may strike most thoughtful observers as distinctly premature. Haven't we been doing well enough, thank you, without an elaborate set of emergency provisions? Isn't it far too dangerous to place the question of emergency power on the agenda for serious political consideration?

These skeptical questions represent the conventional wisdom of the largely American readership of this journal. So it is wise to confront them head-on before proceeding.

III. THE MODEL OF JUDICIAL MANAGEMENT

Do we really need an emergency constitution?

Shiny new solutions may contain serious blunders that will be difficult to change once solemnly enshrined in legislation or, even worse, in constitutional provisions. Putting aside the real danger of initial mistakes, the very creation of an elaborate structure may increase the frequency with which officials use emergency powers. They now handle the overwhelming majority of disturbing events within the traditional framework of the criminal law. But the new machinery will normalize the rhetoric of emergency, making extraordinary powers part of the ordinary discourse of government. If you build it, they will come—officials will seek to invoke “emergency” powers to handle middling crises, resulting in yet another sad story of unintended consequences.

To be sure, the U.S. Constitution does contain a rudimentary emergency provision, permitting the suspension of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.”²⁷ But it largely leaves the rest to the judicial imagination. Rather than issuing a call for self-conscious redesign, perhaps we should cherish the clouds that presently obscure our subject?

26. See *infra* text accompanying notes 63-66, 75-77.

27. U.S. CONST. art. I, § 9, cl. 2.

During normal times, the common law fog allows judges and other legal sages to regale themselves with remarkably astringent commentaries on the use of emergency powers, cautioning all and sundry that they are unconstitutional except under the most extreme circumstances. This creates a cloud of suspicion and restrains officials who might otherwise resort to emergency powers too lightly. Then, when a real crisis arises, judges can display remarkable flexibility for the interim, while covering their tracks with confusing dicta and occasional restrictive holdings. As the crisis abates, they can then inaugurate a period of agonizing reappraisal, casting doubt upon the constitutional propriety of their momentary permissiveness. After a revisionist decade or two, the oracles of the law can then return to their older habit of casting aspersions on the entire idea of emergency powers—leading to an atmosphere of genuine restraint, until the next real crisis comes around.²⁸

So why not let this common law cycle deal with the problem of emergencies? Won't the effort to build a new legal structure be more trouble than it's worth?

This seemingly plausible response rests upon a controversial premise. It supposes a lucky society in which serious emergencies arise very infrequently—once or twice in a lifetime. This was more or less true in America during the last couple of centuries. Perhaps it was also true of the island polity of Great Britain from which our common law tradition derives.²⁹ But no longer. The realities of globalization, mass transportation, and miniaturization of the means of destruction suggest that bombs will go off too frequently for the common law cycle to manage crises effectively.

*Korematsu v. United States*³⁰ provides a revealing example of both the strengths and limits of a judge-centered approach. I myself believe that Justice Hugo Black—that great civil libertarian—was wrong in upholding the wartime concentration camps for Japanese Americans. But the fact that Justice Black *was* a great libertarian suggests how dangerous the emergency appeared at the time to right-thinking people. It seems fair, then, to view *Korematsu* as a paradigm case representing the “permissive” moment in the common law cycle.

It was then followed by decades of revisionist activity that can be seen to vindicate the common-lawyer's confidence in his methods. By the 1980s,

28. For a remarkably complacent view of this cycle, see Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 283-98.

29. In both the American and British cases, it all depends on how serious a crisis must be in order to count as a “genuine” emergency. As Professor Mark Tushnet's historical overview suggests, the last serious crisis occurred a full generation ago—during the McCarthy and Vietnam War periods. *See id.* at 286-87. I fear that the lengthy period without a crisis may lead many legal commentators to take an overly optimistic view of the likely future operation of judicial management.

30. 323 U.S. 214 (1944).

it was hard to find a constitutional commentator with a good word to say for the decision.³¹ Governmental institutions slowly responded to a broader change in public opinion, with President Ford symbolically rescinding President Roosevelt's order authorizing the wartime detention in 1976³² and Congress granting compensation to inmates of the concentration camps in 1988.³³

Nevertheless, *Korematsu* has never been formally overruled, a fact that has begun to matter after September 11. Even today, the case remains under a cloud. It is bad law, very bad law, *very, very* bad law. But what will we say after another terrorist attack? More precisely, what will the Supreme Court say if Arab Americans are herded into concentration camps? Are we certain any longer that the wartime precedent of *Korematsu* will not be extended to the "war on terrorism"?³⁴

Suppose that, as the current Justices are pondering their decision, there is another devastating terrorist attack. If Hugo Black fell down on the job, will his successors do any better? Another bad decision will have much worse consequences. The war with Japan came to an end, but the war against terror will not.

The result is the normalization of emergency conditions—the creation of legal precedents that authorize oppressive measures without any end. Sensing the gravity of this danger, two recent articles have suggested drastic measures to avoid it. Rather than stretching the law, officials may be well-advised to proclaim that the emergency requires them to act with utter lawlessness—or so Professors Oren Gross and Mark Tushnet suggest.³⁵

31. Agonizing reappraisal began early, with Dean Eugene V. Rostow's famous critique of *Korematsu*. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). More than forty years later, Rostow claimed that "*Korematsu* has already been overruled in fact, although the Supreme Court has never explicitly overruled it. The case has been overruled in fact because of the criticism it has received . . ." Charles J. Cooper, Orrin Hatch, Eugene V. Rostow & Michael Tigar, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 196-97 (1988) (footnote omitted). So it seemed in 1988, but what will be the view in 2008?

32. See Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976) (declaring that Proclamation No. 2714, which formally ended World War II, also rescinded President Roosevelt's Executive Order No. 9066).

33. See ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II, at 88-106 (1993); LESLIE T. HATAMIYA, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988 (1993).

34. Chief Justice William H. Rehnquist leaves the matter in some doubt in his book, *All the Laws but One: Civil Liberties in Wartime*. He agrees that the relocation of the Nisei (American-born children of Japanese immigrants) occurred without sufficient justification. But he defends the military's internment of their noncitizen parents (the Issei) on the grounds that the Alien Enemy Act of 1798, 50 U.S.C. §§ 21-24 (2000), was still valid law during the World War II era. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 209-10 (1998). Although he recognizes that "Eugene Rostow suggests the possibility of a judicial inquiry into the entire question of military necessity," he calls this "an extraordinarily dubious proposition." *Id.* at 205.

35. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Tushnet, *supra* note 28, at 299. Of the two articles, Professor Gross's provides a much more elaborate defense of this view.

They recognize, of course, that this public break with the rule of law is a desperate expedient. But isn't it preferable to the normalization of emergency conditions? At least the legal system would not be corrupted by legal precedents that live on indefinitely. And when the emergency comes to an end, the lawless officials may find themselves subject to legal liability unless their fellow citizens choose to ratify their actions retroactively.³⁶

But, of course, there is a downside. Lawlessness, once publicly embraced, may escalate uncontrollably. By hypothesis, we are dealing with a terrorist strike that has generated mass panic. Once officials make a virtue out of lawlessness, why won't they seek to whip up mass hysteria further and create a permanent regime of arbitrary rule?

Gross and Tushnet offer us a grim choice: legally normalized oppression or a lawless police state. Before placing our bets, it seems wise to reconsider this high-stakes gamble. Undoubtedly, there are times when a political society is struggling for its very survival. But my central thesis is that we are not living in one of these times. Terrorism—as exemplified by the attack on the Twin Towers—does *not* raise an existential threat, at least in the consolidated democracies of the West.³⁷ If Professors Gross and Tushnet are suggesting otherwise, they are unwitting examples of the imperative need to rethink the prevailing rationale for emergency powers. We must rescue the concept from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal democracy.³⁸ Rather than indulge in melodramatic invocations of existential threats, liberal constitutionalists should view the state of emergency as a crucial tool enabling public reassurance in the short run without creating long-run damage to foundational commitments to freedom and the rule of law.³⁹

I do not suggest that the concerns voiced by Professors Gross and Tushnet are irrelevant once we reorient the theory of emergency powers to focus on the reassurance function. To the contrary, they are absolutely right to emphasize that we face grave risks of legal normalization in dealing with terrorist attacks. I suggest, however, that these risks can be minimized if we take some of the load off judges in managing front-line legal responses, and

36. See Gross, *supra* note 35, at 1111-15.

37. See *supra* Part II.

38. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., MIT Press 1985) (1922) ("Sovereign is he who decides on the exception."); see also Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 *CARDOZO L. REV.* 1825, 1825-30 (2000) (considering whether Schmitt "sought to facilitate the destruction of liberalism and democracy" through his theory of the exception). For more general overviews of Schmitt's philosophy, see *THE CHALLENGE OF CARL SCHMITT* (Chantal Mouffe ed., 1999); and JOHN P. MCCORMICK, *CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY* (1997).

39. For some important recent reflections on this theme, see JOSÉ ANTONIO AGUILAR RIVERA, *EN POS DE LA QUIMERA: REFLEXIONES SOBRE EL EXPERIMENTO CONSTITUCIONAL ATLÁNTICO* 57-94 (2000) (examining the role of emergency powers in liberal constitutionalism).

create new constitutional structures that will more reliably respond to the recurring tragedies of the coming century.

We must build a new constitution for the state of emergency, but with modest expectations. If terrorist attacks become too frequent, no legal structure will save us from a civil liberties disaster. I do not suppose, for example, that clever constitutional design will suffice to constrain the repressive forces that may be unleashed by a Palestinian intifada that continues at its present intensity for years and years.⁴⁰ My proposals make the most sense for societies afflicted by *episodic terrorism*—where events like September 11 remain exceptional, but not so exceptional that we can count on the decades-long process of common law recuperation to do its work.

Crystal balls are notoriously unreliable, but as I write these lines in early 2004, episodic terrorism seems to be the most likely fate of the West in general, and America in particular, for a very long time to come. Within this context, constitutional structures can perform a crucial channeling function. Bad legal structures will channel temporary needs for reassurance into permanent restrictions on liberty; good structures will channel them into temporary states of emergency, without permanent damage to fundamental freedoms.

IV. CHECKS AND BALANCES

In designing basic institutions to discharge this channeling function, we will be proceeding on the constitutional level of reflection. My approach depends crucially on the construction of a political system of checks and balances, and this is the subject of the next two Parts. I then turn to consider the plight of the principal victims of the state of emergency—the thousands of innocents who will be caught up in dragnets launched under the

40. Israel has been under an official state of emergency since its creation. Under Section 38 of the Basic Law of Israel, the Knesset may declare a state of emergency on its own prerogative, without consulting the other branches of government. See BASIC LAW (The Government, 2001), § 38, S.H. 165. Under the Israeli Basic Law, an emergency can last for no more than one year, but it can be renewed indefinitely by simple majority vote. Under much more constrained conditions, the Executive can declare an emergency unilaterally. See *id.* § 38(c) (granting this power when there is an urgent need to declare the emergency and it is impossible to convene the Knesset immediately).

This is hardly the place for a mature assessment of the overall operation of emergency powers by the Israeli authorities—a subject on which there exists a wide spectrum of opinion. Compare Claude Klein, *Is There a Case for Constitutional Dictatorship in Israel?*, in CHALLENGES TO DEMOCRACY: ESSAYS IN HONOUR AND MEMORY OF ISAIAH BERLIN 157 (Raphael Cohen-Almagor ed., 2000) (concluding that a constitutional dictatorship, different from the traditional emergency regime, is an inevitability in Israel), with Raphael Cohen-Almagor, *Reflections on Administrative Detention in Israel: A Critique*, in CHALLENGES TO DEMOCRACY: ESSAYS IN HONOUR AND MEMORY OF ISAIAH BERLIN, *supra*, at 203 (arguing that administrative detentions under the emergency regime are unjust).

government's emergency powers of detention that aim to prevent a second terrorist strike. Elementary principles of justice, as well as more functional considerations, mandate full financial compensation for the time they spend in detention. After filling in this political and economic background, I finally turn to define the place of judges. While it is a mistake to depend on courts to manage panics on their own, judges do play crucial backstopping roles within the emerging system. On the macro-level, they help enforce the special emergency system of checks and balances; on the micro-level, they protect the detainees' core rights to decent treatment.

A. *From Ancient to Modern*

The Roman Republic represents the first great experiment with states of emergency, and it serves as an inspiration for my heavy reliance on a political system of checks and balances. At a moment of crisis, the Senate could propose to its ordinary chief executives (the two consuls) that they appoint a dictator to exercise emergency powers. Sometimes the consuls acted jointly; sometimes one was chosen by lot to make the appointment. But in all cases, there was a rigid rule: The appointing official could not select himself. As a consequence, the consuls had every incentive to resist the call for a dictatorship unless it was really necessary. There was a second basic limitation: Dictators were limited to six months in office. The term was not renewable under any circumstances. About ninety dictators were named during the three-hundred-year history of the office, but none violated this rule. And no dictator used his extraordinary powers to name another dictator at the end of his term.⁴¹

During his six-month tenure, the dictator exercised vast military and police powers, with only a few significant limitations. Most notably, he remained dependent on the Senate for financial resources; he could not exercise civil jurisdiction as a judge (though he did have the power of life and death); and finally, he was charged with suppressing domestic upheaval and protecting against foreign attack, but he had no authority to launch offensive wars.⁴²

The Roman model was very clever, but I do not think that it is either desirable or practical under modern conditions. In contrast to the Romans, we do not depend on a rotating group of aristocrats exercising executive powers for very short terms. (The consuls rolled over every year.) We depend on a professional political class with a lifetime commitment to high

41. For a concise description of the Roman dictatorship, see ROSSITER, *supra* note 24, at 15-28.

42. *Id.* at 24. During the later history of the office, the dictatorship was also occasionally employed for ceremonial purposes or other lesser functions, but these were merely derivative uses of the position. *Id.* at 22.

office. We select the most seasoned professionals to serve as president or prime minister, and it would be odd to replace them with a temporary dictator just when the going got roughest. If we are lucky enough to have a Winston Churchill when we need him, we should rejoice in our good fortune—not push him out for fear of his dictatorial ambitions.

Nevertheless, the Roman concern is a very real one. Indeed, it is no different from the anxiety that motivated the model of judicial management. Once we create an elaborate structure authorizing extraordinary powers, there is a danger that ordinary officials will exploit the system to create too many “emergencies,” using a wide range of repressive measures despite the adequacy of more standard frameworks involving the criminal law. If the Roman system of executive displacement is implausible, are there other political checks and balances that will serve to contain this risk?

B. *The Supermajoritarian Escalator*

European nations have had a long and unhappy historical experience with explicit emergency regimes. Speaking broadly, these regimes have tended to give executives far too much unfettered power, both to declare emergencies and to continue them for lengthy periods.⁴³ This is a fatal mistake. The Executive should be given the power to act unilaterally only for the briefest period—long enough for the legislature to convene and consider the matter, but no longer. If the legislature is already in session, one week seems the longest tolerable period; if not, two weeks at most.⁴⁴

The state of emergency then should expire unless it gains majority approval. But this is only the beginning. Majority support should serve to sustain the emergency for a short time—two or three months. Continuation should require an escalating cascade of supermajorities: sixty percent for the next two months; seventy for the next; eighty thereafter.

There are matters of principle here, but also important issues involving institutional incentives. Principles first. The need for repeated renewal at short intervals serves as a first line of defense against a dangerous normalization of the state of emergency. The need for a new vote every two

43. Clinton Rossiter provides an illuminating review of the use of emergency powers in Germany, France, and England during the nineteenth century, continuing through the 1930s. *See id.* at 31-205.

44. Of course, the constitution should contain special arrangements if the attack makes it impossible to convene a legislative quorum. For example, the German Basic Law establishes a joint committee of the Bundestag and Bundesrat to function in the place of the full legislative chambers. *See* GRUNDGESETZ arts. 53a, 115a(2).

For a suggestion on how to fill this gap in the U.S. Constitution, see THE CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF CONGRESS (2003), <http://www.continuityofgovernment.org/pdfs/FirstReport.pdf> (suggesting a formal constitutional amendment to give Congress fairly broad authority during a national emergency to fill vacant seats temporarily).

months publicly marks the regime as provisional, requiring self-conscious approval for limited continuation. Before each vote, there will be a debate in which politicians, the press, and the rest of us are obliged to ask once more: Is this state of emergency really necessary?

The supermajoritarian escalator requires further principled commitments. Even if a bare legislative majority repeatedly votes to sustain an extension, this should not be enough to normalize emergency powers: We can never forget that hundreds or thousands have been placed in detention without the evidence normally required. Some may believe that this breach, once it has occurred, does not get worse with the passage of time. I disagree. Preventive detention for six months or a year disrupts ordinary life far more than incarceration lasting a week or even a month.

But there is more at stake than the devastation of individual lives. Despite repeated debates in Congress or Parliament, repeated votes of approval threaten to erode the general sense that emergency powers should be reserved for truly extraordinary crises. By subjecting these decisions to increasing supermajorities, the constitutional order places the extraordinary regime on the path to extinction. As the escalator moves to the eighty-percent level, everybody will recognize that it is unrealistic to expect this degree of legislative support for the indefinite future. Modern pluralist societies are simply too fragmented to sustain this kind of politics—unless, of course, the terrorists succeed in striking repeatedly with devastating effect.

The supermajoritarian case becomes even stronger once the dangers of political abuse are taken into account. A “state of emergency” provides a wonderful electioneering tool for the majority party: “All true patriots must rally around the existing government in this time of need. We cannot give in to the terrorists by allowing them to force us to change our leaders when the going gets tough.” This may be blather, but it will bring out the votes. Supermajoritarian escalators give smaller and smaller minority parties veto power over such manipulations. Even if the minority allows the emergency to continue during elections, the majority can no longer easily present itself as the country’s savior, since the support of the minority is fundamental to the extraordinary regime.

The escalator will also have a salutary effect on the Executive. When extraordinary powers are authorized, the President knows that he will have a tough time sustaining supermajorities in the future, and this will lead him to use his powers cautiously. The public will bridle if his underlings run amok or act in arbitrary ways that go well beyond the needs of the situation. So the political check of supermajorities will not only serve to make the emergency temporary, but also to make it milder while it lasts.

In addition, the escalator will force the Executive to recognize the distributional injustices imposed by the emergency regime. Each terrorist

wave will generate a distinctive demonology. Right now, the demons come largely from the Arab world, but twenty years onward, they may emerge from Latin America or China. Or they may have signed on to some universalistic creed, secular or religious, as in the case of the Cold War or the still-avoidable struggle against something called “Islamic fundamentalism.”

Each demonology will mark out segments of the population as peculiarly appropriate targets for emergency measures, and the supermajoritarian escalator may play a greater or smaller role in checking the abuses that such discrimination invites.⁴⁵ This may not operate too forcefully in America during the present wave, but it will serve as a more potent check in Europe, given the larger size of its domestic Arab and Islamic minorities. But the next terrorist wave may well shift the ethnic distribution of political interests in very surprising directions.

Even when the prevailing demonology casts a relatively small shadow in domestic politics, the supermajoritarian escalator will provide political cover for civil libertarians who are looking for an excuse to call an end to the emergency regime. Immediately after the terrorist strike, they can polish their antiterrorist credentials by voting for the state of emergency when only a simple majority is required. This is a moment for maximum reassurance, and it is overwhelmingly likely that fifty-one percent of the legislators will support the measure regardless of protests from their libertarian colleagues. So there is no real harm done if the vote is ninety-nine to one rather than seventy-five to twenty-five.

As time marches on, contrarian legislators will be accumulating political capital that will make it easier for them to defect as the need for reassurance declines: “I have now voted twice to continue the emergency,” they can say, “but enough is enough. I want to commend the President for keeping the situation under control, but now that the situation is stabilizing, we should return to the protection of our normal liberties. If we allow the continued erosion of our freedoms, the terrorists will have really triumphed.”⁴⁶ And so the vote this time is seventy-nine to twenty-one, and the emergency comes to an end, at least for now.⁴⁷

45. For the role of a judicial check, see *infra* Section VII.C.

46. But will there be enough contrarian legislators to serve as an effective check? Although the USA PATRIOT Act passed by overwhelming margins in the immediate aftermath of September 11, the 107th Congress contained a substantial cadre of civil libertarians (both on the right and the left). For example, the ACLU compiled a scorecard on each member of the House based on his or her vote on fifteen civil liberties issues, including the USA PATRIOT Act: 198 representatives voted the ACLU way on fifty percent of the issues, 176 on sixty percent, 150 on seventy percent, and 115 on eighty percent. See ACLU, National Freedom Scorecard, at <http://scorecard.aclu.org> (last visited Oct. 4, 2003) (providing an interface that lets visitors look up how their representatives scored). On the Senate side, forty-four senators voted with the ACLU on at least three of the five issues included in its scorecard. See *id.*

C. Minority Control of Information

The supermajoritarian escalator will shorten the state of emergency and soften its administration, but it will not work miracles. By hypothesis, the emergency begins with a terrorist attack that deeply embarrasses the nation's military, police, and intelligence services. *Res ipsa loquitur*: Whatever they did was not enough, and in retrospect, it will be easy to find clues that might have alerted superalert guardians of order. The bureaucratic reaction will be swift and predictable: On the one hand, displace responsibility for past mistakes; on the other, strike out aggressively against the forces of evil.

But especially in the beginning, the security services will be striking out blindly. After all, if they had been on top of the conspiracy, they would have intervened beforehand. So they are almost certain to be in the dark during the early days after a terrorist attack. Nevertheless, early dragnets may well be functional, and not only because they provide appropriate television footage for calming public anxieties. While many perfectly innocent people will be swept into the net, the "usual suspects" identified by counterintelligence agencies may well contain a few of the genuine conspirators. If we are lucky, the detention of a few key operators can disrupt existing terrorist networks, reducing the probability of a quick second strike and its spiral of fear.⁴⁸

Given the virtual certainty of massive error, the Executive will be tempted to keep secret all information concerning the particular injustices that are the inevitable consequence of emergency dragnets. The supermajoritarian escalator will only heighten this perverse incentive. Perhaps the President or Prime Minister can convince his party loyalists to remain faithful when the opposition press generates a public uproar by headlining the worst abuses wreaked upon the most sympathetic victims. But if the emergency regime requires the increasing support of the legislative minority, it will be hopeless for the Executive to appeal to party loyalty. Perhaps the only hope of satisfying the supermajority requirement

In parliamentary systems in Europe, individual deputies generally have much less freedom of action than in the United States, but this is typically offset by a greater number of parties in parliament due to the prevalence of proportional representation. The crucial decision in these cases, then, will be made by the leaders of these parliamentary fractions, rather than individual members.

47. Once an emergency expires, the supermajoritarian vote needed for a new state of emergency should de-escalate on the same time schedule under which it escalated previously. If eighty-percent support is required, the percentage drops to seventy percent after two months, then to sixty, then to fifty, as time marches on.

48. This seems to be true in the case of the Mafia, where the detention of a few key players can effectively destroy large conspiracies. See Federico Varese, *Social Capital, Protection and Mafia Transplantation* 31 (2002) (unpublished manuscript, on file with author).

is to treat as top secret all potentially embarrassing facts surrounding the dragnets?

Despite the grave risk of partisan abuse, a simple rule requiring total openness is simpleminded. Terrorists are newspaper readers and Internet surfers like the rest of us, and they can learn a lot about the government's surveillance activities that might allow them to escape detection. Much of this information quickly decays over time. News of particular dragnets may pinpoint geographical areas that terrorists should avoid. But investigators change focus quickly, and old news no longer has much value a week later. Other information, however, will have more enduring significance. How, then, to separate the wheat from the chaff?

A political system of checks and balances provides distinctive tools for a constructive response. While the Executive is in charge of day-to-day affairs, the emergency regime returns to Congress every two months. The legislature cannot act effectively if it is at the mercy of the Executive for information. What is more, the state of emergency can survive only with the support of the increasingly large legislative coalition required by the supermajoritarian escalator. It follows that the majority party cannot be allowed to use its normal control over the legislature to deny informational access to minority parties. Instead, our emergency constitution should contain special safeguards to assure that the minority is well-informed when it is asked to join the majority in authorizing a two-month extension of the emergency regime.

Members of opposition political parties should be guaranteed the majority of seats on oversight committees. The chairpersons of these committees should also come from the opposition, though it should not be allowed to select any candidate it likes. Instead, it should be required to offer a slate of three nominees to the majority and allow majority members to pick the chairperson they find least offensive.

Such practices may seem alien to Americans, who take it for granted that the legislative majority should control all committees. But this is by no means true in other leading democracies. In Germany, for example, Chancellor Schroeder's Social Democratic Party controls only nine of twenty-one committee chairmanships.⁴⁹ Minority control means that the

49. See German Bundestag, Organization: Committees, at http://www.bundestag.de/htdocs_e/orga/03organs/04commit/01comminf.html (last visited Oct. 7, 2003). Even though the British House of Commons grants broad control to the majority party, the government generally grants chairmanships of a number of important committees to the minority. At least ten committees are presently chaired by members of minority parties. See The U.K. Parliament, Select Committee Membership at 18 November 2003, at <http://www.parliament.uk/directories/hciolists/selmem.cfm> (last visited Dec. 10, 2003). For general information on the membership and chairmanship of parliamentary committees, see ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 628-39, 692-96 (Donald Limon & W.R. McKay eds., 22d ed. 1997); see also COMM. OFFICE, HOUSE OF COMMONS, THE COMMITTEE SYSTEM OF THE HOUSE OF COMMONS 13 (2003), <http://www.parliament.uk/commons/>

oversight committees will not be lap dogs for the Executive, but watchdogs for society.⁵⁰ They will have a real political interest to engage in aggressive and ongoing investigations into the administration of the emergency regime.⁵¹

The emergency constitution should require the Executive to provide the committees with complete and immediate access to all documents. This puts the government on notice that it cannot keep secrets from key members of the opposition and serves, without more, as an important check on the abuse of power. It should also be up to the committee majority to decide how much information should be shared more broadly. In contrast to ordinary committees, oversight groups will not have a strong incentive to suppress information merely because the government finds it embarrassing. But they will not make everything public since this would open them up to the charge of giving aid and comfort to terrorism. Instead, the committees will be structured to make the tradeoff between secrecy and publicity in a politically responsible fashion.

The oversight committees also should be explicitly required to give a report to their colleagues, in secret session if necessary, as part of the debate on each two-month extension. Even here, they can hold back particularly sensitive details to reduce the risks of damaging leaks. Nevertheless, they have every incentive to apprise the majority and minority of the main costs and benefits of continuing the emergency effort. Legislators, in turn, have the fundamental right to pass on the main points to the public as they debate and defend their votes.

We have designed a permeable sieve, not an ironclad wall of secrecy. But that is just the point. In the immediate aftermath of a massive attack, the need for emergency measures may seem self-evident, but this need must

selcom/cteesystemmay2003.pdf (“[T]here is usually an informal understanding about the party from which each [select committee] chairman will be chosen.”).

50. In a parliamentary system, the identity of political minorities is straightforward—these are the parties that remain outside the governing coalition. But in a presidential regime, like that of the United States, identifying “the opposition” can be tricky when one party controls the presidency and the other controls Congress. In these cases, legislative oversight should go to the party that does not control the presidency, even if it does hold the majority in Congress. After all, the operational command over the security services is vested in the Executive, and this will give the President control over all sensitive information. Since our constitutional aim is to create a structure that effectively challenges the Executive’s informational monopoly, the watchdog role should not be turned over to the President’s party, even if it happens to have “minority” status in the legislature.

51. Under propitious political conditions, congressional committees have successfully played this role even when they were controlled by the majority. During World War II, a committee headed by Senator Harry S. Truman played a legendary oversight role. See DONALD H. RIDDLE, *THE TRUMAN COMMITTEE: A STUDY IN CONGRESSIONAL RESPONSIBILITY* (1964); Theodore Wilson, *The Truman Committee, 1941*, in 4 *CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974*, at 3115 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975). But so long as this oversight function is in the hands of the majority party, the incentives move in the wrong direction.

be continually reassessed as time marches on. An extraordinary regime cannot be allowed to continue for four or six months, or longer, without the *informed* consent of the broader public. Leading members of the opposition are in the best position to appreciate this value. We should leave it to them to play a central gatekeeping role.

Finally, when the emergency comes to an end, the constitution should require a legislative inquest, chaired once again by an opposition member with an opposition majority, on the administration of the entire emergency. A public report, with formal recommendations, would be due within a year.

D. *The Need for Constitutional Revision*

I have begun with the problem of legislative control because it exposes the most important constitutional weakness of existing practices in the United States and Europe. The American provision for suspending habeas corpus is in Article I of the Constitution, dealing with congressional powers. This placement suggests that legislative consent is required for a suspension of habeas, but the text does not say so, and Lincoln famously suspended the writ unilaterally at the beginning of the Civil War.⁵² The French Constitution is explicit, but misguided, in authorizing the President to declare and maintain an emergency unilaterally.⁵³ The Germans do better, insisting that a state of emergency must gain the support of a simple majority of the Bundestag.⁵⁴ Unfortunately, the Basic Law allows the emergency to continue indefinitely until a majority of both Houses of Parliament vote to eliminate it.⁵⁵

With the notable exception of Russia,⁵⁶ the new constitutions of Central and Eastern Europe also have rejected French-style unilateralism.⁵⁷

52. See FARBER, *supra* note 22, at 158.

53. See *supra* note 19 and accompanying text.

54. The requirement of parliamentary approval applies only to those emergencies generated by external threats. GRUNDGESETZ art. 80a. The Basic Law also envisions a heightened state of emergency that it calls a “state of defense” for cases where armed attack is imminent. A two-thirds majority of the Bundestag is required to move into this condition, and the consent of the Bundesrat is also required. *Id.* art. 115a(1). If it is impossible for Parliament to convene, this decision can also be made by a special joint committee created for interim decisionmaking. See *id.* arts. 53a, 115e(1).

55. *Id.* art. 115l(2). This provision applies to the heightened “state of defense.” See *supra* note 54. There is no similar article regulating the elimination of the basic state of emergency established by Article 80a.

56. KONST. RF arts. 87-88, 102 (1993). The President must immediately notify both Houses of Parliament—the Federation Council and the State Duma—upon declaring a state of emergency, *id.* art. 88, or martial law, *id.* art. 87(2). The Federation Council has jurisdiction to approve presidential decrees issued during a state of emergency. *Id.* art. 102(1)(c).

57. For a thoughtful overview, see Venelin I. Ganev, *Emergency Powers and the New East European Constitutions*, 45 AM. J. COMP. L. 585 (1997). Ganev suggests that the Romanian President has the power to declare an emergency independently of Parliament, but this claim

Reacting strongly against a half-century of totalitarianism, most countries explicitly require parliamentary consent, and Hungary requires a two-thirds majority before an emergency goes into effect.⁵⁸ While Poland does not always require explicit legislative approval, it creates a compensating structure involving strict time limits. On recommendation of the Council of Ministers, the President can declare an emergency for a period no longer than ninety days.⁵⁹ If he wants a one-time extension, he can obtain sixty more days with the express approval of a majority of the Sejm (the more powerful chamber in Poland's bicameral system).⁶⁰

Poland's self-conscious concern with termination makes a significant contribution, but it suffers from serious technical flaws. The Sejm can only grant a single renewal, and the emergency terminates regardless of real-world conditions. Creating such a gap between law and reality is an invitation to lawlessness and should be avoided at all costs. The Polish ban is undoubtedly rooted in the country's terrible experience with a continuing state of emergency during the 1980s.⁶¹ Nevertheless, a supermajoritarian escalator provides a more realistic response to the problem of normalization, making it increasingly difficult to sustain the state of emergency without preventing an overwhelming majority from responding effectively to the exigencies of the moment.⁶²

ignores the explicit requirement that Parliament consent within five days. *See* CONSTITUTIA ROMÂNIEI art. 93.

58. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 19(4). Ganev reports that Slovakia requires a three-fifths majority, *see* Ganev, *supra* note 57, at 590, but this requirement has since been eliminated by an amendment of February 23, 2000. *See* Gisbert H. Flanz, *The Constitution of the Slovak Republic: Introductory and Comparative Notes*, in 16 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE SLOVAK REPUBLIC, at v-vi (Gisbert H. Flanz ed., 2001). Under the new rule, the President proclaims a state of emergency after a proposal from the government. *See* ÚSTAVA SLOVENSKEJ REPUBLIKY [Constitution] arts. 102(1)(m), 119(n) (Slovk.). The government consists of the Prime Minister, deputy prime ministers, and ministers, *id.* art. 109(1), and is dependent on the continuing support of Parliament. So it would be a mistake to say that Slovakia has adopted French-style presidential unilateralism.

59. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 230(1). While the President does not require the affirmative approval of the Sejm during the first ninety-day period, this assembly can annul the emergency by an absolute majority vote in the presence of at least half the statutory deputies. *Id.* art. 231.

60. *Id.* art. 230(2).

61. *See* M.B. BISKUPSKI, *THE HISTORY OF POLAND 164-68* (2000).

62. Other constitutions have introduced termination clauses that require frequent legislative revotes in order to continue the emergency. Unlike South Africa, these constitutions do not contain supermajoritarian escalators, and therefore make the indefinite continuation of the emergency a real possibility. *See, e.g.*, CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE art. 40(2), (6) (providing that a state of siege may not exceed ninety days, may be terminated by an absolute majority of the members in each chamber or by the President, and may be extended for up to ninety days by Congress upon the request of the President); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA art. 19(5) (providing that a state of siege or emergency may be in effect for "not more than fifteen days," though it may be renewed subject to this time limit, but if the declaration results from war the state may last for a period specified by law), *translated in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: PORTUGAL 15 (Gisbert H. Flanz ed., 2002); TÜRKİYE CUMHURİYETİ ANAYASASI [Constitution] arts. 120-21 (providing that a state of emergency may

From this vantage point, recent developments in South Africa constitute a genuine breakthrough. As in Poland, the country suffered bitterly from an ongoing state of emergency during the apartheid era.⁶³ But this experience led to some fresh thinking, which has produced the first supermajoritarian escalator in the constitutional world.⁶⁴ While a state of emergency can be introduced with the support of a simple majority of the National Assembly, it must be renewed at three-month intervals by “a supporting vote of at least 60 per cent of the members of the Assembly.”⁶⁵ To be sure, this escalator takes a rather simple two-step form—first fifty percent, then sixty percent, without any further upward movement. Especially in a country like South Africa, where a single political party regularly wins large majorities, it might prove possible to obtain virtually indefinite extensions on party-line votes.⁶⁶ Only a more elaborate multistage mechanism can reliably steer the system toward the eventual dissolution of emergency conditions. Nevertheless, I am greatly encouraged by these provisions: It is one thing for a theorist, sitting in New Haven, to commend the idea of a supermajoritarian escalator; it is quite another for a constitutional convention, reflecting on its bitter historical experience, to enact the principle into its higher law.

The challenge is to develop the South African idea to its fullest potential, and to move onward to elaborate other structural mechanisms for disciplining emergency powers. For example, no established democracy has yet taken a serious step to control the abuse of information by the Executive during emergency periods.⁶⁷ But as we have seen, the supermajoritarian

not exceed six months, that the Turkish Grand National Assembly may reduce or extend the state of emergency upon the request of the Council of Ministers, that each extension may not exceed four months, and that the Turkish Grand National Assembly may lift the state of emergency).

63. For the best legal account of the South African state of emergency, see STEPHEN ELLMANN, *IN A TIME OF TROUBLE* (1992).

64. See S. AFR. CONST. § 37. The structure of the constitutional provisions is slightly more complex than the text suggests. Under Section 37, a simple majority of the Parliament first approves a state of emergency that only endures for twenty-one days at most. During this time, Parliament can approve an extension of no more than three months through a simple majority. It is only at this point that the sixty-percent escalator operates for all further extensions. The emergency provisions are analyzed in G.E. Devenish, *The Demise of Salus Republicae Suprema Lex in South Africa: Emergency Rule in Terms of the 1996 Constitution*, 31 *COMP. & INT'L L.J. S. AFR.* 142 (1998). Devenish's essay, however, fails to emphasize the innovative character of the supermajoritarian escalator. For a good history of the struggle out of which the Constitution of South Africa was born, see generally HASSEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1998).

65. S. AFR. CONST. § 37(2)(b).

66. During the last general election, the African National Congress won 266 of 400 seats in Parliament—slightly less than two-thirds of the total. Election Results 1999, at <http://www.gov.za/elections/results99.htm> (last visited Oct. 4, 2003).

67. The only constitution I have found that adverts to this problem is that of Ethiopia, which provides that the House of Peoples' Representatives, upon declaration of a state of emergency, must create a State of Emergency Inquiry Board. ETH. CONST. art. 93(5). The Board has the power:

escalator may make it even more tempting for the Executive to conceal embarrassing facts. Both in theory and in practice, we are only at the beginning of the process of disciplining the use of emergency powers by the creative development of the tradition of checks and balances.

V. QUESTIONS OF SCOPE

Consider the merits of an alternative model, relying exclusively on command and control rather than checks and balances. This approach regulates the future by writing substantive standards directly into the constitution—limiting the conditions under which the emergency can be declared and restricting the extraordinary powers that can be exercised. The resulting legalisms may look impressive, but they will only function effectively when they are embedded within a vibrant system of separation of powers. If a political panic prevails, and there is no institutional check on the President, textual formulae will not be enough to constrain him in the crunch. Lawyers are cheap, and the President can always call upon the best and brightest to stretch the legalisms to cover his case. Though opponents may energetically protest, the resulting fog will only serve to perplex the general public—who will be far more impressed by the President's explanation of the pressing need for decisive action.

Command and control is a serious option only when the constitution clearly requires the Executive to share decisionmaking with others. Perhaps the Executive can exploit a political panic to gain a single act of legislative consent even when real-world conditions do not qualify as an emergency under the applicable constitutional standards. But this gap between law and the real world will prove to be a serious obstacle as the President repeatedly returns to the legislature for increasing shows of supermajority support. Within a short time, the constitutional gap will tend to legitimate legislative resistance and push fence-sitters into the "No" column at voting time. To put the point in a single line: Command and control is a complement to, but

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- (a) To make public within one month the names of all individuals arrested on account of the state of emergency together with the reasons for their arrest.
 - (b) To inspect and follow up [to determine] that no measure taken during the state of emergency is inhumane.
 - (c) To recommend to the Prime Minister or to the Council of Ministers corrective measures if it finds any case of inhumane treatment.
 - (d) To ensure the prosecution of perpetrators of inhumane acts.
 - (e) To submit its views to the House of Peoples' Representatives on a request to extend the duration of the state of emergency.

Id. art. 93(6). Generally speaking, I have not been citing the constitutions of countries whose claims to democratic status are as contestable as those of Ethiopia. But this constitutional development seems significant enough to warrant making an exception.

not a substitute for, checks and balances. Call this the priority of checks and balances.⁶⁸

So long as this priority is recognized, the formulation of appropriate command-and-control provisions is a crucial matter, and one requiring radical reconceptualization. As we have seen, the classic rationale for emergency power authorizes sweeping grants of power while the government engages in a life-and-death struggle. Indeed, the grant of *carte blanche, à la française*, may well be a plausible response when confronting an existential threat. But in the present case, a blank check sends precisely the wrong message. In the worst case, it provides the means for a would-be dictator to bootstrap his way to permanent power; in the best, an open-ended grant of authority is in tension with the overriding aim of presenting the emergency regime as a temporary and limited exception to the principles of limited government.

There are two ways of dealing with the problem of scope: the positive way, which specifies affirmative grants of power, and the negative way, which explicitly insulates certain zones of liberty from emergency control. Beginning with the positive, I will distinguish between two distinct rationales: relief and prevention. Relief is concerned with the current disaster; prevention, with its future recurrence. Both rationales provide the emergency powers needed to reassure the public that the government is acting effectively to relieve distress and to prevent a second strike. But they do so in a different spirit.

The relief rationale conceives of the emergency in a technocratic spirit. Disaster has struck: An epidemic rages, a city is devastated, and there are countless things to be done to return to normal. The model here is provided by the countless statutes dealing with “states of emergency” generated by natural disasters. Aside from providing emergency relief, these statutes grant extraordinary powers to seize property and impose quarantine, which may seem intolerable under normal circumstances.⁶⁹

68. This priority is central to Federalist constitutional theory. *See* THE FEDERALIST NO. 48, at 332-33 (James Madison) (Jacob E. Cooke ed., 1961) (“Will it be sufficient to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? But experience assures us . . . that some more adequate defence is indispensably necessary for the more feeble, against the more powerful members of the government.”).

69. Shortly after September 11, the Centers for Disease Control and Prevention (CDC) commissioned a team, led by Lawrence Gostin of the Georgetown University Law Center, to develop a draft model law to assist states in updating their statutes governing public health emergencies. The team consulted very broadly, but the first draft of its Model Act received a great deal of criticism for overreliance on coercive measures and insufficient attention to civil liberties protections. *See* John M. Colmers & Daniel M. Fox, *The Politics of Emergency Health Powers and the Isolation of Public Health*, 93 AM. J. PUB. HEALTH 397 (2003) (surveying the political controversy generated by the Model Act). In response, the Gostin group issued a revised Act on December 21, 2001. *See* Lawrence O. Gostin et al., *The Model State Emergency Health Powers*

Drafting these provisions is a tricky business, but the controversies surrounding them lack a crucial political dimension. Temporary restrictions on property and liberty are always regrettable, but there is little chance that the victims will be treated as political enemies. As a consequence, a technocratic orientation seems entirely appropriate: The faster and more effective the response, the smaller the overall damage to society as a whole. The primary objective of the emergency legislation should be a speedy collective response. Once the disaster is under control, there will be time enough to do justice to individuals whose property and liberty have been restricted. So long as appropriate legal procedures are securely in place, there is good reason to expect decisionmakers to treat these victims with special solicitude, since their sacrifices for the common good are the result of sheer bad luck.⁷⁰

In contrast, the prevention rationale is squarely concerned with the primal distinction between friend and foe. To one degree or another, the emergency regime suspends the normal protections of the criminal law in its effort to detect and arrest potential terrorists before they have a chance to strike again. The critical question is how broadly to define the scope of this extraordinary power. This is a task requiring great sensitivity, and one upon which reasonable people will invariably disagree. Since it is impossible to do justice to the full complexities in an exploratory essay, I will be focusing on the crux of the matter—the power to detain people on mere suspicion, without the evidence generally required for arrest or continuing confinement. Mass preventive detention will predictably violate the rights of countless innocent people, and the main point of the economic and juridical dimensions of my proposal is to soften this blow. But for now, it is enough to pause a moment in recognition of the painful injustices inexorably involved.

We can seek to limit the damage by explicitly exempting certain liberties from the exercise of emergency powers. On an individual level, the issue is raised most starkly in the case of torture, but this question is best deferred to a more general consideration of the role of judges in the emergency regime. On a collective level, the exemption strategy seems most compelling in the case of political liberties. Most fundamentally, the emergency authority should be barred from revising any of the basic laws

Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases, 288 JAMA 622 (2002).

70. Indeed, policy wonks typically complain that federal disaster programs can be counterproductive, *see, e.g.*, RUTHERFORD H. PLATT, *DISASTERS AND DEMOCRACY: THE POLITICS OF EXTREME NATURAL EVENTS* 38-41 (1999), or that compensation is overly generous, *see* HOWARD KUNREUTHER, *RECOVERY FROM NATURAL DISASTERS: INSURANCE OR FEDERAL AID?* 2, 29-32 (Am. Enter. Inst. for Pub. Policy Research, Evaluative Studies No. 12, 1973).

organizing the legislature, judiciary, and executive.⁷¹ The case for specifically denying the power to impose censorship is also compelling, especially when the separation of powers mechanism is taken into consideration. Quite simply, if the government can censor, the political opposition will have a new incentive to vote for the premature termination of the state of emergency, so as to regain its full rights to communicate to the public. By expressly insulating political expression and association from the emergency power, the constitution not only enhances the vitality of the democratic process; it encourages the minority to contribute constructively to the legislative decision terminating the emergency regime. The timing of elections is another sensitive matter; perhaps a one-time deferral of an election by a six-month period might be authorized by an eighty-percent supermajority. But we are now well within the zone of good faith disagreement.⁷²

There remains a final issue of great importance. I have been speaking broadly of a “terrorist attack,” but more clarity is required in determining the triggering event for a state of emergency: Should our constitutional framework require an actual attack, or should it allow the government merely to invoke a “clear and present danger”?

I would insist on an actual attack, basing this requirement on the reassurance function that serves as my organizing constitutional rationale. Something large and dramatic like September 11 shakes ordinary citizens’ confidence in their government’s capacity to discharge its most basic sovereign function: the preservation of law and order. The best way for government to respond to these fears is to do something large and dramatic

71. See, e.g., KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] arts. 228(6)-(7), 233 (Pol.) (stating that during a period of extraordinary measures, no amendments may be made to the constitution, laws on elections, or the statutes on extraordinary measures); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA art. 19(7) (stating that a declaration of a state of emergency or a state of siege “may not affect the enforcement of the constitutional provisions with respect to the powers and the operation of the organs with supreme authority and the organs of self-government of the autonomous regions, nor the rights and immunities of their members”), translated in 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: PORTUGAL, *supra* note 62, at 9; CONSTITUTIA ROMÂNIEI art. 148(3) (Rom.) (forbidding revisions to the constitution during a state of siege, emergency, or war).

72. Under the German Constitution, all expiring parliamentary terms are automatically extended until six months beyond the termination of the heightened form of emergency called the “state of defense.” See GRUNDGESETZ arts. 115a, 115h(1); *supra* note 54. Most parliamentary systems are not committed to a fixed electoral calendar. Within this context, it makes sense to deprive the government of the power to exploit the prevailing panic to its electoral advantage by dissolving parliament during the emergency. See, e.g., CONST. art. 16 (Fr.) (providing that the National Assembly may not be dissolved during times of emergency); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 28A(1) (Hung.) (providing that the Parliament may not be dissolved during a state of national crisis or emergency); KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 228(7) (Pol.) (providing that terms of office may not be shortened, nor elections held, during a period of emergency and for ninety days thereafter); CONSTITUTIA ROMÂNIEI art. 89(3) (Rom.) (forbidding dissolution of the Parliament during martial law or a state of emergency).

to reassure the populace that the breach of sovereignty was only temporary and that the state is taking every plausible step to prevent a second strike. But when an attack has not occurred, panic-reactions do not seem unmanageable by standard techniques.

A “clear and present danger” test also generates unacceptable risks of political manipulation. Presidents and prime ministers receive daily reports from their security services on terrorist threats. While these risks ebb and flow, they are always portrayed as serious. Security services have no incentive to play the role of Pangloss. As a consequence, politicians will almost always be in a position to cite bureaucratic reports that detect a “clear and present danger” lurking on the horizon. To make matters worse, these reports will always carry a “top secret” label. The Executive will understandably be reluctant to publish documents revealing the extent to which our spies have penetrated the terrorist network. So how are the rest of us to assess whether there really is a “clear and present danger”?

It is fatuous to require the Prime Minister to go to court and try to persuade judges that he is really justified in crying wolf this time. By the time due process has been observed, the situation will have changed once more, for better or for worse.⁷³ In contrast, a major terrorist attack is an indisputable reality, beyond the capacity of politicians to manipulate. That’s what makes it so scary. And that’s why it serves as the best trigger for an emergency regime.

But if this is right, it remains to devise a legal formula that restricts the triggering event within its proper bounds. In personal conversations, some have suggested that the triggering provision specify a quantitative bright line, requiring that an attack destroy, say, one thousand lives before an emergency regime can be inaugurated. This is the best way, some suggest, to avoid a slippery slope into the normalization of extraordinary powers. They have a point, but I think it wiser to rely on the exercise of political judgment, rather than a mathematical formula—something like: “A state of emergency may be proclaimed by the Executive in response to a terrorist attack that kills large numbers of innocent civilians in a way that threatens the recurrence of more large-scale attacks. The declaration lapses within seven days unless approved by a majority of the legislature.” A president who invokes this provision without sufficient cause will obtain an almost immediate rebuke from the legislature, and this should help deter trigger-happy behavior.

We are now in a position to glimpse the overall shape of my political proposal: Emergencies can be declared only after an actual attack; they can

73. In contrast, judicial review may make more sense if the triggering event involves something as obvious as a major terrorist attack. For further discussion, see *infra* text accompanying notes 91-93.

be continued for short intervals only by increasing supermajorities in the legislature and only after minority parties obtain privileged opportunities to inform themselves as to the real-world operation of the emergency regime and to publicize the facts as they see fit; and the scope of emergency powers is limited to the needs for relief and prevention that justify them in the first place.

This distinctive design requires, in turn, further critical reflection on the basic contours of existing emergency provisions. Generally, the world's constitutions deal with all emergencies as if they were alike. The Constitution of South Africa is typical in authorizing a state of emergency when "the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency."⁷⁴ But this "one size fits all" approach is a mistake. Standards and procedures that may be appropriate for existential threats will generally be too permissive when dealing with terrorist attacks. Future constitutions should be multitrack affairs that differentiate among types of emergencies.

Canada can serve as a model here. Its Emergencies Act distinguishes among four types of emergencies—natural disasters, threats to public order, international emergencies, and states of war⁷⁵—and treats each threat separately.⁷⁶ For example, terrorist threats to public order require renewal

74. S. AFR. CONST § 37(1)(a).

75. The Act refers to these as "public welfare," "public order," "international," and "war" emergencies, respectively. Emergencies Act, R.S.C., ch. 22, §§ 5-45 (Supp. IV 1985). Public welfare emergencies are those arising from natural disasters. *See id.* § 5. Public order emergencies encompass terrorist attacks. *See id.* § 16 (adopting the definition of "threats to the security of Canada" assigned by the Canadian Security Intelligence Service Act, R.S.C., ch. C-23, § 2 (1985), which characterizes terrorist attacks as security threats). International emergencies are those that "threaten[] the sovereignty, security or territorial integrity of Canada or any of its allies." Office of Critical Infrastructure Prot. & Emergency Preparedness, Fact Sheets: Highlights of the *Emergencies Act*, at http://www.ocipep-bpiepc.gc.ca/info_pro/fact_sheets/general/L_high_emer_e.asp (last visited Dec. 10, 2003).

76. Note that the Canadians handle this matter through a framework statute—the Emergencies Act—and not through explicit constitutional provisions, which provides a useful precedent for my proposed solution for the United States.

While the government initiates a state of emergency, both Houses of Parliament must assent, and they can also revoke the emergency or any of the regulations issued under it. Emergencies Act §§ 58-62. Emergency measures are constrained by provisions within the Emergencies Act as well as those within the charters of rights that Canada has adopted. The Act, for example, prohibits the detention of Canadian citizens or permanent residents on the basis of race, religion, ethnicity, or national origin, *id.* § 4(b), and requires that compensation be paid to anyone injured by the emergency measures, *id.* §§ 46-56. The Canadian Charter of Rights and Freedoms permits deviations from its protections only if they are "reasonable" and "demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1. The Charter can also be overridden by explicit parliamentary legislation designed to derogate from any of an array of protected rights. *Id.* § 33(1). In addition, Canada is a signatory to the International Covenant on Civil and Political Rights, which imposes constraints on the use of emergency powers, though many of these rights are also subject to derogation. *See International Covenant on Civil and Political Rights, adopted* Dec. 19, 1966, art. 4, S. EXEC. DOC. E, 95-2, at 24 (1978), 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976; accession by Canada May 19, 1976).

by Parliament every thirty days, while war emergencies require a revote every 120 days—a sensible differentiation, though it would have been even better if Canada had adopted a supermajoritarian escalator in the terrorist case.⁷⁷

But I don't want to seem hypercritical. The Canadian decision to differentiate emergencies should be recognized for what it is: a legal breakthrough that deserves emulation—and improvement—elsewhere.⁷⁸

VI. COMPENSATION

Focus now on the core of the emergency power: the authority to detain suspects without the kind of evidence normally required by liberal constitutions. There will be dragnets sweeping up many innocent people in an effort to remove a few central operators and thereby reduce the threat of a second strike. As of yet, my emergency constitution does not confront the crushing costs imposed on dragnet victims. This Part argues for financial compensation to all innocents who have been swept into preventive detention.

As September 11 suggests, the public and politicians can be counted on to respond generously to the financial needs of some victims of the war on terrorism. Congressionally mandated payments for survivors of those killed at the Twin Towers and the Pentagon were in amounts as high as \$7.6 million.⁷⁹ But generosity turns to callousness when it comes to another class of victims: the hundreds or thousands of innocent men and women caught up in antiterrorist dragnets. To be sure, the lives of these people are only temporarily disrupted, while the families of terrorist victims suffer a permanent loss. Nevertheless, a sudden seizure is a traumatic experience, especially when you know you have not done anything wrong, and especially when it is followed by weeks or months of detention. Dragnet victims also have families, with acute anxieties and significant financial needs. Yet these obvious facts have not generated a groundswell of public opinion in favor of granting compensation to them as well. To the contrary,

77. See Emergencies Act § 18(2) (setting a thirty-day limit for public order emergencies); *id.* § 39(2) (requiring that war emergencies be renewed every 120 days); *cf. id.* § 7(2) (requiring renewal of public welfare emergencies ninety days after the initiation of such states of emergency); *id.* § 29(2) (requiring that emergency declarations made after international emergencies be renewed every sixty days).

I defer consideration of whether the supermajoritarian escalator is also appropriate in wartime emergencies, which raise a very different range of problems, only some of which are canvassed in Part I.

78. The German Constitution also differentiates between different sorts of emergencies, *see supra* notes 54-55, but none of its provisions was designed to confront the distinctive threats of modern terrorism.

79. See U.S. Dep't of Justice, September 11th Victim Compensation Fund of 2001, [at http://www.usdoj.gov/victimcompensation/payments_injury.html](http://www.usdoj.gov/victimcompensation/payments_injury.html) (last visited Oct. 28, 2003).

their losses are forgotten amid the general anxiety generated by the terrorist strike.

This blindness is absolutely typical. It took almost half a century before the Japanese-American victims of wartime concentration camps gained financial compensation, and then only by a special act of Congress that awarded incredibly tiny sums.⁸⁰

Such callousness suggests a deeper distortion in the law of just compensation. When a small piece of property is taken by the government to build a new highway, the owner is constitutionally guaranteed fair market compensation, even if owed a relatively trivial sum. But when an innocent person is wrongly convicted by the criminal justice system, he or she is not guaranteed a dime when the mistake is discovered afterward, despite the scars of long years of incarceration. The Constitution's requirement of "just compensation" has never been interpreted to include this particularly devastating loss of human capital.⁸¹ Worse yet, American legislators have been remarkably deficient in providing statutory relief. Only the federal government, fifteen states, and the District of Columbia provide any compensation whatsoever, and some jurisdictions impose ridiculously low ceilings on recovery.⁸² For example, the federal

80. In 1988, Congress passed the Civil Liberties Act, which apologized for the harm done to Japanese Americans and Aleuts interned during World War II. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. §§ 1989-1989d (2000)). The Act awarded \$20,000 in compensation to each individual who was interned, *id.* § 1989b-4, and by accepting the award, the recipient surrendered the opportunity to pursue any other claims against the U.S. government, *id.* § 1989b-4(a)(6). Twenty thousand dollars equals the yield an internee would have received in 1988 from a deposit of \$2454 in a bank account in 1945 if compounded at an annual interest rate of five percent. The compensation thus amounts to \$3.36 per day if the detainee had been confined for two years. To make matters worse, the Act made eligible only those internees, or their spouses or parents, who were still living on the date of statutory enactment, August 10, 1988. *Id.* § 1989b-7. It thereby deprived the children of deceased internees of the right to receive payments for their parents' reparations claims. *But cf.* *Ishida v. United States*, 59 F.3d 1224, 1232-33 (Fed. Cir. 1995) (allowing the child of internees to claim compensation as a result of his exclusion from his parents' home during the time of their internment).

81. There has never been a Supreme Court decision squarely confronting an innocent's claim to compensation under the Takings Clause. The Supreme Court did uphold a statute paying material witnesses only one dollar a day for every day that they spent in government confinement while waiting to testify at trial, but only because "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." *Hurtado v. United States*, 410 U.S. 578, 588 (1973). There was no question that *Hurtado* was in fact a material witness, who actually owed the public a duty. But in the cases we are considering, the confined person has done nothing that places him or her under a public duty to serve time in jail. It is only an erroneous legal process that has imposed such an obligation.

82. Only four of these jurisdictions—the District of Columbia, New York, Tennessee, and West Virginia—impose no statutory ceiling on compensation. D.C. CODE ANN. §§ 1-1221 to 1-1225 (1981); N.Y. JUD. CT. ACTS LAW § 8-b (McKinney 1989); TENN. CODE ANN. § 9-8-108(7) (1999); W. VA. CODE ANN. § 14-2-13a (Michie 2000). The other jurisdictions providing relief are: Alabama, ALA. CODE §§ 29-2-150 to -165 (2003) (providing \$50,000 for each year of incarceration, prorated for periods of less than a year, plus a discretionary amount that the committee in charge of compensation decisions may request from the state legislature); California, CAL. PENAL CODE §§ 4900-4906 (West 2000 & Supp. 2004) (providing \$100 per day, not

government will pay an innocent convict only \$5000, regardless of the amount of time he has wasted in prison.⁸³ But this is a princely sum compared to the zero afforded innocents in thirty-five American states.

This dismissive response contrasts sharply with the relatively openhanded treatment offered by European governments.⁸⁴ The wide disparity between America and Europe has endured for generations, and I am puzzled by the failure of American scholars to mount a sustained constitutional critique.⁸⁵ Not only is this callous treatment scandalously

included in gross income for the purposes of state income taxation); Illinois, 705 ILL. COMP. STAT. 505/8(c) (1999) (providing "for imprisonment of 5 years or less, not more than \$15,000; for imprisonment of 14 years or less but over 5 years, not more than \$30,000; for imprisonment of over 14 years, not more than \$35,000" plus cost-of-living adjustments); Iowa, IOWA CODE ANN. § 663A.1 (West 1998) (granting attorneys' fees and court costs, liquidated damages up to \$50 per day of incarceration, and up to \$25,000 per year of lost income directly related to conviction and imprisonment); Maine, ME. REV. STAT. ANN. tit. 14, §§ 8241-8242 (West 2003) (allocating up to \$300,000 for damages and costs, which may not include punitive damages); Maryland, MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West, WESTLAW through 2003 Reg. Sess.) (providing actual damages due to confinement plus a reasonable sum for counseling); New Hampshire, N.H. REV. STAT. ANN. § 541-B:14 (1997 & Supp. 2003) (providing \$20,000); New Jersey, N.J. STAT. ANN. §§ 52:4C-1 to :4C-6 (West 2001) (granting the greater of twice the claimant's income in the year prior to his incarceration or \$20,000 for each year of imprisonment); North Carolina, N.C. GEN. STAT. §§ 148-82 to -84 (2003) (authorizing payments of \$20,000 per year, not to exceed \$500,000); Ohio, OHIO REV. CODE ANN. § 2743.48 (Anderson Supp. 2002) (providing \$40,330 per year of incarceration plus court costs, attorneys' fees, and lost wages); Texas, TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.052, 103.105 (Vernon Supp. 2004) (stating that an award determined by a court may not exceed \$500,000, and if the award is determined by the state comptroller, it is \$25,000 per year if the detention is for less than twenty years, and \$500,000 if twenty or more years); and Wisconsin, WIS. STAT. ANN. § 775.05 (West 2001) (awarding \$5000 per year up to \$25,000, although the claims board may petition the legislature for additional compensation). These state programs impose other stringent requirements before recovery, sometimes making it an entirely discretionary matter. For more on this dark corner of American jurisprudence, see Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999).

83. See 28 U.S.C. §§ 1495, 2513. The Innocence Protection Act, originally proposed in 2001 and still pending in Congress, would increase the ceiling to more realistic levels, authorizing the payment of \$50,000 per year, with an increase to \$100,000 per year in capital cases. See Innocence Protection Act of 2003, H.R. 3214, §§ 301-332, 108th Cong. One can only hope that this provision will be enacted sometime soon.

84. The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms guarantees compensation to anyone who has been unlawfully arrested or detained. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(5), 213 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953). A subsequent protocol authorizes compensation for convicts who have been pardoned, or had their conviction overturned, on the ground of miscarriage of justice. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, Europ. T.S. No. 117 (entered into force Nov. 1, 1988); see also Carolyn Shelbourn, *Compensation for Detention*, 1978 CRIM. L. REV. 22, 25 (comparing approaches to compensation in various European countries and the United States).

85. There has been remarkably little legal scholarship on this issue. Professor Edwin M. Borchard of the Yale Law School remains the only significant figure who persistently engaged the subject throughout his distinguished career. He once wrote:

Among the most shocking . . . [and] glaring of injustices are erroneous criminal convictions of innocent people. The State must necessarily prosecute persons legitimately suspected of crime; but when it is discovered after conviction that the wrong man was condemned, the least the State can do to right this essentially

unjust, but it cannot be justified by any of the theories of just compensation law that are taken seriously by the courts or commentators.⁸⁶

For present purposes, I need not launch a general theoretical critique to urge a different approach for the innocent victims of emergency dragnets. These men and women are in an especially vulnerable position. By hypothesis, they do not enjoy the full panoply of rights guaranteed the normal criminal defendant, and this makes it much more difficult for them to gain quick release by establishing their innocence. This is a bitter price to pay for reassuring the general public after a catastrophic attack, and it is not one that is paid by criminal defendants generally. Though a financial payment will not fully compensate the innocent victims and their families, it is the least that a decent society can do to cushion the blow.

Compensation will also have desirable systemic effects. The emergency administration should be obliged to pay these costs out of its own budget. Given the chaotic conditions in the aftermath of an attack, the threat of substantial budgetary costs can serve to concentrate the bureaucratic mind. It would not make economic sense to devote all resources to sweeping more suspects into the net without determining the likely guilt of those already in custody. Rather than stockpiling suspects in prison, budgetary costs will give security forces new incentives to spend time and energy determining who has been caught up by mistake.⁸⁷

So it is not only simple justice that requires compensation, but bureaucratic efficiency as well.⁸⁸ Provision for innocent detainees should be

irreparable injury is to reimburse the innocent victim, by an appropriate indemnity, for the loss and damage suffered.

EDWIN M. BORCHARD, *CONVICING THE INNOCENT*, at vii (1932). For Professor Borchard's eight-part treatment of the subject, see Edwin M. Borchard, *Government Liability in Tort* (pts. 1-3), 34 *YALE L.J.* 1, 129, 229 (1924-1925); Edwin M. Borchard, *Governmental Responsibility in Tort* (pts. 4-7), 36 *YALE L.J.* 1, 757, 1039 (1926-1927), 28 *COLUM. L. REV.* 577 (1928); and Edwin M. Borchard, *Theories of Governmental Responsibility in Tort* (pt. 8), 28 *COLUM. L. REV.* 734 (1928).

86. For a canvass of the general theories of just compensation, see BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 41-87 (1977). My book does not draw this specific implication from the prevailing theories—it has only dawned on me more recently. But I think that the chapters cited do provide substantial support for my claim. Professor Borchard utilized two theories to justify his views: an eminent domain theory and a social welfare theory. See Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 *B.U. L. REV.* 201, 207-08 (1941).

87. It is a fair question how much impact these budgetary costs will have on the bureaucratic mind. Skeptics may suggest that agency heads will expect Congress to pay compensation without subtracting the cost from other areas of the agency budget. This may well be true to some extent, but it would be a brave agency that expected total absolution. The prospect of budgetary costs may still have a significant impact on the margin even if a partial congressional offset is anticipated.

88. What about detainees who are ultimately convicted of terrorist acts? Surely, they do not deserve compensation. But as a bureaucratic matter, I would not make all detainees wait for payment for years, simply because a few may be successfully prosecuted over time. The compensation needs of detainees and their families are short-term. They need money to put bread on the table and cushion the search for a new job after the detainee is released; deferred

part of a larger compensation package that includes payments for the direct victims of terrorist attack. These people have suffered lifelong losses, and they should be compensated much more generously. Nevertheless, the emergency constitution should seek to do justice to all victims of the emergency, not only to some.⁸⁹

VII. THE PLACE OF JUDGES

The political and economic aspects of my proposal provide a distinctive pathway to the legal sphere. Although judges cannot themselves construct an adequate emergency regime, they play a vital role in sustaining it. Distinguish two levels: macromanagement, concerned with the integrity of the emergency regime as a whole, and microadjudication, concerned with safeguarding individuals against the predictable abuses of the system.

A. *Macromanagement*

Should judges be asked to second-guess the initial decision by the President or Parliament to declare a state of emergency?

I am skeptical about the wisdom of immediate judicial intervention. With the country reeling from a terrorist strike, it simply cannot afford the time needed for serious judicial review. If the President can convince a majority of the legislature of the need for emergency powers, this should suffice. At this early stage, we should rely on the legislature, not the judiciary, to restrain arbitrary power.⁹⁰

But perhaps there is a Solomonic compromise available, at least in some legal cultures. This is suggested by an ingenious French provision. As we have seen, the President of France is granted unilateral authority to

compensation loses much of its utility. It probably makes sense, then, to pay compensation to all detainees, and then try to claw it back from those who are later found guilty.

There remains an intermediary case: detainees who continue to be imprisoned under the normal standards of the criminal law after sixty days, but who are ultimately released or acquitted at trial. These detainees should receive compensation for their initial period of emergency detention, but should then be treated like all others in a similar situation—in America, this means no compensation. Beyond the simple justice of the matter, denying compensation for the initial imprisonment would create a perverse incentive for the authorities to charge innocent people with crimes so as to avoid the need for payment.

89. The prevailing pattern of partial compensation also violates another basic norm: When property is seized by private actors, the owners cannot generally expect the state to compensate them for the loss. It is only when government agents are involved in the seizure that government payments are constitutionally compelled.

The reverse is happening in the aftermath of September 11. The government is offering large sums to the victims of al Qaeda terrorists while it is offering nothing to those seized in the dragnet following the tragedy. But it is the latter individuals who have been directly affected by government officials, not the former.

90. *See supra* Part IV.

declare an emergency. The French Constitution does require him, however, to consult with the constitutional court, the Conseil Constitutionnel,⁹¹ which responds by issuing an advisory opinion that is provided to the general public. If the Conseil Constitutionnel advises against the emergency, the President can disregard its opinion. But an adverse judgment by the Conseil would have a powerful impact on the public, and the prospect of a negative opinion can serve as a constraint on presidential abuse, especially in the absence of a legislative check.⁹²

In any event, such a compromise seems implausible in legal cultures like America's, where constitutional judges have a deeply ingrained instinct to avoid advisory opinions. Here it seems wiser to deploy a familiar variety of "passive virtues" to avoid premature decision and see whether the political branches, aided by the supermajoritarian escalator, will call an early halt to emergency declarations that lack an adequate basis in reality.⁹³ Judicial intervention on the merits should be reserved only for the most egregious cases.

In contrast, the constitutional court does have a crucial backstopping role on more procedural matters. The great danger is this: The supermajoritarian escalator will eventually require the termination of the emergency regime, but the Executive may refuse to give up his emergency powers. After all, the President or Prime Minister may still remain extremely popular even though he has failed to gain the necessary legislative supermajority, which may be as high as eighty percent. It can be tempting to play the demagogue and appeal to the people for support against the minority that seeks to terminate extraordinary conditions: "As President, I cannot allow a small minority in the legislature to sabotage the national interest. I hereby declare that the country remains in a state of emergency."

Here is where the judges can play a fundamental role. Their opposition to the continuation of the emergency regime will transform the nature of the political battle. The President can no longer pretend that he is merely fighting a bunch of minority politicians. He will be obliged to take on the courts as well, casting himself as an enemy of the entire constitutional order. Such high stakes should deter much reckless behavior.

91. CONST. art. 16, paras. 1, 3.

92. Article 16 is interpreted to require a public opinion by the Conseil Constitutionnel. *See VOISSET, supra* note 19, at 50 (noting that while the opinion by the Conseil Constitutionnel may not be legally binding, the publicity surrounding the opinion would give it political and moral importance).

93. *Cf. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115 (1962) (stating that "the judgment of courts can come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society").

But not all of it. Demagogues may call the courts' bluff, and then it will be up to the country to decide. But at least the courts will go into the struggle on relatively advantageous terms. The President's breach of the rule of law will be plain for all to see: The vote was seventy-five to twenty-five when it was supposed to be eighty to twenty. The court will not be obliged to justify its intervention with complex legalisms. The issue will be clean and clear: Is the country prepared to destroy the rule of law and embark on a disastrous adventure that may end with dictatorship?

To dramatize the stakes further, the emergency constitution should explicitly command the courts to begin considering habeas petitions immediately upon the legal termination of the emergency. This will require countless officials throughout the country to ask where their ultimate loyalties lie—to the usurper or to the constitution. At least some will uphold the law and hand their prisoners over to the judges, putting the burden on the usurper to take further extraordinary actions. All this may help provoke a popular movement in support of the constitution—or it may not.

So much for visions of apocalypse. The constitutional court also has a backstopping role to play in more humdrum scenarios. For example, my proposal virtually guarantees a struggle between the Executive and the legislature over control of information. By placing the legislative oversight committees in the hands of the minority party, we can be sure of countless protests against executive claims of secrecy based on national security. These unending tensions are entirely healthy, and judges should largely keep to the sidelines while the parties work out a reasonable accommodation on their own.

Nevertheless, the Executive has most of the chips in this game, and if it abuses its bargaining power, judicial intervention may sometimes be desirable to enforce legislative demands. This will call for a great deal of judicial tact and discretion in sifting the facts of particular cases—a matter that can only be discussed intelligently at retail, not wholesale.

B. *Microadjudication*

But of course, the bulk of judicial activity will not involve macromanagement of the separation of powers. It will require the microadjudication of cases raised by particular detainees. Begin by considering how the political and economic aspects of the emergency constitution shape the disposition of these cases before they get to the judges.

Start with the prosecutors and how they will respond to the provision for a series of two-month extensions. The supermajoritarian escalator puts them on notice that the emergency will not go on and on. When the regime terminates, all the cases of emergency detention will be dumped on their

desks at once. At that point, they must release all suspects whose detention cannot be supported by hard evidence. To avoid an embarrassing jail delivery, prosecutors have every incentive to prepare their cases during the emergency so that they will not be caught off guard by the operation of the supermajoritarian escalator. This means that the “emergency” will not denote a period of sheer lawlessness, but a time for prosecutors to undertake serious investigations of the merits of individual cases. When a preliminary probe reveals an evidentiary vacuum, the prosecutors themselves will serve as a powerful lobby for the release of innocent detainees.

At this point, the economic aspect of the proposal kicks in. Since compensation payments come out of the budget of the security services, a prosecutorial inquiry about a particular detainee will serve as an institutional prod. To avoid budgetary costs, the security services have an incentive to focus their energies on the particular detainees singled out by the prosecutors. And if their investigation does not show any progress, they have reason to release the detainee rather than hold him to the bitter end.

So much for prosecutors and police officers. The supermajoritarian escalator also will have a salutary impact on the behavior of judges. Judges are conservative folk who are likely to interpret their legal mandate very cautiously during the immediate aftermath of a massive terrorist strike. I think this caution is perfectly appropriate, but those who disagree on the merits must conjure with my empirical prediction that judges will tend to exploit ambiguities in the constitutional text to minimize energetic inquiry during the period of most acute crisis. If my prediction is right, another key operational question emerges: How do we apprise the judiciary that the time has come to shift gears and move from extraordinary restraint to their normal activities on behalf of fundamental rights?

This is where my proposed system of political checks and balances becomes important. As time moves on, the supermajoritarian escalator makes it possible for twenty-one percent of the legislature to terminate the emergency regime. From a juridical point of view, it is not important that only a small legislative minority has in fact triggered the shift back to normalcy. The key point for judges is that they are off the hook, that the legislature has taken responsibility for terminating the emergency in a highly public fashion. Once the legislature has taken the lead, judges will resume their normal role in the criminal process, safeguarding individual rights and providing due process of law. And they will do this even though a majority of the legislature, and the general population, may not yet have fully recovered from the anxieties generated by the terrorist attack.

Some may think that my timetable is too precipitous and that the return to judicial normalcy should proceed with more deliberate speed. But this cautionary judgment can be readily accommodated by recalibrating the

speed of the supermajoritarian escalator—changing the extension periods from two to three months, slowing down the rate of ascent to the supermajoritarian heights, and reducing the ultimate requirement from eighty percent to some lower figure.

But as you tinker with the terms, remember this: No matter how you redesign the escalator, the return to judicial normalcy will always inspire lots of anxiety in the hearts of lots of people. The “war on terrorism” will never end. There will always be disaffected groups scurrying about seeking terrible weapons from unscrupulous arms dealers and rogue states. There will always be fear-mongering politicians pointing with alarm to the storm clouds on the horizon. And there will always be many people who, understandably enough, have not recovered fully from the trauma of the last outrageous attack. Even committed civil libertarians will find it hard to suppress a residual doubt: Is it really safe to lift the state of emergency?

I have no inclination to deny the reality of these pervasive anxieties. To the contrary, they motivate my call for a constitutional approach to the problem. We should take advantage of periods of relative calm to anticipate the political difficulties involved in returning to juridical normalcy and take steps now to channel the predictable political resistances of the future. We should not allow reasonable disagreements about the design of the escalator to generate constitutional paralysis and allow the entire project to be overtaken by events. Every terrorist attack will make it more difficult to frame a response that prevents the permanent erosion of civil liberties. Almost any supermajoritarian escalator is better than the status quo.

The particular design of the glide path to normalcy will, in turn, shape our decisions on a crucial issue: What is the appropriate judicial role during the emergency period itself?

The longer the likely period of emergency, the greater the need for judicial supervision. Indeed, it may make sense to design a graduated system of increasing judicial scrutiny: minimal for the first two months of detention, with more intrusive scrutiny thereafter. But for now, I will be focusing on the central problems involved in defining the absolute floor for judicial protection.

Begin by recalling that other aspects of our proposal will already provide some protection. The compensation provisions give the security services a bureaucratic interest in releasing innocent detainees, and the clear prospect of the termination of the emergency regime creates a similar incentive for government lawyers. Within this context, I do not favor immediate judicial hearings that weigh the evidentiary basis for detention in individual cases.

Nevertheless, there are good reasons for requiring the prosecutor to bring detainees expeditiously before a judge even if the suspects cannot challenge the factual basis for their detention. At this initial hearing, the

judge should ask the prosecutor to state the grounds for detention on the record.⁹⁴ Even if the reasons may not be rebutted, the need to explain will encourage the prosecutor to operate as a first line of defense against totally arbitrary conduct. Before the hearing commences, he must at least obtain a statement from the detaining officers that explains the grounds for their suspicion. If the officers' statement is a sheer fabrication, motivated by personal animus against the detainee, there will be a basis for a punitive lawsuit after the emergency ends.⁹⁵

The initial hearing also will serve to give the detainee a firm bureaucratic identity. It would otherwise be easy for people to get entirely lost in a system reeling in response to the unexpected attack. While innocent people will not take much solace in knowing that they are "Suspect 1072," whose charges have been reviewed by "Judge X" on "Day Y," these formalities will serve to start the clock running and alert all concerned that there *will* be a day of legal reckoning. After forty-five or sixty days, prosecutors should be required to present hard evidence of the detainee's complicity with the conspiracy.

Such a lengthy period is regrettable, but by hypothesis, the terrorist attack will have taken the security services by surprise, and they will be scrambling to create a coherent response to the larger threat. They will be stretched too thin to devote large resources to evidentiary hearings in the immediate aftermath of the attack, and if they skimp on legal preparation, they may fail to make a compelling presentation of the information at their disposal. They may even fail to provide judges with all of the evidence that actually exists in the agencies' computer banks, leading to the judicial discharge of detainees who have genuine links to terrorist organizations. Given this risk, most judges will bend over backwards to give the government the benefit of the doubt, leading to lots of hearings without much in the way of effective relief.

I would set a different goal for the judges during the early period of detention. Decency, not innocence, should be their overriding concern. *Do not torture the detainees*. That should be an absolute, and judges should enforce it rigorously. The fact that many of the detainees are almost certainly innocent makes the ban more exigent. Professor Alan Dershowitz

94. If security requires, this might be done in camera, with release of the record to the detainee at a later point.

95. See *infra* text accompanying note 103. The European Convention on Human Rights creates a fundamental right to a "prompt[]" judicial hearing. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 84, art. 5(3), 213 U.N.T.S. at 226. The European Court of Human Rights has taken repeated steps in terrorism cases to protect this right. See *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 553; *Brogan v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) 117 (1988). But when the United Kingdom exercised its power to file a "derogation" from the Convention in the case of terrorism in Northern Ireland, the Court deferred—excessively in my view—to the British decision to delay these initial judicial hearings in terrorism cases. See *Brannigan v. United Kingdom*, 17 Eur. Ct. H.R. (ser. A) 539 (1993).

has recently urged us to rethink this absolute prohibition, trotting out familiar law school hypotheticals dealing with ticking time bombs and the like.⁹⁶ But I am entirely unimpressed with the relevance of such musings in real-world emergency settings. Security services can panic in the face of horrific tragedy. With rumors flying about, amid immense pressures to produce results, there will be overwhelming temptations to use indecent forms of interrogation. This is the last place to expect carefully nuanced responses.

Dershowitz recognizes the problem, and proposes to solve it by inviting judges to serve as our collective superego, issuing “torture warrants” only in the most compelling cases.⁹⁷ But judges are no more immune from panic than the rest of us. To offset the rush toward torture in an emergency, they would be obliged to make their hearings especially deliberate and thoughtful. But if they slow the judicial proceedings down to deliberate speed, the ticking time bomb will explode before the torture warrant can issue. Serious deliberation is simply incompatible with the panic that follows a terrorist attack. Once the ban on torture is lifted, judges will not systematically stand up to the enormous pressure. It is far more likely that they will become mere rubber stamps, processing mounds of paper to cover up the remorseless operation of the torture machine.

Even a few judicial lapses will have devastating consequences, carrying a message that transcends the cruelties and indecencies involved in particular cases: “Beware all ye who enter here. Anyone swept into the emergency dragnet may never return with his body and soul intact. The state is hurtling down the path of uncontrolled violence.” Once word gets around that judges cannot be trusted to guard against abusive torture, ordinary people will wonder whom they *can* trust.

There is another danger: If torture runs rampant, the torturers will form a formidable pressure group. Working behind the scenes, they will try to extend the emergency to defer the bitter calls for retribution that are sure to follow when victims and their families regain their full freedom. These officials may become sufficiently desperate to support a violent coup if this is their only hope of preventing a return to normalcy.

Dershowitz utterly fails to confront these problems. He recognizes that torture may have long-run legitimacy consequences, but fails entirely to consider its devastating short-run consequences in a state of emergency.⁹⁸ Our overriding constitutional aim is to create an emergency regime that

96. See ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 142-63 (2002). For another—and very reflective—essay on the problem of torture in an age of terrorism, see Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013 (2003).

97. See DERSHOWITZ, *supra* note 96, at 158-61.

98. See *id.* at 145.

remains subordinated—both in symbol and in actual fact—to the principles of liberal democracy. Without the effective constraint of the rule of law, it is simply too easy for the emergency regime to degenerate into a full-blown police state.

So let us keep torture a taboo, and consider how judges may effectively enforce this ban.⁹⁹ Here is where the right to counsel enters—a right that has proved remarkably vulnerable in America in the aftermath of September 11.¹⁰⁰ Regular visits by counsel are the crucial mechanism for policing against torture. Once security services know that detainees have direct access to the legal system for their complaints, torture will no longer be a thinkable option.¹⁰¹ To be sure, regular visits by counsel may also make more legitimate forms of interrogation less effective. Detainees will feel themselves less isolated and vulnerable, and so may prove less cooperative. But this is simply the price that any decent society must be willing to pay.

Quick access to counsel is also crucial for other purposes. While hearings on the question of innocence won't happen immediately, they will occur within sixty days of detention. Detainees have the fundamental right to ask their lawyers to collect exculpatory evidence rapidly before memories fade or physical materials disappear. Finally, lawyers play a crucial intermediary role between detainees and their families, friends, and employers in the outside world. These people must be in a position to hear from the lawyer, and quickly, that the detainee has not disappeared into a police state hellhole. They also should be permitted to monitor the attorney's performance to ensure that their loved one is treated with respect, and to engage replacement counsel if they so choose.

Special limitations on these rights may be tolerable so long as they do not undermine the fundamentals. For example, the detainee's intimates must have access to his counsel, but they may be forbidden to publicize further any information they receive. Some restrictions on the right to choose particular lawyers may well be tolerable. But we are reaching the

99. In 1992, the United States ratified the International Covenant on Civil and Political Rights. Article 7 of the Covenant states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” International Covenant on Civil and Political Rights, *supra* note 76, art. 7, S. EXEC. DOC. E, 95-2, at 25, 999 U.N.T.S. at 175. In ratifying the Covenant, the United States filed a reservation stating that it “considers itself bound by Article 7 to the extent that ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” S. EXEC. REP. NO. 102-23, at 22 (1992).

100. See Nicholas A. Kacprowski, Note, *Stacking the Deck Against Suspected Terrorists: The Dwindling Procedural Limits on the Government's Power To Indefinitely Detain United States Citizens as Enemy Combatants*, 26 SEATTLE U. L. REV. 651, 666 (2003).

101. As a further safeguard, judicial hearings on torture complaints should be expedited, and security officers found to be complicit should be subjected to immediate administrative discharge and timely criminal prosecution.

realm of reasonable disagreement, and I am restricting myself only to some very basic fundamentals.¹⁰²

From this vantage point, we must take steps to anticipate another potential abuse: Suppose that, after sixty days of detention, the government cannot produce the evidence required to justify further incarceration. The judicial hearing concludes with the release of the detainee, but the security services respond by seizing the newly freed person at the courthouse door, and arresting him for another two-month emergency detention. We require an adaptation of the “double jeopardy” principle to block this transparent abuse. While the security services have the power to detain new suspects so long as the state of emergency continues, they cannot engage in revolving door tactics. By hypothesis, they have already focused on the detainee and have failed to find evidence of his complicity with the ongoing terrorist conspiracy. If further investigations uncover new evidence, by all means arrest the suspect once again—but this time, the prosecution must make its case for detention under the standard ground rules established by the criminal law.

C. *The Power of Hindsight*

I have been distinguishing between macro- and microjudicial interventions—the former dealing with the integrity of the system as a whole and the latter with the treatment of individual cases. But this neat distinction will blur over time. Some individual detainees, once released, will predictably complain about their treatment during confinement. These complaints will accumulate into larger patterns as they slowly reach appellate tribunals. With any luck at all, the state of emergency will have ended before the highest court begins to consider a series of typical grievances stemming from the recent crisis.

Microadjudication will merge into macromanagement. The high court should try to do justice in the particular case, but in ways that will shape

102. This brief discussion emphatically does not provide a full list of core rights meriting protection under emergency conditions. A comprehensive assessment goes far beyond the scope of a single essay.

Further study should include careful reflection on the rights protected during an emergency by the South African Constitution, *see supra* note 23, as well as the nonderogable rights specified by Article 4 of the International Covenant on Civil and Political Rights, *supra* note 76, art. 4, S. EXEC. DOC. E, 95-2, at 24, 999 U.N.T.S. at 174, and the fundamental guarantees established by Protocol I to the Geneva Convention, *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, art. 75, 1125 U.N.T.S. 3, 37-78. In addition, a very thoughtful Declaration of Minimum Humanitarian Standards was elaborated by a leading group of jurists meeting in 1990 at the Institute for Human Rights in Turku/Åbo, Finland. *See* Declaration of Minimum Humanitarian Standards (Dec. 2, 1990), http://www.abo.fi/instut/imr/publications_online_text.htm.

future patterns of emergency administration. How will the structure of the emergency constitution guide the path of this ongoing judicial dialectic?

Consider the way our compensation requirement will shape judicial perceptions. Since all innocent detainees will be receiving fair payment for their time in jail, only lawsuits alleging truly outrageous conduct will seem plausible. And this is just as it should be. Even in retrospect, the courts should give a wide discretion to the judgments of the emergency authorities. Nonetheless, there will be abuses. Even if the system steers clear of torture, the emergency will predictably tempt some members of the security services to use their extraordinary powers in the service of personal vendettas: Inspector Smith has always hated his next-door neighbor, Jones, and seizes the chance to throw him behind bars for sixty days by calling him a terrorist.

While proving animus is always difficult, the procedural framework will make it possible. Although an evidentiary hearing may be deferred for forty-five or sixty days, the emergency constitution requires an immediate judicial hearing at which the prosecution must state the grounds of suspicion that support the detention.¹⁰³ If it later develops that these charges are bogus, the question naturally arises whether the officials making them were acting in good faith. The entry of a few punitive damages awards, moreover, will have a structural consequence—both the bad publicity and the budgetary hits will induce agencies to get rid of their “bad apples” and institutionalize more rigorous controls.

A more systemic problem may arise if criminal prosecutors use emergency powers as a shortcut for ordinary procedures. Even though the prosecutor may not have enough evidence to move against a suspected car thief, why not call him a terrorist and subject him to immediate detention and interrogation? In these cases, structural remedies are even more important than damages: Not only should errant prosecutors lose their licenses to practice law, but errant prosecutorial offices should be required to take systematic steps to assure that such abuses do not recur.

And then there will be problems of ethnic, religious, and racial profiling. Some terrorist groups will not invite this practice since they are drawn primarily from the dominant groups—consider the Oklahoma City bombers. But the current war on terrorism is fraught with anti-Islamic and anti-Arab prejudices that could turn very ugly under emergency conditions.

The International Covenant on Civil and Political Rights sets the proper standard. Article 4 applies even during states of emergency and prohibits states from discriminating “*solely* on the ground of race, colour, sex,

103. See *supra* text accompanying notes 94-95.

language, religion or social origin.”¹⁰⁴ In signing the Convention, the United States accepted this provision without reservation, but filed an “understanding” that it did not “bar distinctions that may have a disproportionate effect upon persons of a particular status” during a “time of public emergency.”¹⁰⁵ During the early period of panic, it will be tough for courts to determine how well the security services are complying with these principles. While a dragnet may well sweep certain groups into detention disproportionately, this may be entirely due to the group’s disproportionate allegiance to one or another terrorist ideology. But as the smoke clears, and the emergency lifts, patterns of gross discrimination may well emerge. Once again, the challenge for courts is not only to provide punitive damages for abusive conduct, but to consider how they might encourage the bureaucracy to take structural measures to reduce these discriminatory impulses when future emergencies strike.

Patterns of individual complaints will undoubtedly accumulate to reveal other problematic practices as experience develops over time. The challenge for both courts and agencies is to learn from this experience and take ongoing measures that will make emergency administration tolerable, if never satisfactory.

D. *An Overview*

Move back a step and take the measure of the overall proposal. Simplifying drastically, I will sum up the whole with three principles drawn from each of three domains: political, economic, and juridical. Politically, the emergency constitution requires increasingly large majorities to continue the extraordinary regime over extended periods of time. Economically, it requires compensation for the many innocent people caught in the dragnet. Legally, it requires a rigorous respect for decency so long as the traditional protections of the criminal law have been suspended.

Supermajorities, compensation, decency. These three principles, and their corollaries, do more than provide substantial protection to the unlucky individuals caught in the net of suspicion. They combine to present a picture of the “state of emergency” as a carefully limited regime, tolerated only as a regrettable necessity, and always on the path toward termination. Undoubtedly, the admission of this regime into our constitutional order would represent a recognition that the moment of triumphalism after 1989 has come to an end, and that liberal ideals may sometimes require extraordinary actions in their defense. It is better to face up to this sad truth

104. International Covenant on Civil and Political Rights, *supra* note 76, art. 4, S. EXEC. DOC. E, 95-2, at 24, 999 U.N.T.S. at 174 (emphasis added).

105. S. EXEC. REP. NO. 102-23, at 22 (1992).

now than to allow terrorists to provoke repeated cycles of public anxiety that will trigger recurring waves of repressive legislation.

VIII. TRAGIC COMPROMISE?

Although the twenty-first century opened with the terrorist attacks on New York and Washington, we are not dealing with a uniquely American problem. The next strike may occur in London or Paris, not Los Angeles or Chicago. Every Western country has an interest in creating an emergency constitution. Since the Europeans have not recently been traumatized by a massive first strike, they may well be in a better position to make progress more quickly.

But it is too soon to count America out. And if this Essay does provoke serious discussion, particular characteristics of the American Constitution will drive the conversation in distinctive directions. The most serious problem is generated by the notorious difficulty of formal constitutional amendment. Proposals on far less controversial matters have regularly failed to navigate the formidable obstacle course established by Article V. If my proposal has any future in the United States, it will not take the form of a constitutional amendment. Throughout the twentieth century, Congress has enacted “framework statutes” that have sought to impose constitutional order on new and unruly realities that were unforeseen by the Founders. The same technique will serve us well here.

After reviewing past experience, I propose a framework based on a tragic compromise: Civil libertarians should allow the Executive to detain suspected terrorists for a period of forty-five to sixty days, without the ordinary safeguards of habeas corpus, but only in exchange for the principles of supermajoritarianism, compensation, and decency elaborated in this Essay.

A. *Past Experience*

The most notable framework statute of the twentieth century is the Administrative Procedure Act (APA).¹⁰⁶ The Founders did not foresee the rise of the bureaucratic state, and it was only during the last half-century that Congress and the courts responded creatively to fill the gap. Although it is packaged as a statute, the APA is the product of constitutional thought, and the courts have given quasi-constitutional status to its provisions. While one may quibble endlessly with particular acts of judicial interpretation, the overall result has been a triumph of constitutional adaptation: The

¹⁰⁶ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

framework provided by the APA has successfully imposed fundamental constraints on bureaucratic government in the name of democracy and the rule of law.

We have been less successful when it comes to states of emergency, but it has not been for want of trying. From the Great Depression through the Cold War, Congress passed no fewer than 470 statutes granting the President authority to exercise one or another power during a declared state of “national emergency,”¹⁰⁷ and presidents made abundant use of this authority.¹⁰⁸ But in response to abuses of executive power, culminating in the Watergate scandal, Congress inaugurated a new approach based on a framework statute. The National Emergencies Act (NEA) of 1976¹⁰⁹ terminated all existing states of emergency¹¹⁰ and established a uniform procedural framework for the future exercise of all such powers.¹¹¹ But it

107. See SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, A RECOMMENDED NATIONAL EMERGENCIES ACT, S. REP. NO. 93-1170, at 2 (1974), *reprinted in* SENATE COMM. ON GOV'T OPERATIONS & THE SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, THE NATIONAL EMERGENCIES ACT (PUBLIC LAW 94-412): SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 19, 20 (Comm. Print 1976) [hereinafter THE NATIONAL EMERGENCIES ACT SOURCE BOOK] (providing examples of the President's “extraordinary powers, among others, to seize property and commodities, organize and control the means of production, call to active duty 2.5 million reservists, assign military forces abroad, seize and control all means of transportation and communication, restrict travel, and institute martial law, and, in many other ways, manage every aspect of the lives of all American citizens”); SPECIAL COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY, S. REP. NO. 93-549, at iv (1973) (compiling a list of “all provisions of Federal law, except the most trivial, conferring extraordinary powers in time of national emergency”); SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES: A WORKING PAPER app. at 135-40 (Comm. Print 1974) (Harold C. Relyea) [hereinafter HISTORY OF EMERGENCY POWERS] (summarizing several “provisions of law which . . . would become operative upon proclamation of a national emergency by the president”).

108. In 1933, President Roosevelt, in a then-novel invocation of wartime emergency powers to deal with a domestic economic crisis, declared a state of emergency with respect to the Depression-era banking crisis. See HISTORY OF EMERGENCY POWERS, *supra* note 107, at 119. President Truman followed in 1950 with an emergency declaration during the Korean conflict, see Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1401 (1989), while President Nixon twice invoked his emergency authority during the balance of payments crisis and the Post Office strike of the early 1970s, see HISTORY OF EMERGENCY POWERS, *supra* note 107, at 120. The Senate's Special Committee on National Emergencies and Delegated Emergency Powers found that none of these states of emergency had been terminated by the President or Congress, 120 CONG. REC. 29,976 (1974) (statement of Sen. Church), and that the Truman order had actually served as the basis for an unrelated embargo against Cuba begun during the Kennedy Administration, see Lobel, *supra*, at 1401.

109. Pub. L. No. 94-412, 90 Stat. 1255 (codified as amended at 50 U.S.C. §§ 1601-1651 (2000)).

110. 50 U.S.C. § 1601.

111. For example, the NEA requires that all future declarations of national emergencies be published in the *Federal Register*, *id.* § 1621, that the President specify the statutory powers to be exercised during the emergency, *id.* § 1631, and that the President report to Congress on emergency orders and expenditures, *id.* § 1641.

did not go further to revise the disorganized, but massive, grants of authority that had accreted to the Executive over the decades.¹¹²

The past quarter-century has seen frequent tests of the NEA framework, most notably in the conduct of foreign affairs.¹¹³ Although presidents never used the NEA framework to detain suspects before September 11, they regularly invoked it to block foreign assets and restrict foreign travel.¹¹⁴ This experience has only dramatized the serious problems with the existing framework.¹¹⁵

Not only does the President retain the power to declare an emergency unilaterally, but the statute's weak consultation and reporting procedures have been largely diluted or ignored.¹¹⁶ Most importantly, the statute

112. See ABRAHAM RIBICOFF, COMM. ON GOV'T OPERATIONS, NATIONAL EMERGENCIES ACT, S. REP. NO. 94-1168, at 3 (1976), *reprinted in* THE NATIONAL EMERGENCIES ACT SOURCE BOOK, *supra* note 107, at 290, 292 ("The National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes.").

113. One year after passage of the NEA, Congress passed the International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, §§ 201-208, 91 Stat. 1625, 1626-29 (1977) (codified as amended at 50 U.S.C. §§ 1701-1707). IEEPA authorizes the President to exercise wide-ranging emergency economic powers in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. §§ 1701-1702. This substantive grant of authority is regulated by the NEA framework, *see id.* § 1621(b) (stating that "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect . . . only in accordance with this chapter"), but IEEPA also imposes additional procedures. For example, pursuant to § 1703(a), the President must consult with Congress "in every possible instance" prior to invoking the statute. He is also required to specify the circumstances constituting an emergency and the powers to be exercised, *id.* § 1703(b), and to report to the Congress every six months following the exercise of such powers, *id.* § 1703(c).

114. During the 1990s, IEEPA was used increasingly as a tool against terrorist groups, but never to arrest or detain suspects. For a detailed summary of the orders issued under IEEPA, see James J. Savage, *Executive Use of the International Emergency Economic Powers Act—Evolution Through the Terrorist and Taliban Sanctions*, CURRENTS: INT'L TRADE L.J., Winter 2001, at 28, 32-37.

115. The best essay on the NEA and IEEPA, and their real-world operation, is Lobel, *supra* note 108. See also Harold C. Relyea, *Reconsidering the National Emergencies Act: Its Evolution, Implementation, and Deficiencies*, in THE PRESIDENCY AND NATIONAL SECURITY POLICY 274 (R. Gordon Hoxie ed., 1984); Glenn E. Fuller, Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453 (1979).

116. IEEPA imposes procedural requirements in addition to those demanded by the NEA, *see supra* note 113, but these safeguards have fared no better in real life. Professor Jules Lobel describes presidential reports pursuant to the NEA and IEEPA as "pro forma" documents and presidential declarations as simply "track[ing] the language of the statute and provid[ing] sparse details of the basis for the purported emergency." Lobel, *supra* note 108, at 1415; *see also id.* at 1416 ("Instead of one generic emergency droning on and on without review, we now have a number of little but no less dubious emergencies—unchecked, unreviewed, and perfunctorily reported."); Relyea, *supra* note 115, at 316 (noting President Carter's failure to meet the six-month reporting requirements during the Iran hostage crisis); Note, *The International Emergency Economic Powers Act: A Congressional Attempt To Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1118-19 (1983) (arguing that IEEPA's consultation provision is "essentially a request, and not a requirement").

provides that “each House of Congress shall meet” every six months to consider a vote on terminating the emergency.¹¹⁷ But neither chamber has ever met to consider this action, and despite the mandatory force of the word “shall,” courts have found “no legal remedy for a congressional failure to comply with the statute.”¹¹⁸ Although emergency declarations automatically lapse after one year,¹¹⁹ there is nothing to stop the President from renewing them immediately, and he has often done so.¹²⁰

Even if Congress took its responsibilities seriously, the NEA does not provide it with an effective mechanism to control an overreaching president. When it was originally passed, the statute did authorize Congress to end an emergency without the President by means of a concurrent resolution passed by a majority in both Houses.¹²¹ But once the Supreme Court held such legislative vetoes unconstitutional,¹²² Congress amended the NEA to require a joint, instead of a concurrent, resolution.¹²³ Since these are subject to presidential veto, it now requires a two-thirds majority to override the “inevitable” opposition of the White House—something that will never happen during periods of crisis.¹²⁴ Even if a miracle occurred, the

117. 50 U.S.C. § 1622.

118. Lobel, *supra* note 108, at 1417. When he was a circuit court judge, Justice Breyer interpreted the provision as granting Congress a discretionary “chance to force a vote on the issue.” *Beacon Prods. Corp. v. Reagan*, 814 F.2d 1, 4-5 (1st Cir. 1987).

In its major decision in the area, the Supreme Court also took a very deferential posture toward the exercise of executive emergency power under IEEPA. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981). As Harold Koh explains, “[U]nder Justice Rehnquist’s *Dames & Moore* reasoning, a court may construe congressional inaction or legislation in a related area as implicit approval for a challenged executive action.” Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1311 (1988).

119. 50 U.S.C. § 1622(d). To renew an emergency declaration, the President need only publish a statement in the *Federal Register* and provide notice to Congress that the emergency is to continue in effect. *Id.*

120. *See, e.g.*, Notice of August 14, 2002, 67 Fed. Reg. 53,721 (Aug. 16, 2002) (continuing the “Emergency Regarding Export Control Regulations”); Notice of July 30, 2002, 67 Fed. Reg. 50,341 (Aug. 1, 2002) (continuing the emergency over Iraq); Notice of June 21, 2002, 67 Fed. Reg. 42,703 (June 25, 2002) (continuing the “Emergency With Respect to the Western Balkans”); Notice of May 16, 2002, 67 Fed. Reg. 35,423 (May 17, 2002) (continuing the emergency with respect to Burma); Notice of January 18, 2002, 67 Fed. Reg. 3033 (Jan. 22, 2002) (continuing the “Emergency Regarding Terrorists Who Threaten To Disrupt the Middle East Peace Process”); Notice of January 3, 2002, 67 Fed. Reg. 637 (Jan. 4, 2002) (continuing the Libyan emergency); Notice of November 9, 2001, 66 Fed. Reg. 56,966 (Nov. 13, 2001) (continuing the twenty-two-year-old national emergency with respect to Iran).

121. National Emergencies Act of 1976, Pub. L. No. 94-412, § 202, 90 Stat. 1255, 1255-57 (current version at 50 U.S.C. § 1622).

122. *See INS v. Chadha*, 462 U.S. 919 (1983).

123. *See Foreign Relations Authorization Act, Fiscal Years 1986 and 1987*, Pub. L. No. 99-93, § 801, 99 Stat. 406, 448 (1985) (codified at 50 U.S.C. § 1622).

124. *See Koh, supra* note 118, at 1303-04 (arguing that a joint resolution “requires Congress to exercise a measure of political will that historically, it has only rarely been able to muster”); *see also* Lobel, *supra* note 108, at 1416 (noting that “[t]he statute now provides for a termination procedure that would ordinarily be available if there were no NEA”).

President could use his unilateral authority to proclaim a new emergency under the same (or different) statutory authority.¹²⁵

Despite its structural weaknesses and lamentable performance, the NEA remains a path-breaking achievement. Thanks to the work of the last generation, American law now self-consciously affirms the need for a framework statute to control the pathologies of emergency declarations. The challenge for the twenty-first century is to revise the framework so that it will have half a chance of fulfilling this great task.

B. *A Thought Experiment*

A thought experiment may help refine the high stakes involved. Suppose that, sometime in the 1990s, Congress had glimpsed the tragic possibility of September 11, and had possessed the wisdom and will to prepare the legal terrain in advance. Reflecting on the obvious inadequacies of the present National Emergencies Act, it adopted a framework statute along the lines presented here. How might this precautionary action have reshaped the legal debate currently developing in the courts?

Consider the notorious *Padilla* case, now before the Supreme Court.¹²⁶ Jose Padilla is an American citizen whom the government believes is a terrorist but whom it refuses to try under the criminal law. The President claims that his powers as Commander in Chief allow him to hold Padilla indefinitely in a military prison as an “enemy combatant,” despite the fact that he has never joined a foreign army or fought on a wartime battlefield.

My hypothetical framework statute would have deprived these presidentialist claims of all plausibility. Undoubtedly, the President and Congress would have responded to September 11 by declaring a state of emergency. But two years later, Congress would have been obliged repeatedly to reauthorize the emergency by eighty-percent majorities—a virtually impossible task in the absence of a second serious strike.¹²⁷ While the government might well have detained Padilla during the emergency, he would have long since been released, with compensation—unless the government was prepared to charge him with a crime. Within this setting, would any court uphold the President’s authority to sweep Padilla into a military prison by unilaterally declaring him an “enemy combatant”?

With the framework statute in place, the case would be a no-brainer. On the one side, the President’s men would be arguing for a radical expansion of his powers as Commander in Chief in an endless “war” without a clear

125. See, e.g., Relyea, *supra* note 115, at 315 (noting “the potential . . . for Congress to be harassed with repeated proclamations of national emergency in a contest of wills where the stakes are very high”).

126. See *supra* note 5.

127. For an analysis of the libertarian propensities of the 107th Congress, see *supra* note 46.

enemy. On the other, Padilla's lawyers would be urging the Court to prevent an end run around Congress's carefully crafted effort to call the crisis by its true name: not a "war" at all, but a carefully controlled "state of emergency." It is *very* hard to believe that the Supreme Court would pause long before cutting off the President's effort to destroy the integrity of a framework statute that required ongoing collaboration between the political branches.¹²⁸

But isn't this thought experiment merely an idle pipe dream? During the struggle over the National Emergencies Act in the 1970s, the Executive and his congressional supporters managed to block all efforts to constrain presidential claims to unilateral emergency power.¹²⁹ Why suppose that future presidents will cooperate in the enactment of a statute that would clearly eliminate these pretensions?

Because presidential powers are not what they used to be. During the early days of the Cold War, Congress was exceptionally profligate in its grants of presidential authority to arrest and detain suspects.¹³⁰ But these provisions were explicitly repealed over three decades ago, leaving President Bush an empty statutory cupboard after September 11.¹³¹ This is

128. The Court's reaction to presidential unilateralism is notoriously complex. *Compare* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (invalidating President Truman's seizure of steel plants), *with* *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality opinion) (declaring President Carter's unilateral repudiation of a treaty a "political question"). Even in *Goldwater*, the plurality opinion did not uphold presidential unilateralism, but consigned the question for resolution "by the Executive and Legislative Branches." *Id.* at 1003 (Rehnquist, J., concurring in the judgment). If the branches resolved such sensitive matters through a framework statute, there would be little question that the Court would hold subsequent presidents to the terms of the deal. *Cf.* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1267 (2002) ("The requirement that the executive branch persuade Congress of the need for measures that jeopardize liberty dampens the tendency of the executive to undertake such measures without the clearest necessity. Formal involvement by Congress, through a joint resolution or bill, is the least that we ordinarily require in order to provide the transparency, perspective, and wisdom needed to authorize measures that might well be, but need not invariably be, unconstitutional even with such involvement.")

129. *See* Relyea, *supra* note 115, at 309 ("Although an attempt was made in the House to establish factors or conditions constituting a 'national emergency,' the amendment was defeated on the grounds it would have limited severely the situations in which the President could effect a 'national emergency' and otherwise restrict his flexibility in responding spontaneously to crisis conditions."); *see also* 121 CONG. REC. 27,641-45 (1975) (documenting the rejection of an amendment that would have required an affirmative act on the part of Congress to extend, by concurrent resolution, an emergency beyond thirty days); Fuller, *supra* note 115, at 1469 (noting the rejection of an effort to require the President to consult with Congress prior to activating the NEA).

130. *See, e.g.*, Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II, § 102, 64 Stat. 1019, 1021 (repealed 1971).

131. *See* *Padilla v. Rumsfeld*, 352 F.3d 695, 718-24 (2d Cir. 2003) (analyzing the current statutory foundations of presidential powers of summary detention), *cert. granted*, No. 03-1027, 2004 WL 95802 (U.S. Feb. 20, 2004); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004) (surveying the history of the President's power to detain U.S. citizens and finding no statutes that today satisfy the requirement of legislative authorization for the detentions of Padilla and Yasser Esam Hamdi); *see also* *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1317 n.133 (1972) ("In

the reason why he was obliged to depend exclusively on his bare constitutional authority as Commander in Chief to justify his extraordinary detention of Padilla and other American citizens. If the Supreme Court rejects these extreme claims, the President will have little choice but to return to Congress to seek appropriate authority.¹³²

So a new framework statute isn't a pipe dream after all. To be sure, working out the details will require many hard, even tragic, choices. The larger terms of the grand bargain should be clear enough: The President gets strictly limited powers of preventive detention, but only in exchange for the key political, economic, and juridical safeguards needed to prevent the normalization of emergency power. Enactment of such a framework would mark a somber moment in the history of the Republic, but one that future generations may come to see as a landmark in the preservation of our fundamental freedoms.

C. *Constitutional Questions*

Even if such a compromise were wise, would it be constitutional? The existing framework statute does not raise serious problems, but only because the NEA is so unambitious. In contrast, the compromises needed for the new framework raise very fundamental issues. On the one hand, my proposal contemplates the limited suspension of the writ of habeas corpus. Thus, detainees who are innocent of all crimes may be held for forty-five or sixty days without an effective judicial remedy.¹³³ On the other hand, my

repealing the [Emergency Detention] Act, Congress sought to remedy the problem of excessive executive discretion by denying the President the power to undertake preventive detention without congressional authorization.”).

132. In principle, the framework statute should address the treatment not only of citizens, but of all legal residents. The Executive's willingness to accept a statute with such a broad scope will depend, however, on judicial willingness to defend the rights of resident aliens against presidential unilateralism.

At present, lower court decisions show the usual combination of deference and resistance to executive pretensions to extraordinary power. *Compare, e.g.,* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (demonstrating extreme deference to the President with regard to American citizens allegedly found on or near the battlefield in Afghanistan), *cert. granted*, 124 S. Ct. 981 (2004) (No. 03-6696), *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (upholding the Justice Department's decision to withhold basic information concerning detainees caught up in post-September 11 investigations), *cert. denied*, 72 U.S.L.W. 3446 (U.S. Jan. 12, 2004), *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir.) (denying federal habeas jurisdiction to hear the complaints of detainees at the Guantánamo Bay Naval Base), *cert. granted*, 124 S. Ct. 534 (2003) (Nos. 03-334, 03-343), *and* Gherebi v. Bush, 262 F. Supp. 2d 1064 (C.D. Cal. 2003) (same), *with Padilla*, 352 F.3d 695 (rejecting unilateral presidential power to detain American citizens as enemy combatants), *and* Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003) (granting habeas jurisdiction over detainees at the Guantánamo Bay Naval Base).

The scattered judgments of the lower courts serve as highly unreliable predictors for the crucial Supreme Court judgments that will decisively shape our jurisprudence.

133. I prefer to confront the suspension issue directly, rather than distort current doctrine by suggesting that preventive detention might pass muster under some ancient doctrines that have long since been consigned to the dustbin of history.

supermajoritarian escalator requires an assessment of the extent to which the Constitution allows Congress to change the rules of the legislative game. These two issues may seem very different on the surface, but appearances are deceiving. Before elaborating the linkage, it is best to consider them one at a time.

1. *Suspension of Habeas Corpus*

The Constitution contemplates the suspension of the Great Writ in “Cases of Rebellion or Invasion [when] the public Safety may require it.”¹³⁴ The history behind these phrases is not very revealing. When Charles Cotesworth Pinckney introduced the suspension problem at the Constitutional Convention, he proposed that the writ “should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months.”¹³⁵ This provoked Gouverneur Morris to suggest the formulation that ultimately appeared in the text.¹³⁶ The Morris proposal clarified the notion of “urgent occasions”¹³⁷ by limiting them to “rebellion or invasion,”¹³⁸ but failed to include anything like Pinckney’s twelve-month sunset provision. Madison’s notes do not explain why Morris excluded the sunset, nor is it clear that the Convention actually debated the issue. The entire matter arose at a late stage and did not receive the serious treatment it deserved.¹³⁹

The deficiency was not cured in the course of the ratification debates. Speaking broadly, the Clause only provoked a serious debate about federalism: Given the powers of the individual states to suspend habeas, was it really necessary to grant a similar power to the federal

134. U.S. CONST. art. I, § 9, cl. 2.

135. This is how the provision read when it came to the floor for debate on August 28, 1787. See James Madison, Journal (Aug. 28, 1787) [hereinafter Madison, August 28 Journal], reprinted in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 437, 438 (Max Farrand ed., rev. ed. 1966) [hereinafter CONVENTION RECORDS]. Pinckney had first introduced the subject on August 20, when his proposal was significantly different, providing that “[t]he privileges and benefit of the Writ of Habeas corpus . . . shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding [] months.” James Madison, Journal (Aug. 20, 1787), reprinted in 2 CONVENTION RECORDS, *supra*, at 340, 341. Pinckney revised his proposal before submitting the August 28 version. Most notably, he deleted the phrases “by the Legislature” and “and pressing” and filled in the number of months as twelve.

136. Madison, August 28 Journal, *supra* note 135, reprinted in 2 CONVENTION RECORDS, *supra* note 135, at 438-39.

137. *Id.*, reprinted in 2 CONVENTION RECORDS, *supra* note 135, at 438.

138. *Id.*, reprinted in 2 CONVENTION RECORDS, *supra* note 135, at 438.

139. See Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 610 (“The foregoing record [Madison’s notes from the Constitutional Convention] is obviously incomplete, but it is all that we have.”). Unfortunately, Paschal reads too much into the tea leaves when he interprets the Convention’s adoption of Morris’s text as a self-conscious rejection of Pinckney’s sunset idea. See *id.* at 610-13. The record is silent, and we will never know whether Pinckney’s idea was ignored in the Convention’s haste to move on to other pressing matters.

government?¹⁴⁰ This issue pushed the problem of criteria to the periphery. If there was a serious debate about the meaning of “Rebellion” or “Invasion,” it has been lost to history. Nevertheless, the record does contain one fascinating tidbit: The New York State Convention, as one of its proposals for additional amendments, did suggest a six-month termination clause.¹⁴¹ While this gesture is vaguely encouraging for my own sunset provisions, the historical fragments simply do not support confident statements about Founding intentions.

Reflection on the text is more productive. Begin with the constitutional concept of “Invasion.” The text does not speak in terms of a legal category like “war,” but addresses a very concrete and practical problem: If invaders challenge the very capacity of government to maintain order, a suspension

140. Each of the individual states established the writ of habeas corpus prior to the constitutional convention, *see* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 115 (1980), and there were already precedents for the states to suspend the writ in times of emergency, *id.* at 142. At the Convention, John Rutledge argued that this made a federal suspension power unnecessary. He did not “conceive that a suspension could ever be necessary at the same time through all the States.” Madison, August 28 Journal, *supra* note 135, *reprinted in* 2 CONVENTION RECORDS, *supra* note 135, at 438. Anti-Federalists continued to make this argument during the ratification debates:

As the State governments have a power of suspending the habeas corpus act in those cases, it was said, there could be no reason for giving such a power to the general government; since whenever the State which is invaded, or in which an insurrection takes place, finds its safety requires it, it will make use of that power.

Luther Martin, The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention, Held at Philadelphia (1787), *reprinted in* 3 CONVENTION RECORDS, *supra* note 135, at 172, 213.

The Anti-Federalists had two major concerns. First, they worried that the Clause would enable the federal government to oppress the states. *See, e.g.,* *Essay by Montezuma*, INDEP. GAZETTEER, Oct. 17, 1787, at 3, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 53 (Herbert J. Storing ed., 1981); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 249 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DOCUMENTARY HISTORY]; Martin, *supra*, *reprinted in* 3 CONVENTION RECORDS, *supra* note 135; Letter from Louis Guillaume Otto to Comte de Montmorin (Oct. 20, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra*, at 422. Second, the Constitution never explicitly granted the federal government the power to issue writs of habeas corpus. As a consequence, Anti-Federalists feared that the Suspension Clause could be interpreted to support the broader suggestion that the Constitution granted implied powers as well as enumerated ones. *See, e.g.,* Letter from Brutus to New York Journal (Nov. 1, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra*, at 528; George Clinton, Remarks at the New York Ratifying Convention (June 27, 1788), *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra*, at 179; William Grayson, Remarks at the Virginia Ratifying Convention (June 16, 1788), *reprinted in* 10 DOCUMENTARY HISTORY, *supra*, at 1332; John Smilie, Remarks at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra*, at 392 (Merrill Jensen ed., 1976).

141. *See* *The Recommendatory Amendments of the Convention of This State to the New Constitution*, COUNTRY J. & POUGHKEEPSIE ADVERTISER, Aug. 12, 1788, at 1, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 140, at 301, 302 (suggesting “[t]hat the privilege of the Habeas Corpus shall not by any law, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress, next following the passing of the act for such suspension.”). This proposed amendment was part and parcel of New York State’s ratifying submission to the Continental Congress. *See* 18 DOCUMENTARY HISTORY, *supra* note 140, at 294-97.

of the writ is justified when “the public Safety may require it.” It is this challenge to effective sovereignty that makes the constitutional situation exceptional.

This is precisely the space that my proposal seeks to occupy. Events like September 11 are distinctive in destabilizing the citizenry’s confidence in the sovereign’s capacity to defend the frontiers, and my proposal is tailored to respond to the pervasive panic that will predictably ensue. On an instrumental level, the statute authorizes emergency dragnets that seek to remove key operators from the scene and thereby eliminate further “invasions.” On a symbolic level, it reassures the citizenry that effective steps to counter the invasion are under way.

But this rationale only covers terrorist attacks, like September 11, involving invaders from abroad. Future cases may well require further reflection on the concept of “Rebellion,” and how it differs from riots and mass disturbances. The crucial dimension is political self-consciousness. When a mob runs amok, looting and destroying, it may cause great damage and anxiety, but this does not amount to a rebellion unless mob leaders challenge the political legitimacy of the existing system. This is precisely the mark of the typical terrorist attack: The group does not merely blast innocent civilians, but “claims credit” for the attack and seeks to justify it by denouncing the government in power.

This distinguishes terrorism from mob violence, but perhaps “Rebellion” requires something more elaborate? Perhaps it requires the group to form an alternative government and proclaim its legitimate authority?

The history of the Clause does not support such a restrictive interpretation. The key precedent involves President Grant’s suspension of habeas corpus in his effort to suppress the Ku Klux Klan in the postwar South. Congress authorized the President to suspend the writ, but it did not require him to assert that the Klan was trying to overthrow the government, much less form an alternative one. Under the statutory definition, it was enough to qualify as a rebellion if the Klan was “organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or *set at defiance* the constituted authorities of such State.”¹⁴² This formula

142. Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14 (emphasis added). The Act also contained a caveat, specifically that “the provisions of this section shall not be in force after the end of the next regular session of Congress.” *Id.*, 17 Stat. at 15. The Ku Klux Klan can be seen as a prototype for modern terrorist groups; although it challenged state power, it never attempted to create an alternative government or proclaim itself as the legitimate political authority of the South. Instead, the Klan justified its actions as an attempt to defend the supposedly weak and defenseless class of oppressed Southern whites. Beginning in 1870, Congress passed a series of Enforcement Acts that authorized the President to suspend the writ of habeas corpus in disaffected areas and to use the army and navy to put down dangerous and illegal combinations or groups. President Grant employed the Enforcement Acts to put more than forty counties under martial law. In 1871, Grant suspended the writ of habeas corpus in portions of South Carolina. Hundreds

from the Reconstruction era states the aims of modern terrorism with preternatural precision: Defiance of the authorities is the essence.

There will be the inevitable line-drawing problems: How large a strike is necessary to make the constitutional case for a suspension? To qualify as an “Invasion,” how much evidence of foreign involvement? To qualify as a “Rebellion,” how much evidence of political defiance? Though congressional decisions deserve deference, the framework statute should expressly make the Supreme Court the final judge of these matters.¹⁴³ The existence of a gray zone, moreover, should be kept in mind as we turn to the second major constitutional challenge involved in my proposal for a tragic compromise: the construction of a phased escalation of the legislative majorities required to sustain emergency conditions.

2. *Supermajorities?*

Before exploring the problematic aspect of my proposal, begin with the unproblematic: Congress passes sunsets on a host of important matters, requiring future legislators to expose statutory solutions to full reconsideration before they can endure. My framework statute breaks no new ground in applying the same technique to the emergency context. If Congress can terminate key portions of the USA PATRIOT Act after four years,¹⁴⁴ it can automatically terminate emergency legislation after two months. The only serious constitutional question is whether the framework statute can insist that subsequent renewals require escalating supermajorities.

of citizens were tried and convicted under the Enforcement Acts. *See* WILLIAM L. RICHTER, *THE ABC-CLIO COMPANION TO AMERICAN RECONSTRUCTION, 1862-1877*, at 198 (1996).

In suspending habeas corpus, President Grant did not claim that the Klan was going to overthrow Southern governments, but explicitly availed himself of the expanded definition of “rebellion” created by the authorizing statute:

[W]henever such combinations and conspiracies do so obstruct and hinder the execution of the laws of [the States] and of the United States . . . and [are] organized and armed, and so numerous and powerful as to be able by violence *either* to overthrow *or to set at defiance* the constituted authorities of [the States] and of the United States.

Ulysses S. Grant, A Proclamation (Oct. 17, 1871), *reprinted in* 7 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897*, at 136, 136 (James D. Richardson ed., Washington, Gov’t Printing Office 1896-1899) (emphases added). Grant continued:

Whereas such unlawful combinations and conspiracies for the purposes aforesaid are declared by the act of Congress aforesaid to be rebellion against the Government of the United States . . . I, Ulysses S. Grant . . . do hereby declare that in my judgment the public safety especially requires that the privileges of the writ of *habeas corpus* be suspended, to the end that such rebellion may be overthrown.

Id. at 137.

143. It is only reasonable, however, to expect the Court to pause for a while before making a final decision. *See supra* Section VII.A.

144. *See* Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295.

An answer requires us to interpret one of the text's great silences. Both British and colonial legislatures used simple majority rule when enacting statutes, and the Framers certainly supposed that majoritarianism would continue to operate as the basic operational test. But nothing in their text expressly requires this, and the Constitution famously contains a number of supermajoritarian provisions designed for special circumstances.¹⁴⁵ The question is whether this list is exhaustive, or whether Congress can add more supermajoritarian rules by means of new framework statutes.

Over the last generation, the Court has looked skeptically upon congressional efforts to change the foundational rules for legislative enactment.¹⁴⁶ As a general matter, I think such skepticism is appropriate. When one Congress imposes a supermajoritarian rule, it not only binds itself, but it also makes it harder for future Congresses—with very different political majorities—to enact their will into law. Any effort by one momentary majority to shackle its successors raises serious legitimacy questions, and ones that have preoccupied me for a long time.¹⁴⁷

Fortunately, there is something special about this case that permits us to avoid a large detour into these grand theoretical matters. Though the Constitution does grant Congress the power to suspend habeas corpus, the text makes it clear that this power is to be used only under exceptional conditions. This contrasts sharply with standard grants of legislative authority. For example, when the Constitution gives Congress the power of taxation, it contemplates its constant exercise, and it is textually neutral about the propriety of a very broad range of taxes.¹⁴⁸ Given the exceptional

145. The text of the original Constitution contains seven supermajoritarian provisions. See U.S. CONST. art. I, § 3, cl. 6 (Senate impeachment trials); *id.* § 5, cl. 2 (expulsion of a member of either House); *id.* § 7, cl. 2 (override of a presidential veto); *id.* art. II, § 1, cl. 3 (two-thirds quorum of state delegations in the House for election of the President upon deadlock in the electoral college), amended by *id.* amend. XII; *id.* § 2, cl. 2 (Senate ratification of a treaty); *id.* art. V (proposal and ratification of a constitutional amendment); *id.* art. VII (ratification of the original Constitution by the states). Two more supermajoritarian provisions have been added by amendment. See *id.* amend. XIV, § 3 (amnesty for rebels); *id.* amend. XXV, § 4 (presidential disability).

146. The great case, of course, is *INS v. Chadha*, 462 U.S. 919 (1983), in which the Court struck down a “legislative veto” under the Presentment Clause.

147. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

148. The Constitution does contain special rules that make it practically impossible to impose “direct” taxes. See Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999). But this is merely a detail, which does not undermine the main point made in the text.

I use taxation as my example because, during the mid-1990s, I played a role in a campaign against an effort by House Speaker Newt Gingrich to require a supermajority vote of sixty percent for tax increases. See Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995) (presenting a letter endorsed by sixteen other law professors). I also participated as counsel in subsequent litigation initiated by members of the House of Representatives. See *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997). The majority of the *Skaggs* panel denied standing to the Representatives, but a strong dissenting opinion reached the merits

character of habeas suspension, the imposition of a supermajority rule should be viewed more sympathetically. It is not simply an effort by one congressional majority to make life more difficult for its political opponents when they come into power. Instead, the supermajoritarian escalator in the emergency statute should be viewed as the product of good faith interpretation by the Congress of its constitutional responsibilities to limit the suspension of habeas corpus to truly exceptional circumstances.

The supermajoritarian escalator seems especially appropriate where, as here, Congress will be exploring the linguistic periphery of the relevant constitutional provisions. I have been arguing that major terrorist attacks can satisfy the requirements of an “Invasion” or “Rebellion,” but I do not suggest that these are easy cases. If Congress ever suspends the writ in response to terrorism, it will be occupying the borderlands of its constitutional authority. By insisting on a supermajoritarian escalator, Congress is taking a reasonable step to assure that the concepts of “Invasion” or “Rebellion” do not expand over time to cover more and more doubtful cases.¹⁴⁹

When all is said and done, I do not wish to exaggerate my proposed statute’s power to bind future Congresses. A framework statute is only a *statute*, and there is nothing to stop a later Congress from repealing it.¹⁵⁰ Suppose some unspeakable disaster strikes in 2020, and Congress responds by declaring an emergency within the framework established by the

and rejected the constitutionality of the new supermajority rule enacted by the House. *See id.* at 841 (Edwards, C.J., dissenting).

I have no inclination to abandon my previous position, but the present case is distinguishable for the reasons presented in the text. Of course, some scholars are more favorably inclined to supermajoritarian rules. They should find it particularly easy to adopt the argument presented here, though to the best of my knowledge, they have not considered the present problem explicitly. *See, e.g.,* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002). I suspect that my limited argument is also compatible with Jed Rubenfeld’s more categorical defense of a majoritarian baseline in Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996), but this is not entirely clear.

149. For a more systematic exploration of Congress’s role as a constitutional interpreter, though one that does not consider the problem under discussion, see Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

150. Recently, Eric Posner and Adrian Vermeule have suggested that Congress not only has a broad power to create supermajority rules, but that the Constitution also allows it to entrench this decision by imposing a supermajority rule on any future Congress that wishes to repeal the supermajority requirement. *See* Posner & Vermeule, *supra* note 148. Adopting their position would permit a clean-cut solution to the puzzles presented in the following paragraphs. Unfortunately, I do not find their claims at all plausible. This is partly for reasons elaborated by Stewart Sterk, *see* Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003), and by John McGinnis and Michael Rappaport, *see* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003), and partly for reasons suggested by the more general constitutional approach I have elaborated in volumes one and two of *We the People*, *see* ACKERMAN, FOUNDATIONS, *supra* note 147; ACKERMAN, TRANSFORMATIONS, *supra* note 147.

Emergencies Act of 2006, miraculously modeled on my proposals. As the supermajoritarian escalator increases to eighty percent, the motion for another extension of the emergency fails in the Senate by a vote of seventy-five to twenty-five. But the majority does not take its defeat easily. It issues a strident call to repeal the framework statute itself, and this time by a simple majority. Doesn't this majoritarian option transform my much-vaunted escalator into a joke?

Not at all. Despite the fifty-one-percent threshold, the attack on the framework statute will prove politically difficult. By hypothesis, the Emergencies Act was passed during calmer times in a self-conscious effort to keep postterrorism panic under collective control. The repeal effort will invariably raise profound questions in the public mind: Does the attack on the statute represent an escalating panic reaction that threatens the survival of liberal democracy? Senators and representatives who might vote enthusiastically for another two-month extension would think twice before destroying the very framework of emergency constitutionalism. Their final votes would be greatly influenced by the character of the larger public debate catalyzed by the repeal effort.

There can be no guarantees, of course. Perhaps, after much *Sturm und Drang*, the majority will choose to destroy the framework of emergency constitutionalism. But perhaps not—and if the statute manages to survive one or two political ordeals, it will become much more difficult for later majorities to destroy. By a curious paradox, the failed efforts to repeal the framework will lead to its symbolic reaffirmation as a time-tested mechanism for regaining political equilibrium during periods of great stress. Or so one may hope.

Even if the repeal effort succeeds, the orgy of statutory destruction will play an important role when the entire matter comes before the Supreme Court. Recall the basic constitutional issue: Should a terrorist strike count as an "Invasion" or "Rebellion" sufficient to justify a suspension of habeas corpus? It is one thing for the Court to uphold an affirmative legislative judgment when made within a carefully controlled statutory framework. It is quite another to uphold Congress when it has broken free of such restraints and seeks to suspend the writ on a more sweeping and enduring basis. The broken framework, in short, should function as an urgent signal of the need to apply the judicial brake.

At the end of the day, neither the framework statute nor a gaggle of judges may save us from some future all-consuming panic. But surely the flame is worth the candle. We already have a framework statute, the National Emergencies Act of 1976—painfully inadequate to be sure, but reflecting an increasing self-consciousness about the seriousness of the problem. Other countries, most notably Canada, are using framework

statutes to grapple with terrorist emergencies in increasingly sophisticated ways.¹⁵¹ This is not the time to call a halt.

IX. THE RACE AGAINST TIME

More than two years have passed since September 11, and no massive strike has devastated any world capital. Smaller attacks continue, reminding us that we are living on borrowed time. The question is not whether but when the next strike will occur, and whether we will use the remaining time for constructive purposes.

Constitutional thought has a role to play in our brave new world, but it proceeds at a deliberate pace. It takes time to imagine institutional alternatives, and more time to separate good proposals from bad ones, and more time to engage in a broad-based public discussion, and more time for farsighted politicians to enact a constitutional framework into law.

During all this time, the terrorists will not be passive. Each major attack may breed further escalations of military force, police surveillance, and repressive legislation. The cycle of terror, fear, and repression may spin out of control long before a political consensus has formed behind a constitution for an emergency regime.

But then again, we may turn out to be lucky. One or another leading Western nation may be graced with a political leadership that grasps the need for decisive action at a relatively early stage in the cycle of fear. A single country enacting a sensible framework can serve as a model and catalyze a wave of constructive change throughout the West.

In any event, constitutional thought has no choice but to develop through its own distinctive rhythms. Now is the moment to toss the ball onto the field of legal speculation and invite others to play the game.

Perhaps some good will come of it.

151. *See supra* notes 75-78 and accompanying text.