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Christina Yang 04/19/2011

Reconstructing Habeas: Towards a New Emergency Scheme

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Abstract

Reconstructing Habeas: Towards a New Emergency Scheme
By Christina Yang

When an attack hits far too close to home, and an entire nation is left gasping in its sudden, violent wake, there is a collective feeling that something has changed; something is different. People begin to wonder: Are we safe? Even as we are brought closer together by the common bond of tragedy, we become hyper-vigilant, hyper-conscious, and hyper-paranoid. Eager, competitive politicians fall quickly into a national security rat race, each seeking ways to one up the other on "toughness." Soon enough, increasingly repressive policies are written into law – each promising greater security for the nation. Sacrifices, they argue, are both necessary and expected in times of emergency. These are not ordinary times, but extraordinary times. Yet what is too often waylaid in times of crisis and emergencies?

Liberty. Rights. All those things we value both in the abstract and in the everyday are somehow lost in the wartime scramble, somehow made insignificant, amidst all the panic, anger, and confusion. The United States, however, is not an authoritarian, dictatorial, government. America is a country that values liberty. Indeed, we prize liberty because it is a big part of who we are as Americans – both at home and around the world. So when we sacrifice our liberties, when we fill the value of liberty with air instead of substance when balanced against security, we forget that America was founded on an idea, a vision of freedom, of rule by democracy and respect of law, and that the idea is only good, meaningful, and valuable insofar as it is practiced.

So the question we ask ourselves must not be "When do we value liberty enough to interfere with security," but "When do we value security enough to interfere with liberty?" To say the least, this is not an easy question to answer – nor is it a question which possesses only one "correct" solution. In this paper, however, I postulate a better solution than what has been offered thus far by arguing for the writ of habeas corpus - i.e., the Suspension Clause – to be set as the absolute minimum in exigent times.

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Table of Contents

Introduction
Chapter 1: Setting the Stage
Chapter 2: Jack Bauer Syndrome
Chapter 3: The Emergency Constitution
Chapter 4: Reconstructing Habeas
Conclusion

Introduction: For the Land of the Free, and the Home of the Brave

Do not think only of what you wish to gain but think too of what you will lose to gain it – the sacrifice of so much that is good, the dangers and disasters of what you will incur.

– Erasmus, *Dulce Bellum Inexpertis* (1515)

The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew. We must disenthrall ourselves, and then we shall save our country."

– Abraham Lincoln, *Annual Message to Congress* (1862).

When an attack hits far too close to home, and an entire nation is left gasping in its sudden, violent wake, there is a collective feeling that something has changed; something is different. Fear, in the aftermath of disaster, is tangible in the air; a sky overcast with anxiety. Fear is entrenched within the eye-catching newspaper headlines and snarky op-ed columns; it underlies pundit rhetoric on the radio and on the television, both liberal and conservative. And once people begin to fear for their safety, they wonder too about their security. Are we safe? More importantly, are we safe *enough*? Are we, in other words, doing all that we can to secure our safety? Even as we are brought closer together by the common bond of tragedy, we become hyper-vigilant, hyper-conscious, and hyper-paranoid. We sleep with one eye open, always on the lookout. And with the safety off, we rest our index fingers uneasily on the trigger as we wait in anticipation, in fear, of the next [inevitable] attack. Eager, competitive politicians fall quickly into a national security rat race, each seeking ways to one up the other on "toughness." Soon enough, increasingly repressive policies are written into law – every one promising greater security for the nation. Sacrifices, they argue, are both necessary and expected in times of emergency. These are not ordinary times, but *extra*ordinary times. And what makes times

extraordinary instead of simply ordinary? What is, indeed, often waylaid in times of crises and emergencies?

Liberty. Rights. All those things we value both in the abstract and in the everyday are somehow lost in the wartime scramble, somehow made smaller, more insignificant, amidst all the panic, anger, and confusion. Security in emergencies oftentimes appears to be the Goliath to liberty's David. The balancing that ensues when these two values conflict tends not only to tip in favor of security, but also at the expense of liberty. But what if the subjugation of liberty is only temporary and will quickly be remedied once the threat has passed?[1] Is the curtailment then justified? In response, critics often argue that it is often the case that political branches – i.e., the legislative and executive branch – overreact to perceived and/or actual domestic and foreign threats which subsequently "leave permanent scars on constitutional freedoms."[2] At the same time, there are reasons why in times of war and crisis the political branches have typically been given greater reign to do as they think best. After all, if either the executive or legislature oversteps the boundaries of its power, the political process is organized such that it allows for self-correction: the American people will simply mobilize and vote the transgressors out of office. This justification, however, hinges on the fundamental assumption that the public is even aware of such missteps in judgment or overextensions of power. But what if the voting public remains in the dark? After all, when issues implicate national security, the government typically deems such information too sensitive to be publicly released as it might later compromise public

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[1] "History does not confirm the existence of a civil liberties ratchet, a 'slippery slope' on which the first step toward curtailing civil liberties precipitates an uninterrupted and perhaps accelerating decline. Every time civil liberties has been curtailed in response to a national emergency, whether real or imagined, they have been fully restored when the emergency passed – and in fact before it passed, often long before. That is another ignored lesson. Curtailments of civil liberties in the Civil War, World War II, and the Cold War were concentrated in the early periods of these crises. [T]his pattern is no accident." Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006), at 44-45.

[2] Daniel Farber, "Introduction," in *Security v. Liberty: Conflicts between Civil Liberties and National Security in American History*, ed. Daniel Farber. (New York: Russell Sage Foundation, 2008), at 2.

safety. Or what if the voting majority does not, or chooses not, to see certain harms – especially when such harms affect a small, unpopular, and/or distant minority? What then? Democracy is not foolproof – even less so in *extra*ordinary times.

The United States nonetheless is not an authoritarian government. It is neither a military dictatorship nor a country that spits on the rule of law. But in times of heightened crisis, in this Age of Terror, it is too easy to forget that we, the United States, are a country that values liberty. From the very beginning, liberty has defined America: we are, after all, known as America the Land of the Free. It made its presence known in Revolutionary rhetoric with Patrick Henry's timeless quote of "[G]ive me liberty or give me death!" And if we believe the Declaration of Independence to mean more than a long, detailed list of grievances against King George III, but is, instead, "a vision of what postrevolutionary America should look like,"[3] then with liberty included as an unalienable right, it becomes all the more apparent that freedom is a value deeply cherished amongst Americans. For that matter, when it came time to sit down and discuss what the American Constitution ought to look like, the desire to protect the citizen from the potential tyranny of the federal government was at the forefront of the Founding Fathers' minds. The fact that the United States government is modeled on a separation of powers, which mandates each branch of government to act as a substantive check against the other branches, is no accident. After all, during periods of emergency or wartime, it is imperative that there are checks in place to protect against the potential abuses of executive power: "[F]or it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action."[4] In other words,

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[3] Michael Sullivan, *Legal Pragmatism: Community, Rights, and Democracy* (Indiana: Indiana University Press, 2007) at 21.
[4] *Kennedy v. Mendoza-Martinez*, 372 U.S. 164.

because of the value we place on liberty, national security concerns do not automatically provide sufficient justification for the gross infringement of rights. "The American notion," as Lord Acton remarked in *The Anglo-American Tradition of Liberty*, "[is] that the end of government is liberty, not happiness, or prosperity, or power, or the [p]rogress of enlightenment and the promotion of virtue."[5]

The United States is the land of the free. It is the land of opportunity. It is the land of justice, of the rule of law, of rights and democracy. We prize liberty because it is a big part of who we are as Americans – both at home and around the world. It makes us a better nation, a nation that can genuinely aspire to be that city upon a hill. So when we sacrifice our liberties, when we fill the value of liberty with air instead of substance when balanced against security, we forget that America was founded on an idea, a vision of freedom, of rule by democracy and respect of law, and that the idea is only good, meaningful, and valuable insofar as it is practiced.

> [Our failure to put into practice our ideals] leads to the delusion that the antagonism we experience is not about our policies and practices but about who we are, about our ideals, what we stand for, and our very existence. Not only does such self-delusion provide the perfect excuse not to subject those policies to scrutiny, but it also forces us to fight the war on terrorism under the gravest handicap, with one hand tied behind our back. For what we stand for, at our best, is our greatest strength. What we stand for is the "unalienable right" of every person to pursue "life, liberty, and…happiness." What we stand for is equal justice and equal opportunity for all, free speech, a free press, fair elections, and no fear that secret police will storm your house at night because you have criticized the government. What we stand for is the highest of respect for human rights, not the denial of legal counsel to suspects or the infliction of torture on prisoners.[6]

And if we fail to practice what we preach, we only end up painting ourselves with "hypocritical hues, and not honorable colors,"[7] as well as alienating our friends while encouraging – and

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[5] Lord Acton, as quoted in Douglas B. Rasmussen and Douglas J. Den Uyl, *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (University Park: Pennsylvania State University Press, 2005).
[6] William F. Schulz, *Tainted Legacy: 9/11 and the Ruin of Human Rights* (New York: Nations Books, 2003) at 62 (emphasis added).
[7] Schulz, *Tainted Legacy*, at 61.

justifying – enemy agendas. "It makes," William Schulz powerfully charges, "the 'clash of civilizations' a self-fulfilling prophecy and the quest for common values a hollow one."[8] In this perpetual War on Terror, this drawn out exceptional time, we can no longer afford to depend on the assurance that liberties will come back in its own time; nor, for that matter should we accept such platitudes. We cannot take our liberties, our rights, our *heritage*, for granted. We ought to remember that the value of liberty is so great and so integral to who we are not only as American citizens, but as people too.

At the same time, we cannot neglect the importance of security. Indeed, can there even be liberty in the absence of security? As Justice Arthur Goldberg so memorably says in his *Kennedy* v. *Mendoza-Martinez* majority opinion, "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."[9] Commitment to liberal ideals, it appears, cannot be so absolute as to hinder or imperil national security efforts. Nevertheless, the question we ask ourselves in times of crisis should not be "When do we value liberty enough to interfere with security," but "When do we value security enough to interfere with liberty?" This is not an easy question to answer – nor is it a question which possesses only one "correct" solution. Conflict becomes difficult when it is not just a matter of choosing between two values, but of having to make a choice of lesser evils. It is a decision between a rock and a hard place, between bad and worse, insofar as whatever we choose – and a choice must be made – we will be sacrificing a value that we hold to be important. So the next question to be asked is: how do we handle and resolve this sort of conflict? Is the solution, as Mark Ignatieff suggests, solely a choice between

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[8] "This is no way to fight a war on terrorism. For it paints us in threatening terms, not sympathetic ones; hypocritical hues, not honorable colors. It alienates our friends whose help we need. It makes impossible for modern Muslims to argue our case without appearing to be doing the bidding of the bully. It casts us as a global policeman who cares nothing about the law. It implicates us in the hypocrisy of regarding others' sovereignty as limited while holding inviolable our own." Schulz, *Tainted Legacy*, at 61.
[9] *Kennedy* v. *Mendoza-Martinez*, at 160.

lesser evils? Or is there another road we might take? However, before we delve into a potential solution to the liberty/security debate in the War on Terror, it is worthwhile to examine why security and liberty are even values worth preserving. And if we can begin to understand the enduring importance of these two values – i.e. if we look to our philosophical heritage[10] – we then become much better equipped to handle the conflict between security and liberty in the particular context of the War on Terror.

[10] Of course, no one thinker or even several thinkers owns the landscape of the liberty v. security debate. Nonetheless, the thinkers discussed in this paper – e.g., Thomas Hobbes, J.S. Mill, Sir Isaiah Berlin, etc. – will help us think through and come up with a plausible solution for the current dilemma America faces in the War on Terror.

Chapter One:

Setting the Stage

<u>On Security and its Necessity</u>

No nation can preserve its freedom in the midst of continual warfare.

– James Madison, April 20, 1795

It is hard, if not completely impossible, to enjoy my freedom to live my own life if the peaceful, secure, and stable conditions that enable me to exercise that freedom do not exist.

– John McGowan, *American Liberalism: An Interpretation for Our Time*

On September 11, 2001, terrorists transformed four commercial airplanes into deadly flying weapons, caused the deaths of approximately three thousand civilians, and totaled some $40 billion dollars in property. Plus, not only would the New York skyline never be quite the same again, but the American political landscape was transformed as well. The enemy was no longer the Soviets, the Communists, or the Nazis, but some unnamed, nation-less, terrorist. "And all this was done," Bruce Schneier reports, "with no more than a thirty-person, two-year, half-million-dollar operation."[1] To say the least, the United States has scarcely felt less safe in the past half-century. In a country that has experienced very few attacks of this particular magnitude on its home soil, the tragic events of 9/11 were a wakeup call – our security was not nearly as strong as we had believed. In the aftermath, we found our nation to be in an unacceptable condition: the United States is vulnerable, and nothing like the invincible superpower it appears to be. How is our nation to survive in these uncertain and violent times?

Security is the necessary precondition, Thomas Hobbes writes, for societies' very existence. Without security, society cannot survive. In the absence of security, as Hobbes states

[1] "No one had ever done this before: hijack fuel-laden airplanes and fly them into skyscrapers. We'll probably never know for sure if the terrorists counted on the heat from the ensuing fire to fatally weaken the steel supports and bring down the World Trade Center towers, but those who planned the attacks certainly chose long-distance flights as targets, since they would be carrying heavy fuel loads." Bruce Schneier, *Beyond Fear: Thinking Sensibly about Security in an Uncertain World* (New York: Copernicus, 2003), at 3.

explicitly, man is condemned to a life of continual violence and fear, with no hope of the comforts of either society or culture:

> Whatsoever therefore is consequent to a time of [War], where every man is enemy to every man; the same is consequent to the time, wherein men live without other security, than that their own strength, and their own invention shall furnish them withal. In such condition, there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious building…[No] arts; no letters; no society, and which is worst of all, continual fear, and danger of violent death.[2]

It is because of our human nature that we require security. Indeed, Hobbes "stipulated that the material and psychological conditions arising from simply being human generated a continuing social problem" – what we today identify as a security dilemma.[3] This dilemma results from the fact that because we – the entire human race – resort to force in order to fulfill our own desires, we then end up creating a "vicious and perpetual circle and cycle of violence and counter-violence."[4]

The security dilemma stems, Kolodziej further notes, "ironically, from humans themselves as intelligent, creative, rational bipeds seeking to survive and thrive in eliciting the cooperation of others on their own egoistic terms."[5] We all have desires, and we all want to pursue and fulfill those desires. And because resources are limited and scarce, conflict between desiring individuals is not only inevitable, but never ending as well. Man, in Hobbes's view, is inherently self-interested. Indeed, there exists neither an utmost aim, nor greatest good in Hobbes's philosophy. Everything – including what is good and bad – is all relative to human desires. Man is a slave to his passions – avidly pursuing that which pleases him, and avoiding

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[2] Thomas Hobbes, *Leviathan*, ed. A.R. Walter (Cambridge: University Press, 1904), at 84.
[3] Edward A. Kolodziej, *Security and International Relations* (New York: Cambridge University Press, 2005), at 53.
[4] Kolodziej, *Security and International Relations*, at 53.
[5] Kolodziej, *Security and International Relations*, at 53.

that which repulses him. The pursuit of wants and avoidance of dislikes is what natural man calls happiness. As power is necessary to achieve our desired ends, mankind – as a whole – desires it. Indeed, we all possess “a perpetual and restless desire for power after power, that ceaseth only in death.”[6] Peace then becomes the exception, and war – i.e., a perpetual condition of insecurity – the norm.

At the same time, we are by nature well matched – though we may differ in degrees of mental and physical strength. To illustrate this idea, Hobbes points out that even the weakest of men has the capability to destroy the strongest, so long as he utilizes the situation advantageously. Neither the strongest nor the smartest man can, therefore, ever feel truly, absolutely, secure since we are constantly competing over a limited number of resources. Not to mention, our inherent fear of death and thirst for glory further incites conflict between our fellow men and us. Without any common authority to keep the passions of mankind in check, the status of humanity is, as Hobbes poignantly remarks, “solitary, poor, nasty, brutish, and short.”[7] The Hobbesian state of nature, at its essence, is human existence without government, without law, and without morality: “Where there is no common power, there is no law: where no law, no injustice.”[8] As such, the state of nature is a war of all against all. The philosophy of “Every man for himself,” holds true for every individual in the Hobbesian state of nature. How then is man to escape from this endless cycle of violence and chaos?

While men are passionate in the pursuit of their desires, they are nonetheless rational beings insofar as they realize that the fulfillment of their desires is impossible

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[6] Hobbes, *Leviathan*, at 63.
[7] Hobbes, *Leviathan*, at 84.
[8] Hobbes, *Leviathan*, at 85.

should they remain within the state of nature. So man utilizes his reason to search for a solution, and thereby encounters what Hobbes calls "laws of nature." Whereas in the state of nature we possessed the "right of nature," which endowed us with the freedom to act in accordance with our own self-interest, we now turn towards "laws of nature" to guide us in the formation of a civil society. Indeed, the first three "laws of nature" serve as the foundation of Hobbesian absolute government.

The first and second natural laws assert that every individual in the state of nature, in order to escape war and obtain peace, is willing to give up his/her natural right to all things, in the event that everyone else so agrees. A contract – defined by Hobbes as a "mutual [transferring] of right"[9] – to create a sovereign is then made amongst those who desire to leave the state of nature. To avoid the risk of civil war, men decide to "confer all their power and strength upon one man, or upon one assembly of men,"[10] thus the many becomes a single, absolute, authority to represent them all. However, a binding contract is necessary and so the third law of nature is introduced: Once a covenant is agreed upon, then to break it is unjust.[11]

As we consent to the above contract, so all of man's natural rights – except that of self-preservation – have been ceded over to the sovereign. It is important to note here that implicit within the definition of "mutual transferring of right" is the idea of consent. Transference of rights – no matter if it was voluntary or coerced – cannot occur without the consent of the individual transferring his/her rights. However as we give our consent to the sovereign, so we are also obligated to obey. And although a portion of our natural liberty is taken away, Hobbes nonetheless argues that in the alternative – i.e., the state of nature –

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[9] Hobbes, *Leviathan,* at 91.
[10] Hobbes, *Leviathan*, at 118.
[11] Hobbes, *Leviathan*, at 111.

man may technically be free, but is nonetheless unable to act on and experience that freedom due to the insecure nature of his reality.

When we talk about the need for, and value of, security, we cannot help but discuss fear as well – fear of the other, fear of danger, and fear of death. And once we fear, our fears soon transform into a desire for security – for safety and all the comforts that accompany it. In some ways the value of security then appears to be absolute. For what do we have, as Hobbes illustrated, if we do not first and foremost have security? What sort of life will we live in the absence of security? The answer is easy: solitary, poor, nasty, brutish, and short. Indeed, what value can stand up to and win against this need for security? Remember, without security, the maintenance and existence of liberty are simply not possible. "Intimidation," Richard Posner states, "can stifle liberty as effectively as laws can."[12] Indeed, he further argues, we ought to keep in mind that the harm to liberty when security measures are increased is often exaggerated – especially by civil libertarians, liberty's most passionate advocates.[13] Liberties cannot, and should not, be absolute. Indeed, in lieu of asking the rhetorical question of "does curtailing civil liberties result in costs," we need to ask ourselves in times of crisis whether the consequences of suspending liberties trump the benefits of increasing security.[14]

"Security," Schneier astutely observes, "is both a feeling and a reality."[15] When we feel protected from harm, free from fear, and prepared for the potential next attack, we are secure. Feeling secure is, without a doubt, important. After all, it is not only difficult to live a life dictated by one's fears, but how effective security measures are is also compromised by a continual, persistent, feeling of insecurity. At the same time, "there's the reality of security as

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[12] Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006), *Not a Suicide Pact*, at 47.
[13] *See* Posner, *Not a Suicide Pact*, at 44-46
[14] Posner, *Not a Suicide Pact,* at 51.
[15] Schneier, *Beyond Fear*, at 9.

well, a reality that has nothing to do with how we feel. We're secure when we actually *are* protected."[16] There is no benefit to treating the whole world and all those who reside in it as potential criminals when the reality is that the threat is not that pervasive. It is not everywhere. More security does not automatically guarantee greater safety. In an authoritarian regime, after all, how safe is the average citizen when compared to the everyday man living in a democratic, liberal country? History has shown that freedom, openness, is also security – e.g., protection for the individual against potentially abusive government power. Indeed, security does not always imply the military or protection from violence, but can also mean the assurance to live one's everyday life free from unreasonable coercion. Ultimately, however, security must mean prevention, protection, from some *thing* – and that thing must not only exist, but also pose a viable threat. "It's easy to reach for the feeling of security and ignore its reality," as Schneier emphasizes.[17] Security and fear are not, in fact, inverse relations. Indeed, the reason we increase security ought not be the alleviation of public fear, but to address real threats with both precision and efficiency.

Security, taken to the extreme, becomes both undesirable and unbearable. Want to protect yourself against identity theft? Don't own a credit card, a driver's license, or a passport. Want to guarantee that you'll never be harmed – physically, mentally, or emotionally? Live as a hermit, in an abandoned cave or on a deserted island. Absolute security is only possible in isolation. However, the majority of us live in society and amongst men – a fact that many of us do not find undesirable. And because we are not alone in the world, we must live, as well as govern, our lives in light of that fact. Absolute security is then impossible. Indeed, unless security is our first

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[16] Schneier, *Beyond Fear*, at 9.
[17] Schneier, *Beyond Fear*, at 11.

and foremost priority, living one's life as one desires – even at the barest of minimums – would be rendered impossible under a regime of absolute security.

Addressing Liberty

Liberty is the only true riches.

– William Hazlitt, *Common Places* (1823)

After the primary necessities of food and raiment, freedom is the first and strongest want of human nature.

– J.S. Mill, *The Subjection of Women* (1869)

Liberty and its preservation have been, and continue to be, the predominant concern of mankind throughout history. Indeed, today we still struggle – as did the theorists before us – with such questions concerning the degree to which individual freedom ought to be maintained, the extent to which the state can coerce its citizens, as well as the definition itself. Indeed, as Sir Isaiah Berlin notes, "Almost every moralist in human history has praised freedom. Like happiness and goodness, like nature and reality, it is a term whose meaning is so porous that there is little interpretation that it seems able to resist."[18] There is, amongst all those different interpretations of liberty that have been offered, nonetheless one common thread that unites all thinkers preoccupied with the question of freedom: they all place great importance on this concept of 'liberty.'

Liberty, they say, is a value. Value, one asks, what is that? To understand value – and thereby fully comprehend this value called liberty – we need to ask ourselves why is it

[18] Isaiah Berlin, "Two Concepts of Liberty," in *Liberty*, ed., Henry Hardy (New York: Oxford University Press, 2002), at 168.

"important that we respect or seek out that value."[19] In other words, what is it about liberty that makes us attribute value to it? What, in short, is so great – so good – about liberty? What makes liberty worth preserving? However, before we can consider the value of freedom, we ought to first determine what exactly we mean when we speak of liberty, of freedom. Let us make sure that when we discuss liberty, we at least begin on the same page, and not be doomed to start off as two ships passing in the night. Do we, perhaps, understand liberty to mean the absence of constraint? Or is freedom actually the prospect of individual self-realization and/or self-fulfillment? Or perhaps, is freedom simply the capacity, the opportunity, for choice?

First, let me definitively say what liberty, in this particular paper, does *not* mean. Indeed, the liberty to be considered is not freedom understood in the abstract, taken out of context, and universalized. I am, instead, more interested in carving out the boundaries of freedom in the context of a governed society – liberty in the political sense, if we are to be more specific. And to understand what liberty in the context of politics looks like, we are inevitably confronted with what Berlin believes to be *the* fundamental question of politics: "the question of obedience and coercion."[20] Why should I not live my life as I wish? Why should I subordinate myself to another's wishes? Put simply, why obey? And if I am disobedient, can I be coerced? If so, then "[b]y whom, and to what degree, and in the name of what, and for the sake of what?"[21] If each individual was completely alone, isolated in her own special sphere of existence, then such questions would never arise since the answers would be irrelevant. However, it is because we are social animals, who value all the goods – e.g., security, sense of community – associated with living amongst other individuals, while simultaneously holding tightly onto – and treasuring –

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[19] Ronald Dworkin, "Do Values Conflict? A Hedgehog's Approach," *Arizona Law Review* 43 (2001): 251-259, at 255.
[20] Berlin, "Two Concepts," at 168.
[21] Berlin, "Two Concepts," at 168.

the notion of an individual free will,[22] that these questions involving the potential limits of liberty then become extremely important.

For all that man has talked about and argued over what liberty means, there nonetheless exist– in political theory, at least – two predominant understandings of political liberty, illuminated and differentiated[23] by Sir Isaiah Berlin in his groundbreaking publication *Two Concepts of Liberty*. However, insofar as liberty framed in the negative governs our philosophical heritage in the United States, this paper will solely focus on that understanding of political liberty. So what exactly is 'negative' liberty? To begin with, liberty understood in the negative seeks to answer the question of "What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?"[24] The goal of negative liberty is not to realize a particular ideal of ourselves, but, instead, to be as free from intrusion as possible.

Put in the simplest terms, liberty understood in the negative is simply freedom *from* constraint. To be more specific, negative liberty, as defined by Berlin, is the absence of constraint understood as interference; it is "the area within which a man can act unobstructed by others."[25] In other words, I experience an infringement upon my liberty only when someone or something – e.g., individual, institution, and/or law – comes in and disrupts what I, unimpeded, *could* have done. The usage of the term "could" is crucial here insofar as Berlin conceives of a categorical difference between lacking *freedom* and lacking *ability*. We can only say we lack

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[22] "We assume the need of an area for free choice, the diminution of which is incompatible with the existence of anything that can properly be called political (or social) liberty." Berlin, *Liberty,* at 30.
[23] "[B]erlin succeeds in showing – beyond doubt, it seems to me – that a strong distinction needs to be marked between two rival and incommensurable concepts of liberty. He succeeds in showing, in other words, that any attempt to bring together our particular judgments about freedom under a single theory or overarching formula will be foredoomed to failure." Quentin Skinner, "A Third Concept of Liberty," *Proceedings of the British Academy* 117 (2002): 237-268, at 238.
[24] Berlin, "Two Concepts," at 169.
[25] Berlin, "Two Concepts," at 169.

freedom, he argues, when "an action within our powers has been rendered impossible or ineligible." [26] However, if we simply cannot perform the desired action, then we are not so much described as unfree as unable. "If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel," Berlin explains, "it would be eccentric to say that I am to that degree enslaved or coerced."[27] Coercion or an infringement of freedom, after all, *must* imply the deliberate, or intentional, interference of another with one's actions. Quentin Skinner raises an interesting and illuminating *Leviathan*[28] connection to help further explain this distinction. In discussing the idea of free action in the *Leviathan*, Hobbes writes:

> And so of all living creatures, whilst they are imprisoned, or restrained, with walls, or chains; and of the water whilst it is kept in by banks, or vessels, that otherwise would spread itself into a larger space, we use to say, they are not at Liberty, to move in such manner, as without those external impediments they would. But when the impediment of motion, is in the constitution of the thing itself, we use not to say, it wants the Liberty; but the power to move; as when a stone lyeth still, or a man is fastened to his bed by sickness.[29]

Whereas the freedom of the imprisoned living creatures has been limited, the restriction illustrated in the second example Hobbes provides – that of the sick man – is not so much the result of freedom constrained, but of simple inability. In other words, the sick man is "neither free nor unfree; he is simply unable."[30]

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[26] Skinner, "A Third Concept," at 245.
[27] Berlin, "Two Concepts," at 169.
[28] The definition of freedom that Hobbes gives in *Leviathan* is strikingly similar to the definition of negative liberty provided by Berlin, a similarity that the latter was very much aware of: "A free-man, is he, that to be free in those things, which by his strength and with he is able to do, is not hind[ered] to do what he has a will to." Hobbes, *Leviathan*, at 148.
[29] Hobbes, *Leviathan*, at 147 (emphasis added)
[30] Skinner, "A Third Concept," at 245.

However, under Berlin's definition of negative liberty as freedom from interference, you would think that the sick man "is *formally* free" insofar as "no one is interfering with him"[31] in the pursuit of moving. Similarly, you might think that the blind man is also formally free to read inasmuch as no one is interfering with his pursuit. Of course, neither the sick nor the blind man is "effectively free, since he is not in a position to make use of his formal liberty."[32] Yet as Skinner points out, Berlin does not attribute to the blind man – and would not, by extension, grant the sick man – either formal or effective freedom: "[T]he predicament of the blind man is that he is incapable of exercising the ability to read under *any* circumstance. [T]o be unfree is to have been rendered *incapable* of exercising an ability I possess."[33] The blind man's inability to read is then not an infringement of his freedom because it is not so much that he has been prevented from reading insofar as a blind man, he simply lacks the necessary reading ability.

These two examples are interesting insofar as it illuminates the connection between choice and liberty in the two authors' thought. The freedom discussed in both authors' treatises – the concept of free action in Hobbes's, and negative freedom in Berlin's – both assume the necessity of not only choice, but also the presence of alternatives, i.e. possibilities, actions, things to choose between. Indeed, the possibility of choice is integral to this concept of liberty as negative. An individual's liberty, in sum, "is his freedom to do whatever he might wish to do free from the interference of others."[34] As a result, the greater the area of "non-interference"[35] is, the greater the individual's freedom becomes. "This [negative understanding of liberty]," Berlin notes, "is what the classical English political philosophers meant when they used this word."[36]

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[31] Skinner, "A Third Concept," at 245.
[32] Skinner, "A Third Concept," at 245.
[33] Skinner, "A Third Concept," at 246.
[34] Dworkin, "Do Values Conflict," at 253.
[35] Berlin, "Two Concepts," at 170.
[36] Berlin, "Two Concepts," at 170.

Of course, no concept of liberty advanced by those Western political philosophers *exactly* resembled another, but there were nonetheless vast similarities:

> They supposed that [liberty] could not, as things were, be unlimited, because if it were, it would entail a state in which all men could boundlessly interfere with all other men; and this kind of 'natural' freedom would lead to social chaos in which men's minimum needs would not be satisfied; or else the liberties of the weak would be suppressed by the strong. Because they perceived that human purposes and activities do not automatically harmonize with one another, and because (whatever their official doctrines) they put high value on other goals, such as justice, or happiness, or culture, or security, or varying degrees of equality, they were prepared to curtail freedom in the interests of other values and, indeed, of freedom itself.[37]

If man wishes to live in a society and in harmony with his fellow men, then freedom cannot be absolute. But what shall be liberty's limit? What, in other words, shall constrain man's liberty? And so the vast majority of the political theorists mentioned above assigned the institution of law the role of delineating the limits of liberty. [38]

At the same time, as Jeremy Bentham rightly points out, we cannot afford to let laws with arbitrary or weak justifications slide by us. In other words, if we value our liberty as much as Bentham assumes we do, then for the sake of its preservation we ought to stay alert to potential legal abuses, and ask ourselves whether the reason behind the law's enactment is sufficient for its

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[37] Of course, this conception of negative liberty is not only restricted to theories of classical political philosophers, but is very much alive in contemporary, modern philosophy. For example, as John McGowan describes of Friedrich von Hayek's take on freedom, "[To Hayek] freedom is simply and only that the individual is not being subject to another's will; it involves no provision of the means to enact his own will. Liberty, in other words, is entirely negative. The supreme good in Hayek's view is not measured by being able to <u>do</u> anything at all, but <u>by the absence of any external interference</u>. Quite literally, the free individual is one who is left alone. Laissez-faire, indeed." John McGowan, *American Liberalism: An Interpretation for Our Time*, (Chapel Hill: University of North Carolina, 2007), at 113 (emphasis added); Berlin, "Two Concepts," at 171.

[38] "By creating obligations, the law to the same extent trenches upon liberty. It converts into offenses acts which would otherwise be permitted and unpunishable. The law creates either by a positive command or a prohibition. These retrenchments of liberty are inevitable. It is impossible to create rights, to impose obligations, to protect the person, life, reputation, property, subsistence, liberty itself, except at the expense of liberty." Jeremy Bentham, *Principles of the Civil Code* (Online Library of Liberty), Pt. 1, Ch.1, accessed February 06, 2011, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2009&chapter=139627&layout=html&Itemid=27. (emphasis added)

restrictive effects. Law, in Bentham's eyes, is nothing more than a necessary evil; something to be endured, and not necessarily celebrated:

> [E]very restraint imposed upon liberty is liable to be followed by a natural feeling of pain, more or less great, independent of an infinite variety of inconveniences and sufferings which may result from the particular mode of this restraint. It follows, therefore, that no restraint should be imposed, no power conferred, no coercive law sanctioned, without a specific and satisfactory reason. There is always one reason against every coercive law, and one reason which, were there no other, would be sufficient by itself: it is, that such a law is restrictive of liberty. Whoever proposes a coercive law, ought to be ready to prove, not only that there is a specific reason in favor of this law, but also that this reason is more weighty than the general reason against every law.[39]

Insofar as liberty was so highly prized and cherished as a value – and this is important – it was also assumed, most especially by such thinkers as John Locke, Benjamin Constant, Alexander Tocqueville, and J.S. Mill, that a minimal area of noninterference, of liberty, *must* be preserved and made absolute: "[F]or if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred."[40] In other words, if we render liberty vulnerable to complete takeover – i.e., if freedom is completely sacrificed in order to advance another value, e.g. security – then the free man makes himself vulnerable to potential enslavement, to the loss of "the essence of his human nature,"[41] at some point in the future. But, as Berlin rightly wonders, what is this essence? By definition, essence implies value – and no small or casual amount. So if we wish to prevent the day when our very essences are placed at risk from ever arriving, then some degree, some portion – no matter how little – of man's liberty must be made inviolable. However, how exactly are we to determine when we've reached the edges of our freedom, and any further

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[39] Bentham, *Principles of the Civil Code*, Pt. 1, Ch. 1. (emphasis added)
[40] Berlin, "Two Concepts," at 171.
[41] Berlin, "Two Concepts," at 173.

encroachment will subsequently result in the tarnishing of our human "essence"? Unsurprisingly, the size of – i.e., how big – this guaranteed spot of liberty has been,[42] and will continue to be, up for debate.

In asking why liberty was so important to the classical political theorists, Berlin turns his attention onto the arguments advanced by the philosopher whom he calls "the most celebrated of [liberty's] champions,"[43] J.S. Mill. Unless we possess liberty, Mill writes, we – neither as individuals nor as a society – cannot progress, "civilization cannot advance; the truth will not, for lack of a free market in ideas, come to light; there will be no scope for spontaneity, originality, genius, for mental energy, and moral courage."[44] Why is individuality so crucial the advancement of society? Men, Mill writes, are imperfect and their individual viewpoints, limited. Insofar as "mankind are not infallible; [t]heir truths, for the most part, are only half-truths, [t]here should be different opinions, [as] it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living."[45] Diversity of perspective, of opinion, of lifestyles can only help advance society, whereas homogeneity threatens to cripple society with "collective mediocrity."[46] Liberty itself is not absolute; there is no single ideal of liberty. Instead, liberty is the fundamental prerequisite of a society that values open and ongoing conversation and debate. What is worthy of preservation is not a single conception of the "best" life, but rather the road taken – the discussions, challenges, and words

[42] "Genuine belief in the inviolability of a minimum extent of individual liberty entails some such absolute stand. [F]or Constant, Mill, Tocqueville, and the liberal tradition to which they belong, no society is free unless [t]here are frontiers, not artificially drawn, within which men should be inviolable, these frontiers being defined in terms of rules so long and widely accepted that their observance has entered into the very conception of what it is to be normal human being, and, therefore, also of what it is to act inhumanly or insanely." Berlin, "Two Concepts of Liberty," at 210-211.
[43] Berlin, "Two Concepts," at 174.
[44] Berlin, "Two Concepts," at 174.
[45] J.S. Mill, *On Liberty*, Ch. 3, accessed February 06, 2011, http://www.bartleby.com/130/3.html.
[46] Mill, *On Liberty*, Ch. 3.

said. The success of the individual – of man being able to live the life he wants for himself [47] – means the success of society. It is apparent that when liberty is understood negatively, the individual is, to an extent, privileged over the community. As Mill remarks, “Over himself, over his own body and mind, the individual is sovereign.”[48] Is negative liberty not, after all, described as “[t]he only freedom which deserves the name, is that of pursuing our own good in our own way” free from another’s interference so long as “we do not attempt to deprive [or impede] others”[49] in their own pursuit of liberty?

At the same time, it is important to emphasize – after bringing Mill into the discussion – that liberty is not simply valuable because of its utility. Liberty is not only worthy of preservation because of the lifestyle, the things, the desires, it allows us to have. Indeed, the danger in defining liberty solely in terms of the things we are at liberty to do or have then raises the question whether there is any other value to just being free? In other words, if we are able to obtain everything we desired even if we are not free – e.g. in an authoritarian, dictatorial regime – then why is freedom still necessary, still valued? If liberty possesses no purpose other than the attainment of itself, then why ought it be a value worth preserving first and foremost? Yes, I say. Liberty, Charles Fried writes, “like glory, pleasure, ease, and beauty, is not just an instrument; it is a particular kind of good in itself.”[50] To conceive of liberty solely as an instrument, of what it allows us to do, we strip it of much of its power. How so? In times of crisis, for example, we would not ask ourselves when do we value security enough to interfere with liberty, but rather whether the utility of security outweighs the utility of liberty in this circumstance. The conflict

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[47] “To threaten a man with persecution unless he submits to a life in which he exercises no choices of his goals; to block before him every door but one, no matter how noble the prospect upon which it opens, or how benevolent the motives of those who arrange this, is to sin against the truth that he is a man, a being with a life of his own to live.” Berlin, “Two Concepts,” at 174 (emphasis added).

[48] Mill, *On Liberty*, Ch.1

[49] Mill, *On Liberty*, Ch.1

[50] Charles Fried, *Modern Liberty and the Limits of Government* (New York: W.W. Norton, 2007), at 50.

between liberty and security would then boil down to a cold calculation of consequences. Subsequently, it is then even more likely that in exigent times, security will always trump liberty. So how ought we understand liberty then?

Liberty is a relation among people, as Charles Fried argues, "[it] is a relation in which each person refrains from interfering with the self-determination of others."[51] We refrain because we respect the other individual. And we respect because we acknowledge the value of each individual as well as his/her right to exercise his/her freedom. Liberty is also then a relation of mutual respect. Of course, this does not mean that we must like, love, or even help each and every individual we encounter. It does, however, require that we accord them the minimum respect demanded by freedom – the acknowledgment that they too are free. For that matter, theorists like Mill strongly believed in the necessity of an absolute minimum. In other words, we must carve out a space for liberty that is absolute, and cannot be trumped by any other value – security or otherwise. Again, the size, the breadth, the scope of that minimum guarantee is up for debate and subject to change, but the fact that the *minimum* exists is crucial. And if we succeed in preserving such a space, then liberty is not just another good or value we deem important and worthy of government protection, but is, in fact, the highest end – for government and ourselves.[52]

<u>In the Lens of History: Security v. Liberty</u>

To say that the terrorist attack on the World Trade Center and the present "War on Terror" is a threat the United States has never before seen the likes of is simply not true.

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[51] Fried, *Modern Liberty*, at 51.

[52] As Lord Acton wrote in the *History of Freedom in Antiquity*: "Liberty is not the means to a higher political end. It is itself the highest *political* end. It is not for the sake of good public administration that it is required, but for security in the pursuit of the highest objects of civil society, and of private life."

Although the empirical facts may differ, the feelings of fear and urgency experienced by the American people in past crises – e.g. the Civil War, both World Wars, the "Red Scare" during the Cold War – are similar, if not the same. And insofar as the government is still ruled by men, it too is subject to our "all-too-human cognitive and emotional imperfections."[53] The questions, problems, and challenges raised by these two supposedly conflicting values are then not unique to today's era – a time dedicated to the 'war' against terror. Indeed, we can find many instances of security and liberty coming into conflict within the landscape of American history. The question we subsequently must ask is whether there are any commonalities to be drawn from these past examples. Of course, no event is identical to another. Certainly, in the present era of nuclear warfare and weapons of mass destruction (WMD), the material stakes[54] – that is, the "real-life" implications – of the security vs. liberty argument may be higher, more dangerous and widespread, than those once considered by leaders in 18th century America. Yet even if the specifics of the situation inevitably differ – at times, importantly and other times, not as much – are there nonetheless patterns to be uncovered in the history of the security/liberty conflict?

To begin to consider such questions, we will first discuss two specific historical examples: The 1798 Alien and Sedition Acts and the suspension of liberties – specifically that of habeas corpus – during the Civil War.

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[53] Stephen Holmes, "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," *97 California Law Review,* 301-355 (2009) at 307

[54] "[T]errorist incidents in the 1970s (such as at the Munich Olympics) had maximum death tolls of about a dozen; attacks in the 1980s and 1990s rasied the scale (as in the Air India and Pan Am 103 bombings) to the hundreds; 9/11 lifted the toll into the thousands; and terrorists are now nosing around weapons of mass destruction that could kill hundreds of thousands." Nicholas Kristoff, "Liberal reality check: we must look anew at freedom vs. security," *Pitssburgh Post-Gazette* June 3, 2002, p. A9, quoted in Jeremy Waldron, "Security and Liberty: The Image of Balance," *The Journal of Political Philosophy* 11 (2003): 191-210.

The Alien and Sedition Acts of 1798: Partisan Warfare

Tensions were high at the start of the summer of 1798 – mere decades after the conclusion of a successful revolution – as the newly formed American government was once again faced with the daunting prospect of another war with an established and powerful nation. Although it had only been a short time since the French had provided the enemy of its enemy crucial aid, France had begun to disrupt American-British trade by seizing merchant ships, capturing both cargo and crew, in response to the former colonies' peace treaty with its former master, Great Britain. When America then sought to settle its differences with the French, the debacle known as the XYZ Affair erupted. As the slogan "Millions for defense, but not a cent for tribute" gathered momentum amongst the American public, war between the two nations appeared to be imminent.[55]

This is not to say that the young nation was certain of its survival, never mind its victory, should war with France truly erupt. Indeed, as Jan E. Lewis recounts, Americans were well aware of the precariousness of their position: "With their new government barely ten years old, Americans were acutely aware of the novelty of their experiment in republican government."[56] With the violent downturn, and ultimate failure, of the French Revolution, the fragility of the newly established American republic became all the more apparent to its citizens. Indeed, the possibility of war with France "released deep anxieties about the security of the United States, not just its capacity to withstand a foreign invasion, but the viability of its republican form of

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[55] "The attempt to settle the differences with the French involved the ill-fated mission of Gerry, Pinckney, and Marshall. [The French foreign minister] Talleyrand's request for money as a condition of a settlement in the XYZ Affair discredited the American 'Franco-philes' and very nearly provoked an American-French war." Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 The Supreme Ct. Rev. 109-159 (1970) at 111.

[56] Jan E. Lewis, "Defining the Nation: 1790 to 1898," in *Security v. Liberty: Conflicts between Civil Liberties and National Security in American History*, ed. Daniel Farber. (New York: Russell Sage Foundation, 2008), at 124.

government."[57] And it was in response to this deep-felt anxiety – this concern over the longevity of the American republic – that the Alien and Sedition Acts passed through a deeply divided Congress.

At this time, there was a substantial amount of partisan tension between the Federalist and Republican parties. After all, the majority of the Federalists believed the nation to be in crisis, and subsequently not only did party discourse became increasingly preoccupied with national security concerns, but the paranoia felt by its members also became more and more exaggerated. "It is almost impossible," Lewis comments, "to exaggerate the anxiety of the Federalists."[58] She then provides examples of the various nightmare scenarios the Federalist congressmen had dreamed up to justify such defense measures as the Alien and Sedition Acts:

Federalist congressmen spun out feverish scenarios by which France would invade and conquer England and move on to the United States, or perhaps, France would try to get at England by sending "thirty or forty thousand men, to come out and invade our country first." Another scenario had England, "a nation, whom, it is frequently said, would rejoice in our destruction," watching happily as France invaded and subjugated the United States.[59]

The Republicans, on the other hand, vehemently insisted that the Federalists were grossly over-exaggerating the nature of the threat at hand. France, after all, was "unable to secure a loan on the international markets, [and therefore] simply lacked the resources to support an invasion"[60] so far from home territory. Where, the Republicans asked the Federalists, was the evidence of such a grave and imminent threat? The Federalists, "[u]nable to catch their Republican opponents up in their fantasies of destruction," then took a strategic turn, a shift best

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[57] Lewis, "Defining the Nation," at 125.
[58] Lewis, "Defining the Nation," at 124.
[59] Lewis, "Defining the Nation," at 124.
[60] Lewis, "Defining the Nation," at 125.

illustrated by the warning given by the Federalist David Brooks of New York: "[W]e have those within our bosom who would give up our country too." [61] No longer was the enemy solely on the outside, but was present on the inside as well. Republicans thus became, in Federalist eyes, poorly disguised foreign agents.

Despite intense opposition by the Republican Party, the Alien and Sedition Acts nonetheless passed the Federalist-controlled Congress and were enacted in the summer of 1798 in less than a month's time.[62] The Acts were comprised of four separate pieces of legislation: the Naturalization Act, the Alien Friends Act, the Alien Enemies Act, and "An Act for the Punishment of Certain Crimes Against the United States," otherwise known as the Sedition Act.[63] The primary purpose of the first act, the Naturalization Act of 1798, was to keep out "the sort of men who might foment a revolution against the new [American] government,"[64] and so increased the period of residence required to be considered for citizenship from five to fourteen years. The second act, the Alien Friends Act, was particularly controversial. Although the act possessed a built-in sunset clause, it nonetheless granted the president the broad discretionary power "to order out of the country any alien *he* deemed 'dangerous to the peace and safety of the United States.' It was irrelevant which nation the immigrant came from."[65] What was the justification for the authorization of such broad executive powers? In these dangerous times, the Federalists argued, these "uncommon measures [are] justifiable"[66] due to the necessity of preserving this nation's security. Under the third act, the Alien Enemies Act, absent a sunset

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[61] Lewis, "Defining the Nation," at 125.
[62] Berns, *Freedom of the Press*, at 113.
[63] Lewis, "Defining the Nation," at 120.
[64] Lewis, "Defining the Nation," at 126.
[65] Lewis, "Defining the Nation," at 127.
[66] Lewis, "Defining the Nation," at 127.

clause, the president was authorized to "apprehend, restrain, secure, or remove any national of a country at war with the United States."[67]

However, as New York representative Edward Livingston rightly pointed out, the danger of the Alien acts – and in particular, the Alien Friends Act – was that it would "give the President despotic power over aliens insofar as it would allow him to decide what conduct merited expulsion from the country."[68] And although the Federalists believe that such coercive and restrictive measures need only apply to aliens, the Republicans further counter that if the government can deny such "basic civil liberties as habeas corpus and trial by jury"[69] to aliens, there is no reason why it cannot eventually do the same to citizens as well. After all, if fundamental rights are subject to removal by executive discretion, then there is nothing differentiating the rights of the citizen as opposed to the rights of the foreigner. Furthermore, the Republican opposition once again argued, where is the evidence of such a threat? Are we to simply accept, without question or challenge, statements made by Federalists as uncontested truth? In this particular context, the Federalists perceived the threat to speak for itself – i.e., to be self-evident. And even if the threat is not imminent, are we to wait until it is? Indeed, the Federalists ask, are we to stay our hand until the threat is already upon us, and the time for effective action has passed us by? What happens then? If the survival of the nation is at stake, then ought we not do what we must do to ensure it survives? Is freedom, liberty, worth risking it all – your livelihood, your very life?

As for the final piece of legislation, the Sedition Act made it illegal "to write, print, utter, or publish [a]ny false, scandalous and malicious writing against the government of the United

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[67] Berns, *Freedom of the Press*, at 113.
[68] Berns, *Freedom of the Press*, at 115.
[69] Lewis, "Defining the Nation," at 127

States, or either house of the Congress, [or] the President…with the intent to defame [them], or to bring them [i]nto contempt or disrepute; or to excite against them [t]he hatred of the good people of the United States."[70] Under this act, indictments were brought against fourteen persons, of which ten were "convicted and sentenced to pay fines ranging from five dollars to a thousand dollars and to be imprisoned for periods ranging from six to eighteen months."[71] Unsurprisingly enough, the targets of this particular piece of legislation turned out to be newspaper editors – specifically, those who were well known to be critical of the Adams administration[72]. With John Adams' secretary of state, Timothy Pickering, "read[ing] the Republican newspapers carefully, looking for opportunities to prosecute," which then led charges being levied against "four of the top five Republican newspapers,"[73] how could the outcome have been coincidental? The victims of the Sedition Act were not chosen arbitrarily, they were targeted specifically. Under the guise of national security, the Federalists trampled on the civil liberties of their political opposition.

What is particularly illuminating and noteworthy about this early episode in American history is not only that it showcases the political usefulness – and if successful, accompanying power – of exaggerating security threats, but also the lengths, as Lewis insightfully observes, to which a political party or organization might go to delegitimize and silence the viewpoints of its opposition, "to the point not only that political opponents could be called dangerous radicals and disloyal Americans, but also that the leading members of the opposition press could [potentially] be tried, convicted, and imprisoned for merely voicing their opposition."[74]

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[70] Lewis, "Defining the Nation," at 128.
[71] Berns, *Freedom of the Press*, at 114.
[72] "Little attempt was made to argue that the [Sedition Act] was necessary to protect the nation from French invasion; rather, the perceived danger was an internal enemy, the Republican opposition." Lewis, "Defining the Nation," at 128.
[73] Lewis, "Defining the Nation," at 129.
[74] Lewis, "Defining the Nation," at 132

A Nation Divided: Executive Suspension of the Writ of Habeas Corpus

In the five years, 1861 to 1865, that the United States was at war with itself, pitting state against state, citizen against citizen, approximately 600,000 people perished – a catastrophic number for a population of 31,443,000.[75] Without a doubt, the challenges the Lincoln administration faced during the Civil War not only possessed no easy fix, but were not limited to the "enemy" south of the capital, i.e. the Confederate army. Opposition to his administration was heavy at home as well, present not just in the border states of Delaware, Missouri, Kentucky, and Maryland, but amongst his political opponents as well – after all, members of "the Democratic Party [o]pposed the war and favored reconciliation with the South."[76] With the degree of hostility and the strength of the resistance, Lewis insightfully asks, it raises the "uncomfortable question of when opposition to the policies of the government crosses the line separating legitimate disagreement from treason."[77] And to make things even more difficult, the decision was a political challenge in addition to a legal and constitutional one. Indeed, President Abraham Lincoln had to walk a fine line between seeming too soft against the opposition, and risking "more resistance by punishing disloyalty too harshly."[78] Indeed, to overcome this crisis and keep the Union intact, Lincoln would have to learn the secrets of the 'iron hand in a velvet glove' approach fast.

It was in the spring of 1861 when the President suspended the writ of habeas corpus from Maryland to Pennsylvania. At the time, rumors of Confederate soldiers gathering at Harpers Ferry, Virginia, in preparation to take Washington, D.C. were rampant. Not to mention, the pro-

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[75] When placed in relation to the causalities of the Vietnam War, the number of deaths that occurred in the time of the Civil War was more than ten times as many. Michael Linfield, *Freedom Under Fire: U.S. Civil Liberties in Times of War* (Boston: South End Press, 1990), at 23.
[76] Lewis, "Defining the Nation," at 147.
[77] Lewis, "Defining the Nation," at 147.
[78] Lewis, "Defining the Nation," at 147.

slavery states were seceding left and right, with Maryland – itself a slave state – on the verge of following suit. There was legitimate concern that soon enough the nation's capital would be surrounded by hostile territory. Unfortunately, Congress was not in session and so President Lincoln took swift action: he endowed his local military commanders with the power to arrest civilians without a need for, a warrant, probable cause, or the promise of a speedy trial.[79] The writ of habeas corpus and the protections it afforded in times of peace had been suspended, for the first time, on the order of the President *absent* legislative authority. And subsequently, "[t]he slow and procedurally difficult process of accusing, trying, and convicting people of treason for aiding the South was replaced by military arrest, trial, and execution, facilitated by the suspension of the writ of *habeas corpus*."[80]

Enter John Merryman, a well-known Maryland planter, rumored Confederate sympathizer, and who was arrested in the late spring of 1861 on order from Union General George Cadwalader. Once in prison, Merryman quickly contacted his lawyers who then filed a petition for the writ of habeas corpus due to the fact that no warrant authorized his arrest. The petition was filed with the local circuit judge, whom was no other than Chief Justice Roger Taney of the U.S. Supreme Court. As the author of the infamous *Dred Scott* decision, it was commonly believed that Justice Taney was no staunch ally of Lincoln's administration. Upon receipt of Merryman's petition, he immediately issued the writ of habeas corpus and ordered General Cadwalader to produce Merryman before the court and justify the imprisonment. The general politely refused. Cadwalader further explained that, at this time, the writ of habeas

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[79] Sandra Day O'Connor and Craig Joyce, *The Majesty of the Law*: *Reflections of a Supreme Court Justice* (New York: Random House, 2003), at 87.
[80] Linfield, *Freedom Under Fire*, at 26.

corpus had been suspended on the president's authority, and therefore Merryman, a self-confessed Confederate sympathizer, could be lawfully held at the military's discretion.[81]

Although Chief Justice Taney orally ordered the release of John Merryman and the enforcement of the court's issuance of the writ, he did not do so in his written opinion. Instead, he chose to utilize his written opinion in *Ex Parte Merryman* as an opportunity to formally reprimand the President. The President, Taney wrote, possessed neither the necessary authority to suspend the writ nor the authority to delegate the enforcement of the suspended writ to military officers. Since the only reference to habeas corpus in the Constitution resides in Article 1, Justice Taney further argued – as many had before him – that only Congress was authorized to suspend the writ in "cases of rebellion or invasion the public safety may require it." The writ of habeas corpus should not be subject to the whims of executive power. It was meant, as illustrated by its historical use in both England and the United States, to protect against the abuses of executive power. Should the President be allowed to suspend the writ, then the Constitution would then "confe[r] upon him more regal and absolute power over the liberty of the citizen, then the people of England have thought it safe to entrust to the crown."[82] Though Justice Taney might have privately sympathized with the Confederacy and their cause, his arguments were not only well reasoned, but also rooted in well-established law.

At the same time, the Suspension Clause in the Constitution does not explicitly assign the power to suspend the writ of habeas corpus to a specific authority. Not to mention, the Civil War presented a situation that might call for a new interpretation. With a third of the nation in open rebellion and several other states choosing to ignore federal law, President Lincoln shrugged off the criticism – from both the North and the South – over his suspension of habeas corpus, and

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[81] O'Connor, *Majesty of the Law*, at 88.
[82] *Ex Parte Merryman*, 17 F. Cas. 144 (1861)

argued before Congress that in the times they now lived, when the nation was in such a dire state of emergency, would “all the laws, *but one*, [go] unexecuted, and the government itself go to pieces lest that one be violated?”[83] In his opinion in support of Lincoln’s suspension of the writ of habeas corpus, Attorney General Edward Bates argued that although Congress was the only governmental body with the constitutional authority necessary to stop court’s from ordering the writ, the President possessed the necessary authority to suspend the privilege for those persons suspected of treason or of open rebellion. Yes, such great power opens the door to abuse, but then what power does not? However, should such abuse occur then Congress also has the ability to impeach. The presidency, no matter how powerful it may seem, is not without checks.

Congress, at the close of its summer session of 1861, passed legislation declaring that all of the President’s military-related orders were legal. Although Congress had not yet passed a statute that suspended the writ of habeas corpus, President Lincoln continued to extend the writ’s suspension throughout the rest of the nation. By late September of 1862, he had expanded the suspension to not only include the entire nation, all citizens in connection with or aiding the Confederate cause, but also to those who resisted or interfered with military recruiting or the newly instated draft. It was only until the spring of 1863 – two years after Lincoln’s suspension of the writ – when Congress formally suspended the writ of habeas corpus for the duration of the Civil War.

“During the course of the Civil War,” Linfield recounts, “the United States arrested and jailed somewhere between 10,000 and 30,000 people, denying them the benefits of habeas corpus hearings.”[84] These prisoners were detained by the military, without charges – and in many cases, their detention was never brought to trial – for as long as the government thought

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[83] O’Connor, *Majesty of the Law*, at 89.
[84] Linfield, *Freedom Under Fire*, at 29.

necessary. In the balancing of national security and civil liberties, once more liberties are set aside in favor of necessity. At the same time, it is worth noting that the Lincoln administration stuck with the 'iron hand in velvet glove' approach insofar as the Union government engaged in a pattern of "thrust and retreat."[85] For example, despite the fact that his administration had faced vehement Democratic opposition – by means of the press – throughout the duration of the war, when "the editor of the *Dubuque Herald* was arrested for discouraging enlistments, but when prominent supporters interceded with the secretary of state, he [the editor] was released."[86] Certainly, during this difficult and violent time period, many civil rights violations occurred under the Lincoln administration,[87] which were justified under the umbrella of national security concerns.[88] However, when compared to the events of the Alien and Sedition Acts of 1798 as recounted above, the Lincoln administration's response to its political opposition, especially in light of the gravity of the threat facing the nation, appears far more reasonable, if not justifiable in context – though, not necessarily excusable.

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[85] Lewis, "Defining the Nation," at 147.
[86] To say the editor was "discouraging enlistments," is, to an extent, deceptively mild. Indeed, at times during the Civil War, the question of whether the press may have crossed the "line separating legitimate dissent from active disloyalty" was a valid one. In one article, the *Dubuque Herald* asked rhetorically "whether soldiers were 'bound by patriotism, duty, or loyalty' to fight a war to emancipate slaves, and it printed, implicitly with approval, letters written by family members to their kinsmen in the army decrying an 'unholy, unconstitutional and hellish war' and imploring them to 'to come home, if you have to desert, you will be protected.'" Incendiary rhetoric, without a doubt. Lewis, at 150; Lewis, "Defining the Nation," at 147.
[87] "During the Civil War, the Constitution was put into a deep freeze," e.g. (1) Complete censorship was imposed on all telegraphic communications, (2) Confederate leaders were jailed after the war without ever being brought to trial, and (3) property was confiscated from pro-slavery whites; slaves, rather than being freed, originally became the property of the US government. Linfield, *Freedom Under Fire*, at 23.
[88] "Ours is a case of Rebellion," Lincoln wrote in a Letter to Erastus Corning about his reasons for suspending the writ of habeas corpus, "[i]n fact, a clear, flagrant, and gigantic case of Rebellion, [w]herein the public Safety does require the suspension." Pres. Abraham Lincoln, "Letter to Erastus Corning and Others, 12 June 1863," accessed February 07, 2011, (http://teachingamericanhistory.org/library/index.asp?document=612).

Conclusion: Lessons Learned

What can be taken away from the description of these two historical, American crises? What have we found to be the commonalities in the handling of these two "national emergencies?" In the battle between liberty and security, it is clear that often security comes out on top in times of crisis as "[p]eople become more than usually deferential to the demands of their rulers in these circumstances and more than usually fearful that if they criticize the proposed adjustments they will be reproached,"[89] or, perhaps, put their own security – safety – at risk. Furthermore, justification of increased security measures and the potential liberties infringements always end up utilizing the language of the exception; that these times of crises, of war, are unique and therefore merit some leeway, i.e. some flexible space for the government to react effectively to protect its populace. And what's the harm in doing so? After all, the curtailments of my civil liberties is likely to only be a temporary inconvenience – a sacrifice with an expiration clause. Indeed, the common defense of overbroad and overaggressive national security policies boils down to the assertion that government, in times of crises, possesses the coolest head and the most information. But this perception, as was seen in the Federalist government's handling of the Quasi-War and the passage of the Alien and Sedition Acts of 1798, is not absolute. At the same time, it is entirely possible, as can be argued about Lincoln's handling of the Civil War, that the government does know what it's doing, and the citizens ought to a certain extent give it the benefit of the doubt. Certainly, as Mark Ignatieff argues, "getting risk and response into balance is easy only in hindsight. The challenge is doing so when a threat

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[89] Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010) at 20.

impends and, as is always the case, authorities lack adequate information about how serious it is going to prove" to be.[90]

Yet too often in the immediate aftermath of great tragedy, our judgment is not only clouded by feelings of anger, fear, and revenge, but the desire to punish those who have hurt us is also at its highest. It is, therefore, in those times when "[r]ights are most important not as [trophies] to polish in peacetime, but as ways to hold ourselves back when we're most tempted to overreact."[91] Rules and adaptability should not be understood as another "all-or-nothing" scenario. They are, in many instances, perfectly compatible. Hindsight, indeed, is 20/20. Oftentimes, when we look back at the government's responses to past national security crises, it turns out that the limitation of rights was not so much a necessary and practical sacrifice, but instead an irrational overreaction – i.e., the product of the personal agendas and prejudices of government officials. As Bruce Ackerman points out, "it's [i]mportant to emphasize the panicky way Congress rushed the [Patriot] bill into law within thirty-three days of its proposal by then-Attorney General John Ashcroft."[92] The Patriot Act provided reassurance that the government was not going to stand passively by and allow opportunity for another attack. Indeed, what Patriot symbolized was the government telling the terrorists, i.e. the enemies of the United States, that it has its eye on them. The government will always be watching. "It was the form," Ackerman further observes, "not the substance, of the law that really mattered: Patriot was a symbolic shake of the collective fist against the lurking terrorist menace."[93] The act was a

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[90] Mark Ignatieff, *The Lesser Evil*: *Politic Ethics in an Age of Terror* (New Jersey: Princeton University Press, 2004), at 55 .
[91] Daniel Solove, *Nothing to Hide: The Clash between Privacy and Security* (unpublished manuscript), at 50
[92] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006), at 2.
[93] Ackerman, *Before the Next Attack*, at 2.

reassurance of protection, of safety, and of decisive political action rather than impotent passivity.

History, indeed, is not important simply because it is a reminder of all our past accomplishments, but also because its examination reminds us that government – including the people leading it – is imperfect, and so "in times of crisis, [b]efore we start throwing people into the volcano, we should take pause to think about all the previous times we wrongly did the same."[94] Remember the Alien and Sedition Acts; recall what happened in the Civil War. Most importantly, learn from our mistakes and try our best to not repeat them. Government apologies ought to lose value if the same mistakes continue to be made, over and over again. Subsequently, we should treat the government curtailment of our civil liberties during times of emergency with both suspicion and skepticism. If we wish to protect our heritage, of what America stands for, we the people cannot forget to hold our government always accountable to its actions – especially so in times of exigent emergency.

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[94] Solove, *Nothing to Hide*, at 50.

Chapter Two:

Jack Bauer Syndrome

What Would Jack [Bauer] Do?

"Jack Bauer saved Los Angeles…He saved hundreds of thousands of lives. Are you going to convict Jack Bauer?"

– Justice Antonin Scalia[1]

It is the year 20[xx], and the authorities have in custody a woman who is suspected of having crucial information about the location of a dirty bomb that has been hidden away somewhere in New York City's bustling Times Square. Time is ticking away, and the urgency – the *necessity* – of finding that bomb only increases with each tick of the second hand. The lives, after all, of hundreds of thousands of innocent New Yorkers are at risk. The problem is, the suspect refuses to be of any help. She consistently maintains that she is innocent, that she has no idea what or where this bomb is. The authorities, however, do have reliable evidence linking this specific woman to the bomb. Indeed, they are convinced that she possesses information crucial to its discovery and disarmament. Yet normal interrogation techniques have nonetheless failed to produce any results; the suspect has stuck to her story, and the interrogators are now at a loss on how to proceed. If they allow this woman to walk, are they then giving up all hope of finding the dirty bomb in time? On the other hand, if they step outside what is legally permissible – e.g., utilize torture – is there any greater guarantee of finding that bomb in a shorter amount of time? And if so, does that then justify the extra-legal actions taken by the authorities? Is necessity by itself sufficient enough to justify all morally questionable – and legally impermissible – actions? Indeed, is this an instance in which torture may not only be justifiable but also necessary – even without the guarantee of success? Or, put more generally, is this an exceptional situation – due to

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[1] Dahlia Lithwick, "The Fiction Behind Torture Policy," *Newsweek*, July 26, 2008, accessed February 21, 2011, http://www.newsweek.com/2008/07/25/the-fiction-behind-torture-policy.html.

the gravity of the stakes – that thereby requires as well as justifies corresponding exceptional measures?

There is very little – if any – room for hesitation in ticking time bomb scenarios,[2] national security apologists have argued. After all, we cannot simply put time on pause while we wait for the authorities to either (a) gather all the information necessary to make the "right" decision, or (b) for them to discuss and reconcile all implicated moral questions. First of all, as was evident in the historical examples provided in the previous chapter, e.g. Quasi-War and Civil War, when a nation is embroiled in a threatening situation – or even when faced with an impending threat – authorities are typically not as well informed as many would expect or prefer. Not to mention, even should all the pertinent information be gathered, emergency situations are rarely black and white – i.e., devoid of difficult moral dilemmas – insofar as it is not always apparent what the *best* decision, never mind what the "right" decision, is. Nonetheless, quick and, presumably, effective governmental action is both assumed and demanded. Indeed, "the political costs of underreaction are always going to be higher than the costs of overreaction."[3] We, simply put, always prefer our governmental leaders to do *something* – or, at the very least, give off the appearance of decisive action – as opposed to standing passively by. And so, in returning to the hypothetical described above, it is then almost inevitable that with every passing minute the

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[2] "[T]he conceit of the ticking time bomb first appeared in Jean Lartéguy's 1960 novel 'Les Centurions,' written during the brutal French occupation of Algeria. The book's hero, after beating a female Arab dissident into submission, uncovers an imminent plot to explode bombs all over Algeria and must race against the clock to stop it. [Darius] Rejali, who has examined the available records of the conflict, told [Mayer] that the story has no basis in fact. In his view, the story line of 'Les Centurions' provided French liberals a more palatable rationale for torture than the racist explanations supplied by others. [L]artéguy's scenario exploited an insecurity shaped by many liberal societies – that their enlightened legal systems had made them vulnerable to security threats." Jane Mayer, "Whatever It Takes," *The New Yorker*, February 19, 2007, accessed February 23, 2011, http://www.newyorker.com/reporting/2007/02/19/070219fa_fact_mayer?currentPage=all.
[3] Mark Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (New Jersey: Princeton University Press, 2004) at 58.

number of options available to the authorities will decrease until only one avenue remains: the torture of the suspected terrorist.

In a situation where the safety of hundreds of thousands of civilians can be preserved at the expense of one [guilty] person's suffering, is the choice between the two scenarios then not obvious? When compared to the unimaginable scenario of the vibrant Times Square as a desolate wasteland, is the torture of a single suspect not the lesser evil by far? Or as Judge Richard Posner puts it: "[I]f the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility."[4] In other words, if you do not have the guts, the strength, to make the difficult, and admittedly morally questionable, decision – e.g., the decision to torture the suspect in custody – quickly, then you have no business leading. It appears then, in Posner's opinion, a necessary leadership characteristic is the ability to not quibble over morality in ethically ambiguous situations. Instead, leaders ought to acknowledge that sometimes you've simply got to do what you've got to do – Jack Bauer-style.

Indeed, in times of heightened fear, what sounds more comforting than the promise that there is someone out there who will do all that it takes to keep you safe? What, in times of great insecurity, is more reassuring than a government full of leaders who will not hesitate to do what is necessary to keep its citizenry safe at all costs? After all, to the insecure, fearful subject, safety – i.e., security – is most important. For that matter, the insecure subject also "anticipates risks and [seeks to] minimize them through systems of fortification, believes that economic inequalities are natural and social exclusion justified, voluntarily sacrifices privacy and civil liberties on the altar of national security, and fully supports punitive state policies,"[5] especially

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[4] Richard A. Posner, "The Best Offense," *The New Republic,* September 2, 2002, accessed February 21, 2011, http://www.tnr.com/article/the-best-offense.
[5] Torin Monahan, *Surveillance in the Time of Insecurity* (New Brunswick: Rutgers University Press, 2010) at 6.

when directed at marginalized populations, e.g. criminals, terrorists, immigrants, and the poor. And in the aftermath of great catastrophe, when we speak of the common citizen, it is the insecure subject whom we are describing.

Less than a week after the terror attacks on the Twin Towers – a time in which fear was arguably at its zenith in America – the Washington Post published a feature recounting the results of a quiz given in a university ethics class which "gave four choices for the proper U.S. response to the terrorist attacks: A.) execute the perpetrators on sight; B.) bring them back for trial in the United States; C.) subject the perpetrators to an international tribunal; or D.) torture and interrogate those involved."[6] The majority of students believed choices A and D – i.e., execution and interrogation by torture – were the appropriate governmental response to terror. In November of 2001, the *Christian Science Monitor* reported that thirty-two percent of surveyed Americans advocated the torturing of suspected terrorists. And thirty-two percent is by no means insignificant when describing a country that possesses a Bill of Rights forbidding cruel and unusual punishment, a people who cherish values perceived to be in opposition to those valued by torture regimes, as well as a government which has historically – and publicly – condemned nations that torture. Alan Dershowitz further observed in 2002 that whenever he "asked audiences for a show of hands as to how many would support the use of nonlethal torture in a ticking-bomb case, [v]irtually every hand is raised."[7] On September 26, 2007, in a Democratic primary debate, moderator Tim Russert even posed a question to the presidential candidates concerning a variation of the ticking time bomb scenario:

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[6] Amy Argetsinger, "At Colleges, Students Are Facing a Big Test," *Washington Post*, September 17, 2001, p. B1, as quoted in David Luban, "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 91 (2005), at 1425.
[7] Of course, it is possible that the audience attending Dershowitzs' speeches may not be an entirely accurate representation of the American populace in general. However, it is nonetheless a striking observation. Alan M. Dershowitz, *Why Terrorism Works* (2002) at 150, as quoted in Luban, "Liberalism, Torture, and the Ticking Bomb," at 1426.

> We get lucky. We get the number three guy in Al Qaeda. We know there's a big bomb going off in America in three days and we know this guy knows where it is. Don't we have the right and responsibility to beat it out of him? You could set up a law where the president could make a finding or could guarantee a pardon. [S]hould there be a presidential exception to allow torture in that kind of situation?[8]

For the most part, the Democratic candidates refused to sanction torture. Nonetheless, it is worth taking a moment to examine then Senator Hillary Clinton's response. Torture, she said, "[a]s a matter of policy it cannot be American policy, period." This is, however, not a categorical rejection. After all, the statement does not address what is to be done when we are in a state of exception[9] – at state in which we are no longer under the purview of American policy. Torture, of course, is unacceptable as a norm – as a legitimate peacetime practice – but what about in the midst of crisis, in *ab*normal times?

Although we ought to ask our presidential candidates questions about the ticking time bomb scenario, it is also crucial to be aware of the way in which such question are posed. "Candidates," Torin Monahan argues, "are not asked how to safeguard civil liberties and uphold the Geneva Conventions in the face of terrorist threats. Instead, they are asked about ticking time bombs and knowledgeable detainees, which naturally valence responses toward immediate, tough action."[10] The very framing of the liberty-security question, in asking whether liberty/security ought to be sacrificed for the sake of security/liberty, presumes a zero-sum game. In other words, with the increase of one value – whether it be liberty or security – the other automatically decreases. So when faced with a catastrophic situation on the one hand – i.e., when the need for security, for state action, is so dire – and with protecting civil liberties on the other

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[8] "The Democratic Presidential Debate on MSNBC," *The New York Times*, September 26, 2007, accessed February 22, 2011, http://www.nytimes.com/2007/09/26/us/politics/26DEBATE-TRANSCRIPT.html?pagewanted=30&_r=1.
[9] The notion of the "exception" will be thoroughly examined in a later part of this chapter.
[10] Monahan, *Surveillance*, at 35.

hand, what will appear to be the logical, rational, choice? Sacrificing a few liberties – *temporarily*, as many would emphasize – does not sound nearly as bad as the alternative, i.e. a nuclear wasteland.

Even the majority of civil libertarians, rights greatest advocates, continually emphasize that rights are not absolutes. They are quick to distance themselves from the old Latin proverb: *Fiat iustitia, pereat mundus,* translated by Immanuel Kant as "Let justice reign even if all the rascals in the world should perish from it."[11] Of course, they say, when faced with a life-threatening crisis, rights ought to give way. We all only have one life to live in this world. And so, "[t]o reckon with the embarrassment, rights enthusiasts therefore declare themselves deontologists up to a 'threshold' of 'disaster,' after which point welfare considerations are taken to dominate rights claims."[12] In other words, rights are valuable and should certainly not be arbitrarily cast aside for just any crisis. There must be a standard, a threshold, a ceiling, by which any danger that exceeds such limits then justifies – validates – subsequent rights intrusions. Rights are not absolute; at some point, utilitarian, consequentialist, considerations must be included in the decision-making process. The problem is, what is that point? How high is that threshold? How strong is that standard? It could be extraordinarily high, but it could also be exceptionally low. "American abhorrence to torture," David Luban writes, "now appears to have extraordinarily shallow roots."[13]

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[11] Immanuel Kant, "Appendix I: On the Opposition between Morality and Politics with Respect to Perpetual Peace," accessed February 22, 2011, http://www.constitution.org/kant/append1.htm.
[12] Christopher Kutz, "Torture, Necessity, and Existential Politics," *California Law Review* 95 (2007), at 254.
[13] It is also worth noting that stances on torture do not necessarily separate on political lines – i.e., Democratic or Republican, liberal or conservative. Indeed, as Luban remarks: "Liberal Senator Charles Schumer has publicly rejected the idea 'that torture should never, ever be used.' He argues that most U.S. senators would back torture to find out where a ticking time bomb is planted. By contrast, William Safire, a self-described 'conservative…and card-carrying hard-liner[],' expresses revulsion at 'phony-tough' pro-torture arguments, and forthrightly labels torture 'barbarism.' Examples like these illustrate how vital it is to avoid a simple right-left reductionism." Luban, "Liberalism, Torture, and the Ticking Time Bomb," at 1426.

Needless to say, insofar as terrorism not only signifies a situation of ultimate insecurity,[14] but also produces a profoundly insecure subject, it is more than likely that for the duration of the War on Terror the insecure subject will come to define the American consciousness: "As an ideal type, the insecurity subject [then] becomes the reference point against which individuals, and increasingly institutions and automated systems, evaluate behavior and make decisions."[15] In other words, the insecurity subject will come to exemplify the primary target audience that the government, when formulating its security policies and rhetoric, seeks to appease. In doing so, the relevance and power of the insecure subject is not only reinforced in political discourse, but is perpetuated in everyday – i.e., cultural – life as well by means of such institutions as the media. The media, Monahan observes, "play[s] a crucial role in shaping insecurities in the social imaginary."[16] And there is, perhaps, no better example of the insecure subject's infiltration of American cultural discourse than scripted network television.

At the start of 2010, *The New York Times* reported that television series centered on espionage typically "come in clusters at times of heightened anxiety over world affairs."[17] Such series often made tragic, unthinkable, security dilemmas much more manageable, inasmuch as they portrayed fearless, heroic, suave agents defending Western civilization while "crack[ing] wise as they crack heads and global conspiracies."[18] Although there are many television shows

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[14] What makes terror so frightening is, in part, due to an overwhelming feeling of uncertainty. Where will the terrorists strike next? From whom will the attack come from? What will be the magnitude of this next attack? In the aftermath of 9/11, these questions of uncertainty have not only captured the American imagination, but have also influenced much of the action taken by the government: "In the United States' protracted 'war on terror,' fear of devastating, indiscriminate attack upon civilian populations has been mobilized by politicians and the media to justify extreme military actions and security operations." Monahan, *Surveillance,* at 15.
[15] Monahan, *Surveillance*, at 2.
[16] Monahan, *Surveillance*, at 6.
[17] Alessandra Stanley, "Another Terrorist Plot, Another Very Long Day," *The New York Times*, January 14, 2010, accessed February 22, 2011, http://tv.nytimes.com/2010/01/15/arts/television/15twentyfour.html?_r=1.
[18] "In the '60s the cold war inspired shows that tapped into, then blunted, people's worst fears about nuclear annihilation. Shows that posited cool, witty secret agents, like 'I Spy,' 'Mission: Impossible' and 'The Man From U.N.C.L.E.,' or bumbling operatives, like the parody 'Get Smart,' made the unthinkable more manageable. Like a

currently on the air that follow such a formula, e.g. Chuck and NCIS, the television series *24* – which made its debut in American homes on November 6, 2001, a mere two months after the tragedy of 9/11 – sets itself apart from the American pop culture pack in both grit and real-life impact. Because the pilot episode of the series had been shot well before the events of 9/11 stunned the nation, the initial plot of the first season as well as the "overarching concept of a [s]how focused on the exploits of a counterterrorism agent in a world of dire threats, [c]reated an eerie and prescient parallel to real-life events."[19] Indeed, at the time of its premiere, the very question that frames, drives, and defines the entire series was extraordinarily and uncannily timely: how ought the government, i.e. those in authority, respond to terrorist threats in contemporary society? And whereas the American public in the latter half of 2001 had yet to formulate an answer to such a question, agent Jack Bauer already has complete answers – even if most of Bauer's solutions ended up outside the bounds of the law.

Agent Jack Bauer is, as Dan Burstein describes, "essentially a Dirty Harry for the twenty-first century, a vigilante who always seems to know who the good guys and the bad guys are, even deep within the pitch-black night of a complex conspiracy."[20] He is confident in his judgments, unhesitating in his actions. Jack Bauer is prepared to do whatever it takes to keep America and her citizens safe – no matter the personal expense.[21] Unsurprising, given the fact

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children's bedtime story, those series addressed the faceless beast by giving it an identifiable, even amusing form. After détente came along in the 1970s, television spies grew scarcer. [T]oday anti-terrorist tales are [back] in fashion, and they keep even the most likely threats at a comforting make-believe remove. It's not that the violence is in any way muted; if anything, special effects reach for Imax overstatement. Instead the heroes are blithe and invulnerable." Stanley, "Another Terrorist Plot."

[19] Dan Burstein, "Introduction," in *Secrets of 24: the Unauthorized Guide to the Political & Moral Issues behind TV's Most Riveting Drama*, eds. Daniel Burstein and Arne J. De Keijzer. (New York: Sterling, 2007), at 11.

[20] Burstein, "Introduction," at 13.

[21] "The agents [of *24*] treat themselves as expendable, ready to put their lives at stake if this will help to prevent an attack. Jack Bauer [e]mbodies this attitude. He not only tortures others but condones his superiors putting his own life at stake. In the fourth season, Bauer agrees to be delivered to China as a scapegoat for a CTU covert operation that killed a Chinese diplomat. He knows he will be tortured and imprisoned for life but promises not to say anything that might damage US interests." Slavoj Zizek, "The depraved heroes of 24 are the Himmlers of

that the tagline referenced in The Internet Movie Database's description of the series states "Federal Agent Jack Bauer can't *afford* to always play by the rules" – not "Federal Agent Jack Bauer does not like/enjoy/refuses to play by the rules." Furthermore, Bauer is a man who is not only always right about *who* the evil man is behind the curtain, but also so happens to possess "the personal, physical, and technological wherewithal to stop the evildoers just in the nick of time."[22] Bauer is neither afraid of bending or breaking with established protocol nor does he possess any qualms about taking the law into his own hands. And although torture is not a recourse Bauer particularly enjoys, nor is it something he would ever hesitate to use if *he* believed it necessary. Of course, when he does resort to torture – which is often – it typically yields the sought after information. The bottom line – the only thing that matters, that is of consequence – is the fact that Jack Bauer succeeds when he steps outside of the law. Consequentialists, when talking about national security, ascribe to the belief that so long as the measures taken succeed in protecting innocent lives – i.e., fulfill its purpose – then there is nothing morally amiss. Indeed, actions are only wrong if they fail to work; "that is, if they produce a chain of future harms, like more terrorist attacks."[23] In many ways, Jack Bauer is, in fact, the ultimate sovereign: judge, jury, and executioner. It is not simply that "Federal Agent Jack Bauer can't afford to always play by the rules," but that "Federal Agent Jack Bauer *can* afford to not always play by the rules." In other words, Bauer can take things into his own hands not only because necessity demands it, but also because he is able to.

What is the significance of this choice of words? First of all, it is important to point out that when we say we cannot *afford* to do something, the action that we are refusing to do was

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Hollywood," *The Guardian*, January 10, 2006, accessed February 23, 2011, http://www.guardian.co.uk/media/2006/jan/10/usnews.comment.

[22] Burstein, "Introduction," at 13.

[23] Ignatieff, *Lesser Evil*, at 7-8.

never an absolute – i.e., an action that must be done – to begin with, but is rather a privilege, a luxury – i.e., an action that we want to do if possible. Rules then, as illustrated by the usage of the phrase "can't afford," in the world of *24* are more peacetime luxuries than absolute wartime constraints. Indeed, Federal Agent Jack Bauer cannot *afford* to play by the rules, i.e. he has no other choice but to break rules. Yes he would like to do things by the book,[24] but due to the extreme circumstances in which Bauer finds himself continually confronted with, he simply cannot do the "right" thing and still hope to save the world. These are, after all, extraordinary circumstances and in such instances, the law and the norm simply are not sufficient.[25] Instead, he must go outside the law – perhaps, even breaking some of his own moral codes – in the name of serving the greater end of world preservation. We are then confronted with the consequentialist mentality of ends justifying the means: because consequences matter and are concrete, whereas abstract philosophical and moral prohibitions ultimately must take second priority to "the calculus of consequences."[26] And as Monahan further observes:

> Absolute and ubiquitous threats characterize the world of *24*. Questions of scale and scope implode as all dangers take on a significance of finality. Each threat gives way to another, just when the characters and viewers long for – and expect – resolution and safety. The best that can be hoped for is temporary management, containment, or postponement of the indiscriminate annihilation of civilian populations. Even individual threats and sacrifices symbolize absolute ones because any loss of positional advantage against terrorists could destabilize the tenuous state of security.[27]

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[24] "In his defense, Bauer does not commit these crimes because he's a sadistic psychopath; he breaks laws to save the country from terrorists bent on using nuclear, biological, or chemical weapons on U.S. soil." Tung Yin, "Jack Bauer Syndrome: Hollywood's Depiction of National Security Law," *Southern California Interdisciplinary Law Journal* 17 (2009), at 279.

[25] In one particular episode, "a human-rights lawyer from a fictional organization called Amnesty Global tells Bauer, who wants to rough up an uncharged terror suspect, that he will violate the Constitution. Bauer responds, "I don't wanna bypass the Constitution, but these are extraordinary circumstances." Mayer, "Whatever It Takes."

[26] Luban, "Liberalism, Torture, and the Ticking Time Bomb," at 1440.

[27] Monahan, *Surveillance*, at 27.

The world the show depicts is constantly in a state of crisis where not only is the threat always imminent, but the stakes involved are also always catastrophic: "nothing less than the survival of entire cities or nations is at stake in each moment of conflict."[28] At the same time, we must keep in mind that Jack Bauer is uniquely situated insofar as he possesses the necessary skills and flexibility – which come with being a higher-ranked Counter Terrorist agent – to successfully handle terrorist threats *his* way.[29]

To say the least, the goal of attaining national security – and therefore, stability in both the short and long-term – in Jack Bauer's world is ever elusive. And in light of this brutal, exceptional reality, Jack Bauer and his Counter Terrorist Unit (CTU) colleagues have no choice but to resort to extreme means. Indeed, in the ticking time bomb scenario where information needs to be extracted as quickly as possible to ensure public safety, the law enforcement officers in *24* would not hesitate to torture the terrorist suspect in custody. After all, as Monahan explains, "“[t]hese extreme actions are necessitated by circumstance because threats to the sovereign are interlinked with absolute threats to society, such as nuclear or biological attacks on American soil. In the face of catastrophic events of this nature, the future itself depends upon radical intervention and individual sacrifice."[30] When faced with the unimaginable – e.g., the United States becoming a nuclear wasteland – what does it matter if law and morality are sacrificed at the altar of national security? What, after all, can we still preserve if there is no nation left? In the context of the show, the answer the protagonists consistently arrive at is that saving the world is a messy and gruesome business – it requires the compromising of personal morals, the breaking of rules/regulations/laws, and if necessary, the strength of character to

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[28] Monahan, *Surveillance*, at 26.
[29] Of course, the Bauer way more often than not involves some form of coercion. In choosing whether to grant an uncooperative suspect due process, which invariably slows down the investigation, or simply torture him for information, Bauer almost always chooses coercion.
[30] Monahan, *Surveillance*, 28.

betray even those you love. If you cannot bring yourself to make such sacrifices – and make them quickly – you'll fail, and with the world at stake, with the lives of millions of innocents in the balance, there is simply no room for failure.[31] However, we must also realize that in the world of *24*, harsh interrogation and torture of suspects are not just perceived as necessary, but have – in a world marked by the incessant threat and fear of extinction – become the routine. What was once perceived, and justified, as the exception is now the *norm*.

Individual choices," Monahan warns, "in this arena are always false choices. The stakes are simply too high for characters to resist – for too long – the injunction to prioritize the demands of political structures and the survival of nations."[32] In other words, what he argues, is that the choice between saving the nation and protecting civil liberties is really no choice at all. After all, what use are civil liberties without a society to enjoy them in? What force do civil liberties have without a government to protect them? Civil liberty, as understood in classical liberal philosophy, means not simply the freedom of the individual pre-society, but instead describes the freedom of a citizen – that is, of a person living under the umbrella of government. Subsequently, insofar as the very existence of civil liberties depends on the survival of government, the preservation of the former must then be subordinate to that of the latter.

It then appears that the old Roman adage – the safety of the people is of the highest priority – still holds true today. Indeed, in the name of preserving the public safety, there was very little that the Roman republic was unwilling to sacrifice: "The suspension of civil liberties, the detention of aliens, the secret assassination of enemies: all this might be allowed, as a last

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[31] "Entrepreneurial agents, especially rogue ones who create and operate within zones of indistinction, [like Bauer,] are the only ones who can act sufficiently. The underlying implication is that the protagonists would certainly prefer to think things through, follow rules, and obey the law, but that circumstances of modern risk societies foreclose such time-consuming endeavors. Thus imperatives for speed and decisive action become social facts and everything else anachronism." Monahan, *Surveillance*, at 30.

[32] Monahan, *Surveillance*, at 29.

resort, if the life of the state were in danger."[33] But let us not jump the gun, throw up our hands, and permanently relegate rights to the much more flexible status of privilege. Indeed, even if law is required at times to compromise with exigencies, must such compromise be so unbalanced – so tipped in favor of security at the expense of liberty? "Is there," as Mark Ignatieff asks, "no moral limit to what a republic can do when its existence is threatened?"[34] In times of emergency and crisis, must we suddenly find ourselves thrust into a situation in which the organizing political anthems consist solely of 'Anything goes,' and 'Whatever it takes'? Perhaps; but so long as we live in a democratic country, ruled and constrained by law, we should not allow ourselves to be sucked into such a scenario. Instead, we ought to remember that what *we* – i.e., those of us enmeshed within the discourse of liberalism – mean by legitimate government action is not necessarily what authoritarian leaders such as Hitler, Stalin, Mao, and Mubarak envisioned. Nor should it be. Instead, when we Americans speak of government, we mean government of the people, by the people, and for the people. At the same time, the interests of the "people" do not necessarily include the interests of all individuals, i.e. minority interests. And so, in a democracy, is it the case that what we mean by "people" is merely a synonym, a better sounding name, for "majority"? When we talk about defending rights, do we, in actuality, mean the protection of majority rights? Does the ideal of democracy then merely boil down – when put into practice – to rule by the majority?

The power wielded by democratic government cannot be unlimited. Democracy assumes, by definition, limited government. And those limits are often manifested in the form of rights and a heartfelt respect for the importance of rights. "These limits," Ignatieff emphasizes, "are not there just for prudential reasons, to prevent governments from riding roughshod over individuals.

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[33] Ignatieff, *Lesser Evil*, at 1.
[34] Ignatieff, *Lesser Evil*, at 1.

Democracies don't just serve majority interests, they accord individuals [and their freedom] with intrinsic respect."[35] Freedom, as was discussed extensively in the first chapter, has an intrinsic value of its own. The value of liberty does not merely start and end with the fact that it allows us to pursue and fulfill our desires. Nor does liberty's worth hinge on the fact that it plays a crucial role in the development of our very own individuality or in the progress of society. Liberty involves the recognition of people as more than just means, but as ends in and of themselves. It is a "relation among people. It is a relation in which each person refrains from interfering with the self-determination of others. It is a relation in which people respect each other."[36] And so a democratic government that respects and believes in the freedom of its citizens cannot simply be "government for the happiness and security of the greatest number,"[37] nor can its greatest constraint be that of majority interest. Instead, "[t]he essential constraint of democratic government is that it must serve majority interests without sacrificing the freedom and dignity of the individuals who comprise the political community to begin with"[38] and, most especially, the minority voices which are at the greatest risk of being lost in the racket of the majority. The question then becomes: In light of our liberal heritage, is there space for a "Whatever it takes" attitude towards national security? Under democratic rule, can a man like Jack Bauer ever be justified?

One might say that we are merely overreacting and overanalyzing, that *24* is only a television show depicting a fictional reality, filled with fictional characters. Why take it all so

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[35] I am careful to include freedom in this particular quote insofar as it is important to distinguish between individuals in chains and those that are free. Though it is beyond the scope of this particular paper, it is worth questioning whether a government, or even an individual, is capable of truly respecting an un-free individual. However, for this particular paper, we will assume that when the notion of 'respect' is mentioned, of respecting individuals, we are presuming the individuals to be free. Ignatieff, *Lesser Evil*, at 5.

[36] Charles Fried, *Modern Liberty and the Limits of Government* (New York: W.W. Norton, 2007), at 51.

[37] Ignatieff, *Lesser Evil*, at 5.

[38] Ignatieff, *Lesser Evil*, at 5.

seriously? The moral dilemmas, the either/or dichotomies, Jack Bauer and his colleagues confront on a constant basis are not situations in which the Average Jane will find herself ever faced with – if anyone would. Not to mention, the speed with which Bauer must decide one way or the other makes the crisis all the more implausible.[39] *24* is, at the end of the day, only mindless entertainment. At the same time, the crises confronted in this fictional reality are not entirely hypothetical – not entirely inconceivable – insofar as they feed directly into the fears held by the American public in this new age of terror: "[T]errorists detonated nuclear bombs in seasons two and six, deployed a lethal airborne virus in a Los Angeles hotel in season three, melted down nuclear plants and shot down Air Force One in season four, and unleashed nerve gas in a shopping mall in season five."[40] Even Surnow, the co-creator of the series, freely admits that the concept of the series is "ripped out of the Zeitgeist of what people's fears are – their paranoia that we're going to be attacked," and that one of the goals of *24* is to "make[] people look at what we're dealing with in terms of threats to national security."[41]

Furthermore, it is not only the familiarity of the scenarios, of the threats, that resonate with us. Indeed, Burstein writes, "[i]n our secular, morally relativistic, individual-obsessed cultural, [*24*] may be offering us some provocative spy fiction (and fact): Who can you really trust? How can you be sure? Can you trust anyone?"[42] Does torturing a terrorist suspect and obtaining the information you needed to defuse a ticking time bomb thereby justify the actions taken? If the interrogators could have obtained such information, but *consciously* chose not to, have they taken the moral high road – or merely condemned themselves and us to a tragic and

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[39] "You have to choose between your family and your country – right now! Hemp! Hemp! Hemp! You have to collaborate with terrorists to save your own life or die a tortured death – you have ten seconds to choose! Hemp! Hemp! Hemp! You have to kill a friend to save a city from a nuclear blast. You have a split second to decide!" Burstein, "Introduction," at 18.
[40] Yin, "Jack Bauer Syndrome," at 279.
[41] Mayer, "Whatever It Takes."
[42] Burstein, "Introduction," at 18.

fiery end? If you break the law in order to protect a society that defines and prides itself on its adherence to the rule of law, are you a necessary criminal or simply a practical, realistic, hero? Without a doubt, the show *24* is entertaining – it would not have remained on the air for nearly a decade if it was not, at the very least, entertaining – but it is also entertainment that hits very close to home, and thereby has a noteworthy and lasting impact on the American public.

The argument against *24* being anything other than a television show would also possess more credibility had it not so noticeably infiltrated our national security discourse. As John Ip observes, the series *24* has been "aptly described as the nearest thing to 'the Official Cultural Product of the War on Terrorism.'"[43] Indeed, in light of the ways in which Jack Bauer is both referenced and talked about outside of the show's context,[44] it is clear that the line between fact and fiction – between our reality and the world of *24* – has become blurred. As Tung Yin recounts:

> During a debate among Republican presidential candidates in 2007, Rep. Tom Tancredo answered a hypothetical question about the appropriate response to a captured would-be suicide bomber with, "I'm looking for Jack Bauer at that point, let me tell you." Homeland Security Secretary Michael Chertoff has said that *24* "frankly,…reflects real life" in presenting scenarios with "no clear magic bullet to solve the problem," and former CIA Director James Woolsey has said that *24* is "quite realistic" about the threats that it depicts. [E]ven more significantly, an article in *The New Yorker* reported that the dean of the West Point military academy and three veteran interrogators went to Los Angeles to urge the producers of the show to stop "promot[ing] unethical and illegal behavior." According to the

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[43] John Ip, "Two Narratives of Torture," *Northwestern Journal of International Human Rights* 7 (2009), at 73.

[44] In 2006, as Maureen Dowd reported in her *New York Times* column, a panel, of which conservative pundit Rush Limbaugh was master of ceremonies, was held titled: "'24' and America's Image in Fighting Terrorism: Fact, Fiction, or Does It Matter?" And among the attendees was Supreme Court Justice Clarence Thomas and Michael Chertoff, at the time the Secretary of the Department of Homeland Security. She further charges the Bush Administration with freely crossing the line between fact and fiction: "Better to pretend that rounding up a bunch of Florida losers whose plan was more 'aspirational than operational,' as one FBI official put it, is a great blow in the war on terror than to really turn our intelligence agencies and Homeland Security into the relentless, resourceful and fearsome organizations they are in fiction – and should be given the billions spent on them. [E]ven though they still haven't captured the fiend behind 9/11, W. and Dick Cheney still blend fact and fiction by using 9/11 to justify their wrongheaded venture in Iraq." Maureen Dowd, "We need Chloe!" *The New York Times*, June 24, 2006, accessed February 23, 2011, http://select.nytimes.com/2006/06/24/opinion/24dowd.html?_r=1.

> West Point dean and the interrogators, American soldiers in Iraq were beginning to emulate the interrogation tactics used in the show.[45]

Clearly, America and many of her leaders today have not only taken notice of the show, but also have, in this War on Terror and in the balancing of liberty and security, succumbed to the call of the Jack Bauer siren. Whereas reports of abuses committed at the hand of American military personnel shocked and angered much of the world – Europe, in particular – the American response, in comparison, was far more lukewarm. Some attribute American apathy towards the torture of detainees as the result of the popularity of a show like *24*, which "has a weekly audience of fifteen million viewers, and has reached millions more through DVD sales."[46] When *The New Yorker* interviewed Joel Surnow, co-creator and executive produce of *24*, in 2007, he was quoted as saying that in terms of fulfilling the needs of national security, "[t]here are not a lot of measures short of extreme measures that will get it done. [A]merica wants the war on terror to be fought by Jack Bauer. He's a patriot."[47] He is a man, a true national hero, who is unafraid of doing all that it may require to protect his family and his country – though when the two come into conflict, the latter still takes precedent.

This sort of hard-line, take no prisoners, attitude exemplifies what might be called the Jack Bauer Syndrome. And this syndrome has infiltrated both American culture and politics - as evident by the attitude observed in many West Point cadets as well as the ways in which each of the Republican presidential candidates in 2007 sought to one-up the other on the issue of torture and interrogation of terrorist suspects. Gary Solis, a retired Marine and Judge Advocate who

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[45] Indeed, as Jane Mayer reports in her *New Yorker* article, the interrogation techniques employed by CTU agents share disturbing similarities to those used by U.S. interrogators on terrorist suspects: "In one instance, Bauer denies painkillers to a female terrorist who is suffering from a bullet wound, just as American officials have acknowledged doing in the case of Abu Zubaydah – one of the highest-ranking Al Qaeda operatives in US custody." What justification does the American government have to explain its extralegal actions? I'm sorry, the government might say in true Bauer fashion, but I need to use every advantage at my disposal. Yin, "Jack Bauer Syndrome," at 280.
[46] Mayer, "Whatever It Takes."
[47] Mayer, "Whatever It Takes."

taught at West Point for a period of time, witnessed such a phenomenon first-hand: "When discussing the legality and morality of torture, [Solis] found that some cadets had adopted Jack Bauer's ethos of being willing to do whatever was necessary to save American lives,"[48] and had to be reminded that Bauer was a fictional character taking action in a fictional world. Not to mention, the very fact that presidential candidates believed it politically expedient for them to appear as tough as possible on national security issues only speaks to the fact that the American people too have bought into the Jack Bauer Syndrome.[49]

This affliction is further showcased by the fact that prior to 9/11, "fewer than four acts of torture appeared on prime-time television each year,"[50] as opposed to the hundred that appear today. For that matter, even the torturers have a new face, as human rights activist David Danzig heavily critiques: "It used to be almost exclusively the villains who tortured. Today, torture is often perpetuated by the heroes."[51] The spread of the Jack Bauer Syndrome is further evident in the words of law enforcement officers who admit, in their more candid moments, that at times they truly believe "the use of excessive force is often the only way to protect the lives of officers and the general public."[52]And while such a statement is unlikely to sit well with civil libertarians – and, to be honest, anyone who claims to perceive individual rights as intrinsic values – there is nonetheless a certain amount of truth to that statement. Therefore, in light of the effectiveness of torture, how does such information then tip the scale as to the method's moral acceptability?

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[48] John Ip, "Two Narratives of Torture," *Northwestern Journal of International Human Rights* 7 (2009), at 75.
[49] "For example, conservative pundit Laura Ingraham referred to the show's popularity as being the closest approximation to a national referendum on the permissibility of using torture and coercion when interrogating high-value al Qaeda detainees." Ip, "Two Narratives" at 74. *See also*, "Republican Presidential Debate in South Carolina, *The New York Times*, May 15, 2007, *transcript available* at http://www.nytimes.com/2007/05/15/us/politics/16repubs-text.html?pagewanted=all; Holly Bailey, "Take That!," *Newsweek*, May 16, 2007, *available at* http://www.newsweek.com/id/34684.
[50] Mayer, "Whatever It Takes."
[51] David Danzi is the project director at Human Rights First; as quoted in Mayer, "Whatever It Takes."
[52] William F. Schulz, *Tainted Legacy*: *9/11 and the Ruin of Human Rights* (New York: Nations Books, 2003) at 167.

Admittedly, torture does appear to yield results occasionally. For example, in January of 1995, Philippine law enforcement officials arrested a suspected terrorist, Abdul Hakim Murad, and after sixty-seven days of severe interrogation – including brutal beatings and other forms of torture – he then confessed to "being part of a plot concocted by [Al Qaeda] terrorists Ramzi Yousef and Khalid Sheikh Mohammed to blow up eleven airplanes simultaneously over the Pacific Ocean."[53] However, as Yin rightly adds, inasmuch Yousef had been arrested prior to Murad's tortured confession, it is unclear exactly how crucial – and how effective – the resort to torture was. At the same time, while it is certainly important to factor in the effectiveness, i.e. the practical effects, of torture when determining its value, it is far more interesting, and challenging, to ask the question of whether torture in the United States – where it is, without question, illegal[54] – is *ever* justified. For the most part, we all agree that torture is an evil. Instead, what we disagree on is whether torture under a certain set of circumstances is a necessary lesser evil.

In order to explore this question of whether such acts as murder or torture can ever be justified, Yin brings up two interesting legal cases, *Regina v. Dudley & Stephens* and *U.S. v. Holmes*.[55] Both courts, interestingly enough, found the defendants' necessity defense – i.e., that they had no choice but to do what they did in order to survive – to be unpersuasive on the facts. Indeed, the *Dudley* court argued that the situation was not so dire that the defendants could not have gambled on being rescued. The victim's gruesome death, the court ruled, could not be justified by the fact that the defendants had killed him in order to save themselves. The *Holmes*

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[53] Yin, "Jack Bauer Syndrome," at 283-284.
[54] Indeed, the Torture Convention, to which the U.S. is a party, states explicitly that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture." Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (Dec. 10, 1984), 1456 U.N.T.S. 85., at Art. 2(1), quoted in Yin, "Jack Bauer Syndrome," at 284
[55] "In both of those cases, survivors from sunken ships found themselves on lifeboats running out of food or space, and elected to save the majority by killing a smaller number: in *Dudley & Stephens*, the victim was eaten; in *Holmes*, the victims were tossed overboard and left to drown. Yin, "Jack Bauer Syndrome," at 284.

court differed in that they accepted the defense that the sacrifice of the few is justifiable when the lives of the many are at stake. Nonetheless, they took issue with the fact that "the ship officers should have sacrificed themselves first rather than selecting the unmarried males to toss overboard."[56] However we attempt to justify cruel and unusual actions, one thing remains – and ought to – clear: the fact of the matter is that the real world situations in which resort to torture is [supposedly] necessary – e.g., ticking time bomb scenarios – they will *never* mirror those represented in the still-fictional world of Jack Bauer exactly.

"With unnerving efficiency," Jane Mayer notes, "suspects are beaten, suffocated, electrocuted, drugged, assaulted with knives, or more exotically abused; almost without fail, these suspects divulge critical secrets."[57] As was mentioned briefly above and which bears emphasizing again, when Jack Bauer tortures, he obtains results. In the world of *24*, torture as a method of interrogation is nearly fool-proof.[58] However, as Schulz observes, "though the ticking bomb scenario has been used for decades to justify torture, its defenders rarely cite verifiable cases from real life that mirrors its conditions."[59] In other words, the intelligence obtained by means of torture – or other harsh interrogation methods – in the real world has no such guarantee. Indeed, rarely do interrogations occur the way they are portrayed on television:

> Prime-time television increasingly offers up plot lines involving the incineration of metropolitan Los Angeles by an atomic weapon or its depopulation by an aerosol nerve toxin. The characters do not have the time to reflect upon,

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[56] Yin, "Jack Bauer Syndrome," at 284.
[57] Mayer, "Whatever It Takes."
[58] "On one occasion, Bauer loses his never about inflicting torture, but the show [immediately] rebukes his qualms. In the episode, Bauer attempts to break a suspected terrorist by plunging a knife in his shoulder; the victim's screams clearly disquiet him. Bauer says to an association, unconvincingly, that he has looked into the victim's eyes and knows that "he's not going to tell us anything." The other man freely takes over, fiercely gouging the suspect's knee – at which point the suspect yells out details of a plot to explode a suitcase nuke in Los Angeles." Although it may take longer to break somebody – everybody's threshold of pain is different – eventually everyone does, and in the world of *24* as opposed to that of actual reality, it is also automatically assumed that whatever information offered up is 100% reliable. And for the most part, in television series *24,* the intelligence gathered through torture turns out to be the exact information needed to save the day. Mayer, "Whatever It Takes."
[59] Schulz, *Tainted Legacy*, at 163.

> much less utilize, what real professionals know to be the "science and art" of "educing information." They want results. Now. The public thinks the same way. They want, and rightly expect, precisely the kind of "protection" that only a skilled intelligence professional can provide. Unfortunately, they have no idea how such a person is supposed to act "in real life." [60]

Not to mention, most of the time the coerced information either turns out to be unreliable or simply intelligence that the authorities were already aware of.[61] Why is this the case? "The reason torture is such a risky proposition," Schulz argues, "is exactly because it is so *difficult* to tell ahead of time who is a terrorist and who is not; who has the information and who does not; who will give the information accurately and who will deceive; who will respond to torture and who will endure it as a religious discipline."[62] It is commonly accepted that different people often react differently to the same action – torture is no different. People respond to torture differently, and even if most did respond in a similar manner insofar as they all sooner or later give up the sought after information, there is *still* no way to know for certain the reliability of that intelligence, most especially in the amount of time allotted in ticking time bomb scenarios. This brings up a simple, but remarkably striking, observation: the necessity driving the hypothetical ticking bomb scenario is never certain or even actual, only probable.

But so what if the necessity is only likely or probable, it is still better to be safe than sorry. Yet is torture truly the best way to go about ensuring that desired safety? For that matter, is it even true that everybody, as former FBI agent Rick Smith asserts, talks *eventually* – i.e., the

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[60] Intelligence Science Board, "Educing Information – Interrogation: Science and Art," ix (Dec. 2006), quoted in Mayer, "Whatever It Takes."

[61] Speaking as a former army interrogator in the Iraq War, Tony Lagouranis argues that based on his own personal experiences, torture – or harsh interrogation methods – has never produced new or relevant intelligence. "I worked with someone who used waterboarding," he explains. "[I] used severe hypothermia, dogs, and sleep deprivation. I saw suspects after soldiers had gone into their homes and broken their bones, or made them sit on a Humvee's hot exhaust pipes until they got third-degree burns. Nothing happened." What intelligence was obtained through these methods, Lagouranis argues, was just information that "we already knew. [These methods] never opened up a stream of new information." And if anything, "physical pain can strengthen the resolve to clam up." Mayer, "Whatever It Takes."

[62] Schulz, *Tainted Legacy*, at 164.

key is simply to have both the patience and the time to wait for each individual's breaking point[63] – and if so, does that then change anything? Perhaps it is true that everyone talks eventually, but the underlying assumption here is that time is *not* in short supply. Indeed, the statement presumes that interrogators have all the time in the world to extract the necessary information – assuming the detained even possesses such knowledge – from the resistant suspect. The effectiveness of torture, in fact, is all about time – i.e., it's only a matter of time before the suspect breaks and reveals the relevant intelligence. The funny thing, however, about the ticking time bomb scenario – and really, with any emergency and/or crisis – is that *time* is the one thing national security apologists claim to not have enough of.

Not to mention, in ticking time bomb scenarios, what is to force the suspect in custody to talk when he/she knows that the bomb will go off if she keeps her silence? If he/she is truly guilty and played a crucial role in the carrying out of the terrorist plot, for what reason will he/she offer up information? Is pain really that big of a motivator – especially when the suspect knows that if they hold out long enough, the bomb will go off and his/her plan will have succeeded. Indeed, Joe Navarro, who is one of the F.B.I.'s top interrogation experts and has conducted approximately twelve *thousand* interrogations, rejects the effectiveness of torture as illusory. "These are very determined people," Navarro warns, "and they won't turn just because you pull a fingernail out."[64] And when confronted with fanaticism – whether religious or otherwise – it is even less likely that the suspect will talk. Furthermore, "[fanatical terrorists] almost welcome torture [because] they expect it," U.S. Army Brigadier General Patrick Finnegan, former dean of the United States Military Academy at West Point, explains, "They

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[63] Schulz, *Tainted Legacy*, at 166.
[64] Mayer, "Whatever It Takes."

want to be martyred."[65] If Navarro and Finnegan are right, then torturing these sorts of men will not produce any relevant information, but will instead give them what they expected all along as well as succeed in undermining America's reputation as a nation that categorically condemns torture carried out by state agents.

But what of movies like *Taken* (2008), where Liam Neeson plays a former spy who comes briefly out of retirement in order to save his kidnapped daughter? In other words, in situations when your loved ones are in danger and you have in your custody someone who can help you save your spouse/child/best friend, how are you to proceed? What are you to do if the only way to get him/her to help you, to offer up the necessary information, is to torture him/her? According to *24* showrunner Surnow, the answer is not only obvious, but also universal:

> I don't believe that [torture doesn't work.] I don't think its honest to say that if someone you love was being held, and you had five minutes to save them, you wouldn't do it. Tell me, what would you do? If someone had one of my children, or my wife, I would *hope* I'd do it. There is nothing – nothing – I wouldn't do.[66]

If someone you loved were truly in danger, would you not want to do everything in your power to protect his/her safety? Yes, most people – including myself – would freely admit that they would answer in the affirmative to the question posed; at the same time, willingness to do "whatever it takes" nonetheless fails to excuse or justify the actions taken. Whatever actions fall outside the realm of the legal – e.g., murder, torture, stealing, breaking and entering – remain on the outside. And although extreme actions may be understandable, and even reasonable, it still does not change the fact that such actions would be condemned if undertaken in the "normal" everyday. In other words, what is normally believed to be criminal activity does not suddenly become acceptable, or legal, just because of necessity – no matter how dire. We should never be

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[65] Mayer, "Whatever It Takes."
[66] Mayer, "Whatever It Takes."

able to explain away – or even worse, naturalize – the transgression of fundamental rights as acceptable or justifiable. No matter the emergency. “The demand of principle,” Kutz poignantly states, “is that we honor it even when we cannot obey it, rather than simply view it as receding under the pressure of other values.”[67]

24 is, to say the least, not an apolitical television show, devoid of any political stance. “There’s definitely a political attitude of the show,” former Fox Television network executive David Nevins admits, “which is that extreme measures are sometimes necessary for the greater good. [T]he show doesn’t have much patience for the niceties of civil liberties or due process.”[68] The message of *24* would not be so concerning if simply dissipated into pure, mindless, entertainment. But such is not the case – that is, if it is even possible for any pop culture product to be completely devoid of political undertone. Instead, its effects, e.g. the Jack Bauer Syndrome, create ripples in both our politics and in the construction of our attitude towards terror – in our very desire of knowing that in this dog-eat-dog world there is someone out there who is willing to do whatever it takes to keep us safe.[69]

In addition, there is still an important difference between an individual transgressing law in the name of necessity and the *government* declaring illegal activity – i.e., exceptional measures – to be justified by exceptional circumstances. We will explore this difference in the next section by analyzing the notion of the exception.

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[67] Kutz, “Torture, Necessity,” at 266.
[68] Mayer, “Whatever It Takes.”
[69] Cyrus Nowrasteh, a right-wing conservative, observed that *24* for his friend Surnow symbolized a sort of wish fulfillment for America: “Every American wishes we had someone out there quietly taking care of business. [I]t’s a deep, dark ugly world out there. [It] would be nice to have a secret government that can get the answers and take care of business – even kill people. Jack Bauer fulfills that fantasy.” Mayer, “Whatever It Takes.”

Constructing the State of Exception

There is always something indefinite about the world: it is laden with contingencies and surprises; it is a vital context which is never mastered once and for all; for this reason, it is a source of *permanent* insecurity. While relative dangers have a "first and last name," absolute dangerousness has no exact face and no unambiguous context.

– Paolo Virno, *A Grammar for the Multitude* (2004)

Exceptional Measures in an Exceptional Time: The War on Terror

On September 14, 2001, the United States Congress gathered at the president's behest to discuss the possibility of war. Although the power to declare war and authorize the federal government's expenditure of money lies exclusively with Congress, presidents have, since the very beginning of American history, committed U.S. military troops overseas on at least two hundred occasions – of which, only a few were backed by actual declarations of war.[70] However, since the passage of the War Powers Act in 1973 – i.e., the congressional response to the unpopularity of the undeclared wars in Korea and Vietnam in the 1950s and 1960s – the president is now required to consult with Congress if he wishes to commit troops abroad. Congress, under the War Powers Act, then had two options: either formally declare war or pass a resolution authorizing the use of force.[71]

Insofar as a formal declaration of war was impossible since there was no *nation* for the United States to retaliate against, Congress decided on the second route and quickly passed a resolution authorizing the use of force. The Authorization for the Use of Military Force (AUMF)

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[70] *See* U.S. Department of Justice, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Washington, D.C., 2001), accessed March 01, 2011, http://www.justice.gov/olc/warpowers925.htm#N_6_.

[71] Stephen T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* (New York: Other, 2008), at 64. For a more comprehensive discussion of the War Powers Act, *see* Phillip Bobbitt, "War Powers: An Essay on John Hart Ely's *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* by John H. Ely," *Michigan Law Review*, May 1994, http://www.jstor.org/stable/1289586.

was signed into law on September 18, 2001. The scope of the Executive's authority was set out in section 2(a), which stated:

> [The] President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, and committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.[72]

In the next few years, the Bush Administration would continually test – and in the opinion of several, grossly exceed – the scope of that hastily passed resolution.

It was on September 20, 2001, in a presidential address to a joint session of Congress that the phrase "war on terror" first made its appearance in American political discourse. It was described as a battle that would not end "until every terrorist group of global reach has been found, stopped, and defeated."[73] In the aftermath of the ruined World Trade Center and a charred Pentagon, a whole new world had dawned: "a world [in which] freedom is itself under attack."[74] And the enemy is not a single nation, or religion, or political ideology, but "terrorism [itself] – premeditated, politically motivated violence perpetrated against innocents."[75] In the years to follow, much of the rhetoric used in that particular speech would be echoed many times over by reporters, politicians, commentators, as well as the American people. We now live in the age of terror, they said, in an era where not only political, but also everyday discourse is charged with both uncertainty and fear. In short, we are in exceptional times. And if these times are exceptional, many wondered, are exceptional measures not also necessary? In order to protect

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[72] Authorization for Use of Military Force, Pub. L. No. 107-110, 115 Stat. 221 (2001).
[73] President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), accessed March 01, 2011, http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.
[74] President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), accessed March 01, 2011, http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.
[75] The National Security Strategy of the United States of America 5 (2002), accessed March 02, 2011, http://www.whitehouse.gov/nsc/nss.pdf.

America and her citizens, should the government not assume the Jack Bauer persona in times of crisis and be given the leeway to do everything in its power?

With the memory of the collapsing Twin Towers still fresh in the minds of the American public, there was, at first, little resistance against this national security rhetoric. Indeed, when polled about whether sacrifices in civil liberties are necessary in times of emergency, the majority of respondents answered in the affirmative.[76] After all, if these sacrifices are only temporary, what is the harm? And in that span of silent national consensus, the Bush Administration acted quickly. On October 7, 2001, the United States set the groundwork for a greater American military presence in Afghanistan with concentrated bombing campaigns in Kabul, Kandahar, and Jalalabad.[77] A little more than ten days later, American troops touched Afghan soil and, without delay, started capturing prisoners. Back on the domestic home front, soon after the events of 9/11, the Justice Department debuted a program called "Terrorism Information and Prevention System" (TIPS), which required "postal carriers and private-sector service providers, such as cable repair persons, to carefully monitor the houses they serviced, watch for anything that might appear suspicious, and report their findings to law enforcement authorities."[78] No longer was the protection of American security solely the responsibility of government agents or law enforcement officials, now everyday citizens also had a duty to be terrorist watchdogs. In addition, within months of the 9/11 attacks, the government authorized the National Security Agency (NSA) to "engage in warrantless wiretapping of American citizens' telephone calls,"[79] as well as granted broad powers of detention to Secretary of Defense

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[76] Daniel J. Solove, *Nothing to Hide: The Clash between Privacy and Security* (unpublished manuscript), at 46.
[77] Patrick Wintour, Kamal Ahmed, Ed Vulliamy in Washington and Ian Traynor, Jabal Saraj in Afghanistan, "It's time for war, Bush and Blair tell Taliban," *The Observer*, October 7, 2001, accessed March 02, 2011, at http://www.guardian.co.uk/world/2001/oct/07/politics.september11.
[78] Monahan, *Surveillance*, at 20-21.
[79] Solove, *Nothing to Hide*, at 51.

Donald Rumsfeld, who then authorized the imprisonment of al Qaeda members or any other person who not only committed, but also planned, conspired, or helped, to commit *any* terrorist act against the United States.[80]

Is there a common thread to be found in this flurry of legislation? The NSA "Terrorist Surveillance Program" (TSP) was created for the purpose of listening, without a warrant or court order, on "people's international calls whenever NSA officials believed the calls were made to people associated with terrorist organizations."[81] Similarly, the Military Order issued on November 13, 2001, was meant not just to remove as many potential fighters – al Qaeda or otherwise affiliated – off the battlefield, but also to transfer them to a secure place where they could then be mined for information with neither hope of release nor possibility of oversight, aside from that provided by military commissions.[82] To put it simply, much of the legislation passed in the immediate aftermath of 9/11 that granted the Executive broad, discretionary powers was justified in the name of national security. The President, as commander-in-chief in a state of emergency – another synonym for national security crisis – then possesses the discretion, the authority bestowed by the delineated powers of Article II of the U.S. Constitution, to *legitimately* step outside the bounds – i.e., violate – the law. As argued by the infamous Jay Bybee memo,[83] "the governmental structure under the Constitution is itself conceived functionally, an instrument

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[80] *See* Petition for Writ of Habeas Corpus at 10, *Rasul* (No. 02-299), accessed March 03, 2011, http://news.findlaw.com/hdocs/docs/terrorism/rasulbush021902pet.html.
[81] Solove, *Nothing to Hide*, at 51.
[82] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,883 (Nov. 16, 2001), accessed March 03, 2011, http://www.law.cornell.edu/background/warpower/fr1665.pdf.
[83] "Prompted by the CIA's request, the [Office of Legal Counsel], under the signature of Jay Bybee, provided a memorandum to the White House on August 1, 2002. This memorandum [m]ade a number of arguments toward several aims. First, it sought to reduce the potential scope of §2340 to include only the most heinous forms of torture. Second, it sought to suggest a range of complete criminal defenses U.S. personnel could deploy if charged under the statute. Finally, it sought to establish as a principle of constitutional law that §2340A could not constitutionally be interpreted to bind the President while exercising his war powers as Commander in Chief." Kutz, "Torture, Necessity," at 240.

for preserving the 'security of the United States,'"[84] while the duty of the President is to carry out – to help realize – that primary goal. And for the duration that the "War on Terror" is considered to be a national security crisis, this breadth of power and prerogative will remain with the Executive branch.

From Dualism to Monism: The Fallacy of the Liberty v. Security Trade-Off

As was discussed briefly in the previous section, the grounds justifying these broad, discretionary executive powers boils down to the belief that in times of genuine emergency, the suspension of law – the invocation of the exceptional – is *necessary* for the continued survival of society – of the world – as we know it. Yes, the security and safety of a nation are important and yes, as outlined in detail by Judge Richard A. Posner[85], the President may be in the best position to respond quickly and strategically to a crisis. Some liberty harms, people say, are worth enduring if it enables government responses to be both effective and rapid – after all, are these not just temporary inconveniences? Besides, what is there left to preserve if the nation itself is destroyed? How can we return to "normal," if all that is the mundane no longer exists? In order to protect freedom overall, some freedoms must be temporarily suspended. In sum, if we put what the staunch defenders of the national security side of the argument say in more colloquial terms, we end up with something along these lines: In times of crisis, temporary liberty sacrifices

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[84] Kutz, "Torture, Necessity," at 245.

[85] In arguing for the unique institutional competence and/or expertise of the political branches in issues concerning national security, Posner provides two reasons for judicial deference: "First, the judiciary, unlike the executive and legislative branches, has no machinery for the systematic study of a problem. Its staffs are small. It has to wait until it has a case to begin its inquiry into the facts and policy ramifications, and the pressure of its caseload requires it to decide the case without being able to take the time to study background and circumstances and likely consequences. If the case involves a subject such as contracts or accidents or ordinary crimes in which the court has long experience, its epistemic limitations will not be serious. But if, as in cases involving modern terrorism, the subject is new, the court will not have the time or resources to bone up on it. And second, our justices, including Supreme Court Justices are generalists. Cases involving national security are only a tiny part of their docket. They cannot afford to devote that much time to them." Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006) 35-36.

are necessary; stop complaining and suck it up. Unsurprisingly, those in positions of political, governmental, authority typically take up this line of defense. On the flip side, insofar as there are *two* parties presently dominating the liberty v. security debate – with the government and its agents at one end and civil libertarians at the other – those against vast expansions of executive prerogative in times of crisis claim, instead, to "speak for civil society by standing up for liberty and rights against the encroachment of the state and other political authorities."[86]

Indeed, the biggest problem critics like Daniel Solove have with programs like the TSP is not simply because they impede upon and/or harm our civil liberties, but also because the future implications for executive power – if such policies are made legitimate – are immense. "The issue," Solove clarifies, "is about whether the President can engage in activities that contravene the laws of the nation. It is about whether we should allow the President to do so in secrecy, without any accountability to the people and without any oversight by the other branches of government."[87] It is about looking forward and not just at the present. And much like in the dilemma presented by the ticking time bomb scenario, there is much that is tempting about the argument posed by national security apologists. After all, how ought the suffering of a single [guilty] person – especially when that suffering falls short of being fatal – compare to the possibility of saving hundreds, thousands, or millions of innocent civilians? "[I]n a strict, if abstract, utilitarian calculus, that is true," Schulz readily concedes. However, he continues, "[R]eal life is neither abstract nor strict, and even if we limit ourselves to a cold cost-benefit analysis, the long-term consequences of violating others' human rights are rarely clear ahead of time."[88] The thing about torture is that even when it produces results and we are then able to

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[86] Andrew W. Neal, *Exceptionalism and the Politics of Counter-Terrorism* (Milton Park: Routledge, 2010), at 8.
[87] Solove, *Nothing to Hide*, at 53.
[88] Schulz, *Tainted Legacy*, at 161.

successfully avert an attack, the precedent – and its implications – such actions set for the future are completely unknown. Yes, for the short-term, such actions resulted in the survival of hundreds of people. But what if in the long-term, because of our extralegal actions that day, hundreds of thousands of people suffer – even die – as a result? William Schulz accuses torture apologists of too easily assuming that "there are no further detrimental consequences once the victims of the bombing are saved – no retaliatory strikes, for example, by the torture victim's comrades to pay back the inhumanity done their brother. If that happens, the math may quickly change: 100 people saved today; 1,000 killed tomorrow."[89] The benefits of torture are ultimately immediate and felt in the short-term, and so it is easy to forget to look ahead and think about what the ramifications for tomorrow might be. "If the principle of liberty is sacrificed," Neal further questions, "what is to distinguish between security practices and plain old violence?"[90] Once liberty is sacrificed, no longer can we attribute a higher purpose – i.e., legitimacy – to excuse our violent actions. They are then simply what they appear to be: coercive and illegitimate.

Without a doubt, we need to be wary of the dangerous possibility that in attempting to defend our freedoms at all cost, we end up irrevocably damaging the very freedoms we sought to protect in the first place. In the context of rights, we cannot think about the harms, for example, of censored speech just in terms of today or tomorrow, but need to consider the long-term effects as well. Indeed, when we treat rights as if they can be turned off and on at the prerogative of the executive, what are we then saying about their importance?[91] The totalitarian world we fear will

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[89] Schulz, *Tainted Legacy*, at 162.
[90] "When the principle of liberty is sacrificed, how are the democratic governments which claim they value the rule of law then set themselves apart from their authoritarian, totalitarian enemies?" Neal, *Exceptionalism*, at 21.
[91] "What works is not always right. What is right doesn't always work. Rights may have to bow to security in some instances, but there had better be good reasons, and there had better be clear limitations to rights abridgments; otherwise, rights will soon lose all their value." Ignatieff, *Lesser Evil*, at 9.

not, of course, necessarily occur overnight or even in the next five decades. Instead, "[s]lowly, secretly and imperceptibly, [the] liberties of ordinary citizens are being surgically removed under a potent anesthesia concocted from propaganda, fear, ignorance, and apathy."[92] And while each of those cuts may be small, they inevitably accumulate and eventually, you risk losing something you had never planned on giving up.[93] Indeed, by the time you realize that right is gone or severely compromised, it might be too late to say, "Right [x] was never on the chopping block, please give it back."

Security and liberty cannot be understood as a zero-sum game – not in theory and certainly not in practice. Every time we protect rights, we do not automatically become less secure; nor is it true that every time we buff up security measures, we must necessarily allow our liberties to be trampled upon. Daniel Solove provides a good metaphor to describe the deficiencies of an "all-or-nothing" understanding of liberty and security:

> [Imagine] the reaction of people on a sinking boat in the middle of the ocean. Frantic to stay afloat, the passengers start throwing all sorts of things overboard. They think: If we toss stuff overboard, then we'll stop sinking. But in their fear, they throw away a chest of food and water, which ironically isn't even the heaviest thing on the boat. And the sinking was due to a hole in the boat which could have been plugged up, but the materials to plug it up are now gone.[94]

One of the lessons to be learned from this example is the fact that not all sacrifices are the same – i.e., throwing a chest of toys overboard versus throwing away the barrel containing water produces different consequences. In the case of the former, you lose a source of entertainment until you reach land, an annoyance but not fatal; in the case of the latter option, you may have

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[92] Jack Balkin, "The Party of Fear, the Party Without a Spine, and the National Surveillance State." *Balkinization*, Aug. 5, 2007, accessed March 03, 2011, http://www.balkin.blogspot.com/2007/08/party-of-fear-party-without-spine-and.html.

[93] Consider Daniel Solove's description of the harm caused by "aggregation," which "emerges from the combination of small bits of seemingly innocuous data. When combined, the information becomes much more telling about a person. [Aggregation means] that by combining pieces of information we might not care to conceal, the government can glean information about us that we might really want to conceal." Solove, *Nothing to Hide*, at 20.

[94] Solove, *Nothing to Hide*, at 53.

resolved the crisis in the short-term, but another life-threatening problem awaits you in the long-term. You have to be smart about the things you sacrifice, and truly consider whether (a) it is a necessary sacrifice and (b) whether the potential benefits of that sacrifice outweigh its cost.

However, this certainly does not mean that an inversion from security/liberty to liberty/security ought to occur – i.e., liberty ought to be privileged and security is not a value worth protecting. The discourse and tradition of liberalism has always posited a constrained understanding of liberty: "[T]he classical political theory of liberty is always an account of liberty under certain conditions and within certain limits."[95] Indeed, in states of emergency and crisis, not only do democratic constitutions allow for suspensions of rights, but often times the people themselves also agree with this stance.[96] Although civil libertarians often argue that "the way a society handles terror [functions as] a test of its identity,"[97] and even though Mr. Average Joe understands the need to protect civil liberties, he is nonetheless more interested in stopping terror – in staying safe. Liberty is not, and *cannot*, be absolute. You cannot randomly shout "Fire!" in a crowded movie theater, and then claim protection under the First Amendment when violent chaos erupts. There is, indeed, truth to the statement that in times of genuine crisis, we ought to tolerate some restrictions on our rights – i.e., privacy, free speech, and habeas corpus – in the interest of preserving order. Otherwise, we give force to the accusation that rights arguments boil down to mere moral rhetoric or "a doctrinaire or 'deontological' mindset, oblivious to real-world consequences."[98] And when rights arguments are charged with being

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[95] Neal, *Exceptionalism*, at 10.
[96] "Civil libertarians think civil liberties define what a democracy is. But the recurrently weak and shallow public support for civil liberties positions suggests that many Americans disagree. They believe that the majority interest should trump the civil liberties of terrorist suspects." Indeed, in times of war, the American people are not searching for a Martin Luther King Jr. figure, but for Jack Bauer. Ignatieff, *Lesser Evil*, at 6.
[97] Ignatieff, *Lesser Evil*, at 59.
[98] Stephen Holmes, "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," *California Law Review* 97 (2009), 301-355, at 305.

unpragmatic or too idealistic, it becomes that much more difficult to be taken seriously by a fearful public. After all, the reality is that there is no freedom without security:

> The problem is that the liberty/security binary is empirically, historically and theoretically hierarchical – claims about freedom always risk being trumped by claims about the necessity of security, which often appear as claims about security *in the name of* freedom.[99]

Inevitably, we are faced with the central contradiction afflicting the liberty/security debate: the very preservation of liberty is dependent upon the possibility of its suspension, upon the existence of the exception. And so, what initially appeared to be two separate, oppositional views instead dissolve into a single discourse: "At the limit, under exceptional conditions, and at the extreme point, the dualism of liberty/security collapses into a monism in which security trumps liberty."[100] Indeed, what is tempting about the torture argument in ticking time bomb cases is the fact that "whatever we might think about torture in the abstract, the pressure to use it in cases of urgent necessity might be overwhelming."[101] Indeed, if the authorities chose the high road, refused to torture the suspect in custody, and the bomb then exploded, decimating half of New York City, what would the interrogators then be thinking? Would they wonder, "What if the suspected had been tortured?" It would be surprising, if that hypothetical scenario did *not* cross their minds. In a way, the decision to torture can also boil down to weighing of several "What if," scenarios: a) what if I torture this suspect, extract information, and stop this bomb, b) what if I torture this suspect, extract the wrong information, and the bomb still goes off, c) what if I do not torture this suspect, and the bomb goes off? The point of the matter is the fact that often times choice (c) is not just the least politically acceptable, but also the most unbearable.

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[99] Neal, *Exceptionalism*, at 9 (emphasis added).
[100] Neal, *Exceptionalism,* at 10.
[101] Ignatieff, *Lesser Evil*, at 139.

In summary, the fundamental paradox in the liberty v. security debate persists because we believe in this thing called the "exception;" that is, in the possibility of circumstances which are not only *different* from the norm, but also necessitate/demand a different – i.e., exceptional – response.

Necessitas Legem Non Habet: Necessity Has No Law

Sovereign is he who decides on the exception.
– Carl Schmitt, *Political Theology* (1922)

The idiom "exceptional times call for exceptional measures" is both well-known and well-used.[102] But what does the phrase really mean? For that matter, what is meant by "exception"? Indeed, when we talk about exceptions, do we mean the opposite of the norm? Do we find it to be fundamentally incompatible with the law? In other words, are legal exceptions always legal suspensions? When is it typically invoked? Is it synonymous with emergency? Furthermore, what is it capable of justifying? Does such the exceptional nature of the situation justify all measures undertaken so long as the law continues to be suspended? To say the least, the notion of the exception is both complex and convoluted. Indeed, Giorgio Agamben explains the concept of the state of exception as constituting a "'point of imbalance between public law and political fact' that is situated – like civil war, insurrection and resistance – in an 'ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political.'"[103] What does that

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[102] "Overwhelmingly, emergencies and emergency powers are treated with reference to this dichotomy between norms and exceptions, which John Ferejohn and Pasquale Pasquino have called 'the structure of emergency powers.'" Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press, 2009), at 3.
[103] Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: Unversity of Chicago Press, 2005), at 1.

mean? The state of exception is the line, the "threshold of indeterminacy,"[104] between the norm and the abnormal – i.e., the exception. In more simple terms, as Nomi C. Lazar clarifies, "[t]he exceptionalist view is that norms apply only in normal situations; in a real crisis, emergency powers do not violate rights and the rule of law because these rules are simply not in effect at such exceptional times."[105] While in the state of exception, we are beyond – outside – the purview of law. This is an important point insofar as it means that we – the people, the government – *cannot* violate, transgress, or break law. Why? One simply cannot violate a law that is not in effect. As the famous Weimar jurist and political theorist Carl Schmitt[106] explained, we understand exceptions to denote a space *outside* the norm: a "norm-less – or nearly norm-less – space."[107] Furthermore, the exception is not just *any* emergency, but must be a condition of "extreme peril, a danger to the existence of the state."[108] And so whenever the exception is invoked, we necessarily fall into ambiguous extra-legal territory where the only voice of authority begins and ends with the sovereign. Needless to say, for the liberal subject living in a democratic regime ruled by law, this state of exception is a dangerous state to find oneself in.

Andrew Neal outlines three reasons why the liberal subject ought to be wary of conditions of exceptionalism:

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[104] Agamben, *State of Exception*, at 3.
[105] Lazar, *States of Emergency*, at 3.
[106] Ignatieff observes that "Schmitt's jurisprudence was framed in the 1920s by Weimar Germany's struggle to preserve constitutional democracy in the face of terrorist violence from both sides of the political spectrum." At the time, political enemies on all sides surrounded the fragile democratic republic, with the communists on the left and Hitler's National Socialists on the right. Ignatieff further argues that Schmitt's beliefs – not only is law a creature of political power, but its enforcement also depended entirely on the "viability of a particular constitutional order" – were directly influenced by the events occurring in Germany at that time: "This seemed only too evident in Weimar, where law's survival depended on the capacity of a constitutionally elected president to defend an embattled regime by force. Hence, according to Schmitt, rights survive in emergencies to the degree that they enable a particular political regime that defends the constitutional order to survive. Rights that stand in the way of a regime's survival should be suspended in a time of a crisis." Ignatieff, *Lesser Evil*, at 42.
[107] Johan Geertsema, "Exceptions, bare life, and colonialism," in *Emergencies and the Limits of Legality*, ed. Victor V. Ramraj. (Cambridge: Cambridge University Press, 2008), at 337.
[108] Lazar, *States of Emergency*, at 39.

> (1) the 'free' subject is threatened with arbitrary, or at least extra-legal, incarceration, degrading treatment, and perhaps even torture or death; (2) the political voice of the 'speaking' subject has become at best ineffectual, at worst compromised and complicit in the very exceptional practices which threaten to undermine political subjectivity; (3) the rational validity of knowledge, discourse, or language presumed by liberal thought to be immanent within political speech has been brought into question by potentially arbitrary declarations of exceptionality.[109]

If exceptionalism, by definition, means the suspension of norms in times of emergency, then the liberal subject does have a great deal to fear. After all, rights – applicable in the norm, i.e. times of peace, and protected by law – in times of emergency are then no longer defensible. The danger is that "[b]y suspending the norms against which their conduct might be measured, exceptionalist conceptions of emergency [consequently] exempt government from accountability."[110] And unaccountable government is not only dangerous, but undemocratic as well. After all, exactly *who* determines what is and what is not a state of exception? "The capacity to authoritatively define such concepts and principles is precisely what is at stake in practices of sovereign exceptionalism," Neal writes.[111] Indeed, whoever has the power to determine what the exception does and does not include thereby also has the authority to suspend the norm, i.e. law, and bring the nation into a state of exception. As Schmitt argues, in the suspension of law "resides the essence of the state's sovereignty, which must be juridically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to *decide*."[112] What are the implications of this statement? "Practices that claim exceptionality," Neal explains,

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[109] Neal, *Exceptionalism*, at 28.
[110] Lazar, *States of Emergency*, at 20.
[111] Neal, *Exceptionalism*, at 25.
[112] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 2nd ed., trans. George Schwab (Cambridge: MIT Press, 1985), at 13. Emphasis added.

"explicitly attempt to draw upon sources of authority *other* than law."[113] So if ultimate power – that is, ultimate sovereignty – is *not* imbued in the law, where can it then be found?[114]

Nomi Lazar identifies two different kinds of exceptionalism in the history of Western political thought: "republican" and "decisionist." The theorists she associates with republican exceptionalism are Machiavelli and Rousseau, whereas Schmitt and Hobbes exemplify the latter type.[115] Before discussing what differentiates these two kinds of exceptionalism, we ought to first consider what they have in common. Indeed, both consider emergencies to be inevitable – whether they occur, or remain in the abstract. The crucial thing to understand about the exception is that its importance does not hinge upon its *eventual* occurrence – there is no such guarantee – but, instead, depends more so upon the nature of its *possibility*. "Norm/exception," Lazar further argues, "is less a division of distinct temporal conditions – times of normalcy/times of emergency – than a *status* divide."[116] In other words, states of exception *reveal* exactly who is in charge, i.e. who is sovereign, and who falls into the category of "normal" people. As Giorgio Agamben explains, the way in which sovereign power is affirmed is not by "asserting its dominion, but by withdrawing its protection, abandoning bare life to a realm of violence and lawlessness."[117] And outside the purview of law, bare life is then rendered vulnerable insofar as

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[113] Neal, *Exceptionalism*, at 30 (emphasis added).
[114] The answer Carl Schmitt provides is that it is the *sovereign* who decides on the exception, relegating law to the status of an instrument to be used by the sovereign, instead of "the warrant for and, indeed, the articulation of state authority." Geertsema, "Exceptions," at 338.
[115] Lazar, *States of Emergency*, at 20.
[116] Lazar, *States of Emergency*, at 21 (emphasis added).
[117] "Bare life in such a state of inclusive exclusion is described as *homo sacer*, a form of life that can be killed without accusations of homicide but that cannot be sacrificed. This life excluded from the *polis* initially inhabits zones of indistinction between fact and law, zones such as the Nazi concentration camp." Matthew Calarco, and Steven DeCaroli, *Giorgio Agamben: Sovereignty and Life*, (Stanford: Stanford University Press, 2007), at 75. Andrew Neal, "Review of the literature on the 'state of the exception' and the application of this concept to contemporary politics," accessed March 04, 2011, http://www.libertysecurity.org/article169.html.

"[it] can be, and indeed can only be, taken away without the law's authority or mediation."[118] The exception, furthermore, "marks the site at which the legal enters into relation with the non-legal. By establishing a threshold between law and non-law the exception effectively produces them both."[119] And insofar as only the sovereign can identify and differentiate the legal from the non-legal, the decision of what is normal and what is abnormal also lies solely with the sovereign. At the same time, it is important to emphasize that states of exception do not, in fact, signify states of unlimited individual freedom – absent sovereign power and constraint. It's the opposite: "Exceptionalism is always exercised by some designated authority."[120] Exceptionalism, after all, only makes sovereign power all the more apparent insofar as it is the capacity to declare the exception that signifies sovereignty.[121]

Republican existentialists possess broader ideological aims – more specifically, they seek to preserve and maintain a certain kind of state – whereas decisionist exceptionalists care less about ideological justifications and more so about the existence of an absolute sovereign that possesses the authority to effectively protect the nation. Indeed, for decisionists like Schmitt and Hobbes, because exceptions – i.e., emergencies – are perceived of as not only inevitable, but also imminent, "there must always be a central, unitary, and incontrovertible power, the source of all law and its guarantor, and hence, one above the law"[122] ready to step in and deal with the emergency. The decisionist believes much more strongly in the necessity of suspending norms and ethics when in a state of emergency than does the republican exceptionalist. After all, for the

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[118] Andrew Norris, *Politics, Metaphysics, and Death: Essays on Giorgio Agamben's Homo Sacer*, (Durham: Duke University Press, 2005), at 49.
[119] Calarco, *Giorgio Agamben*, at 55.
[120] Lazar, *States of Emergency*, at 22.
[121] "For Schmitt, existentially threatening contingencies that fall beyond the law necessarily require and justify responses beyond the law. He argues that an exceptional, unlimited authority belongs to the sovereign, but, moreover, that it is the *capacity* for this kind of authority that actually reveals who is *truly sovereign*." Neal, *Exceptionalism*, at 58.
[122] Lazar, *States of Emergency*, at 37.

decisionist, the exact details of the exception, of the emergency, "cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of emergency."[123] It is impossible, in other words, to know exactly how the exception will manifest: "It can have an infinite number of concrete manifestations. The exception has no [specific] characteristics."[124] Indeed, if one word were to capture the spirit of decisionist exceptionalism it would be "fear," i.e. fear of the exception and the chaos, violence, and uncertainty that accompanies such crises. And because of this fear, this positing of the exception "as the extreme danger that cannot be anticipated by the law,"[125] we require a sovereign that is unilateral and absolute. And so for Schmitt, "any legal system rests upon a [sovereign] decision that cannot itself take the form of law."[126]

"[N]o politics," Carl Schmitt argues, "can be based solely on sacrosanct formalisms like constitutions, rights, and the rule of law, because at their theoretical and political limits reside the contingent and existentially threatening 'real possibility' of an exceptional enemy, event, or situation."[127] Indeed, it is because liberal democratic regimes are so wedded to the rule of law and the preservation of certain normative principles – e.g., freedom – on Schmitt's view, such republics are then not adequately equipped to handle exceptions, i.e. extreme circumstances, when they do arise. There is, from Schmitt's perspective, nothing more restrictive, more suffocating for sovereign power – in times of emergency – than the democratic love of and adherence to checks and balances, as well as the need to preserve certain individual rights. Instead, "[i]f laws can't govern, if regular police action is insufficient to maintain order, then

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[123] Neal, *Exceptionalism*, at 70.
[124] Lazar, *States of Emergency*, at 39.
[125] Furthermore, Schmitt writes, "It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty." Neal, *Exceptionalism*, at 71.
[126] Norris, *Politics*, at 267.
[127] Neal, *Exceptionalism,* at 57.

there must be rule by *decision*, and not by norm. [And] the person who decides whether such a situation exists is called sovereign."[128] The designation of extra-legal cannot belong to the law alone inasmuch "the contingent possibility of exceptional events and situations dictates the necessity of *extra-legal* authority." In other words, because exceptions are by definition outside the norm, beyond the law, its invocation requires a special – an exceptional – kind of sovereign power. In order to possess the authority to even identify and declare an exception, sovereignty itself must also be exceptional. Thus, exceptionalism "is both the prerogative of sovereignty and the mark of sovereignty."[129]

How can liberty be protected, preserved, and maintained without it being diminished, destroyed, or tainted? This question, indeed, embodies the great challenge that all liberal governments must eventually confront. In Schmitt's opinion, it is a futile aspiration to try so hard to preserve all those principles that liberals value – e.g., the rule of law, due process, the Constitution, liberty – while in the state of exception. Why is it a futile endeavor? "Because," Neal answers, "all of those principles and practices ultimately exist in a dialectical relationship with the possibility of their own exceptional suspension." After all, the exception – i.e., what makes an event or situation exceptional – is the "unforeseen possibility that has not and cannot be predicted."[130] Indeed, it is not so much that the exception stands in opposition to liberty, but instead delineates the very limits of liberty.[131]

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[128] Lazar, *States of Emergency*, at 40.
[129] "In order for modern, politically qualified life to be possible, the sovereign state must be able to declare and deal with enemies, both internally and externally. This existential imperative means that in matters of survival, the sovereign state must not be constrained by law, domestic or international. The sovereign state is exceptional, and the enemy is an exception." Neal, *Exceptionalism*, at 58.
[130] Neal, *Exceptionalism*, at 70.
[131] "Although the everyday purpose of law is to codify the norm/rule, law ultimately derives its strength and vitality from the exception. It is precisely because the law has a limit, both politically (in the unforeseen exceptional circumstance that requires a sovereign political decision) and philosophically, that the exception exists. And <u>as a *limit*, the exception *delimits* the shape of the norm/rule</u>." Neal, *Exceptionalism*, at 63 (emphasis added).

Chapter Three:

The Emergency Constitution

<u>Dealing with the Exception: A Switch in Perspective</u>

A US Marine in Vietnam is said to have justified a destruction of a village saying 'we had to destroy it in order to save it.' Are we, like that Marine, in danger of destroying our liberal 'village' in order to save it?

– David Bonner, *Executive Measures, Terrorism, and National Security* (2007)

After each perceived security crisis has ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.

– Justice William J. Brennan, Jr. (1987)

To say the least, the problem of the exception has plagued both liberal democracies and liberal thinkers. "Given that liberal democracy is essentially bound up with the division of powers and the preservation of rights and freedoms," Nomi Lazar asks, "how could emergency powers, which impose order through constraint of these features, *ever* be justly constituted and exercised?"[1] How can governments dedicated to aspirational liberal ideals explain that there are times in which liberal values need to make way for illiberal ones? And if a liberal democratic state refuses to acknowledge such a possibility, in times of genuine emergency, how is it to survive? On the one hand, in resorting to illiberal powers, the state compromises its liberal integrity; on the other hand, if it chooses not to, the state then risks its very existence. It appears that we are thus caught in a catch-22 – damned if we do, damned if we don't.

In the previous chapter, we considered what answers Jack Bauer, the national security apologists, and Carl Schmitt had to offer in response to this dilemma. In the state of exception, they say, security above all else. On the flip side, the most hard-core of civil libertarians argue that we ought never compromise our liberties. Liberties are *rights*, not mere privileges to be

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[1] Nomi Lazar, *States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press, 2009), at 2.

turned on and off at executive will. What meaning, what force, can rights possess when stripped of its absolute status – even temporarily? For once the inviolability of rights is put into question, we know – perhaps, in the back of our minds – that should the circumstance call for it, rights can be neutered once more. The damage done to rights in the state of emergency is therefore not temporary, but irrevocable.[2] So if we truly believe in these ideals, in the value of these liberal values, then we ought to stick by them through thick and thin. If it results in the destruction of our state, then so be it. At least we remained true to ourselves. Although perfectly logical to some, many people will, in fact, find this extremist position to be far less attractive than even the most extreme security argument insofar as the majority of the common populace is not nearly so dedicated to the preservation of [abstract] rights. Indeed, "[w]hat used to be bedrock constitutional understandings are now looking naïve to [s]elf-proclaimed new constitutional realists."[3] The concrete survival of mankind, on the other hand, is something they can get behind. Life in an authoritarian regime, bare life though it may be, is life nonetheless. The question then becomes: how are we to "navigate the Scylla of amoralist exceptionalism on one hand and the Charybdis of libertarian rejection of emergency powers on the other"?[4] Is there a solution, a middle-passage, to be found?

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[2] "David Dyzenhaus argues that law that compromises is necessarily not only morally but legally compromised. Law cannot be law if it makes room for exceptions. Emergency powers are immoral if making exceptions to laws and moral rules are always immoral. Franz Neumann has claimed that emergency powers allow the state to 'annihilate civil liberties altogether.' And Jules Lobel has argued, from the American case, that the problem of exceptions has meant that liberals – among whom we might perhaps count Oren Gross – have aimed to 'separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its pristine form.'" As can be seen from Lazar's helpful overview, although many other well-known theorists have offered solutions to this emergency dilemma, in this paper we will be focusing on Bruce Ackerman's "emergency constitution" and supermajoritarian escalator, as well as Michael Ignatieff's lesser evil outlook. Lazar, *States of Emergency*, at 3-4.
[3] Kim Lane Scheppele, "We Are All Post-9/11 Now," *Fordham Law Review* 75 (2006), at 608.
[4] Lazar, *States of Emergency*, at 18.

Mayday, Mayday! The Value of Rules in Times of Emergency

Rules help keep our heads cool when in crisis; it provides order in an otherwise disorderly, chaotic situation. As Stephen Holmes points out, crisis is neither a rare nor an exceptional experience. In fact, for emergency-room medical personnel, firefighters, and even parents, emergency is quite possibly an everyday experience. For almost every type of disaster, indeed, whether natural or terrorist-inflicted, there is an accompanying "instruction manual devoted to emergency preparedness and contingency planning [that] stresses [a] set of carefully pre-crafted rules."[5] Professionals trained to respond to emergencies are not told to act in an *ad hoc*, improvisational manner, but to adhere to pre-established procedures and guidelines "rendered quasi-instinctive by practice and repetition."[6]

Can we then draw a hard distinction between the emergencies faced by firefighters and the national security emergencies the U.S. is faced with? In my opinion, the distinction is not as clear as some would make it out to be. People on the security side insist that the breadth and urgency of the terrorist threat differs from that faced by the trauma surgeon, insofar as the former potentially harms the *entire* nation and not simply the single patient open on the table. Not to mention, they argue, the nature of today's threat is *un*precedented – there is no real past example that we can rely on. The magnitude and newness, security apologists argue, of the threat therefore demand flexibility, i.e. space for the Executive to maneuver both effectively and efficiently. In other words, rules not only unduly constrain, but also "diminish the capacity of the country's national-security agencies to respond effectively to an existential threat."[7] Yet this argument still neglects to adequately address the purpose behind emergency protocol, i.e. why do

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[5] Stephen Holmes, "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," *California Law Review* 97 (2009) 301-355, at 302.
[6] Holmes, "In Case," at 302.
[7] Holmes, "In Case," at 304.

we have – and follow – protocol in times of crisis? Nor does it account for the reality of what goes on in the emergency room:

> [N]urses, for example, follow protocols elaborated in advance because, when a disaster strikes, they have little time to think. Besides reducing the risk of avoidable error, the rules governing emergency response considerably reduce decision and coordination costs. They also serve an emotionally reassuring function, something of immense practical value when the stakes are high and time is scarce.[8]

We follow pre-established protocols because, to put it simply, they *work.* In many cases, the procedures outlined in the emergency-response instruction manuals continue to be taught because they have proven to keep responders calm and effective – instead of being paralyzed with fear or, in the face of substantial time pressures, end up making costly mistakes – in past crises. Of course, no crisis unfolds in a predictable, textbook manner – and I am certainly not encouraging a slavish, rigid faithfulness to rules – and room for improvisation is a must. "But," Holmes argues, "the patently dysfunctional nature of particular rules in certain situations [still] does not justify a blanket repudiation of obligatory rule-following during emergencies."[9] Indeed, it would be foolish for us to throw the baby out with the bathwater.

Rules and adaptability should not be understood as another "all-or-nothing" scenario. They are, in many instances[10], perfectly compatible. Emergency regulations, guidelines, and protocol are not put in place to stifle responders' abilities to respond to a new and unforeseen circumstance, but to "provide a psychologically stabilizing floor"[11] and to protect against possible abuses. I think Daniel Solove says it best when he remarks, "The choice is not between a security measure and nothing, but between a security measure with oversight and regulation

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[8] Holmes, "In Case," at 307.
[9] Holmes, "In Case," at 303.
[10] "There is no reason why mechanically following protocols designed to prevent harried nurses from negligently administering the wrong blood type should preclude the same nurse from improvising unique solutions to the unique problems of a particular trauma patient." Holmes, "In Case," at 309.
[11] Holmes, "In Case," at 309.

and a security measure with the sole discretion of the executive officials."[12] Yes, as advocates for broad discretionary executive powers say, rules do "tie hands." However, in times of heightened danger, the fact that rules constrain our actions and limit our responses is not disabling, but *necessary*. Too often in the immediate aftermath of great tragedy, our judgment is not only clouded by feelings of anger, fear, and revenge, but the desire to punish those who have hurt us is also at its highest. It is, therefore, in those times when "[r]ights are most important not as [trophies] to polish in peacetime, but as ways to hold ourselves back when we are most tempted to overreact."[13] It is all too likely in situations of extreme stress and danger – e.g. national security crises – that, if given the latitude, we will too quickly cast aside the rule of law, i.e. those rules that tie the government's "hands," in favor of perilous and unnecessary shortcuts. Not to mention, just because the government responds both quickly and powerfully does not automatically guarantee that the response was the solution required. Recall Solove's metaphor of the sinking boat: the fact that we were able to throw a bunch of cargo overboard quickly does not automatically mean we'll stop sinking – especially if in our haste, we misidentified the source of the problem. In fact, rules may be the best reminder of the value and important of *not* approaching each national security threat as a new and unprecedented crisis. If understood in this way, neither liberty nor security is then Goliath to the other's David. Contrary to how security apologists have argued, protecting our civil liberties typically does *not* incur much cost for security, aside from the inconveniences of having to justify certain measures to an institution other than themselves – i.e., to Congress or to the Judiciary. And if liberty needs to suffer some inconveniences and annoyances in the name of security, ought liberty not demand this of security as well?

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[12] Daniel J. Solove, *Nothing to Hide: The Clash between Privacy and Security* (unpublished manuscript), at 26.
[13] Solove, *Nothing to Hide*, at 50.

To conclude: A more conservative and cautious approach – of recognizing that "a crew of human responders, with no script to follow, often *fail* to adapt [w]ith desirable rapidity and coordination to the demands of a dangerous and confusing situation"[14] – might be better suited to address today's national security crises. Indeed, as we shall see in the next section, legal scholar Bruce Ackerman advocates one such approach – that of the emergency constitution – in his book *Before the Next Attack*.

Not a War, Not a Crime, This is an Emergency: The Need for an Emergency Constitution

We require an "emergency constitution" that allows for effective short-term measures that will do everything plausible to stop a second strike – but which firmly draws the line against permanent restrictions. [G]iven the clear and present danger, it makes sense to tie ourselves to the mast as a precaution against deadly enticements. This is the promise of the "emergency constitution."

– Bruce Ackerman, *Before the Next Attack* (2006)

How are we, as a liberal democracy, to efficiently and effectively answer the necessary threat in the short-term without placing at risk our long-term commitments to liberal rights and values? The terrorist threat exposed in the aftermath of 9/11 is not a new threat, nor is it the last we will be confronted with. The threat that we seek to resolve is not, after all, something so particular as Islamic fundamentalism or so concrete as Al Qaeda, but the very threat of terror itself.[15] "In this respect," David Cole observes, "the threat of terrorist attacks may be something that we must learn to live with – as a cancer patient learns to live with the ever-present

[14] Holmes, "In Case," at 308.
[15] "The fact that the terrorist threat is unlikely to abate anytime soon – or ever – makes a 'war on terror' like no other war. While it is never possible, in the midst of a war, to say when it will end, this war may literally have no end. President Bush has said that the war "will not end until every terrorist group of global reach has been found, stopped, and defeated." It is highly unlikely that this day will ever arrive.
David Cole, "In Case of Emergency," *The New York York Review of Books*, July 13, 2006, accessed March 04, 2011, http://www.nybooks.com/articles/archives/2006/jul/13/in-case-of-emergency/?pagination=false.

possibility of recurrence."[16] And if the nature of the terrorist threat is such, then it becomes all the more important that we – to continue the cancer metaphor – find the right dose and type of medicine to combat the threat such that it eliminates the threat without killing us. In other words, in light of this potentially never-ending terror threat, it is necessary for us to find a means to address the menace which remains consistent with our deepest commitments as a liberal, democratic nation. Otherwise, we risk becoming entangled in a steadily oppressive cycle: In the aftermath of a successful terrorist bomb, politicians will scramble to write up a slew of repressive laws promising greater security in order to appease the paranoia of their constituents. However, once the next bomb goes off, even though the nature of the problem remains the same, the pressure to further expand the breadth of restrictions will only increase. Each attack, in other words, will be perceived as "evidence that prior expansions of government power didn't go far enough"[17] – that the government failed to uphold its promise to adequately protect the citizen-populace. As a result, "even if the next half-century sees only three or four attacks on a scale that dwarf September 11, the pathological political cycle will prove devastating to civil liberties by 2050."[18] Indeed, as was seen in the previous chapter, the nature of our democratic politics simply condemns us to such a fate.[19]

So what is the solution? How are we to break this seemingly inevitable cycle? Is it the judicial system – i.e. the courts? The historical example of *Korematsu* in particular, and the

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[16] Cole, "In Case of Emergency."
[17] David Cole, "The Priority of Morality: The Emergency Constitution's Blind Spot," *The Yale Law Journal* 113 (2004), at 1759.
[18] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006), at 2.
[19] "The shock waves will ripple through the populace with blinding speed. Competitive elections will tempt politicians to exploit the spreading panic to partisan advantage, challenging their rivals as insufficiently "tough on terrorism" and depicting civil libertarians as softies who are virtually laying out the welcome mat for our enemies. And so the cycle of repression moves relentlessly forward, with the blessing of our duly elected representatives." Ackerman, *Before the Next Attack*, at 2.

deferential wartime behavior of judges in general, seem to say otherwise. Indeed, as Clinton Rossiter observes, "Whatever [judicial] relief is afforded [in wartime], and however ringing the defense of liberty that goes with it, will be precious little and far too late."[20] Instead, Bruce Ackerman argues, the defense of America in the age of terror demands something stronger and more dependable than just a capable, independent judiciary. The United States, he writes, requires the creation of an "emergency constitution."[21] Although this is may be a relatively novel concept for a nation that has had the luxury of experiencing few and far-in-between threats, the idea of the "emergency constitution" is not so foreign to most nations in the world: "By the luck of the geographic draw, they have been forced to live with extreme danger for centuries. As a consequence, their constitutions often contain elaborate political safeguards on the use of emergency powers."[22] Of course, Ackerman does not advocate the complete adaptation of another country's emergency measures for our own[23] – especially since the nature of the threat has morphed from state-helmed invasion to isolated, massive, civilian-targeted attacks instigated by guerilla soldiers – but such examples are nonetheless thought provoking as a sort of *Handling Emergencies for Dummies* guidebook.

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[20] Clinton Rossiter & R. Longaker, *The Supreme Court and the Commander-in-Chief* (Ithaca: Cornell University Press, 1976), quoted in David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," *Michigan Law Review* 101 (2003), at 2568.
[21] Ackerman, *Before the Next Attack*, at 3.
[22] Ackerman, *Before the Next Attack*, at 3.
[23] In fact, he finds all of the existing emergency constitutions to be inadequate: "[T]here is no constitution on earth that provides a perfect model – or even a half-decent one. They were all deigned with the problems of an earlier age in mind – the threat of an invasion of one state by another, or a violent coup by domestic extremists." Indeed, Ackerman argues that it is unlikely those existing constitutions with emergency clauses would even apply to the terrorist threat we face today due to the fact that "[t]hese texts were not framed with the distinctive problem of terrorism in mind. They focus on external attacks and internal coups that threaten to destroy the regime. Unless these constitutions are modified, they will predictably misfire, authorizing disproportionate measures that may not even significantly respond to the need for reassurance provoked by the attack." Ackerman, *Before the Next Attack*, at 3 and 122-123. For a more in-depth discussion on Ackerman's foreign inspiration, *see* Kim Lane Scheppele, "We Are All Post-9/11 Now," *Fordham Law Review* 75 (2006).

Yet why even require an emergency model? Yes, the terrorist threat is great, but there have been greater. Yes, the terrorist threat is novel insofar as it has become "a product of the free market in a world of high technology,"[24] but how unprecedented is it really? Are the existing institutional models – i.e., war and crime – so ineffective in addressing the threat presented by terrorism that we require the creation of an entirely new model focused specifically and exclusively on terror? Indeed, before agreeing to the creation of a new emergency constitution, we ought to first consider why such a novel approach is even required to address the threat at hand. In other words, we must first confront both the war model and the criminal model in order to uncover the reasons why these models cannot accommodate the terrorist threat. Why is it so dangerous to describe the terrorist threat as a "war on terror," and "[w]hy isn't it good enough to use the tried and true system of our existing criminal law?"[25] What makes these two systems so inadequate such that we require a new[26] framework, i.e. the emergency constitution?

First of all, Ackerman charges, the terrorist threat involves neither the traditional territorial conquest, the struggle with a well-equipped sovereign nation of uniformed soldiers, nor the possibility of a domestic coup. For that matter, wars are not fought at the drop of a pin, at a whim, or at a moment's notice. Real wars do not occur because the government was lax with our security. Instead, "[t]hey arise after years of highly visible tension between sovereign states,

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[24] Ackerman, *Before the Next Attack*, at 13.
[25] Ackerman, *Before the Next Attack*, at 8.
[26] Interestingly enough, though it has been not afforded much attention, we already possess a framework statute, i.e. the National Emergency Statute of 1976. "The National Emergencies Act (50 U.S.C. 1601-1651) eliminated or modified some statutory grants of emergency authority, required the President to declare formally the existence of a national emergency and to specify what statutory authority, activated by the declaration, would be used, and provided Congress a means to countermand the President's declaration and the activated authority being sought." Harold C. Relyea, U.S. Congressional Research Service. "National Emergency Powers" (Updated September 18, 2001), at 2. The reason why he does not simply cite this statute and then call it a day is the fact that he finds unacceptable deficiencies with the National Emergency Statute. Nonetheless, Ackerman writes that his "emergency constitution" will build upon "the efforts of the preceding generation, both by learning from its mistakes and redeeming its efforts to build a reliable system of checks and balances to control the potential abuses of emergency power." Ackerman, *Before the Next Attack*, at 8.

and after the failure of countless efforts of diplomacy. They occur only after the public has reluctantly recognized that the awesome powers of warmaking might be justified."[27] Indeed, even though Pearl Harbor had been an unwelcome and tragic surprise, Americans were nonetheless very much aware of the escalating and encroaching threat presented by the imperial nation of Japan. Although the attack was unanticipated, we could not honestly say: "We never saw it coming. We were completely blindsided." In Ackerman's opinion, war is tangible insofar as it is at least obvious who the enemy is.

"The law," Ackerman writes, "is a blunt instrument. It hacks the complexities of life into a few legal boxes, and obliterates the nuances."[28] All war can then be – and is – categorized beneath the singular heading of "war." The problem is that wars differ in magnitude. The threat posed to the security of United States in World War Three is simply different than that posed to the nation embroiled in a war against a singular nation. As Ackerman observes, "the Spanish-American war was a war, and so was the Second World War, but the Spanish-American war did not involve a life-and-death struggle for political survival."[29] Yet due to the nature of our legal system and its need to categorize,[30] the law nonetheless fails to take into consideration such gradations of security threat present in different wars. "War is war," Ackerman notes, "and that is that."[31] And so the danger of including the terrorist threat within this paradigm is that we risk

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[27] Ackerman, *Before the Next Attack,* at 14.
[28] Ackerman, *Before the Next Attack*, at 19.
[29] Ackerman, *Before the Next Attack*, at 19.
[30] The law creates and perpetuates categories all the time – e.g. racial, religious, sexual orientation, gender to name but a few. While there are distinct advantages to such an approach, the danger of essentializing nonetheless lingers. For example, the racial category of Asian-American carves out a space in law for a specific group of people. However, it also reduces that group of people to a singular characteristic – that of their race – thereby leaving out all other characteristics that may also be relevant in the ruling of a particular case, e.g. gender. The reality is an individual does not possess a singular identity; she is not one-dimensional, but multi-dimensional. For a more thorough critique of the reductive nature of existing legal categories *see* Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *The University of Chicago Legal Forum* (1989).
[31] Ackerman, *Before the Next Attack,* at 20.

equivocating such a threat with that presented by the World War II Axis powers. Indeed, "once we call it a war on terror, we are in grave danger of treating these attacks as if they raised the [same] constitutional stakes as did our life-and-death struggle against Germany and Japan."[32] Although the threat we are confronted with when dealing with terrorism is, without a doubt, serious and ought to be of concern; nonetheless it is *not* an existential threat – i.e. a situation whereby the continued survival of our nation is at stake. To say otherwise, to allow ourselves to engage in this war talk, is to "encourage courts to rubber-stamp presidential decisions to respond to terrorist attacks with escalating cycles of repression."[33] And so we must then utilize different words, phrases, and rhetoric when talking about the terror threat.

Without question, the terrorist threat differs from that presented in wartime. Whereas wars are fought out in the open – e.g., on delineated battlefields, with armies, beneath the laws of war, etc. – terrorism lingers in the shadows, waiting for the right opportunity to strike. And even when we are bitten, we are unsure as to (a) *who* bit us and (b) the longevity of the threat. Ackerman notes: "Given the free market in destructive technologies, we don't know whether we face a tiny group of fanatics, with a couple of million dollars, which happened to get lucky, or a more serious organization with real staying power."[34] Subsequently, we tend to overreact.[35] After all, who knows what could happen next? In the face of uncertainty, it is better to be safe than sorry – and this fearful attitude is exactly what incites and sustains the pathological political cycle discussed above.

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[32] Ackerman, *Before the Next Attack*, at 20.
[33] Ackerman, *Before the Next Attack*, at 22.
[34] Ackerman, *Before the Next Attack,* at 14.
[35] "[I]n the aftermath of a sneak attack, our expansive war talk invites us to suppose that we should confide to government the awesome powers that might well be appropriate when fighting a Third World War." Ackerman, *Before the Next Attack*, at 15.

The truth of the matter is, however, that individual terrorist threats are short-term problems which do not necessitate responses with potentially long-term ramifications. We simply do not know whether this attack was beginner's luck, whether a second strike will hit soon, or whether they are even in it for the long fight. So we take up the mentality of "[L]et's do what's necessary in the short term, and buy some time to figure out what's appropriate in the long term."[36] But what does the short-term problem even entail? And for that matter, how are we to deal with this problem rationally when we remain in the atmosphere of anxiety and paranoia which inevitably persists in the aftermath of a terrorist attack? After all, the emotion of fear – which Cass Sunstein has recently examined – incites people's imaginations to focus on the worst-case scenario regardless of what the evidence says, which subsequently leads to a "cognitive misapprehension of danger."[37] A nation living in fear, as we have seen in previous chapters, is rendered incapable of making sensible decisions. In light of this government weakness, what must be done? Ackerman argues, as Martha Minow observes, that we then require "concrete plans that anticipate a terrorist attack against the United States."[38] The key, indeed, to turning this otherwise chaotic environment of fear into a productive employment of government emergency power is not only the need to distinguish between threats, but also the acknowledgement of the need for contingency planning – i.e., an emergency constitution.[39]

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[36] Ackerman, *Before the Next Attack,* at 15.

[37] "When the image of an event is readily available to people, they overstate the likelihood that the event will occur. So, shortly after an earthquake or flood, consumers are eager to buy insurance to cover natural disasters. But their interest steadily declines as these terrible events fade in their memories. In a similar vein, individuals overestimate the probability of dying from a highly publicized, dramatic causes and underestimate the probability of succumbing to unspectacular killers that quietly take their victims one at a time." Rachel F. Moran, "Fear Unbound: A Reply to Professor Sunstein," *Washburn Law Journal*, 42 (2002), at 2. *See further* Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005).

[38] Martha Minow, "The Constitution as Black Box during National Emergencies: Comment on Bruce Ackerman's *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*," *Fordham Law Review* 75 (2006), at 594.

[39] To add further showcase the need for advance planning, "Ackerman joins Congressman Brian Baird in outlining a line of succession in the event that terrorist acts incapacitate state governors, congressional representatives, senators or U.S. Supreme Court Justices." Martha Minow, "The Constitution as Black Box," at 595.

This need for advance planning, for this emergency constitution, is nevertheless contingent upon the assumed likelihood of a second strike. Without the possibility of a second strike, what use is an emergency constitution if there is no emergency to regulate? Indeed, if terrorist attacks were but one-off occurrences, then the government would have no reason to do everything necessary – including compromising cherished liberties – to prevent the occurrence of another. There is no need to plan ahead for an impossible event. However, Ackerman does presume the likelihood of an impending second strike and the short-term goals of his emergency constitution reflect such a belief. Indeed, the short-term problem he believes the terrorist threat presents is the very possibility of the second strike. We, as a nation, ought to assume that a second strike is coming and act accordingly – i.e. do our best to prevent such an attack. At the same time, this does not thereby grant the breadth of discretion necessary for the political leadership to act in the name of an immanent third, fourth, or hundredth attack. Indeed, the possibility of a second attack is neither carte blanche for the executive branch to demand free rein during emergencies nor does it justify excessive judicial deference.

Whereas the ambitious career politician speaks eagerly of war, the legal traditionalist as well as the civil libertarian "[has] been insisting that the tried-and-true principles of the criminal law suffice to deal with [the terrorist] problem."[40] Why institute a new and untested framework when the old one works just as well – if not better? Indeed, if one of the primary fears following terrorists threats is the exercise of arbitrary, abusive executive power, then criminal law is your solution: "The basic principles of criminal due process are [after all] the product of centuries of struggle against arbitrary power."[41] Why not consider terrorism as a "crime that can be dealt with through the ordinary criminal-justice system, perhaps with relatively modest tweaks like

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[40] Ackerman, *Before the Next Attack*, at 39.
[41] Ackerman, *Before the Next Attack,* at 39.

expanded definitions of conspiracy and related offenses"?[42] The fundamental difference between crime and terror, Ackerman argues, is that even the greatest criminal threats – e.g., the Mafia and communism – do not have as their purpose the destabilization of the "expectation of *effective sovereignty*."[43] In other words, the threat presented by criminals does not raise questions about the ability of the sovereign to protect the nation. Crime is expected insofar as no one genuinely expects a crime-free world. We certainly can – and ought to – hope for such a peaceful world, but oftentimes we neither expect it nor are we promised it. Acts of terror, on the other hand, are not expected – and when they do occur, they are not acceptable.

> Effective sovereigns don't promise their citizens a crime-free world. But they are expected to maintain control over the basic security situation – and it is precisely this expectation which is challenged by a terrorist attack. The tragic loss of three thousand lives in the September 11 attacks was traumatizing in itself. But it was Al Qaeda's success in shaking the public's confidence in the American government's effective sovereignty that gave the attack its overwhelming political resonance. For a while at least, it was perfectly reasonable for ordinary Americans to wonder whether the government really was in control of affairs within the nation's borders.[44]

It is not so much that terrorists threaten the existence of our nation insofar as it shakes our faith in our own leadership to keep us safe. Whereas we tend to overestimate the threat in the aftermath of a terrorist attack, we do the opposite with regards to everyday, faceless, murderers. With regard to serial killers, the home invader, and even the rapist, the average, middle-class American does not typically think "I'm next," but rather, "Such crimes happen to *other* people, but me, *I* am safe." Indeed, if we cannot trust our government with our national security, then paranoia and heightened anxiety will inevitably ensue at such a magnitude, Ackerman believes, incapable of sustaining a criminal justice system insofar as "the normal operation of the criminal

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[42] Adrian Vermeule, "Self-Defeating Proposals: Ackerman on Emergency Powers," *Fordham Law Review* 75 (2006), at 632.
[43] Ackerman, *Before the Next Attack*, at 42.
[44] Ackerman, *Before the Next Attack*, at 42.

law *presupposes* the effective sovereignty of the state, but a major terrorist attack *challenges* it."[45] The government therefore possesses a need, in the aftermath of crisis, to categorically reassert its authority – its very sovereignty – over the nation before it can even implement criminal law.

Another reason Ackerman offers in support of the inadequacy of the criminal system to address terrorist threats is what he calls the "*reassurance interest*."[46] This reassurance interest has two parts – a symbolic and a functional – to it. The symbolic aspect is fulfilled when a state of emergency is declared. This declaration thereby recognizes that "the terrorist assault on effective sovereignty strikes at a fundamental aspect of the social contract,"[47] and therefore swift and aggressive governmental action is necessary to assuage – to reassure – the panicked public. The functional aspect, on the other hand, is concerned with the short-term problem of the second attack – however uncertain the immanence may be.[48] And though our reaction ought to be both calculated and situational, Ackerman nonetheless argues for the endowment of exceptional powers insofar as he believes it *necessary* for the prevention of another strike. He offers three reasons for this necessary endowment: (1) "a *massive* terrorist strike generates a great deal of bureaucratic confusion," (2) "time is of the essence," (3) "the damages of a second strike will be very great indeed" insofar as it will not only kill a great deal of people, but will also critically demoralize the general populace. As a result, the public may begin to wonder not just whether

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[45] Ackerman, *Before the Next Attack,* at 43.
[46] Ackerman, *Before the Next Attack,* at 44.
[47] Ackerman, *Before the Next Attack*, at 45.
[48] "Here is where the big difference with the Japanese sneak attack becomes apparent. When the Japanese struck on December 7, their larger naval fleet lurked in the background – the risk of a second strike was very real, and unless and until something decisive was done to destroy the enemy fleet, the danger would remain. Not necessarily so in the aftermath of a terrorist attack. Perhaps the terrorists were just lucky, and they have already shot their load. Perhaps they have prepared for one or two other sneak attacks. [T]here is no way to know." Ackerman, *Before the Next Attack*, at 45.

the existing government has any ability to protect them, but whether *democracy* itself is capable of keeping them safe as well.

But what if the criminal system could somehow incorporate the reassurance rationale, would it then be an adequate model to respond to terrorist threats? Why not "change the rules for speedy trial and allow prosecutors discretion to keep suspected terrorists in jail for a longer time, on a less compelling evidentiary showing, before they must confront a jury?"[49] Ackerman rejects these proposed changes insofar as he believes them to be not only impractical[50] but also dangerous. After all, by inserting exceptional measures suitable for emergencies into criminal law we thereby risk "normalizing the oppressive use of the criminal law during periods of relative calm. And if we compensate by bringing in time-sensitive definitions into the criminal law, we will manage to be ineffective and draconian at the same time."[51] In short, the criminal justice system fails to "offer a context for taking national precautions or for preventing further catastrophe, nor does it speak to how individual rights should be treated outside of criminal prosecutions."[52] Why ought we then expose ourselves to such risks if there exists a better alternative at hand – i.e. the emergency constitution?

The emergency constitution can be said to have two goals: (1) the short-term goal of preventing the second strike and (2) the long-term goal of preserving civil liberties. As a result, under the emergency constitution, presidential power will be strictly limited insofar as "[p]residents will not be authorized to declare an emergency on their *own* authority, except for a

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[49] Ackerman, *Before the Next Attack,* at 47.
[50] "Although the time-sensitive statute may cast an extremely broad net, it remains a *criminal* statute, and the Constitution would still require the authorities to come up with probable cause to believe that the suspect has committed the crime. But this places too heavy a burden on the overwhelmed security services immediately after a massive attack." Ackerman, *Before the Next Attack*, at 48.
[51] Ackerman, *Before the Next Attack,* at 49.
[52] Minow, "The Constitution as Black Box," at 596.

week or two while Congress is considering the matter."[53] At the end of that two-week period, the executive's emergency powers would then be subject to majority congressional approval – "but even this vote has a temporal limit and is valid for only two months."[54] Once that time period has concluded, the president must seek reauthorization from Congress, and this second time, the continuation of the executive's expanded powers would require a supermajority of 60 percent; after four months, the necessary majority would ratchet up to 70 percent; and finally after six months – and every renewal thereafter – an 80 percent legislative majority is required.[55]

Unless a second attack occurs, this "supermajoritarian escalator" then ensures a definitive expiration date. After all, as the threat lessens, it becomes less and less likely that the executive will obtain the 80 percent of the congressional vote necessary to renew his/her emergency powers. As Ackerman puts it, "[e]ach ballot in the House and Senate requires 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?"[56] For that matter, the supermajority escalator will also temper the otherwise more aggressive actions of the executive insofar as she is aware that her expanded powers must be renewed. If she acts with too heavy and careless a hand in the beginning, she is less likely to gain the stipulated congressional majority to renew that authority. In addition, the supermajoritarian escalator allows for the preservation of the minority voice. After all, "if the emergency regime requires the increasing support of the legislative minority, party loyalty is a nonstarter when it comes to building a broad coalition in support of the emergency."[57] The executive cannot therefore depend solely on his party for support – at some point, there must be bipartisan consensus. The supermajoritarian escalator then serves several purposes: (a) functions

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[53] Ackerman, *Before the Next Attack,* at 4 (emphasis added).
[54] Ackerman, *Before the Next Attack*, at 4.
[55] Ackerman, *Before the Next Attack*, at 4.
[56] Ackerman, *Before the Next Attack*, at 80.
[57] Ackerman, *Before the Next Attack*, at 84.

as a continual reminder that things are not business-as-usual – i.e. we are in a state of emergency, (b) inspires a mentality of executive restraint rather than executive license, and (c) prevents minority rights from being permanently set aside. And at the conclusion of the state of emergency, Ackerman outlines, the emergency constitution must not only mandate a "wide-ranging legislative review, chaired once again by an opposition member with an opposition majority, critiquing the administration of the entire operation,"[58] but must also require the submission of a public report, comprised of formal recommendations for improvement, within the next year.

However, when ought these emergency powers come into effect? In other words, what is the appropriate threshold for a declaration of emergency? Is it the presence of a "clear and present" danger? No, because such a threshold is too subject to political manipulation – after all, what exactly do the terms "clear" and "present" mean anyways? "Presidents and prime ministers receive daily reports," Ackerman points out, "from their security services on terrorist threats. These risks ebb and flow, but they are always portrayed as serious. [P]oliticians will never lack bureaucratic reports detecting a 'clear and present danger' on the horizon."[59] Instead, he suggests a far more concrete standard: "I would insist on an *actual* attack."[60] An actual attack is reality; it is intelligence, predictions, and threats made *real*. Subsequently, there is very little room – if any – for politicians to argue over whether an attack occurred. Indeed, although we can argue about the ramifications, the seriousness, and how we ought to respond, the fact that the attack happened is nonetheless irrefutable. Now that it is clear that an actual attack is necessary to trigger the emergency constitution, the question then becomes more difficult: How big must the attack be to

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[58] Ackerman, *Before the Next Attack*, at 87.
[59] Ackerman, *Before the Next Attack*, at 91.
[60] Ackerman, *Before the Next Attack*, at 91.

trigger the switch from "normal" Constitution to the emergency constitution? Must it cross a certain numerical threshold or simply be large enough to create enough public anxiety to spur political action? And who will be the judge? The solution Ackerman advances establishes the minimum standard for the emergency constitution to take effect to be an actual attack of a scale similar to that of 9/11. In his words, we require a "legal provision that would explicitly make room for self-consciously political judgment, authorizing an emergency declaration for 'terrorist attacks on the scale of those which occurred on September 11, 2001.'"[61] But why make 9/11 the threshold – especially if Ackerman believes the event to barely fulfill the requirement of an attack disturbing enough to raise questions about effective sovereignty? To respond, Ackerman explains:

> [T]he remorseless proliferation of technologies of mass destruction suggests, alas, a grimmer prospect – something over the next half-century, some tragedy will occur that makes September 11 into a mere prologue to a new age of terrorist mass destruction. The challenge is to get legally prepared before the next great disaster, without allowing the state of emergency to be trivialized in responding to the low-level bombings that will sadly become part of the background conditions of ordinary life.[62]

In other words, September 11th is the minimum standard because it will likely be the most mild – if disasters can be described in such terms – of all future attacks. We should not expect the next terrorist strike to be of a similar scale to the 9/11 attack. Indeed, the rapid evolution of modern technology coupled with the unregulated free market warns us that the next attack may well be on the scale of mass destruction – e.g. nuclear. 9/11, Ackerman grimly asserts, is only the beginning.

Now that we have considered when the emergency constitution ought to be allowed to take effect, we must examine exactly what can be done once the state of emergency is in effect.

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[61] Ackerman, *Before the Next Attack,* at 93.
[62] Ackerman, *Before the Next Attack*, at 92.

What is included in these emergency powers? Once the executive possesses the congressionally approved emergency powers, what can she then do? In other words, what is the scope of these expanded executive powers under the emergency constitution? The scope of executive power under the emergency constitution, to say the least, is not an easy determination. We need to be wary of ceding too much to the executive such that it risks becoming abusive. At the same time, we ought to be cautious of giving too little such that effectiveness and efficiency are compromised. In defining the scope of his emergency constitution, Ackerman focuses on what he perceives to be the paradigmatic use of emergency power by the executive: "the power to seize human beings and dramatically limit their freedom without satisfying the normal standards of due process."[63] Indeed, any individual who might have a possible connection to the attack or anyone who possesses any information which may prevent the next attack could be swept up in this dragnet. However, Ackerman does delineate concrete, numerical limits to this potentially abusive executive power: (1) suspects can only be held on reasonable suspicion; (2) suspects can be detained either up to the end of the emergency or up to the *maximum* of forty-five days; (3) the government must present a factual showing to the court justifying its actions; (4) at the end of the forty-five day period, the detainee must either be released or criminally charged; (5) if acquitted, or if they were simply not charged, the government is required to compensate detainees $500 for each day of imprisonment – the maximum compensation being $22,500; and (6) torture and other abuses are absolutely forbidden.[64]

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[63] Of course detention power will not be the only power made available under the emergency constitution. "Here is a short list: curfews, evacuations, compulsory medical treatment, border controls; authority to search and seize suspicious materials and to engage in intensive surveillance and data compilation; freezing financial assets and closing otherwise lawful businesses; increasing federal control over state governments, expanding the domestic role of the military, and imposing special limitations on the right to bear arms – to name only some of the hot-button items." Ackerman, *Before the Next Attack,* at 96.

[64] Ackerman, *Before the Next Attack,* at 5 and 106.

"The problem," Ackerman explains, "is to prevent a second strike; the solution is to declare a temporary state of emergency."[65] But how do we get from point A to endpoint B? Indeed, the challenge is to construct a viable emergency constitution both flexible enough to accommodate short-term exigencies and restrained such that we do not risk irreparably damaging our nation's core principles. Is this, however, an attainable goal? Ackerman believes that it is so long as we maintain and operate within a system of checks and balances. If we wish to preserve our constitutional democracy, the Executive can never be the sole decision-maker – not in times of peace, not in times of war, not in times of emergency. After all, if his say is the only voice that matters, we no longer reside in a liberal democracy, but in an illiberal authoritarian regime: "Without checks and balances, other forms of restraint aren't worth the paper they are written on. Although the Constitution may contain an impressive set of legalisms limiting emergency power, they won't mean much so long as the president has the sole power to say what they mean."[66] Legal scholar Stephen Holmes further emphasizes the necessity of meaningful and substantive participation by all three branches of the U.S. government in the tradeoff debate by arguing:

> [E]xecutive-discretion advocates artificially reduce liberty to those civil liberties associated with the presumption of innocence. This selective definition of liberty makes it suspiciously easy for them to condemn liberals, who are committed to civil liberties, as naïve pawns of an enemy whose saboteurs blend invisibly into innocent civilian populations. Stressing 'the refusal of the civil liberties lobby to take threats to national security seriously,' they introduce a key and, arguably, misleading storyline: the idea that liberalism itself is a kind of suicide pact into which left-leaning legal academics and activists, adhering dogmatically to non-negotiable values, wish to drag the country to its collective ruin.[67]

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[65] Ackerman, *Before the Next Attack*, at 77.
[66] Ackerman, *Before the Next Attack*, at 90.
[67] Holmes, "In Case," at 315.

Is he correct? Yes, I believe he is. We need only consider the dooms-day arguments – what Solove calls the "parade of horribles"[68] – both sides have trotted out as justification to see the truth in Holmes' argument. Indeed, we need only look to the attitude former Secretary of State Donald H. Rumsfeld held – of which others on the security side no doubt shared – towards the detainees imprisoned at Guantanamo Bay, Cuba: in a single breath calling them the "worst of the worst," while also casually remarking, "I don't know that I even bothered to look at what the nationality of these folks are."[69] It is because of these realities that we require participation from all three branches of government, especially in times of crisis. Indeed, if we allow a single branch to completely dominate and control the discourse framing today's liberty/security debate, then we lend a "spurious plausibility to the slanderous [and absurd] charge that expressing concern"[70] for the protection of our civil liberties is equivalent to aiding and comforting the enemy. In short, if the emergency constitution is to stand a chance in accomplishing its stated purpose, we cannot then fall victim either to a Schmittian or a extremist national security outlook – i.e., sovereign is he who determines the exception – and allow for emergency powers to be enacted absent constraint.

A system of checks and balances will ensure that the emergency does not devolve into a state of sheer lawlessness. To think about these limits in action, we can consider – as Ackerman does – the behavior of prosecutors beneath the emergency constitution. With the imposition of the supermajoritarian escalator, prosecutors will realize that emergencies are not everlasting – there is an end point. And once the emergency ends, they must then "move forward promptly on *all* those in custody. This will push them to begin serious work at once: with hundreds or

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[68] Solove, *Nothing to Hide*, at 9.
[69] Katherine Q. Seelye, "Threats and Responses: The Detainees," *The New York Times*, October 23, 2002, *available* at http://www.nytimes.com/2002/10/23/world/threats-responses-detainees-some-guantanamo-prisoners-will-be-freed-rumsfeld.html.
[70] Holmes, "In Case," at 316.

thousands in custody, they will try to clear out those who have been arrested by mistake"[71] insofar as they can then concentrate their energies on prosecuting those held on substantive charges. Similarly, Ackerman argues that his requirement of compensation will provide the necessary incentive for prosecutors to shake off "the inertia that might otherwise lead them to prolong detention to the bitter end of the forty-five day period."[72] Unnecessary detention is, after all, not only costly to the wellbeing of potentially innocent detainees, but strains the national purse as well. In sum, "the prosecutor's need to prepare for a legal day of reckoning and the bureaucratic response to the budgetary pressure for compensation create their own incentives for the speedy discharge of innocents."[73] And because the emergency constitution has its own built-in limits, there is less of a need for those judicial limits – e.g. judicial evidentiary hearings – employed in normal times. In fact, Ackerman takes it one step further when he argues for overall judicial restraint and deference:

> Judges should act with great restraint once an attack occurs, even if there is fair dispute whether the attack is so large as to justify an emergency response. With the country reeling, it simply cannot afford the time needed for serious judicial review. If the president can convince a majority of Congress of the need for emergency authority, this should suffice. At this early stage, we should rely on the legislature, not the judiciary, to restrain arbitrary power.[74]

Is he right to suspend judicial review in the immediate aftermath of an attack? Is the judiciary truly, in times of crisis, an unnecessary handicap to decisive, effective executive action? David Cole answers no, and his critique of Ackerman's detention policy will be considered in the following section.

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[71] Ackerman, *Before the Next Attack,* at 106.
[72] Ackerman, *Before the Next Attack*, at 107.
[73] Ackerman, *Before the Next Attack*, at 107.
[74] Ackerman, *Before the Next Attack*, at 102.

To briefly summarize Ackerman's argument: In order for us to temper and control our often overzealous responses to crises, we require a legal framework capable of both preserving our long-term national legacy and protecting our short-term interests, i.e. preventing a second attack. The emergency constitution would thereby grant the president considerable emergency powers – including preventative detention – to combat the immediate terrorist threat for how ever long a steadily increasing legislative majority renews his authority. With these powers, the executive would then be able to reassure the public of her effectiveness as sovereign, as well as prevent the occurrence of another terrorist attack. And with the supermajoritarian escalator as a built-in safety valve on emergency powers, we can then both preserve our civil liberties in an age of terrorism and provide an effective and efficient response to the short-term threat of the second attack.

This is an Emergency, Not an Extra-Legal Exception: The Danger of Preventive Detention

For a nation that values freedom as much as the United States does, the concept of detention – like torture – further illuminates the tension between liberty and security we so struggle with. Indeed, it is difficult to justify powers of detention within a framework that nonetheless attributes great worth to maintenance of an individual's freedom. Detention, after all, limits freedom and so we must ask ourselves whether there is space for this power in our liberal heritage. From the security standpoint, all forms of detention – e.g. preventive, imprisonment, even arbitrary – must be made available to ensure the preservation of the public safety inasmuch one can never anticipate what future situations may require. On the other hand, broad powers to detain frequently result in the abuse of detainees' rights insofar as too often detentions turn out to be intelligence blunders, unnecessarily long, or simply arbitrary exercises of executive power.

Certainly, this is not a power we can blindly give away risk-free, without any major future ramifications. The authority to detain, to say the least, is no trifling matter and ought to be handled with the utmost care and consideration.

At its most extreme – i.e. in its most unregulated form – the power to detain can inflict serious harm on not just the individual and his/her rights, but on democracy as well. Indeed, the executive – for it is typically the executive who wields this power – can then imprison whomever he wishes, whenever he wishes, on whatever grounds his wishes, and for however long he wishes. His reach is unlimited and the scope of his power, undefined. No one is safe. At any point, darkly uniformed men can arrive on your doorstep, sweep you away without so much as an explanation, and hold you incommunicado for whatever duration of time. You do not know where you are, why you are there, or how long you'll be staying – and neither do your family or friends. To the liberal, what is so frightening about the power to detain is not only the fact that it grants as well as legitimates executive control over an individual's life – his/her freedom – but also because it *is* necessary to the security of the state. Indeed, coercive detention is not always troubling or problematic: "All law enforcement, after all, seeks to prevent crime, and coercion is a necessary element of state power."[75] For example, imagine person A has contracted a highly contagious and lethal virus. Should he then be allowed to roam freely, to go wherever he desires, at the risk of infecting many more people? No, the majority would say, he should be quarantined – i.e. detained. But are we not infringing upon this poor individual's rights? After all, it's not his fault that he got sick. Why should he be punished for something he had no control over? The answer: the public safety demands it. However, this is not to say that this answer alone will always be sufficient to justify detention. Nor is it carte blanche for the executive to abuse his

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[75] David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (New York: New Press, 2007), at 2.

powers by treating the detainee unfairly or holding him beyond what was necessary. The key here is that detentions must be legitimate; they must *not* be arbitrary. If freedom and detention are to coexist, the latter must be held strongly in check. Therefore, in a liberal democratic state, the executive's power to detain must come saddled with strict limitations. And in particular, the power to authorize preventive detention must be both closely scrutinized and tightly regulated.

So let's tweak the hypothetical a bit: what are we to do if we suspected the man was going to contract this terrible contagious disease, but he had not yet? Can we detain him preemptively? In that instance, if we are to steer free of arbitrary detention decisions, then the man must either be (a) uniquely susceptible to contracting diseases insofar as the likelihood of infection is very high or (b) we must be absolutely certain that this man will, without a doubt, become sick in order to justify preventive detention. If we are unsure, then preemptive detention is no longer justified. Why? In practice, preventive detention treads a fine line between the rule of law and authoritarian, arbitrary discretion. "When the end of prevention and the means of coercion are combined," Cole warns, "[t]hey produce a very troubling form of anticipatory state violence – undertaken before any wrongdoing has actually occurred and often without good evidence for believing that any wrongdoing will in fact occur."[76] We need only look to the historical record to see the potential harm this power of detention possesses. After all, the power to detain preemptively is, perhaps, the most vulnerable to arbitrary executive exercise. Unlike the normal criminal process, preventative detention may deny the imprisoned the right to "a public trial, the right to be represented by a lawyer, the privilege against compelled self-incrimination, the presumption of innocence until proven guilty beyond a reasonable doubt, and the right to

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[76] Cole, *Less Safe*, at 2.

confront any evidence used against one."[77] Instead, it may come to resemble administrative immigration proceedings, which denies all of those rights typically associated with the criminal process and subsequently "[makes] it far easier to round up and 'convict' large numbers of individuals on little or no evidence of crime."[78] Better to be safe, they say, than to be sorry. Better to prevent a terrorist attack than be forced to deal with the aftermath – "all the more so when the threats include weapons of mass destruction and our adversaries are difficult to detect, willing to kill themselves, and seemingly unconstrained by any considerations of law, morality, or human dignity that we can recognize."[79] Put in a more everyday context, is it not better to take all the steps necessary to prevent heart attack, then to adopt a 'come what may' attitude towards one's health? This is one aspect of the underlying ethos behind preventative detention, the assumption that not only is there an identifiable enemy to be captured, but also that once the foe is captured, the next strike will have been prevented.

Currently, there have been three principal preventive experiences in the landscape of American history – the Palmer Raids of World War I, the infamous Japanese internment in World War II, and the long-term detention of enemy combatants in today's war on terror – and, to say the least, all three have been highly controversial. When terrorist bombs exploded almost simultaneously in eight different cities across the United States in 1919, the Justice Department responded by apprehending several thousand foreign nationals in coordinated cross-country raids – raids which are now known as the Palmer Raids.[80] These men were "herded into bullpens, interrogated without lawyers, and charged with technical violations and association with various

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[77] David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003), at 127.
[78] Cole, *Enemy Aliens*, at 127.
[79] Cole, *Less Safe,* at 6.
[80] Cole, *Less Safe*, at 48.

communist parties. Hundreds were eventually deported."[81] Yet, not a single individual was found to have been involved with the bombings. How could this be? "[To] Hoover, Palmer, and arguably to Congress as well," Cole explains, "mere membership in a group advocating the propriety of forceful overthrow of government was sufficient to warrant detention and expulsion, without regard to whether a particular individual had ever actually engaged in or supported any criminal or violent activity."[82] The fact of the matter was the seized men had not been chosen because of their suspected involvement in the attacks, but for their communist affiliations.[83] After all, in the eyes of law enforcement, any association with communism meant that you were not only undemocratic, but also a potential enemy of the state.

Even if the men apprehended in the Palmer Raids were not guilty of this particular crime, who is to say that they will not be responsible for the next one? Is it not better to nip that threat in the bud, then to allow it to potentially bite us in the behind at some indeterminate future date? And so in lieu of singling out those individuals who were actually involved in the execution of the terrorist bombings, the Justice Department "took a broad-brush approach and sought to neutralize all persons who it thought might pose a potential *future* threat."[84] In the paradigm of preventive detention, individual culpability is irrelevant. It does not, in other words, matter whether you actually did or are responsible for what they are accusing you of. What's important, what's relevant, is that because of who you are or what you are associated with, you *might* do it – and to the government, that potential is damning enough.

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[81] Cole, "The Priority of Morality," at 1754.
[82] Cole, *Enemy Aliens*, at 127.
[83] Cole, *Less Safe*, at 48.
[84] Cole, *Enemy Aliens*, at 125-126.

Guilty Until Proven Innocent: Japanese-American Internment in the Second World War

Masuo Yasui, a Japanese immigrant businessman residing in Oregon, lived an ordinary American life. He was a well-respected leader in his community, a dedicated Rotary Club member, and a "prominent figure in both the largely white apple growers' association and the valley's Japanese-American community.[85] He raised his seven children as Methodists, and worked tirelessly to provide them all with the opportunity of pursuing a college education. In short, Masuo Yasui lived the American dream. And when the Japanese launched a sneak attack on Pearl Harbor on December 7, 1941,[86] Yasui wasted no time sending a telegram to his son, Minoru – at the time, an officer in the U.S. Army Infantry Reserve – urging him to do his patriotic duty and enlist.[87] From Masuo's standpoint, there was never a question that his loyalty would lie with the nation which they called home, and not the nation of his birth.

Soon after he received his father's telegram, Minoru resigned from his job as a lawyer working for the Chicago Japanese consulate and reported for duty at Fort Vancouver, Oregon.[88] Yet a day after the army assigned him the post of platoon leader, Minoru was relieved of his military duty. The army discharged him. A few days later, Masuo Yasui was arrested and taken to an internment camp in Missoula, Montana. What was the reason behind this abrupt detention? Apparently, the elder Yasui's "name had appeared on a list generated in Washington of potentially dangerous Japanese nationals to be considered for internment as 'enemy aliens.' The

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[85] Cole, *Enemy Aliens*, at 88.
[86] "Japan's military strike on Pearl Harbor was also said to be preventive. The Japanese felt cornered by President Roosevelt's freezing of Japanese assets and imposition of an oil embargo. They believed that war with the United States was inevitable, and that only by launching a preemptive strike could they avoid defeat. Admiral Yamamoto, commander in chief of the Japanese fleet, wrote that 'in the event of outbreak of war with the United States, there would be little prospect of our operations succeeding unless, at the very outset, we can deal a crushing blow to the main force of the American fleet in Hawaiian waters.'" Cole, *Less Safe*, at 174.
[87] Yasui to his son Minoru: "Now that this country is at war and needs you, and since you are trained as an officer, I as your father urge you to enlist immediately." As quoted in Cole, *Enemy Aliens*, at 88.
[88] Cole, *Enemy Aliens*, at 88.

list, which contained over 2,000 names"[89] encompassed a wide variety of people from different walks of life: from Japanese nationals prominent in their respective communities to both Shinto and Buddhist priests. The Federal Bureau of Investigation (FBI) had prepared this "custodial detention list" of potentially dangerous persons at President Franklin D. Roosevelt's request. But how did Masuo Yasui's name get on that list? David Cole explains the process:

> FBI records reveal that placement on the list turned largely on political and ethnic associations. The list was constructed from subscription lists to German, Italian, Japanese and Communist newspapers, membership in political or ethnic organizations, and reports on meetings and demonstrations. Italians, for example, could end up on the FBI's list if they had been members of the Italian War Veterans (IWV) organization; were associated with Italian language newspapers, magazines, or radio shows; or were Italian language instructors in schools sponsored by Italian consulates.[90]

When Minoru petitioned to defend his father in his internment hearing, he was denied on the grounds that internees were neither permitted access to counsel nor information concerning the charges against them. The detainees were given individualized hearings that typically took place far from home, which typically disallowed any other testimony on the internee's behalf aside from his own. "And despite the importance of the FBI's 'custodial detention list' to internment and exclusion decisions," Cole further writes, "the Bureau did not provide any information about the organizations on the list to the enemy alien hearing boards, to the army or its intelligence division, or to the commanding generals who had final authority to make exclusion decisions."[91] To say the least, the intelligence available to both the detainee and those sitting in judgment was extremely limited – as exemplified in the telling of Masuo Yasui's hearing.

Minoru, although he was unable to represent his father, was allowed to sit in on his father's hearing and described it as follows:

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[89] Cole, *Enemy Aliens*, at 88.
[90] Cole, *Enemy Aliens*, at 93.
[91] Cole, *Enemy Aliens*, at 94.

> They produced some very childish maps of the Panama Canal, and they were saying, "Do you know what these are?" Dad looked at them and said, "They look like maps of the Panama Canal." "How did you get them?" he was asked. "Well my kids drew these maps in school." The maps were illustrations of how the locks worked. The questioner [then] said, "This shows how you were really trying to disguise a nefarious plot to blow up the Panama Canal." Dad said, "Of course not, I had no such intention." "Well, prove that you didn't have an intention," they replied.[92]

Prove that you never had the intention to bomb the Panama Canal, the authorities demanded. Aside from the inversion of the burden of proof – i.e., the detainee must prove his innocence, instead of the government being required to prove his guilt – the real difficulty of the above statement is its implausibility: how is one to show proof of innocence if the intention never existed in the first place? There is no paper trail or witnesses who can testify to your innocence. Indeed, the answer is simple: you cannot prove anything – neither guilt nor innocence. As mentioned previously, in the preventive detention paradigm, proof of individual guilt is irrelevant – what matters is the possibility, the what if. And until shown otherwise, one is simply presumed to be guilty. Indeed, when Masuo Yasui was unable to definitively demonstrate that he had neither the capability nor the intention to blow up the Panama Canal, he was then interned for a period of *three* years, from 1942 until 1945.

The very same day Pearl Harbor was attacked, President Franklin D. Roosevelt invoked the Enemy Alien Act against Japanese nationals – though in the next twenty-four hours he expanded those regulations to include German and Italian citizens as well. Subsequently, of the five million immigrants present in the United States in 1940, "900,000 were classified as enemy aliens upon the United States' entry into the war."[93] In other words, almost one-fifth of the U.S. immigrant population became legally categorized as enemy aliens, a classification which

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[92] Cole, *Enemy Aliens*, at 89.
[93] Cole, *Enemy Aliens*, at 93.

prohibits them from venturing outside a five-mile radius of their homes without permission, subjects them to a dusk-to-dawn curfew, and forbids them from owning guns or such electronic devices as cameras and shortwave radios. Enemy aliens are also subject to "sweeping administrative search and seizures – without probable cause – for any such 'contraband,'"[94] as well as required to have their alien registration certificate on their person at all times.

A few weeks after Yasui was interned, on February 19, 1942, Executive Order 9066 was signed into law. The order authorized the military to prescribe certain areas as military zones "from which any or all persons may be excluded, and with respect to which, the right of any persons to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose [at] his discretion."[95] The order also resulted in a curfew imposed not only on Japanese nationals, but also on *all* persons – i.e. U.S. citizens – of Japanese ancestry residing on the West Coast.[96] No longer were regulations only applicable to immigrants, i.e. foreign-born, but American citizens became subject to them as well. In this instance, the relevant factor clearly was not one's citizenship, but one's ethnicity. The final outcome of these preventive detention efforts in World War II was the internment of approximately 110,000 persons of Japanese descent, with more than 70,000 being American citizens. Although the justification offered in defense of the government's actions was to

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[94] Cole, *Enemy Aliens*, at 93.
[95] Franklin D. Roosevelt, "Authorizing the Secretary of War to Prescribe Military Areas," Executive Order 9066, February 19, 1942, accessed March 04, 2011, http://historymatters.gmu.edu/d/5154.
[96] Deeply offended by this piece of legislation, Yasui's American-born son, Minoru, sought to directly challenge the legitimacy of this when on March 28, 1942, "he walked into a police station in Portland and demanded to be arrested for violating curfew, thus launching the first test case of the military's campaign to restrict the rights and freedoms of Japanese-Americans." His bravery, however, did not come without a price. Shortly after his stand, in accordance with an evacuation order commanding all persons of Japanese ancestry – American citizen or not – to be evacuated, Minoru Yasui and his entire family were ordered to leave their homes and "report for internment as part of the military's wholesale evacuation of Japanese and Japanese-Americans from the West Coast." As for his lawsuit, Yasui did see his challenge to the curfew reach as far as the Supreme Court, where he lost by a unanimous vote. "He ultimately spent more than nine months in solitary confinement in a county jail for standing up for a principle of equality that he had learned as a young boy in American public schools." Cole, *Enemy Aliens*, at 89.

"forestall espionage or sabotage by Japanese and Japanese-Americans living on the West Coast,"[97] not one of the internees was discovered to have engaged in either espionage or sabotage. The only basis on which they were held was the presumption that their Japanese heritage spoke for itself – similar to how those rounded up in the Palmer Raids were suspect because of their communist affiliations. In other words, because they were of Japanese ancestry, every one of those internees *could* have engaged in either espionage or sabotage – they all possessed the potential, if not the motive. The question is: In a liberal democratic state, is the *possibility* – the "what if" – enough to legitimate government actions in times of crisis, even when the harm is often, in practice, limited to the minority?[98] At the time, the United States Supreme Court answered this question in the affirmative.

"Reviewing challenges to the government's anti-Japanese measures," David Cole argues, "the Supreme Court deferred to the military, accepted the racial prejudice that underlay the wartime restrictions, and upheld both the initial curfews and the ultimate internment."[99] In fact, he further remarks, the Court scarcely acknowledged that these cases presented an issue of citizenship. Instead, the Justices chose to adopt the military's equivocation of valid suspicion with an individual's ancestry: "[t]he fact alone that the attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular association with Japan."[100] In other words, *because* you are Japanese – no matter which country issued your passport – you are suspect. This was, in fact, the underlying assumption informing the decision made in the infamous *Korematsu v. United States* case.

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[97] Cole, "In Case of Emergency."
[98] Nativism, "defined by historian John Higham as 'intense opposition to an internal minority on the ground of its foreign (i.e., 'un-American') connections,' has been a persistent theme throughout our history. From the nation's earliest days, citizens have deemed immigrants suspicious based on their racial, religious, and ethnic difference, and their radical associations and ideas." Cole, *Enemy Aliens*, at 90.
[99] Cole, *Enemy Aliens*, at 97.
[100] *Hirabayashi v. United States*, 320 U.S. (1943) at 96-97, 101, as quoted in Cole, *Enemy Aliens*, at 98.

Although the Court acknowledged that laws discriminating on the basis of race or national origin are *typically* – i.e., normally – subject to the highest level of judicial scrutiny, the majority nonetheless deferred to the military's judgment in the case of Japanese internment. The Supreme Court, in *Korematsu*, ultimately "rejected the argument that the Japanese were victims of racial prejudice by deferring to the military's assertions that some Japanese were disloyal, and that it was impossible to separate the disloyal from the loyal."[101] Indeed, the Court argued that there was no reason to reject the government's argument that should internment be restricted, should the military's power of detention be constrained, an invasion – or another Pearl Harbor – may then occur. The internment of the Japanese – both foreign nationals and American citizens – is then justified when faced with the possibility of so great a security threat. Justice Hugo Black articulated exactly this mindset in his *Korematsu* majority opinion:

> We cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.[102]

In short, the stance taken by the judges in this case can be summed up as: Because we cannot say for sure what the gravity of the security threat is, it is better to err on the side of caution within this context. Therefore, internment – i.e. preventive detention – based exclusively on race while not preferable, is nevertheless a-okay.

With regard to preventive detention, historically the American people have admitted that, in hindsight, the reaction and conduct of its government was an overreaction. Once the dust of crisis has settled down, we sheepishly acknowledge that yes, it was wrong to suppress speech

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[101] Cole, *Enemy Aliens*, at 98.
[102] *Korematsu v. United States*, 323 U.S. 214 (1944), quoted in Ackerman, *Before the Next Attack*, at 63.

during World War I, to arrest and deport foreign nationals merely because of their political associations during the Palmer Raids, to intern over a hundred thousand people of Japanese ancestry solely based on their ethnicity, and to both discriminate against, humiliate, and prosecute Communists during the Red Scare.[103] And in the case of the Japanese internees, the government has gone so far as to issue not only a formal apology, but also reparations to those interned – nearly forty years after the fact. The harm is clear: "Roosevelt should never have allowed wartime hatreds to sweep an entire racial group into internment camps, without *any* individualized showing of collaboration with the enemy."[104] At the same time, *Korematsu* was never formally overruled even as it is universally condemned. This is a troubling technicality insofar as it remains to be seen whether the precedent will be resurrected in the context of today's war on terror. For who knows what we will think should another attack occur within the next decade. Indeed, "the real difficulty," Michael Ignatieff says, "[is] to get the balance right when emergencies are underway, and when no one knows what measures will turn out to have been necessary."[105] Who knows how the government will react to the crisis, and what the courts will say should Arab and/or Muslim Americans be rounded up in a way similar to how the Japanese were more than half a century ago. The crucial question is: have we learned anything about the dangers of preventive detention? Based on our actions in the aftermath of 9/11, it appears we have not yet heeded the lessons history has taught us.

[103] Cole, *Enemy Aliens*, at 228-229.
[104] Ackerman, *Before the Next Attack*, at 63.
[105] Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (New Jersey: Princeton University Press, 2004), at 36.

The Unbroken Cycle: Welcome to the New Preventive Paradigm

In late 2001, U.S. military forces had begun to receive prisoners from both the Afghans and the Pakistanis. Although a few of these men had been captured on the battlefields, most – as was later discovered – were not. Under international laws of war, American commanders were authorized only to detain men picked up on the battlefield. The Bush Administration, however, had granted them a larger scope, and so even after the battlefields disappeared, men were still being arrested. Many of these men were, in fact, the result of enthusiastic responses to the thousands of bounty posters and leaflets both posted and dropped from U.S. military airplanes as part of the campaign to win the "hearts and minds of Afghanistan."[106] Unsurprising, given what the typical flyer advertised:

> Get wealth and power, beyond your dreams….You can receive millions of dollars helping the anti-Taliban forces catch al-Qaeda and Taliban murders. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for your people.[107]

If you lived in an impoverished and war-stricken country – living day-by-day with scarcely enough food to feed your family – and saw what these flyers were promising, would you not be tempted to respond, to turn *someone* in, even if you did not actually know any Taliban or al-Qaeda members? To say the least, the campaign was successful inasmuch it provided the incentive to generate hundreds of responses. However, the greater problem was the matter of *who* was being turned in. Were they truly terrorists, a threat to American safety? Or was it far more likely – due to the nature of the incentive provided – that a good amount of these captured "terrorists" were the victims of human avarice and paranoia than actual enemy fighters?

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[106] Stephen T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* (New York: Other, 2008), at 68. "Defense Secretary Donald Rumsfeld later boasted that such leaflets fell over Afghanistan 'like snowflakes in December in Chicago.'" Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* (New York: New York University Press, 2011), at 35.
[107] Hafetz, *Habeas Corpus After 9/11*, at 35.

Unfortunately, according to the results of a 2006 study by Seton Law School, the latter statement turned out to be true. Indeed, only eight percent of the detainees held at the U.S. Naval Base at Guantánamo Bay, Cuba, were classified as al Qaeda fighters whereas *forty* percent had no definitive connection with al Qaeda. The study further discovered that fifty-five percent of detainees "had never committed a hostile act against the United States or its coalition allies," and that "only [five] percent of Guantánamo detainees were captured by the United States, while [eighty-six] percent had been turned over to the United States by Pakistani or Northern Alliance forces."[108] It appears that in the light of day many of the so-called "worst of the worst"[109] are simply men who had the misfortune to be in the wrong place at the wrong time.

In the beginning, most of the men detained were either held in prisons at American military bases in Bagram and Kandahar, or in Pakistani prisons: "By December 2001, the United States had forty-five prisoners in its [exclusive] custody," with an additional "three thousand prisoners were being held by the Northern Alliance and other anti-Taliban forces elsewhere in Afghanistan."[110] Then on December 27, 2001, the Defense Department announced its decision to transfer the prisoners currently in military custody to the U.S. Naval Base at Guantánamo Bay, Cuba. After all, with the number of prisoners captured by the U.S. Armed Forces in Afghanistan rapidly growing, the U.S. needed a secure location to hold these men where they could be mined for information with no release date in sight. "Guantánamo's overriding purpose," Hafetz claims, "[w]as not detention but intelligence gathering"[111] removed out of the public eye. In other words,

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[108] "A subsequent Seton Hall study found that one-third of the detainees at Guantánamo were identified based on links to organizations other than al Qaeda. Also, in many of those cases, neither Congress nor the State Department had identified the organizations as a terrorist group. This meant that a person could be detained at Guantánamo as an "enemy combatant" based on an alleged association with an organization that would not bar him from entering the United States if he sought admission at the country's borders." Hafetz, *Habeas Corpus After 9/11*, at 34.

[109] Hafetz, *Habeas Corpus After 9/11*, at 33.

[110] Hafetz, *Habeas Corpus After 9/11*, at 28.

[111] Hafetz, *Habeas Corpus After 9/11*, at 38.

the administration needed a place where interrogation methods that would otherwise be illegal in the States could be employed. Indeed, Hafetz argues further, "[t]he desire to extract information through torture and other illegal methods shaped virtually every aspect of Guantánamo, from the creation of a category of prisoners without legal protection to the effort to avoid habeas corpus review by federal courts."[112] The first twenty prisoners arrived at the Guantánamo Bay on January 11, 2002.[113] And with "military cargo planes [b]ringing Muslim men seized in Afghanistan and Pakistan to Cuba, 20 and 30 at a time,"[114] the prison population at Guantánamo had ballooned into three hundred within a month and within the next few years, the number would climb to a little short of eight hundred.

The U.S. Naval Base at Guantánamo Bay is located in Cuba's southeast corner, approximately four hundred miles from Miami, Florida, and occupies a forty-five square mile area. The United States first acquired the land during the Spanish-American War, and in 1903, Cuba gave the United States a perpetual lease for both a coaling and a naval station.[115] Although Guantánamo Bay still formally belongs to Cuba, the United States has, for the past century, maintained *de facto* control over the territory through the renewed 1903 lease agreement. Under the terms of the lease, control over Guantánamo is effectively permanent, so long as the United States annually pays the rent, so to speak.[116] What also differentiates Guantánamo from all other overseas U.S. military bases is the fact that there is no Status of Forces Agreement (SOFA) to "define the assignment of civil and criminal jurisdiction over military and other personnel

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[112] Hafetz, *Habeas Corpus After 9/11*, at 38.
[113] Hafetz, *Habeas Corpus After 9/11*, at 31.
[114] Carol D. Leonnig and Julie Tate, "Some at Guantanamo Mark 5 Years in Limbo: Big Questions about Low-Profile Inmates," *The Washington Post*, January 16, 2007, accessed March 05, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/15/AR2007011501227.html.
[115] Hafetz, *Habeas Corpus After 9/11*, at 28.
[116] Hafetz, *Habeas Corpus After 9/11*, at 28.

there."[117] The only law that is applicable there is U.S. law. In that sense, the United States is thereby "accountable only to itself."[118] And as the decades passed, the Base became entirely self-sufficient, "with its own water plant, schools, transportation system, entertainment facilities, and franchise outlets and chains, from Starbucks to McDonald."[119] In essence, it has transformed into a little slice of home away from home. Indeed, Guantánamo Bay has become American in all but name.

So why make Guantánamo the primary site of long-term detention? A leaked December 28, 2001 memo by Office of Legal Counsel (OLC) John Yoo and his fellow attorney Patrick F. Philbin provides the answer:

> [T]he Bush administration chose Guantánamo because it believed Guantánamo would be beyond the jurisdiction of the federal courts and thus immune from judicial review. Without jurisdiction, a court could not examine the basis for any prisoner's confinement. It could not, therefore, consider whether the prisoners were entitled to any legal protections (contrary to the president's determination) or examine the allegations against them. It could not order that the prisoners be provided access to attorneys, to family members, or to anyone else from the outside world. A court could not inquire into the prisoner's treatment, thus insulating torture and other abuse from judicial scrutiny.[120]

In short, the government chose to transfer detainees to Guantánamo in order to evade the writ of habeas corpus – one of our most fundamental protections against arbitrary government. Indeed, the writ of habeas corpus guarantees the opportunity for those detained by the state to challenge the legality of their imprisonment before a judge. Although the exact procedural guarantees of the writ do differ in different contexts, historically the writ's protections have nonetheless been at its strongest when applied to executive detention. So why did the administration believe its detention policies could evade review if moved to Guantánamo?

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[117] Hafetz, *Habeas Corpus After 9/11*, at 28.
[118] Hafetz, Habeas Corpus After 9/11, at 29.
[119] Hafetz, *Habeas Corpus After 9/11*, at 28.
[120] Hafetz, *Habeas Corpus After 9/11*, at 29.

The administration believed that the federal courts would refuse to grant habeas petitions brought by or on behalf of the detainees held at Guantánamo for two reasons: (1) the majority of detainees were foreign nationals (2) all were captured overseas and are now being held outside the sovereign territory of the United States. They also did not believe the federal courts would give much weight to the claim that the United States, in effect, exercised "total and exclusive control over Guantánamo."[121] After all, their line of thinking was not entirely novel – the argument was once put forward by the prior Clinton administration in response to thousands of Haitians and Cuban refugees seeking asylum in the early 1990s.[122] And although both Yoo and Philbin acknowledged the risk of potential litigation from detainee lawsuits, they nevertheless concluded that the courts would hesitate "to interfere with the president's decision in the area of military and foreign affairs."[123] This assumption would also undergird the other offshore detention sites at Bagram Air Base in Afghanistan as well as various secret CIA "black sites" located all over the world thereby creating, as Hafetz calls it, "a new global network of prisons outside the law."[124]

Detain First, Ask Questions Later: The Achilles Heel of the Emergency Constitution

History teaches us that, in time of war, we have often sacrificed fundamental freedoms unnecessarily.

– Geoffrey Stone, on behalf of Fred Korematsu (2003)

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[121] Hafetz, *Habeas Corpus After 9/11*, at 30.
[122] Hafetz, *Habeas Corpus After 9/11*, at 30. For a more in-depth account of the Clinton administrations' handling of the Haitian refugees, *see* Brandt Goldstein, *Storming the Court: How a Band of Yale Law Students Sued the President and Won* (New York: Scribner, 2005).
[123] Hafetz, *Habeas Corpus After 9/11*, at 30.
[124] Hafetz, *Habeas Corpus After 9/11*, at 30.

The events of the 21st century, as well as that of history, have shown us that the executive power to detain preemptively in the context of war or crisis have often resulted in abuse – i.e., infringements upon minority rights. Indeed, it is even questionable whether preventive detention as it has been practiced thus far has a place in a nation ruled by law. David Cole articulates this point best:

> The rule of law, after all, is designed to subject state power to careful checks, to scrupulously enforce the line between guilt and innocence, and to hold government officials accountable to clear rules. These ideals mix uneasily with the strategies of the preventive paradigm, which generally demand sweeping executive discretion, eschew questions of guilt or innocence (because no wrong has yet occurred), and substitute secrecy and speculation for accountability and verifiable fact. Where the rule of law insists on objective evidence of wrongdoing, the preventive paradigm relies on predictions about future behavior.[125]

And in times of crisis, this tension becomes further amplified insofar as the fear that we will somehow let a real terrorist slip through our fingers is at its zenith – a paranoia which subsequently fosters what Cole calls "false positives, " i.e. the detention or punishment of innocents, to be constructed as necessary evils.[126]

At the same time, I am not advocating for a categorical prohibition of preventive detention. In fact, we *should* be allowed to preemptively detain those people we know definitively to be dangerous or pose a flight risk. Indeed, there is nothing inherently problematic about a preventive detention law that is carefully tailored, "preserve[s] prompt judicial review, and restrict[s] resort to other laws that have been abused for preventive detention purposes in the past."[127] However, preventive detention as it has thus far been used in times of emergency has not fulfilled those requirements – and neither does the version of preventive detention Bruce Ackerman offers under his emergency constitution. As a result, the emergency constitution

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[125] Cole, *Less Safe*, at 5.
[126] Cole, *Less Safe*, at 5.
[127] Cole, "In Case of Emergency."

proposed by Ackerman does not go far enough to sufficiently remedy the dilemma we currently face.

However, let us first review what Ackerman says about preventive detention under the emergency constitution. While a state of emergency is in effect, the executive will have (1) the power to can hold suspects for a maximum of forty-five days; (2) upon detention, the government must present a factual showing to the court justifying its actions; (3) the detention must be based, at minimum, on grounds of "reasonable suspicion"; (4) at the end of the forty-five day period, the government must either bring criminal charges against the detainee or release him; (5) if the detainee is not charged or if he has been acquitted, he is due compensation at a rate of $500 for every day he was wrongfully imprisoned; and (6) torture and other abuses are absolutely off limits. In addition, a further constraint on the executive's power to detain is what Ackerman calls the "supermajoritarian escalator," which mandates the renewal of emergency powers – and therefore, the executive authority to detain – at "two-month intervals by increasingly lopsided 'supermajorities.'"[128] What Ackerman seeks to remedy with the emergency constitution is the current lack of a proposal that can effectively address both the short-term difficulties present in the possibility of a second attack and the long-term challenge of preserving our nation's civil liberties. So what's wrong? The emergency constitution is problematic insofar as it is far from certain whether preventive detention – in the form Ackerman has outlined – can solve those short-term and long-term problems. In other words, it is questionable whether preventive detention, in practice, is (a) capable of protecting us from a second attack or (b) can aid in the preservation of – rather than harm – our civil liberties in the face of national security.

[128] Cole, "In Case of Emergency."

First of all, in defending the necessity of his emergency constitution, Ackerman conflates the success of the preventing the second attack with the implementation of emergency detention:

> Within this context [of the second strike], the instrumental case for an emergency regime is straightforward. Emergency detention will allow the security services to detain suspects on their "watch lists," without concretely linking them to the particular terrorist conspiracy that has demonstrated its potency. This dragnet will undoubtedly sweep many innocents into detention, but it may well catch a few key actors: disrupting the second strike, saving lots of lives, and deflecting a blow to the body politic.[129]

As was discussed in previous sections, history has shown that oftentimes what Ackerman calls the "second strike rationale"[130] proves to be an illusion – recall the Palmer Raids of World War I and the World War II internment of both Japanese nationals and Japanese-Americans. In fact, we need only look to the recent events – i.e., Guantánamo – to see that preventive detention, in practice, has both yielded precious little results and caused a great deal of harm to those unfortunate enough to be caught in its unnecessarily broad dragnet. Although Ackerman acknowledges that preventive detention, when seen through the lens of history, appears as a "primitive and paranoiac impulse to lash out at convenient scapegoats,"[131] he nonetheless denies that this thereby prohibits the possibility of future success.

Even though the dragnet may fail at capturing actual terrorists, Ackerman writes, there is nothing to rule out the possibility that it disrupts the terrorist network enough to dissuade them

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[129] Ackerman, *Before the Next Attack*, at 47.
[130] Ackerman outlines three functional premises upon which his "second strike" rationale rests: (1) "[A] massive terrorist strike generates a great deal of bureaucratic confusion. The security services have been caught by surprise: they don't know what's going on, and their efforts to find out are deflected by recurring episodes of bureaucratic infighting, faultfinding, and blame evasion. And yet for all the backbiting, Homeland Security will be in a position to frame a short-term response. The bureaucracy has been preparing long lists of the 'usual suspects' over the course of many years. This provides a basis for an emergency dragnet []"; (2) "[T]ime is of the essence, because the initial terrorist strike greatly increases the probability of a second major attack. [I]f its attack isn't merely the result of a lucky break, the terrorists have probably prepared the way for a series of strikes before the first one occurs"; (3) [T]he damages of a second strike will be very great indeed….With repeated attacks on a massive scale, people face the open-ended prospect of great and unpredictable violence, leading to a quantum jump in general anxiety and signs of panic. This general unease, in turn, paves the way for a new cycle of political demagoguery." Ackerman, *Before the Next Attack*, at 46-47.
[131] Ackerman, *Before the Next Attack*, at 50.

from carrying out a second attack. After all, what is to say that an emergency dragnet with a wide scope won't make the terrorists more nervous as the likelihood that they will fall into its reach is far greater than it would be if the dragnet were targeted and narrow? Not to mention, he further argues, "a major terrorist attack throws us into a condition of *radical* uncertainty, in which *nobody* can responsibly claim to *know* the risk of the second-strike, much less that a dragnet is *certainly* inefficacious."[132] In short: even if preventive detention has failed in the context of emergency each and every time, there is nothing to say that the next time won't be different.

Yes, it is entirely possible that the next time an emergency dragnet is cast it will succeed. Very few people, aside from extremists, would deny this. Yes, Ackerman does provide a more constrained take on emergency detention by not only specifying a time constraint, but also offering compensation for those acquitted – which is different from offering compensation for those who were, as David Cole argues, arrested absent any legitimate basis.[133] Yes, he does say that detention must be based on "reasonable suspicion" that a person may be involved in an illegal act in order to decrease the probability of wrongful detention.[134] This standard originated from a Supreme Court case that permitted police "stop people briefly in public places in order to dispel or confirm their 'reasonable suspicion' that a crime may be afoot."[135] Inasmuch these stops are but temporary inconveniences as well as an important method for crime investigation, the Court ruled that they could be justified on "reasonable suspicion" instead of the more

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[132] Ackerman, *Before the Next Attack*, at 50.
[133] "Compensation in Ackerman's scheme turns not on whether there was any basis for the detention in the first place, but only on whether a person is successfully prosecuted for a crime thereafter. Thus, those arrested without any legitimate basis get no compensation so long as prosecutors can convict them of even the most minor offense – from credit card fraud to a false statement on a government form." Cole, "In Case of Emergency."
[134] "[S]uspects should be taken expeditiously before a judge even if they aren't given a chance to rebut the charges against them, and prosecutors should place the grounds for their suspicion on the record….At the very least, the preliminary hearing will force the prosecutor to obtain a statement from the security services, explaining why it believes that its suspicions are "reasonable" – the operational standard under the emergency constitution." Ackerman, *Before the Next Attack*, at 107.
[135] Cole, "In Case of Emergency."

rigorous standard of "probable cause." As to what is even meant by "reasonable suspicion," the Court has both said that it's "more than a hunch" and "that if a person runs away from the police in a high-crime area, that behavior is sufficient to meet the standard of 'reasonable suspicion.'"[136] Aside from the problem of "[w]hether a standard of suspicion created to justify temporary stops on public streets *should* be sufficient to warrant forty-five days of incarceration,"[137] we need to also consider whether this standard would succeed in decreasing the number of innocents languishing in detention centers. Most likely, it would not. Indeed, as Cole illuminates, "the more fundamental problem is that even this minimal standard is meaningless if judges cannot enforce it."[138] If detainees are not allowed to challenge the basis of their detention before a court while they are in jail, then the executive becomes the sole judge on what "reasonable suspicion" entails. In other words, "reasonable suspicion" is what the executive says it is – it can be as broad or as narrow as he wishes. The biggest flaw of Ackerman's proposal is its failure to remedy the fundamental glitch of preventive detention as seen through the examples of the Palmer Raids, the Japanese internment, and Guantánamo detainees – i.e., the fact that preventive detentions have, in practice, failed to differentiate between legitimate and illegitimate arrests insofar as the only determinant of the detention's legitimacy is the executive. Instead, preventive detention under the emergency constitution ends up looking not too different from that of previous crises.

Suddenly, Ackerman's detention scheme begins to look like something the security apologist might argue: In an environment of emergency, the possibility is all that is necessary to justify preemptive detention. Is not the purpose of preemptive detention to prevent an individual

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[136] Cole, "In Case of Emergency."
[137] Cole, "In Case of Emergency," (emphasis added).
[138] Cole, "In Case of Emergency."

likely to commit a crime or an attack from succeeding by physically holding him captive? After all, if he's sitting in a cell at an internment facility, he cannot go blow up a building. And so if we round up a bunch of people who might be likely to commit an attack of terror, does the risk of a second attack then not decrease substantially? In fact, if the second attack does *not* occur, then who is to say that preventive detention is unsuccessful? Are we not more secure? The problem is once the government is relieved of the "ordinary requirement that they demonstrate objective, individualized evidence of dangerousness or flight risk in order to detain suspects, law enforcement officials resort[] instead to political association, racial and ethnic identity, and religion as proxies for suspicion."[139] In other words, if the decisions on who to imprison are made on arbitrary grounds – i.e. race, ethnicity, political or religious affiliation, etc. – then how can we know that there was even a second attack to deter? If we have all the wrong people in custody – assuming the determination to detain was not made on grounds of actual suspicion, but solely based on profiling – and still no follow-up strike, does that not mean that the reason behind the deterrence of the next attack is because it was never planned in the first place and *not* because we apprehended a bunch of people who we suspected *might* carry out the next attack? And if this is true, then for what purpose have we detained these people in the first place? What justification do we then have for the harm we have inflicted?

In response, Ackerman might argue that issues of expediency justify such harms. Remember, this is a "study of lesser evils."[140] *Before the Next Attack* is not simply a theoretical exercise, but a practical solution as well. "[T]his book," Ackerman writes, "explores how this promise [of the emergency constitution] might be realized in the real world."[141] So let's be

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[139] Cole, "The Priority of Morality," at 1755.
[140] Ackerman, *Before the Next Attack*, at 9.
[141] Ackerman, *Before the Next Attack*, at 3.

realistic. In the immediate aftermath of an attack, security forces will be scrambling to reassure the general public of their safety.

> 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. 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.[142]

In other words, the possibility of letting a terrorist slip through our fingers is too great for us to place too great a burden on our security forces. Not to mention, judges, being the wise men and women they are no doubt understand the gravity of the risks at stake, may then defer to government judgment anyways, leaving us with a bunch of hearings without much relief. This situation is simply a lose-lose: the deferential judicial system is bogged down by massive caseloads and the detainees are afforded more false hope than actual relief. Yes, the emergency constitution may not protect against countless cases of illegitimate detention, and the forty-five day detention is regrettable, but there may still be some upsides. Indeed, after six weeks have gone by, a judge will likely be less deferential and lenient now that she has had the "real chance to search the files and find out what's really there."[143] Subsequently, Ackerman argues, the detainee might even have a better prospect of release than if his case had been heard earlier.

"All things considered," Ackerman writes, "the judges should sit on the sidelines while the political branches, aided by the supermajoritarian escalator, determine whether the threat of a second strike is serious enough to merit a continuing state of emergency."[144] With regard to limiting emergency powers and protecting individual liberties, it is clear that he believes legislative checks to be more effective than judicial checks. After all, judicial review demands a

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[142] Ackerman, *Before the Next Attack*, at 108.
[143] Ackerman, *Before the Next Attack*, at 108.
[144] Ackerman, *Before the Next Attack*, at 103.

certain amount of time that we just cannot afford in the immediate aftermath of crisis. Instead, we ought to place our faith in the legislature – we elected them after all – to restrain the executive: "If the president can convince a majority of Congress of the need for emergency authority, this should suffice."[145] But is Congress capable of such restraint? Legal scholar Martha Minow is doubtful. She raises three criticisms in particular: (1) even if the emergency constitution were to be made into law, there is no guarantee that Congress would not simply abandon the provision's terms once the two month marker has passed and a supermajority is now required to renew emergency powers; (2) because the executive possesses the power to not only control information about terrorist threats, but can also shield its own abuses from both politicians and journalists, the effectiveness of the legislative check is then compromised; (3) it is unlikely that the sense of urgency which justifies the enactment of a state of emergency would simply decline with time.[146]

The American constitution is uniquely difficult to amend – especially on matters that are even moderately controversial.[147] And so, as it is "entirely unrealistic to agitate for formal amendments – the task, instead, is to persuade Congress to build upon existing emergency legislation and create a 'framework statute'"[148] that constrains executive power in the short-term and protects civil liberties in the long-term. The problem is, unlike a constitutional amendment, a statute does not have a binding effect on subsequent Congresses insofar as the "Constitution gives Congress the power to enact or repeal any law within its authority, so long as it obtains a

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[145] Ackerman, *Before the Next Attack*, at 102.
[146] Minow, "The Constitution as a Black Box," at 595.
[147] "As recent experience has proved, the existing system for constitutional amendment contains so many veto points that it will even defeat proposals that have gained broad national consensus. No controversial change has won enactment for seventy-five years." Ackerman, *Before the Next Attack*, at 123.
[148] Ackerman, *Before the Next Attack*, at 122.

bare majority of each house and the approval of the president."[149] Put into context, should seventy-nine percent of Congress still wish to keep in effect the emergency constitution after six, eight, or ten months, but twenty-one percent disagrees, it might then decide that the supermajoritarian escalator has become too much of an impediment to executive action and repeal it. Or Congress could even pass new emergency legislation through a majority vote that grants the president the same or potentially even greater discretion. And while Ackerman responds to this difficulty by falling back on judicial review,[150] Cole challenges this failsafe insofar as "the escalator is only statute, [and so] there would be no legal basis for doing so. When statutes conflict, the long-established rule is that the later statute prevails over the earlier, because Congress is always free to change its mind."[151]

In response, Ackerman notes that insofar as the emergency scheme is a partial suspension of the writ of habeas corpus, its legal basis is then the Suspension Clause. Therefore, if Congress attempted to rid itself of the supermajoritarian escalator, it might then "trigger a judicial ruling that the amended detention statute violates the Constitution's Suspension Clause"[152] as the Clause dictates that the writ of habeas can only be suspended in times of "rebellion" or "invasion" – and a single or even multiple attacks do not fall into such categories. However, as Cole argues, the constitutionality of the new congressional emergency legislation would turn on "whether we are in a time of 'rebellion' or 'invasion,' a fact that is entirely unrelated to whether

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[149] Cole, "In Case of Emergency."
[150] "The courts, in short, should understand themselves as *guardians of the emergency constitution*. Judges can take on this task with relative confidence, since they won't be rendering the government powerless by rejecting panic-driven legislation. Active judicial review will simply push the government into the channels established by the emergency constitution. Rather than rejecting the new legislation on its merits, the courts should simply tell the president to make his case to Congress under the terms specified by the supermajoritarian escalator." Ackerman, *Before the Next Attack*, at 105.
[151] Cole, "In Case of Emergency."
[152] Cole, "An 'Emergency Constitution'?" *The New York York Review of Books*, October 19, 2006, accessed March 04, 2011, http://www.nybooks.com/articles/archives/2006/oct/19/an-emergency-constitution/.

the statute contains the procedural innovation '[s]upermajoritarian escalator.'"[153] In other words, there is no constitutional difficulty with repealing the escalator. It thus appears that if we were to settle for the emergency constitution as a framework statute, much of the teeth would then be taken out of the supermajoritarian escalator, leaving our civil liberties once again vulnerable in times of crisis to executive power. Indeed, for the legislature to provide as strong a check as Ackerman believes it capable of, the emergency constitution needs to be in the form of a constitutional amendment.

We now come to the second difficulty: the reality that the ability of the legislature to check the Executive branch is contingent upon access to the necessary intelligence, and that such information is hard to come by. In other words, in times of emergency, the Executive branch has historically been less than forthcoming about its missteps and abuses – especially in the area of detention – preferring instead to keep such mistakes under wraps. Unfortunately, as Ackerman freely admits, the supermajoritarian escalator will only further encourage less transparency and more secrecy since "[t]he president's only hope of satisfying the supermajority requirement may lie in treating as top secret potentially embarrassing facts surrounding the dragnet."[154] The solution to this deficiency is not only a well-informed minority, but also a requirement that mandates the majority of the oversight committee members – as well as the leadership position – to be of the opposition party. "Minority control," Ackerman argues, "means that the oversight committees will be not lapdogs for the executive but watchdogs for society."[155] There is, however, as Martha Minow points out, no historical basis for such a claim. Who, after all,

[153] Cole, "An 'Emergency Constitution'?"
[154] Ackerman, *Before the Next Attack*, at 84.
[155] Ackerman, *Before the Next Attack*, at 85.

typically exposes the skeletons in the government's closet? Are the whistleblowers typically senators or House representatives?

> The secret use of undisclosed offshore detention centers and domestic surveillance techniques emerged from journalist reporting and government leaks – not from congressional oversight. Similarly, journalists and officials uncomfortable with the Administration's practices were responsible for bringing to public attention the Administration's use of coercive interrogation techniques.[156]

The media – in recent years, the Internet in particular, e.g. WikiLeaks – takes the active role in watching for and tracking down governmental abuses. For that matter, it is questionable whether the congressional majority would even allow a clause which guarantees the presence and involvement of the minority party in oversight work to be included within the emergency statute. Even less certain is whether the minority referenced "includes individuals with real capacity for skepticism, motivation to engage critically, and distance from the Administration."[157] At least in the history of emergencies, there have been few examples – if any – of substantive minority resistance.[158] Ultimately, when confronted with a national crisis, what politician wants to be accused of being soft on security? No ambitious politician, majority or minority, would wish to be seen as such – especially Democrats who are burdened with the stereotype of being weak on issues of national security. So exactly on what basis does Ackerman ground this faith in the legislative minority to serve as a powerful check against the actions of both the congressional majority and executive?

Finally, if the sense of urgency justifying the continuation of emergency powers is unlikely to abate, or if neither Congress nor the executive wishes to discontinue such powers,

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[156] Minow, "The Constitution as a Black Box," at 597.
[157] Minow, "The Constitution as a Black Box," at 598.
[158] "For example, after leaks from the Administration revealed the Administration's secret domestic spying program, the Democrat's flabby resistance to the program came to light. Republicans such as Arlen Specter, even in arranging a compromise to exempt the domestic spying program from previous legal restraint, have exercised as much critical oversight over the program as the Democrats, if not more." Minow, ""The Constitution as a Black Box," at 598.

what are we to do then? Ackerman, I believe, does not provide an answer except to assume that eventually it will. But if we believe in the inevitability of the next attack, that "[t]here always will be disaffected groups scurrying about seeking terrible weapons from unscrupulous arms dealers and rogue states,"[159] then is this still a safe assumption to make? Recent evidence, Minow writes, points to the contrary – e.g. "Congress's recent affirmation and expansion of broadened executive powers with the reauthorization of the USA PATRIOT Act five years after 9/11."[160] A decade later and under a new presidential regime, the urgency felt in the immediate aftermath of the 9/11 attacks has still not completely dissipated. Instead, it lingers in the limited reforms at Bagram Air Base in Afghanistan and in the response to the Obama administration's decision to prosecute Nigerian Umar Farouk Abdulmutallab – who attempted and failed to detonate a bomb hidden away in his underwear while aboard a Northwest Airlines flight in 2009 – in criminal court instead of in military commission. Critics argued that because criminal prosecutions forbid harsh interrogation methods and require access to a defense attorney, it would thereby undermine the government's efforts to gather useful intelligence.[161] As Hafetz observes, "military commissions, indefinite detention, and coercive interrogations had become mainstream, while criminal prosecutions in accordance with the Constitution had become merely an option – one, moreover, that carried the political risk of being painted as weak on terrorism."[162]

There is much to admire and appreciate about the emergency constitution proposed by Bruce Ackerman. First and foremost, his recommended schema drives home the necessity of a *concrete* plan, not just an abstract idea, of how to deal with emergencies – especially since we

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[159] Ackerman, *Before the Next Attack*, at 115.
[160] Minow, "The Constitution as a Black Box," at 596.
[161] Hafetz, *Habeas Corpus After 9/11*, at 254.
[162] Hafetz, *Habeas Corpus After 9/11*, at 255.

have a tendency to overreact, to focus on worst-case scenarios, and to misjudge in the immediate aftermath. Subsequently, we think too much of the short-term goals, i.e. safety, and neglect the long-term dangers of compromising our civil liberties in the scramble to address the terrorist risk. As Minow puts it, "Ackerman's third contribution is championing long-term analysis in an effort to ensure that short-term responses to terrorism neither destroy nor erode national constitutional values."[163] For an emergency constitution to be successful, it must be framed such that it is capable of addressing the nation's needs in both the short-term and the long-term. In addition, Ackerman both insightfully and clearly differentiates between lesser and greater threats – i.e., between those that are existential and those that challenge the nation's effective sovereignty. Furthermore, he persuasively illuminates the deficiencies of framing the terrorist threat within either the war or criminal paradigm. At the same time, as discussed in-depth above, the emergency constitution outlined in *Before the Next Attack* is not without its flaws – most problematic of which is its take on preventive detention. Institutional expediency, while important, cannot be the sole justification for the unjust imprisonment of hundreds – even if that detention is as short as six weeks. And so if the status quo is unacceptable and the emergency constitution as framed by Ackerman is little more than "a statute giving the executive temporary authority to lock up suspects without any judicially checked basis for suspicion,"[164] then what is the alternative?

As the old adage goes: it is not quantity that matters, but quality. Indeed, I am not categorically rejecting the paradigm of preventive detention, only arguing that it can only be successful if we arrest the right people. And even though such a goal will set the detention standard higher and thereby place greater burdens on both law enforcement and the judicial

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[163] Minow, "The Constitution as a Black Box," at 595.
[164] Cole, "An 'Emergency Constitution'?"

system, we nonetheless ought to hold ourselves to that standard. We should encourage smart, creative, *legal* intelligence gathering rather than condone the combined tactic of blind fishing and the hope of getting lucky – an approach which, frankly, requires neither smarts nor strategy to implement – that has thus far characterized preventive detention in the aftermath of a terrorist attack. I believe we can do better in attempting to preserve our treasured civil liberties – we owe the pursuit of such an endeavor both to ourselves and to future Americans. Indeed, if we wish to minimize the harm done to civil liberties in the long run, then rights and emergencies can neither be perceived nor treated as mutually exclusive. Of course, this is not a promise that government will always abide by or uphold "a conception of security that includes protecting rights – and specifies rights that cannot be undermined even in urgent contexts"[165] – but a resolution to do our very best to fulfill that hope.

In light of both our history and recent events, we need to spend less time justifying emergency executive prerogative and more time thinking about how to safeguard our fundamental rights. Furthermore, "[w]e need to think more about promoting checks and balances," as Minow persuasively argues, "and the disclosure of information necessary to do so, rather than expecting that time's passage will generate more resistance to executive prerogatives."[166] We need to challenge ourselves to take a more active role in the protection of our rights by looking to set an absolute minimum. I will argue in the remainder of this paper that a positive interpretation of the Suspension Clause – i.e., that the writ of habeas corpus is guaranteed unless suspended – represents this necessary minimum. In short, I will argue that this understanding of the Suspension Clause resolves three issues we face in the aftermath of a terrorist attack: (1) the problem of the exception; (2) the problem of checks and balances; and (3)

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[165] Minow, "The Constitution as a Black Box," at 603.
[166] Minow, "The Constitution as a Black Box," at 604.

the problem of effectively and efficiently addressing our short-term concerns while preserving long-term civil liberties.[167] Furthermore, I will advance this argument through a detailed historical consideration of the writ of habeas corpus from its English origins to its manifestation in the United States, as well as a legal analysis of the cases of *Boumediene v. Bush* and *Al-Maqaleh v. Gates*.

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[167] Like Bruce Ackerman in *Before the Next Attack*, this scheme will primarily address the issue of detention. Furthermore, I too will narrowly restrict the scope of this solution to the context of terrorist attacks.

Chapter Four:

Reconstructing Habeas

The Paradigm of Habeas Corpus in an Age of Terror

In the year 2054, crime has been eradicated in Washington, D.C. thanks to three humans gifted with the power of premonition, which allows them to see crimes before they are perpetrated. Using the information supplied by these entities, a special arm of law enforcement – appropriately called Pre-Crime – is devoted especially to capturing would-be criminals before they can commit the crime. In this world, intent is absolute. In other words, it does not matter that you did not actually commit murder, only that you intended to. It's believed to be the perfect system until it is "revealed that the psychics' visions can be manipulated, and an innocent man is wrongly implicated in a future murder"[1] he never intended to commit. The problem with preventive detention is that arrests are made based on speculation, which by definition is never certain. To say the least, intent is incredibly difficult to prove without concrete evidence. For how can you prove the intent to murder without (a) the murder victim and (b) the physical proof – e.g., the murder weapon? And even if you had all the physical evidence – the knife, the letters, the gloves, etc. – intent to murder is still not murder unless the act has taken place. You do not know, after all, if at the last minute the would-be murderer got cold feet and decided against it. But what if you are not willing to take that risk – to bet on the possibility that nothing will happen – especially in instances where the gamble involves not one life, but an entire nation's?

In late October 2001, then-Attorney General John Ashcroft declared that the administration's "single objective is to prevent terrorist attacks by taking suspected terrorists off the street."[2] Like the government depicted in Steven Spielberg's *Minority Report* (2002), the Bush administration defended their extralegal actions by saying that they were preventing crime

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[1] David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (New York: New Press, 2007), at 2.
[2] John Ashcroft, "Prepared Remarks for the U.S. Mayers Conference," October 25, 2001, as quoted in Cole, *Less Safe*, at 31.

before it had a chance to occur. Preventive detention is therefore justified insofar as it thwarts potential future threats. However, we cannot forget that there are also grave implications, as Cole illuminates:

> This strategy of employing force anticipatorily, before there is evidence of wrongdoing and before wrongdoing occurs, turns the law's traditional approach to state coercion on its head. With narrow exceptions, the rule of law generally reserves invasions of privacy, detention, punishment, and use of military force for those who have shown – on the basis of sound evidence and fair procedures – to have committed some wrongful act in the past….What unites all of these measures is not simply that they are justified on preventive grounds, but that they employ harshly coercive or highly invasive measures in anticipation of future wrongdoing, rather than in response to past acts.[3]

Unquestionably, preventive detention challenges the rule of law and so in attempts to reconcile the two, some have argued that they ought to be treated separately, as mutually exclusive. In other words, this form of preventive detention ought only be legitimate or acceptable in state of emergencies, which are then spaces outside the law – i.e., extralegal and exceptional. The thing is, when a state resorts to illiberal powers – to powers outside the law – it not only compromises its integrity as a liberal state but also as a state of limited, democratic government. The state cannot – and we should not allow it to – simply excuse their actions by saying: "Governmental actions cannot be held accountable insofar as exceptional times call for exceptional measures." In times of crisis, the government, i.e. the executive, should get a free pass – a carte blanche to do as it sees fit. As has been said before, but bears repeating: The United States is not an authoritarian regime, but an accountable, limited, democratic nation. We value the preservation and maintenance of both individual freedom and civil rights, not in a unilateral executive who can use emergencies to legitimate otherwise arbitrary exercises of power. The "ends justify the means" rationale alone has never been part of the American ethos. Yes, ends – i.e., results – are

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[3] Cole, *Less Safe*, at 4 and 32.

important, but the means – the road we take from point A to point B in the name of security – matters just as much. "It is one thing," as Cole insightfully observes, "to act defensively by hardening cockpit doors, sharing legitimately procured information between agencies to increase the likelihood of 'connecting the dots,' or screening airline passengers and luggage,"[4] and another to indefinitely detain another human being on very dubious and hastily gathered intelligence. Governmental action is taken in order to remedy a problem; not simply because voting populace seeks reassurance that *something* is being done. Recall Solove's example of the sinking ship: although some sacrifice in times of emergency is necessary, we nonetheless need to be both cautious and alert of what we toss overboard. So what is the best vehicle to get us from one end to the other, from the urgency of the short-term to the necessity of preserving a long-term, cohesive national narrative? That vehicle, I will argue, is the writ of habeas corpus as enforced through the Suspension Clause.

The writ of habeas corpus has historically served as a powerful judicial safeguard against, specifically, arbitrary executive detention. It was one of the principles fiercely fought for in the American Revolution; arbitrary imprisonment, after all, has been a favored means of intimidation and punishment through history. Habeas corpus then not only serves as a reminder that the government cannot simply do as it wishes without justifiable reason, but also that the determination of justifiability is not a unilateral decision to be made by the executive alone – the judiciary and the legislature must also be involved in the conversation. Indeed, as a tribute to its value, the Founding Fathers decided to leave ambiguous the only mention of habeas in the Constitution, aside from the fact that its suspension is forbidden unless the nation is threatened by either rebellion or invasion.

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[4] Cole, *Less Safe*, at 32.

Of course, the writ of habeas corpus is neither a guarantee of success nor a promise that the government will compensate for its wrongdoings. Instead, the Great Writ of Liberty, as it was known in England, promises that the actions of government will be scrutinized and tested in an independent court of law. It seeks to provide the detained with the opportunity to not only speak, but also be heard. As illustrated in the cases of the detainees held in Guantánamo Bay and elsewhere, in this ongoing War on Terror the writ of habeas corpus may be the strongest safeguard available against new and unanticipated misuses of executive power. If enforced, habeas protections provide alien detainees not only with the crucial opportunity to challenge one's imprisonment, but also ensure vigilant courts, well-trained lawyers, and stringent evidentiary requirements. At the same time, an unlimited habeas – that is, a writ guaranteed without any restrictions – is neither practical nor desirable. After all, such an overextension not only tries the patience of politicians, federal judges, and the common man, but can also impose a substantial strain on admittedly limited resources – resources that might be better expended elsewhere. But we are not looking to overextend the writ; we only seek to reaffirm a minimum that already exists – i.e., the Suspension Clause.

The fights we have had over the importance of liberties in times of war – like privacy – have been difficult, but I believe that the debate over whether to provide detainees held abroad by U.S. military forces is even more challenging because it involves the rights of not just foreigners detained abroad, but accused *terrorists*. The urgency and importance of this issue does not translate nearly as well when there (a) appears to be no immediate consequences to the rights of Joe the Plumber, upright American citizen, and (b) when the denial of due process to the foreign terrorist held an ocean away does not inconvenience or affect his everyday life in any manner. This is just another reason why Bruce Ackerman's emergency constitution is unrealistic:

another necessary condition for a substantive legislative check on executive power is an engaged and informed public who will then push their representatives to restrict executive prerogative even if it does not affect them. After all, in the aftermath of emergency it is not the Anglo-Saxon, middle-class, heterosexual American who needs to worry about serious rights infringements, but the minority – more specifically, the foreign national. "Thousands of foreign nationals from predominantly Arab and Muslim countries," David Cole observes, "have been singled out for detention, deportation, and prosecution since 9/11."[5]

Indeed, in the year immediately following 9/11, there was not a single amendment, legislative proposal, or hearing inquiry in Washington, D.C., into the circumstances of those detained at Guantánamo. No politician wanted to be labeled as the person supporting the extension of *American* constitutional rights to suspected alien terrorists. And so the detainees captured in the "war on terror" remained at Guantánamo Bay without access to any methods of communication and with very little hope of release. To many of their families, these captured men had simply disappeared, without a word. The United States government, after all, refused to release any names and blocked any contact or inquiries into the detainees' status from both lawyers and reporters. To say the least, the lawyers who tirelessly fought for the habeas rights of these hidden and heavily guarded men faced incredible challenges, in large part due to the U.S. government's massive resistance against granting these detainees any substantive due process, never mind access to the American federal judiciary.[6] However, in denying the writ of habeas corpus – in some form – to those America detains abroad, we end up risking far more – e.g.,

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[5] Cole, *Less Safe*, at 31.

[6] For detailed first-hand accounts of the road to *Boumediene v. Bush* by the lawyers who represented the GITMO detainees, see generally Mark P. Denbeaux, Jonathan Hafetz, and Grace A. Brown, *The Guantanamo Lawyers: Inside a Prison Outside the Law* (New York: New York UP, 2009); Stephen T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* (New York: Other, 2008); Clifford S. Smith, *Eight O'Clock Ferry to the Windward Side: Seeking Justice in Guantanamo Bay* (New York: Nation, 2007).

checks and balances, safety – than we initially anticipated. For that matter, these consequences do not just implicate separation-of-powers difficulties, but also have a massive impact on American foreign policy. How so? The answer is actually simple: the actions of our government no longer must survive only the scrutiny of those at home, but also of those abroad. In this globalized society, our actions no longer occur in a vacuum. Both our allies and our enemies are watching our actions closely.

The British Heritage of the Great Writ of Liberty

There is no difficulty, and there is often very little gain in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The Habeas Corpus Acts have achieved this end, and have therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights.

– Albert V. Dicey, *An Introduction to the Study of Law of the Constitution* (1885)

Prior to 9/11, habeas litigation in American courts dealt primarily with collateral challenges to criminal convictions, in which detention was premised on a prior judicial determination of guilt. In the four years between 2003 and 2007, federal courts handled approximately 22,000 to 24,000 habeas petitions annually. Of those cases, roughly eighty percent were state-prisoner applications. [7] To the federal courts of the United States, the writ of habeas corpus is neither a novel nor rarely utilized legal action. However, the issues raised in the executive-detention situation are almost entirely distinct from those that arise in collateral challenges to criminal convictions. Whereas challenges to criminal convictions, which are typically filed by state prisoners, involve such issues as comity and federalism, executive-

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[7] Marc D. Falkoff, "Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention," *Denver University Law Review* 86 (2009), at 961.

detention habeas petitions also include questions regarding the competence of the judicial and executive branches to oversee detentions. "For the first time in the modern era," Marc D. Falkoff observes, "[t]he federal courts must rule on the legality of non-criminal executive detentions, and they must fashion procedures that provide due process of law"[8] while keeping in mind issues of national security.

At the heart of habeas corpus, once known as the Great Writ of Liberty, is a challenge to arbitrary detention. In other words, the writ of habeas corpus ensures that one cannot simply be locked up without cause. It is the legal means by which a prisoner may contest the legality of his/her detention. Its roots extend as far back as the English Magna Carta in 1215, which included the guarantee that "no free man shall be seized or imprisoned…except by lawful judgment of his equals or by the law of the land."[9] Although the actual phrase "habeas corpus" is not found in the Magna Carta, the notion that extrajudicial detention ought to be viewed with suspicion if not outright forbidden – an idea that later became the core of what we now know to be the Great Writ of Liberty – derives from that famous document. Indeed, as Falkoff writes, the writ of habeas corpus would later evolve into the primary procedural device for executing the promise of the Magna Carta.[10]

Originally, habeas corpus was little more than a command to have a person brought physically before the court for a particular purpose.[11] In the aftermath of the Norman Conquest in

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[8] Falkoff, "Back to Basics," at 962.
[9] Falkoff, "Back to Basics," at 966.
[10] It is worth noting briefly that the exact relation between the writ of habeas corpus and the Magna Carta is contested. The origin of this connection, however, can be traced to the Petition of Right, whereby Parliament attempted to strengthen the writ by embracing the "romantic notion [of] the Magna Carta [as] the source of the writ." However, whether or not habeas corpus has its origins in the Magna Carta is another issue; although many modern scholars believe it does not. Brian Farrell, "Habeas Corpus in Times of Emergency: A Historical and Comparative View," *Pace International Law Review Online Companion* 9 (2010), at 79.
[11] Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* (New York: New York University Press, 2011), at 81.

1066, a centralized, national court system was imposed over the previously existing localized court system in England.[12] William the Conqueror, therefore, sent his royal judges to ride throughout the countryside of his new kingdom enforcing the new rule of law. However, in order for these centralized courts to exercise their authority, a process was required to bring persons physically before the newly established courts. As a result, these judges would then order the local sheriffs to "have the bodies" – in Latin, habeas corpus – of accused criminals brought before their courts. Habeas corpus, in addition, became known as the writ of habeas corpus due to the fact that these itinerant judges used to put their orders into a "written" document.[13] Indeed, the Great Writ of Liberty did not originate as a substantive right, i.e. a right that someone possesses, so much as a way of dragging a reluctant suspect into court to be tried. Up until the thirteenth century, there was little about the earliest form of habeas that could be characterized as a means of protecting liberty or of providing safeguards against arbitrary detention.[14]

However, people who were unlawfully imprisoned – e.g., by order of the king or any corrupt authority – eventually began petitioning England's royal judges to bring them out of jail and into court, where their jailers would then have to justify the petitioner's imprisonment. In the 14th century, in response to such petitions, the English courts fashioned a writ that questioned the cause of a prisoner's custody. In this time period, as Brian Farrell observes, two important evolutions had occurred: "An individual could now initiate a habeas corpus proceeding, and the courts were now using habeas corpus to examine the grounds for the individual's detention."[15] Soon after, the courts coupled this new writ with the original writ of habeas corpus, which later became known as the writ of habeas corpus *cum causa*. With the passage of this new writ,

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[12] Farrell, "Habeas Corpus in Times of Emergency," at 77.
[13] Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (New York: Random House, 2003), at 85.
[14] Falkoff, "Back to Basics," at 967.
[15] Farrell, "Habeas Corpus in Times of Emergency," at 77.

English courts had established a procedure that began to resemble the writ of habeas corpus of which we are familiar with. The writ of habeas corpus *cum causa* required not only the prisoner's presence in court, but also the reason for his detention.[16] This was, as Marc D. Falkoff notes, "a powerful [judicial] tool for controlling the authority of the state and private parties to coerce persons to acquiesce to demand, whether legal or not, via their detention powers."[17] However, at the time, such a tool was rarely used to challenge or limit the authority of the executive. Instead, it was employed primarily as a way for the centralized courts to strip older local courts of their former jurisdiction.[18]

By the beginning of the 15th century, after the supremacy of the central over local courts had been accepted, another struggle for power arose amongst the central courts. As a result, the courts began to utilize the writ of habeas corpus to scrutinize the legality of the detentions ordered by their fellow courts. This judicial rivalry, it can be argued, thus paved the way for habeas to evolve as a means for challenging the legality of a person's imprisonment.[19] Soon thereafter, the courts started applying the writ of habeas corpus to the actions of the crown. One of the earlier examples involves the Privy Council, which exercised both executive and judicial functions. Courts began utilizing the Great Writ to protect their jurisdiction from interference by the Privy Council, whose detention practices were also increasingly considered to be unlawful.[20] Although the courts tended to be deferential, these inquiries nonetheless represented a "watershed moment, as they marked the dawn of judicial scrutiny of detentions ordered by the executive."[21] The executive – e.g. king – was, it seemed, not above the law. Indeed, by the end of

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[16] Falkoff, "Back to Basics," at 967.
[17] Falkoff, "Back to Basics," at 967.
[18] Falkoff, "Back to Basics," at 967.
[19] Farrell, "Habeas Corpus in Times of Emergency," at 77-78.
[20] Falkoff, "Back to Basics," at 968.
[21] Farrell, "Habeas Corpus in Times of Emergency," at 78.

the sixteenth century, what had previously been known as the writ of habeas corpus *cum causa* had already evolved to the writ of habeas corpus *ad subjiciendum*.[22] And insofar as the new writ enables a "court to examine whether there was a lawful basis for a prisoner's confinement by ordering the jailer to produce both the prisoner and the cause for his confinement,"[23] we begin to see the form of habeas corpus that we are more familiar with today. However, this is not to say that the rest of the writ's history was without hiccups.

In 1628, Parliament attempted to formally strengthen the writ of habeas corpus, and thus limit the crown's power to imprison. They not only sought to expand the availability of the writ to all detention cases, but also fought for the release of the detainee if no lawful grounds were established. Although Parliament did not succeed in achieving all of their demands, they were successful insofar as the King agreed to the creation of the Petition of Right, formally disallowing him from imprisoning without demonstrating cause.[24] However, less than twenty years later, Parliament passed the Habeas Act of 1641 which required "courts to issue writs of habeas corpus on behalf of prisoners 'without delay' and abolish[ed] the Star Chamber, which had become associated with arbitrary exercises of power and other abuses."[25] Indeed, the Act held that any person imprisoned on the authority of the crown could petition the courts for a writ of habeas corpus. At the same time, the Act suffered from several procedural defects and as a result, was not particularly effective. For example, it was silent on whether habeas corpus could be granted while the courts were in vacation. This silence was problematic because it rendered the writ vulnerable to manipulation insofar as the King could still detain whilst the court was in recess, and the prisoner would then not be able to find relief until the courts returned.

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[22] Falkoff, "Back to Basics," at 968.
[23] Haftez, *Habeas Corpus After 9/11*, at 81.
[24] Farrell, "Habeas Corpus in Times of Emergency," at 78.
[25] Hafetz, *Habeas Corpus After 9/11,* at 82.

Furthermore, the Habeas Corpus Act of 1640 failed to protect against a number of abuses, including the transfer of prisoners from jail to jail – sometimes even to overseas jails – in an effort to prevent service on the correct jailer, and thus evade the writ's reach.[26]

In 1679, Parliament finally managed to pass another Habeas Corpus Act that sought to remedy all the procedural defects of the previous Act.[27] This time, the Act prohibited overseas imprisonment and the unauthorized transfer of prisoners, guaranteed the right to a speedy trial, as well as enhanced procedures for the issuance of habeas corpus.[28] This Act then codified the common law of habeas and established it not only as the law's primary safeguard against illegal detentions, but also as the preeminent guarantee of personal liberty. It sent the powerful message that the government was, at all times, subject to, and not above, the law. The writ of habeas corpus was slowly gaining force as a guarantee of individual liberty – in great part due to the increased unwillingness of judges to simply defer to the Crown. Instead, judges were more and more willing to exercise their habeas jurisdiction to uphold challenges to executive detention. As Hafetz recounts: "Amid the political turmoil of the late 1600s, the King's Bench adjudicated numerous habeas petitions involving accusations of treason, treasonous practices, and sedition, often finding that there was no basis to hold the prisoner."[29]

By the start of the 18th century, the writ of habeas corpus – both in common law and statutory law – was made available to all Englishmen who contested the legality of all executive detentions. The state was then held accountable to not only produce the prisoner in court, but also to articulate a legal basis for the detention.[30] And with the strengthening of the writ's power, the judiciary became more powerful as well insofar as the writ provided the bench with the

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[26] Falkoff, "Back to Basics," at 971.
[27] Hafetz, *Habeas Corpus After 9/11*, at 82.
[28] Farrell, "Habeas Corpus in Times of Emergency," at 80.
[29] Haftez, *Habeas Corpus After 9/11*, at 82.
[30] Falkoff, "Back to Basics," at 971.

authority to reverse an action of government – e.g. detention – it found to be unlawful. Indeed, "[a]t the center of this jurisprudence stood the idea that the court might inspect imprisonment orders made at any time, anywhere, by any authority. This simple idea, grounded in the prerogative, marked the point from which the justices' use of the writ expanded."[31] Yes, the government must answer to the law, but not just in its original form; it is also subject to law as *interpreted* and *applied* by judges. In this sense, it can be argued that the writ of habeas corpus is concerned first and foremost with judicial power, and not the rights of the detained.[32]

What happens once the writ of habeas corpus is petitioned? Once the government justified the legality of the detention to the court, was the petitioner allowed to contest the facts provided in the return?[33] Was the court allowed to look into the matter independently, i.e. double-check the government's evidence? In habeas cases, the courts commonly exercised independent review over the evidence provided by the prisoner,[34] regardless of whether the executive detention was criminal or non-criminal – especially in cases tried without a jury. Judges also had to determine whether the detention possessed a statutory or common law basis. However, as to whether or not a petitioner could contest the government's return, herein a difference arose between criminal and non-criminal executive detentions. If the detention was criminal, then the petitioner could not contest the government's return. After all, judicial review in criminal cases was more constrained insofar as the prisoners would have or had already been tried by a jury of their peers in accordance with the common law due process: "Judges thus did

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[31] Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Belknap of Harvard University Press, 2010), at 160, cited in Stephen Vladeck, "The New Habeas Revisionism," 124 *Harvard Law Review* (2011) at 5.
[32] *See* generally Halliday, *Habeas Corpus: From England to Empire*.
[33] "Once presented with a habeas corpus petition, a judge was supposed to exercise independent judgment about the sufficiency of the facts and the law asserted in the jailer's response, known as the *return*." Hafetz, *Habeas Corpus After 9/11*, at 83.
[34] "Judges were not bound by a jailer's statements in the return but instead could probe the evidence and arguments submitted by prisoners in response, known as the *traverse*." Haftez, *Habeas Corpus After 9/11*, at 83.

not wish to usurp the jury's role by conducting trials in habeas corpus proceedings."[35] If, on the other hand, the imprisonment was of a non-criminal nature then habeas review has usually been more incisive. Habeas, however, is at its strongest in cases of executive detention without trial, "for it was here that the danger of the arbitrary exercise of state power was greatest."[36] And so in the latter two cases, the prisoner historically has also been allowed the opportunity to contest the evidence included in the government's justification.

In fact, the subject of the government's return – i.e. to what degree could the petitioner and the judge challenge the contents – was heavily debated by jurists in the latter half of the 18th century. In 1758, a new habeas bill was introduced in an attempt to expand the protections already provided for criminal prisoners, due to the Habeas Corpus Act of 1679, to non-criminal prisoners. While such protections were already extended to non-criminal petitioners in common-law practice, this new habeas legislation would codify, and thereby strengthen, such guarantees. In addition, the bill included a clause that would ground the habeas petitioner's right to challenge the legality of his detention in not just common-law, but statute as well.[37] A strong advocate for the inclusion of the above clause, Justice Michael Foster argued that if denied an opportunity to challenge facts, the habeas petitioner would then be "absolutely without remedy [as] an inadequate, ineffectual remedy is no remedy; it is a rope thrown to a drowning man, which cannot reach him, or will not bear his weight."[38] Eventually, the habeas protections fought for in 1758 were eventually codified in the Habeas Corpus Act of 1816.[39]

The practices of the English courts in the 18th century are, indeed, good examples of judicial flexibility and diligence. If the executive provided inadequate returns, the court did not

[35] Haftez, *Habeas Corpus After 9/11*, at 83.
[36] Haftez, *Habeas Corpus After 9/11*, at 84.
[37] Falkoff, "Back to Basics," at 973.
[38] Falkoff, "Back to Basics," at 973.
[39] Falkoff, "Back to Basics," at 977.

simply defer and turn a blind eye. Instead, it made sure not only to examine the reasons behind the return's inadequacy, but also considered additional evidence, including that provided by the prisoner himself.[40] As Hafetz further observes, "[judicial] duty was to render decisions independently, grounding their judgment on their 'own inferences and understandings' and not on the conclusions of the government officials responsible for the detention."[41] To say the least, the English courts sought to ensure that the petitioner challenging his/her detention received a substantive review of their claims.[42]

There is, however, a limit to the Great Writ of Liberty: suspension by Parliament. In suspending the writ, Parliament then "deprived courts of their authority to adjudicate accusations by Crown officials and asserted its control over detention in matter affecting the security of the state."[43] The first suspension act was passed in 1688, in response to both the armed conflict occurring abroad and fears at home that King John would attempt to regain his throne after the Glorious Revolution had removed him from power. Other suspension acts subsequently followed, acts which thereby authorized the detention of suspected enemies of the state without judicial inquiry. At the same time – and this is a crucial point – the suspension of habeas corpus only impacted "the right secured by the writ to test the government's allegations in court"[44]; it did *not*, in fact, suspend access to the writ itself. Judicial review, furthermore, did not cease to exist in times of emergency; it was still available to those prisoners seeking review of whether their habeas case fell beneath the umbrella of the suspension acts. Not to mention, as Haftez recounts, suspension acts typically came with a sunset clause, which was usually a year or less after its passage. Although the suspension of habeas corpus nonetheless provided the Crown with

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[40] Falkoff, "Back to Basics," at 974.
[41] Haftez, *Habeas Corpus After 9/11*, at 83.
[42] Falkoff, "Back to Basics," at 972.
[43] Haftez, *Habeas Corpus After 9/11*, at 82.
[44] Haftez, *Habeas Corpus After 9/11*, at 82.

a great deal of discretion, "those powers were specifically bound by the emergency that necessitated them and remained 'distinctly limited by law.'"[45] Emergency powers are neither unlimited nor beyond the purview of law. As such, no one – the detainee, enemy alien, prisoner of war – can be held incommunicado, i.e., kept in a legal black hole, without any recourse to legal action; at the very minimum, habeas corpus provides all captives with the limited opportunity to show the court that there is no basis to hold them.[46]

The writ of habeas corpus, in its common law form, was not considered to be a territorially bounded right.[47] As Haftez explains, judges could then issue the writ to "jailers throughout the realm of the British Crown, including to so-called exempt jurisdictions that maintained their own local courts and were otherwise exempt from oversight by the central English courts because of ancient privileges predating their acquisition by the Crown."[48] In short, so long as Crown officials detained an individual – thereby exercising power on behalf of the King – a habeas court could exercise its common law jurisdiction, step in, and review the legality of that detention, regardless of where the detainee is held. No matter where the King exercised his authority, he would be held accountable for his actions.

At the same time, the writ of habeas corpus had no *statutory* power outside of England. The British government, concerned for its authority overseas, did not grant its colonies access to statutory habeas rights until the 19th century.[49] However, individual colonial governments – e.g. India, Ghana, and Canada – eventually began writing habeas corpus into their own statutory

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[45] Haftez, *Habeas Corpus After 9/11*, at 83.
[46] Haftez, *Habeas Corpus After 9/11*, at 84.
[47] "This reach, as Professors Paul D. Halliday and G. Edward White have explained, was rooted in habeas's origins as a prerogative writ by which the Crown, through common law judges of the King's Bench at Westminster, could inquire into the legality of a detention by any Crown official or by another court or tribunal." Haftez, *Habeas Corpus After 9/11*, at 84.
[48] Haftez, *Habeas Corpus After 9/11*, at 84.
[49] Brian Farrell, "From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law," *Michigan State Journal of International Law* 17 (2008-2009), at 557.

law.[50] Soon enough, the writ of habeas corpus – in both its common law and statutory forms – flourished not only in England, but in Her many colonies as well. The Thirteen Colonies, of course, was no exception.

The Great Writ of Liberty in the American Context

[F]reedom of religion; freedom of the press; freedom of person under the protection of the *habeas corpus*, and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.

– Thomas Jefferson, *First Inaugural Address*

As their English forefathers believed, the Founders also considered the Great Writ of Liberty as an essential safeguard against tyrannical government. In the time prior to the Revolution, the English statutory habeas corpus rights were not available to the residents of the Thirteen Colonies. They were only afforded the protections of the writ in its common law form, which fostered great disgruntlement amongst the American colonists.[51] To an Englishman, after all, the writ of habeas corpus was considered both to be a fundamental birthright as well as a necessary safeguard of liberty. The colonists – of which many were English-born – were not happy, to say the least, when the British Privy Council not only denied them access to British statutory habeas rights, but also rejected colonial legislation that sought to guarantee such access.[52] The Privy Council argued that the British statutory habeas corpus acts were not extraterritorial; they did not apply outside of England's immediate borders. As a result, the writ

[50] Farrell, "From Westminster to the World," at 557.
[51] Falkoff, "Back to Basics," at 978.
[52] Falkoff, "Back to Basics," at 979.

of habeas corpus was not written into statute until after the Revolution and the colonies had won their independence from Great Britain.[53]

Little to no controversy surrounded the incorporation of the writ of habeas corpus into the United States Constitution. Indeed, the absence of debate surrounding the Great Writ's role in the Constitution only further demonstrates the magnitude of its importance to the Founders. Everyone considered the writ to be integral to the maintenance and protection of liberty. As a result, discussion did not revolve around whether habeas "should be given the widest possible scope," as Falkoff observes, "[but] whether it was necessary to provide for the suspension of the writ."[54] In other words, people disagreed about whether there would ever come a time when the protections afforded by habeas ought to be suspended. Some of the Founders, e.g. John Rutledge, argued for the writ of habeas corpus to be "inviolable," as he could not imagine a situation that demanded the suspension of habeas corpus. He was, however, outvoted and the habeas provision that eventually passed the Constitutional Committee of Style and Arrangement did, in fact, allow for its limited suspension.[55]

The Suspension Clause, Art. 1, §9, cl. 2, as written in the United States Constitution, reads as follows: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The clause dictates no specific procedure that must be followed, only that the writ of habeas corpus is so integral that it can *only* be suspended for two explicit reasons: rebellion or invasion. And not just for any kind of rebellion or invasion, but a rebellion or invasion that endangers public safety. Although the clause does not speak specifically on the subject of habeas jurisdiction, i.e. who is authorized to

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[53] Falkoff, "Back to Basics," at 980.
[54] Falkoff, "Back to Basics," at 981.
[55] Falkoff, "Back to Basics," at 981.

issue writs, it was a common perception that the federal judiciary would be endowed with such power. As to speculate on the Founders' reasons for the ambiguity of the matter, perhaps they thought it self-evident that the courts possess habeas jurisdiction, or that Congress would, without much fuss, ground the federal judiciary's habeas authority in statutory law soon after the Constitution's ratification. As for the specific rules, procedures, and limits of habeas, it would be left up to the courts and the legislature to decide; the Constitution is also silent on such matters.

One of the principles fiercely fought for in the American Revolution was that governments ought not to exercise their power arbitrarily. The ruler – whether he is king or President – cannot, for example, imprison free citizens absent legitimate cause. Arbitrary executive imprisonment, after all, has been a favorite means of intimidation and punishment throughout history. Furthermore, the legitimacy of the detention must be subject to the rule of law, which includes judicial scrutiny. The Suspension Clause ensures all of the above. Indeed, as Hafetz explains:

> This provision – known as the "Suspension Clause" – has been called "the most important right in the Constitution." It requires that those detained by the government have access to the courts and, in the process, makes possible "the full realization" of other constitutional guarantees. If, for example, a person imprisoned on account of his political opinions had no way to seek review before a judge, the guarantees of freedom of speech and of the press secured by the First Amendment could be rendered meaningless. The Suspension Clause also serves an important structural function under the Constitution's separation of powers by giving the judiciary a powerful check against executive overreaching.[56]

And so Congress, in Section 14 of the Judiciary Act of 1789, endowed the newly established federal courts with the jurisdiction necessary to issue the writ of habeas corpus. From that point onward, the scope and understanding of habeas corpus in the United States would be rooted not

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[56] Haftez, *Habeas Corpus After 9/11*, at 86.

only in the common law and – potentially – the Constitution, but also in statutory language and Congressional intent.

The political chaos following the controversial 1800 presidential elections as well as the subsequent disagreement between newly elected President Thomas Jefferson and his former Vice President Aaron Burr informed the first instance in which the Suspension Clause came to be interpreted by the U.S. Supreme Court.[57] The ruling would define several important parameters of the Clause. Indeed, in the decision, Chief Justice John Marshall ruled that "the power to suspend habeas corpus belonged solely to Congress, a view that reflected both historical practice and the Suspension Clause's placement with other legislative powers in Article I of the Constitution."[58] He further argued that under the terms outlined by the Judiciary Act of 1789 courts thereby possessed the authority to issue writs of habeas corpus. In light of this interpretation of the court's habeas authority, *Ex Parte Bollman* subsequently raised the question of whether the Suspension Clause *itself* guaranteed habeas corpus, or does "it merely prohibit its suspension absent rebellion or invasion once Congress had first statutorily authorized courts to issue writs"?[59] Unfortunately, Marshall was not entirely clear on the answer.

> On the one hand, *Bollman* might be read to suggest that jurisdiction to issue habeas writs must be provided by positive legislation. This left open the possibility that the Suspension Clause could be rendered a dead letter by congressional inaction, making habeas corpus equivalent to government benefits like Social Security that require positive legislation. But Marshall also explained that the Suspension Clause imposed an "obligation" on Congress to make the writ

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[57] "Burr was suspected of plotting to sever recently acquired territories in the West from their allegiance to the United States. In December 1806, the U.S. Army commander in New Orleans seized two of Burr's co-conspirators, Erick Bollman and Samuel Swartwout, and took them on a warship to Baltimore by way of Charleston, South Carolina. In the process, the commander ignored writs of habeas corpus that had been issued on the prisoners' behalf by federal judges in New Orleans and Charleston. President Jefferson recognized that the only legal way to deny the prisoners access to the courts was to suspend habeas corpus. So his supporters introduced legislation in Congress to suspend habeas for three months. But the bill failed in the House, prompting the U.S. attorney general to file formal charges of treason against the men….After the circuit court denied their habeas petition and remanded them for trial, the prisoners sought a writ of habeas corpus from the Supreme Court." Hafetz, *Habeas Corpus After 9/11*, at 87.

[58] Hafetz, *Habeas Corpus After 9/11*, at 87.

[59] Hafetz, *Habeas Corpus After 9/11*, at 87.

> available, indicating that federal habeas legislation was *compelled* by the Constitution.[60]

However, in light of what is known about the Framers' intent regarding the writ as well as its historical purpose, the argument in favor of constitutionally enforced habeas corpus – through the vehicle of the Suspension Clause – is more persuasive. Furthermore, the fact that Congress prior to 9/11 "had never sought to eliminate altogether the statutory guarantee of habeas corpus for individuals detained by the federal government without prior judicial process"[61] also testifies to how important the availability of the writ is to our nation's legal narrative.

Courts in the late 18th century to the Civil War further established in case law – as a matter of procedure – not only that habeas petitioners possessed the right to challenge government returns, but also that the federal courts had the power to review the facts provided by the government. At the same time, the reach of the writ was relatively limited. First of all, habeas corpus relief was only available to those held in federal, not state, custody. The remedies available to state prisoners were strictly limited to those provided by individual states.[62] Second, once convicted, criminal prisoners lost their right to the writ of habeas corpus; there were no post-conviction habeas appeals. The limited jurisdiction of the writ continued until it became both apparent and troublesome when South Carolina rebelled against federal authority by passing its Nullification Ordinance in 1833. In response, Congress expanded the habeas power of the federal judiciary to include those persons held in state custody while acting under federal authority. However, thirty years and a bloody Civil War would pass before Congress formally

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[60] Hafetz, *Habeas Corpus After 9/11*, at 88.
[61] Hafetz, *Habeas Corpus After 9/11*, at 89.
[62] Hafetz, *Habeas Corpus After 9/11*, at 88.

granted federal habeas protections to all persons held in state custody in its Habeas Corpus Act of 1867.[63]

With the passage of the Civil War Amendments, there was a great shift in power in the American government. Indeed, the superior authority of the national government over state governments was firmly established. The Fourteenth Amendment was groundbreaking not only because it introduced a new concept of national citizenship, but also because, for the very first time in American history, the federal government could protect the rights of individual citizens from transgression by state governments. In addition to the new constitutional amendments, the United States Congress amended Section 14 of the Judiciary Act of 1789 with the Habeas Corpus Act of 1867.[64] The passage of the Act was, no doubt, a result of the tense political and social reality following the end of the Civil War. There was, after all, a need – which the Act fulfilled – for the protection of both federal officials and newly freed slaves from potential arbitrary and abusive imprisonment by resentful Confederate state governments. The new legislation bestowed the federal courts with the authority to issue writs of habeas corpus "in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States,"[65] including state prisoners. In addition, the Act codified specific procedures for the determination of when the writ should issue and under what circumstances the prisoner ought to be released. Drawing from previous statutory habeas acts passed in England – the Habeas Corpus Acts of 1679 and 1816 – as well as the common law, the

[63] Hafetz, *Habeas Corpus After 9/11*, at 88.
[64] Falkoff, "Back to Basics," at 985.
[65] Falkoff, "Back to Basics," at 985.

Habeas Corpus Act of 1867 set the minimum in the United States for the process necessary to determine the legality of the petitioner's imprisonment.[66]

Although the statutory language of habeas corpus did not change for more than eighty years after the 1867 Act, the federal judiciary's use of the writ of habeas corpus in case law did change – and continues to – in accordance with the nation's evolving needs and beliefs.[67] For example, the expansion of federal habeas corpus relief for state prisoners occurred in response to the increasing scope of due process and its expanded application to the states. In the early 20th century, due to such cases as *Frank v. Mangum*, the writ of habeas corpus began to be issued as a result of deficiencies, whether external or internal, in the process. In other words, federal habeas protections became available to those prisoners who proved that the due process in their case was severely deficient or unfair, e.g. a prosecutor's intentional suppression of exculpatory evidence, a confession obtained through police coercion, or, as occurred in *Frank*, mob interference.[68]

The Habeas Corpus Act of 1867 was amended, for the first time, in 1948. Due to the evolution of the writ's scope and application in the past century, Congress recognized the need to revise the outdated habeas statute to reflect present judicial interpretation and practice. As a result, habeas corpus was split into three separate statutes: 28 U.S.C. § 2241, 28 U.S.C. § 2254, and 28 U.S.C. § 2255. § 2241, descended from the protections enshrined in the original Judiciary Act of 1789, provided relief for non-criminal petitioners, including those detained absent a conviction. § 2254, rooted in the Habeas Corpus Act of 1867, codified federal habeas remedies for state prisoners. The third habeas statute in the 1948 revision, § 2255, was new and it provided an improved substitute to the writ of habeas corpus for those federal prisoners appealing the legality of their

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[66] Falkoff, "Back to Basics," at 986.

[67] Nancy J. King and Joseph L. Hoffman, "Habeas Corpus for the Twenty-First Century," *Vanderbilt University Law School Public Law and Legal Theory*, Working Paper 09-27, at 8

[68] Falkoff, "Back to Basics," at 986.

criminal convictions.[69] The scope and power of habeas corpus in American jurisprudence would be further built upon and expanded under the reign of the Warren Court and in the time of the Civil Rights era.

In the next two decades, the 1950s and 1960s, a succession of Supreme Court decisions not only expanded the procedural guarantees of the Bill of Rights, but also the extent to which those protections bound the states. This was done, in part, through the vehicle of federal habeas corpus, wielded in the cases of state habeas petitioners – which also illuminated troubling due process transgressions on the part of law enforcement agencies. In response to such abuses, the Supreme Court read into the Due Process Clause of the Fourteenth amendment as requiring states to provide their criminal defendants with a variety of new federal rights, e.g. the *Miranda* rights, the inadmissibility of evidence obtained through illegal searches, and the fundamental right to counsel.[70] The Warren Court, to say the least, reminded the nation that while the writ of habeas corpus is a symbol of individual liberty, it is also a necessary safeguard against abuses of power by institutions of government. However, a conservative backlash followed in the aftermath of the Warren Court. State prisoners' access to federal habeas relief slowly became more and more limited in subsequent decades. Under the Burger and Rehnquist Courts, for example, federal courts could not issue the writ in cases concerning potential violations of the Fourth Amendment, and all federal habeas petitioners were required to first fulfill the "total exhaustion" rule – i.e. exhaustion of all available state remedies – before a federal judge could even consider their petition. Such restrictions eventually culminated in the congressional passage of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).[71]

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[69] King and Hoffman, "Habeas Corpus for the Twenty-First Century," at 9.
[70] King and Hoffman, "Habeas Corpus for the Twenty-First Century," at 9.
[71] Falkoff, "Back to Basics," at 987.

Although the increasing amount of obstacles to habeas relief may seem disturbing, there is a certain amount of merit in such restrictions. The habeas corpus petitions filed by state prisoners are the most common case on the dockets of the federal judiciary. Annually, federal judges see thousands of these petitions from state prisoners, of which very few – i.e., less than one percent – are deemed substantive enough to move forward.[72] A great deal of time is required for a thorough review of each habeas petition, e.g. time bars, exhaustion, and procedural defaults, which does not even include the time needed to consider the merits of the case. Not to mention, in granting a habeas petition from a state prisoner, the federal judge is implicitly either stating that the state courts misunderstood something or that they failed to correctly apply or abide by the U.S. Constitution. Subsequently, many federal judges – in great part due to a respect for comity and federalism – are primed to be more deferential in habeas cases involving state criminal prisoners.[73] At the same time, this deference is not necessarily required – nor should it be – in other habeas cases, specifically those involving petitions from those detained on executive authority.

The American political climate in the early 1990s not only became increasingly focused on the issue of terrorism in general, but also with the prosecution of those responsible for acts of terror – an issue prioritized with the capture of those involved with the first World Trade Center bombing. Conservatives were particularly outspoken about their concerns, as exemplified by Utah's Senator Orrin Hatch who argued for increased habeas limitations on the grounds that convicted terrorists could potentially use the writ and be released on a technicality, rather than on actual guilt or innocence. He further emphasized the fact that, at present, habeas corpus

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[72] Falkoff, "Back to Basics," at 987.
[73] Falkoff, "Back to Basics," at 988.

accomplished little more than use up federal resources and clog up the judiciary.[74] Senator Hatch's opinions concerning habeas corpus were, by no means, in the minority. Indeed, the AEDPA and its habeas restrictions simply exemplify the majority's opinion of the writ. In the late twentieth century, the writ of habeas corpus became less known as the Great Writ of Liberty – a bastion of individual freedom and historical safeguard against the abuses of executive power – so much as a 'Get out of jail' card for savvy criminals.

The importance of the writ and all that it stands for was, however, reignited in the American imagination with the landmark case *Boumediene* v. *Bush* in 2008. However, the fight over detainee rights to the writ of habeas corpus is not yet over. Although in *Boumediene*, the Court settled the question of habeas for the detainees held at the U.S. Naval Base in Guantanamo Bay, Cuba, it left open for future consideration the status of those detainees held elsewhere – e.g. Bagram Theatre Internment Facility in Afghanistan.

<u>What *Boumediene* Says, and the Implications for Bagram</u>

Boumediene v. *Bush* was decided on June 12, 2008. The Court held 5 to 4 that the alien detainees imprisoned at Guantánamo Bay, Cuba do possess a constitutional right to challenge their continued imprisonment in federal courts. Therefore, the "court-stripping" clause of the Military Commissions Act is unconstitutional as it prevents federal courts from hearing detainee habeas petitions, which then violates the Suspension Clause. Neither Congress nor the Executive could deprive the detainees of their habeas rights "without a valid invocation of the limited emergency powers provided under the Suspension Clause."[75] The *Boumediene* Court further emphasized the importance of habeas corpus in both the U.S. Constitution as well as the

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[74] Cary Frederman. *The Body and the State: Habeas Corpus and American Jurisprudence* (Albany: State University of New York, 2006), at 158.
[75] Hafetz, *Habeas Corpus After 9/11*, at 158.

American system of government insofar as "[t]he Framers [v]iewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."[76] The Court also held in *Boumediene* that while greater deference and more limited exhaustion requirements are reasonable when accorded to a court of record – i.e., state courts – such deference is not appropriate in cases of executive detention. The Great Writ of Liberty is, after all, "a time-tested device [meant to] maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[77] The Suspension Clause then "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account."[78]

Guantánamo Bay is not the only detainment facility currently utilized by the U.S. military. Bagram Threatre Internment Facility, at the start of 2009, had an estimated 670 detainees on site. These prisoners, however, were not all captured on Afghan soil. Indeed, like the Guantánamo detainees, many of the Bagram detainees were rendered there after being captured by Pakistani forces, or after being interrogated in secret CIA prisons around the world.[79] If the Bagram detainees are similarly situated to those detained at Guantánamo, should they enjoy the same rights? Or were the rights awarded to the GITMO detainees contingent upon their location in Guantánamo Bay, Cuba – territory long held under U.S. authority and far away from the theatre of war? Bagram Air Base is, in comparison, located in Afghanistan, which at present and for the immediate future, is an active theatre of war. The main question at hand is then: How far does the Suspension Clause extend?

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[76] *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), quoted in Hafetz, *Habeas Corpus After 9/11*, at 159.
[77] 553 U.S. ___ (2008), at 15
[78] 553 U.S. ___ (2008), at 15
[79] *See* Redacted List of Detainees Held at Bagram Air Base, *available at* http://www.aclu.org/national-security/redacted-list-detainees-held-bagram-air-base.

The *Boumediene* Court determined at least three relevant factors in the determination of the reach of constitutional habeas corpus: "(1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[80] Although this functional test does not guarantee habeas corpus wherever the United States chooses to detain a prisoner, it nevertheless "rejected the idea that the president could avoid judicial review simply by choosing to hold that prisoner outside the country."[81] And in doing so, the Court argued that the separation of powers issue was not that the judiciary was unduly interfering with executive prerogative in times of emergency, but that rather the problem in *Boumediene* concerned how to prevent future executive manipulation of both the judiciary and the Constitution. The Court categorically rejected the existence of legal black holes – i.e., areas absent legal constraint or somehow beyond its reach. In other words, the Court ruled in *Boumediene* that "[t]he actions of the United States [a]re always subject to constitutional constraints, even when those actions concern foreign nationals and occur abroad."[82] Already the writ of habeas corpus is demonstrating its ability to constrain the arbitrary exercise of executive power through checks and balances.

At the same time, many more questions arose: Are these determining factors of equal weight? Should we be affording greater weight to the practical obstacles prong of this test than to the citizenship one? What are the implications – e.g. for the separation of powers – of bestowing greater weight to certain factors? For that matter, how many of these requirements need to be fulfilled in order to determine that yes, the Suspension Clause applies here? Did the *Boumediene*

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[80] 553 U.S. ___ (2008), at 36-37.
[81] Hafetz, *Habeas Corpus After 9/11*, at 159.
[82] Hafetz, *Habeas Corpus After 9/11*, at 161.

Court intend its application of the framework to be categorical, or to apply on a case-by-case basis? While Judge Gates interpreted the Supreme Court to mean the latter, a "functional, multi-factor, detainee-by-detainee test,"[83] he nonetheless closely followed, in *Al Maqaleh* v. *Gates,* the *Boumediene* decision with regard to its determinative factors.

In *Al Maqaleh*, each of the four petitioners is a foreign national who claims to have been captured outside of Afghanistan and then rendered to Bagram Theatre Internment Facility. Each was designated an enemy combatant by the Pentagon, and similar to many of the Guantanamo detainees, each petitioner has been held for at least six years with no prospect of release.[84] Judge Gates further rules, "The issues here closely parallel those in Boumediene, in large part because the detainees themselves as well as the rationale for detention are essentially the same."[85] In the context of the Bagram detainees, there is also a need to balance the powers given to the executive as Commander-in- Chief with the courts' responsibility to ensure the proper exercise of those powers: "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."[86]

Whereas Kennedy framed the question in *Boumediene* as "whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protections,"[87] Bates understands the central question in *Al Maqaleh* to be essentially the same: "whether petitioners – foreign nationals designated as enemy combatants, captured, and held abroad at Bagram – are entitled to

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[83] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 4-5. (D.D.C. 2009)
[84] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 1-2. (D.D.C. 2009)
[85] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 2. (D.D.C. 2009)
[86] 553 U.S. ___ (2008), at 69
[87] 553 U.S. ___ (2008), at 15.

invoke the protections of the writ of habeas corpus in U.S. Courts."[88] As such, the legal analysis must then be conducted within the framework provided by the *Boumediene* decision – although Bates does subdivide the three factors into six:

> (1) the citizenship of the detainee; (2) status of the detainee; (3) adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ.

Insofar as the *Boumediene* Court sees the common thread uniting its own precedent – i.e., those pre-*Boumediene* cases which considered the extraterritorial application of the Constitution – to be "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism,"[89] an "individualized, detainee-specific"[90] analysis of the above six factors is also necessary in the context of the Bagram detainees. In other words, access to the writ of habeas corpus will not be given to *every* Bagram detainee who seeks it; instead, it will be granted on a case-by-case basis, contingent upon the analysis of the six outlined factors.

<u>In the Aftermath of *Boumediene*: Analyzing Citizenship, Status, and Site of Apprehension</u>

Judge Bates begins his analysis of the six *Boumediene* factors by arguing that the Supreme Court weighed the factors of (3) adequacy of process, (5) site of detention, and (6) practical obstacles more heavily than the remaining three, insofar as the "Supreme Court spent little time"[91] reviewing (1) citizenship, (2) status, and (4) site of apprehension in its decision. As a result, there is little to guide the District Court in its decision on those three latter factors. Regarding the first factor, i.e. citizenship, the only definitive statement after *Boumediene* is that

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[88] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 13 (D.D.C. 2009)
[89] 553 U.S. ___ (2008), at 34
[90] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 17 (D.D.C. 2009)
[91] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 20. (D.D.C. 2009)

"U.S. citizenship helps petitioners whereas foreign citizenship does not."[92] Since all four petitioners in this case are foreign nationals, the citizenship factor is found to weigh against them. As for the second factor, i.e. the status of the detainee, the petitioners are similarly situated to the *Boumediene* petitioners – both contest their classification as "enemy combatants." In *Al Maqaleh*, however, "the parties even dispute what it means to be an enemy combatant."[93] Yet because the *Boumediene* Court avoided ruling on the appropriate definition of enemy combatant, Bates refuses to fully consider the definition as well. At the same time, he does comment on the broadness of the respondent's – i.e. the government's – enemy combatant definition, and thereby states that such a "necessary corollary [to such a broad definition] is a robust process to ensure that only detainees who pose the kind of threat that warrants detention are designated as enemy combatants."[94] In sum, although this second factor weighs neither in favor nor against the extension of the Suspension Clause to the Bagram detainees, the breadth of the existing classification indicates the need for a substantive due process to protect against completely arbitrary executive detentions. Interestingly enough, the District Court of Appeals decision in *Al Maqaleh* – which actually overturned Bates' ruling – argued that insofar as the Bagram detainees do not differ materially from the petitioners at Guantánamo with regard to the citizenship and status factor of the test, those two factors weigh *in favor* of the extension of the writ to Bagram.[95]

In his consideration of the fourth factor, i.e. site of apprehension, Judge Bates provides a more in-depth analysis than the Supreme Court did in *Boumediene*. The site of apprehension factor plays a greater role in the case of the Bagram detainees than it did for those held at Guantánamo due to the heterogeneity of the Bagram detainees. In other words, the Bagram

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[92] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 22. (D.D.C. 2009)
[93] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 22. (D.D.C. 2009)
[94] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 23. (D.D.C. 2009)
[95] *See* Nos. 09-5265, 09-5266, 09-5277, --- F.3d ---, 2010 WL 2010783, at 19-20 (D.C. Cir. May 21, 2010).

detainees can be divided into two groups: those captured *in* Afghanistan, and those captured elsewhere and then *brought* to Afghanistan, "a theater of war, where the Constitution arguably may not reach."[96] All of the Guantánamo detainees, on the other hand, were brought to the secure U.S. military base in Cuba – a location far from an active war zone – to be detained. "The site of apprehension factor," Bates concludes, "is of more importance here than it was for the Guantánamo detainees in Boumediene, and for these petitioners cuts in their favor because [all] were apprehended outside of Afghanistan."[97] However insofar as Bates ultimately rules, "for these three factors, petitioners are not much different than the petitioners in Boumediene,"[98] the third factor is still not given much more weight than what the *Boumediene* Court already provided.

"[The] concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely,"[99] is the primary principle driving the District Court's decision to attribute greater importance to the third factor – the site of apprehension. And insofar as this concern implicates serious separation-of-powers questions as it introduces the possibility of the political branches playing hide-and-seek with the judiciary, this third factor should be afforded greater weight. "[If] Congress and the president had the power to take control of a territory and then determine that U.S. law does not apply there,"[100] it damages America's long-held reputation as abiding by the rule of law in all situations, at all times. We are not a dictatorship, a fascist or a totalitarian state. The United States of America is, and has always been, a democracy. Yet we are a democratic state not because we happen to hold elections, but

[96] 604 F. Supp. 2d 205, at 25.
[97] 604 F. Supp. 2d 205, at 25.
[98] 604 F. Supp. 2d 205, at 26.
[99] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 23. (D.D.C. 2009)
[100] Noah Feldman, "When Judges Make Foreign Policy," *The New York Times Magazine*, September 25, 2008, accessed November 12, 2010, http://www.nytimes.com/2008/09/28/magazine/28law-t.html.

because we abide by – and believe in the importance of – the rule of law. This reputation is further harmed when the Executive consciously and purposely transfers detainees from one detention site to another – e.g. from Guantánamo to Bagram or to other CIA black-sites around the world – based on whether or not the U.S. Constitution applies. The rule of law, remember, "is the cornerstone of a modern democratic society, one that is run not on the whims of its leaders but by established rules."[101] Even if adherence to rule of law in times of crisis constrains or impedes executive action to some extent, it also forces the executive to justify its actions – thereby diminishing the risk of heinous mistakes made in the name of urgency. The extension of the writ to Bagram does *not* guarantee release for the detainee, but simply demands that the executive have *reasonable* reasons for the petitioner's continued detention. What harm to security is being done when all habeas does is to protect against arbitrary executive action? Security is, in fact, only harmed when the courts fail to hold the executive accountable for his decisions.[102] After all, *al-Maqaleh* does *not* advocate for its "malleable, multifactored test"[103] to automatically afford habeas rights for all Bagram detainees. The Great Writ of Liberty, it appears, is not absolute but subject to limitation in certain contexts and based on pragmatic grounds.

In this global war on terror, America cannot stand alone. But in the aftermath of 9/11, we have become more and more alone. "Once a leading exponent of the rule of law," David Cole observes, "the United States is now widely viewed as a systematic and arrogant violator of the most basic norms of human rights law – including the prohibitions against torture,

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[101] Solove, *Nothing to Hide*, at 54.
[102] "An administration that is legally exempted from providing reasons for its actions also has a weak incentive to develop and implement a coherent overall policy. One reason why the United States was able to treat various terrorist suspects in its custody [in] incomprehensible erratic and inconsistent ways may have been that it was never forced to explain publicly, or perhaps even behind closed doors, exactly what it was doing." Holmes, at 333.
[103] Hafetz, *Habeas Corpus After 9/11*, at 166.

disappearances, and arbitrary detention."[104] We cannot afford to alienate our friends with our actions. This loss of legitimacy is not simply harmful because it paints us in hypocritical colors, but because it also leaves us more vulnerable to terrorist attack inasmuch our governmental abuses in the arena of detention "fuels the animus and resentment that inspire the attacks against us in the first place."[105] We only confirm what the terrorists have been saying all along. In the end, the fight against terrorism is fundamentally a battle for hearts and minds.[106] The more we win over our enemies, the fewer enemies we have to be concerned about. But the battle is not won with money; it is not won with victory. It is won by a long term commitment to civil liberties and the rule of law – everything that America was once known to stand for – as well as proof that even in the short term, we will act with legitimacy, fairness, and within the constraints of law. "As any leader instinctively knows," Cole advises, "it is far better to have people follow your lead because they view you as legitimate than to have to try to compel others by force to adhere to your will."[107] Our allies were once willing to aid us in our cause – for the cause, the fight against terrorism, is neither illegitimate nor unworthy of pursuit. They are more reluctant now because we have compromised our legitimacy – i.e., the sincerity of our reasons for fighting this fight – when we employ illegitimate means to reach our ends. We require the help of our allies; and so in order to keep them on our side, we need to maintain "our historic position of leadership in the global spread of the rule of law," thus reminding them of the "virtue of [the] legal commitments they [too] have made."[108]

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[104] Cole, *Less Safe*, at 139.
[105] Cole, *Less Safe*, at 140.
[106] Cole, *Less Safe*, at 140.
[107] Cole, *Less Safe*, at 140.
[108] Feldman, "When Judges Make Foreign Policy."

In the Aftermath of *Boumediene*: Analyzing Detention and the Necessity of Due Process

In its analysis of the fourth and fifth factors, i.e. the site of apprehension and detention, the District Court of Appeals dispenses with the site of apprehension factor in a rather cursory manner – indeed, the statement "Like all petitioners in both *Eisentrager* and *Boumediene*, the petitioners here were apprehended abroad" is the extent of the fourth factor's analysis.[109] The court instead attributes far greater weight and attention to the site of detention factor; it concludes that in the absence of *de facto* sovereignty, "the site of detention analysis weighs in favor of the United States and against the petitioners."[110] Judge Bates, however, presents a more flexible and more persuasive interpretation of the fifth factor.

The fifth factor, i.e. the site of detention, brings into question which site Bagram is more similar to with regard to the "objective degree of [U.S.] control"[111]: Guantánamo Bay or Landsberg Prison in post-World War II Germany, the site at issue in *Johnson* v. *Eisentrager*[112]. Whereas the Court held that the Suspension Clause was in full effect at Guantánamo Bay, it ruled in *Eisentrager* that the writ of habeas corpus did not reach those detained at Landsberg. Yet it is important to note that *Johnson* v. *Eisentrager* was not overruled in *Boumediene*, as the Court determined several "critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008."[113] The question is now whether or not the precedent of *Eisentrager* restrains *Al Maqaleh*. To do so, the District Court "must examine both the degree and duration of U.S. 'control' at Bagram to determine where Bagram falls on the Guantánamo -Landsberg spectrum."[114]

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[109] Nos. 09-5265, 09-5266, 09-5277, --- F.3d ---, 2010 WL 2010783, at 21 (D.C. Cir. May 21, 2010).
[110] Nos. 09-5265, 09-5266, 09-5277, --- F.3d ---, 2010 WL 2010783, at 22.
[111] 604 F. Supp. 2d 205, at 26.
[112] *See* 339 U.S. 763 (1950)
[113] 553 U.S. ___ (2008), at 38
[114] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 27 (D.D.C. 2009)

Two things govern the U.S. presence in Afghanistan: the "Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield" and a Status of Forces Agreement (SOFA). When read together, the U.S. appears to have "near-total operational control at Bagram. For instance, paragraph 9 of the lease grants the United States exclusive use of the premises at Bagram,"[115] and it is further written that the lease is to remain in effect "until the United States or its successors determine that the premises are no longer required for its use."[116] Furthermore, the SOFA not only grants U.S. military personnel the leeway to enter and leave Afghanistan without a passport, but also exempts American vehicles, imports, and exports from taxation, regulation, and inspection. Nonetheless, there are several key differences in the degree of U.S. control at Bagram and at Guantánamo. First of all, the implication of a SOFA is the "manifestation of the full sovereignty of the state on whose territory it applies."[117] The presence of a lease does not, furthermore, "transfer sovereignty over leased land to the United States."[118] Guantánamo Bay, on the other hand, is governed in the absence of such an agreement. Second, access to the military facility at Guantánamo is almost exclusively confined to U.S. personnel, a fact which then led the Supreme Court to conclude that "[in] every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."[119] In contrast, there is a significant non-U.S. presence at Bagram: "as of February 1, 2010, approximately 38,000 non-United States troops were serving in Afghanistan as part of the [International Security Assistance Force (ISAF)], representing 42 other countries."[120] Third, the extent of American jurisdiction is not as unambiguous at Bagram as it is at Guantánamo – where the lease explicitly states that the

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[115] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 27 (D.D.C. 2009)
[116] Nos. 09-5265, 09-5266, 09-5277, --- F.3d ---, 2010 WL 2010783, at 4 (D.C. Cir. May 21, 2010).
[117] 604 F. Supp. 2d 205, at 28.
[118] 604 F. Supp. 2d 205, at 28.
[119] 553 U.S. ___ (2008), at 39
[120] Nos. 09-5265, 09-5266, 09-5277, --- F.3d ---, 2010 WL 2010783, at 5 (D.C. Cir. May 21, 2010).

United States has "complete jurisdiction and control" over the military base.[121] Whereas the lease governing U.S. control over Bagram is silent with regard to U.S. jurisdiction, the SOFA does address it: "Under the SOFA, the United States has criminal jurisdiction over U.S. personnel. [However, criminal] jurisdiction over Afghan workers or over allied personnel is beyond U.S. authority." There are then limitations on U.S. jurisdiction at Bagram where there are none at Guantánamo. However, as Kennedy did in *Boumediene*, Bates rejects the argument "that a label like 'sovereignty' is determinative in assessing the reach of the Suspension Clause."[122] Instead, what ought to be included in the final analysis is the *actual* degree of control the United States exercises at the Bagram detention facility. In "assessing the day-to-day activities at Bagram,"[123] it is clear that the United States does, in fact, exercise a very high "objective degree of control" at the base.

As to Bagram's similarities with the Landsberg Prison in post-World War II Germany, the District Court holds that although both sites were not exclusively restricted to that of U.S. personnel, the U.S. "does not share control at Bagram the way the Allied Forces shared control at Landsberg."[124] However, with regard to the duration of the U.S. presence, Bagram resembles Landsberg more than Guantánamo – "the United States has been at Bagram for less than a decade and has disavowed any intention of a permanent presence there." Indeed, in January of 2010, the Afghan Defense Ministry announced that it had signed an agreement that would "see the Afghan government take over operation of [Bagram] and responsibility for 'investigating, detaining, observing, and trying' its inmates."[125] As a result, the site of detention does not favor

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[121] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 29 (D.D.C. 2009)
[122] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 30. (D.D.C. 2009)
[123] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 30. (D.D.C. 2009)
[124] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 32. (D.D.C. 2009)
[125] Peter Graff, "Afghans agree to take over U.S. prison at Bagram," *Reuters*, January 9, 2010, *available at* http://www.reuters.com/article/idUSTRE6081IN20100109.

the Bagram detainees to the extent it does for the Guantánamo detainees. "Nonetheless," Bates argues, "it is still fair to say that the United States has a high objective degree of control at Bagram."[126]

As was necessary in consideration of the fifth factor, so too must we compare Bagram in reference to both Landsberg and Guantánamo in the analysis of the third factor, i.e. adequacy of the process used to make status determinations. The *Boumediene* Court described the process used to determine the "enemy aliens" status of the *Eisentrager* petitioners as:

> The records from the Eisentrager trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The Eisentrager petitioners were charged by a bill of particulars that made detailed factual allegations against them. [To] rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses.[127]

In comparison with the procedural protections afforded to the *Eisentrager* petitioners, the CSRT hearings at Guantánamo are "far more limited, and [fall] well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[128] The procedural protections available to detainees held at Bagram Theatre Internment Facility, as described in the *Al Maqaleh* decision,[129] are even more limited. Notably, the District Court of Appeals agrees with this determination.[130] The Unlawful Enemy Combatant Review Board (UECRB) not only denies detainees access to a "personal representative," – i.e., Bagram detainees must represent themselves before the panel – but also, permits them only to submit a written statement. "Detainees," Bates writes, "cannot even <u>speak</u> for themselves."[131] Not to

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[126] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 34 (D.D.C. 2009)
[127] 553 U.S. ___ (2008), at 37.
[128] 553 U.S. ___ (2008), at 37.
[129] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 36-37 (D.D.C. 2009)
[130] Nos. 09-5265, 09-5266, 09-5277, --- F.3d ---, 2010 WL 2010783, at 21 (D.C. Cir. May 21, 2010).
[131] 604 F. Supp. 2d 205, at 37.

mention, the government's "far-reaching and ever-changing definition of enemy combatant, coupled with the uncertain evidentiary standards, further undercut the reliability of the UECRB review," and – perhaps, most importantly – "unlike the CSRT process, Bagram detainees receive no review beyond the UECRB itself."[132] It is clear then that the processes provided by the UECRB to the detainees held at Bagram falls far short of even the CSRT process at Guantánamo, and insofar as this third factor weighed heavily in favor of supporting the extension of the Suspension Clause to Cuba, it does so even more strongly in the case of the Bagram detainees.

The reason why this particular factor ought to be weighed more heavily is, in great part, due to the fact that "[l]aw comes into being and is sustained not because the weak demand it, but because it is a tool of the powerful."[133] Indeed, law allows those in power to legitimize the exercise of their authority, which then paves the way for more efficient and effective executive or legislative action. To be put more bluntly, "[it] is easier and cheaper to get the compliance of weaker people or states by promising them rules and fair hearing than by threatening them constantly with force."[134] A government that not only bases its legitimacy on certain abstract ideals, but also follows through on those promises, almost always lasts longer than those that seek to maintain legitimacy solely through the maintenance of fear and the threat of the sword: "An act of violence one can disclose and be proud of is ultimately stronger, more *legitimate*."[135] Indeed, we need only look to the present status of the postcolonial world[136] to see the value of a legitimacy story that is consistent in both theory and practice. Although the constitutions created

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[132] 604 F. Supp. 2d 205, at 37.
[133] Feldman, "When Judges Make Foreign Policy."
[134] Feldman, "When Judges Make Foreign Policy."
[135] David Kennedy, "Modern War and Modern Law," *Baltimore Law Review* 36 (2007), at 13.
[136] For a detailed account of law in the postcolonies, *see generally* Jean and John L. Comaroff, *Law and Disorder in the Postcolony* (Chicago: University of Chicago, 2006).

"over the past twenty years have tended [to] emphasize the rule of law and the primacy of rights,"[137] they do so in place of both justice and government accountability. It has even become advantageous for criminals in postcolonies to "not so much repudiate the rule of law or the licit operations of the market as *appropriate* their forms."[138] Consequently, what is legal cannot be differentiated from the illegal, the real from the fake, the legitimate from the illegitimate. The United States is, on the other hand, a nation which does possess a compelling legitimacy story that is – for the most part – realized and protected in practice. But the rule of law demands continual effort, "it isn't "self-executing – it can't work on its own."[139] We have to, in colloquial terms, practice what we preach.

Remember: Many of the ideals cherished by the United States of America can find its origins in Great Britain, a country that possesses a long history of dedication to the ideals associated with the writ of habeas corpus – i.e., a commitment to the guarantee of liberty and the denial that the government is above the law. In accordance with the values held by their English forefathers, the Founders also considered the Great Writ to be an essential safeguard against tyrannical government. They were all too aware of the implications of a too strong executive branch, "where the President would have the powers of a king."[140] As a result, there was little to no controversy surrounding the incorporation of the writ into the United States Constitution; the absence of debate only further illustrates that many Americans believed the writ to be integral to both the maintenance and protection of liberty. What debate there was, instead, revolved around whether or not habeas should be restricted at *any* time.[141]

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[137] Comaroff, *Law and Disorder*, at 23.
[138] Comaroff, *Law and Disorder*, at 5.
[139] Solove, *Nothing to Hide,* at 57.
[140] Solove, *Nothing to Hide*, at 57.
[141] Marc D. Falkoff and Robert Knowles, "Bagram, *Boumediene*, and Limited Government," *DePaul Law Review*, 59 (2010).

In the Aftermath of *Boumediene*: Analyzing the Practicalities

The final factor to be considered is the sixth, i.e. the practical obstacles implicated in the extension of the writ. In *Boumediene*, the Supreme Court dedicated a significant amount of attention to this specific factor, "focusing on the impact that habeas review would have on the military mission and on whether litigating habeas cases would cause friction with the host government."[142] In the case of Guantánamo, the Court ruled that extension of the writ would not significantly impact the military mission. However, "arguments that issuing the writ would be 'impracticable or anomalous'" might be given greater weight if Guantánamo had been "located in an active theater of war."[143] Indeed, the practical difficulties of habeas review are no doubt enhanced when the petitioners are held in an active military combat zone. And in this regard, the Bagram detainees resemble the *Eisentrager* petitioners more so than those held at the secure U.S. facility in Guantánamo "since [Bagram], like Landsberg, is under constant threat by suicide bombers and other violent elements."[144] The Circuit Court in its *Al Maqaleh* decision further emphasize the danger and insecurity of the site of detention: "Bagram has been subject to repeated attacks from the Taliban and al Qaeda, including a March 2009 suicide bombing striking the gates of the facility, and Taliban rocket attacks in June of 2009 resulting in death and injury to [U.S.] service members and other personnel."[145]

At the same time, if the *Eisentrager* petitioners were still able to receive "a rigorous adversarial process to test the legality of their detention" at a "hastily-constituted military tribunal in post-war China, [it] strains credulity to believe that it is impractical to provide meaningful process to detainees held at a large, secure [U.S. controlled] military base, like

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[142] Falkoff, "Bagram, *Boumediene*," at 38.
[143] 553 U.S. ___ (2008), at 41.
[144] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, at 38 (D.D.C. 2009)
[145] Nos. 09-5265, 09-5266, 09-5277, --- F.3d ---, 2010 WL 2010783, at 4 (D.C. Cir. May 21, 2010).

Bagram."[146] Indeed, Bates dismisses the government's argument regarding the inconveniences involved in gathering evidence and providing the Bagram detainees with counsel insofar as he believes certain technological advances significantly reduce such logistical concerns: e.g. "[r]eal-time video-conferencing provides a workable substitute for an in-court appearance."[147] Furthermore, when weighing the practical obstacles, the District Court also considered, as the Supreme Court did in *Boumediene*, whether the Executive was afforded a "reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition."[148] In *Al Maqaleh*, all four petitioners have already been detained for more than six years – the reasonable time period before meaningful judicial review is required has long passed.

In its *Boumediene* decision, the Supreme Court also considered the possibility of friction with the host government. However, because "[n]o Cuban court has jurisdiction over American military personnel at Guantánamo or the enemy combatants detained there," the United States is then "answerable to no other sovereign for its acts on the base."[149] With the Bagram detainees, especially with those detainees of Afghan nationality, on the other hand, there is the real possibility of conflict. After all, the expectation is for the United States to eventually transfer control over the base and its detainees to the Afghan government. Afghan President Karzai was even quoted as saying that the "detention and prosecution of suspects should be the responsibility of the Afghan government."[150] Nonetheless, Bates still differentiates between the Afghan and non-Afghan detainees held at Bagram, ruling that while the practical difficulties associated with the former weighs *against* the extension of the writ, those involved with the latter are not so great "as to defeat their invocation of the Suspension Clause – especially when it is considered that

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[146] 604 F. Supp. 2d 205, at 39.
[147] 604 F. Supp. 2d 205, at 39.
[148] 553 U.S. ___ (2008), at 66.
[149] 553 U.S. ___ (2008), at 41.
[150] Graff, "Afghans agree to take over U.S. prison at Bagram."

these petitioners were apprehended elsewhere more than six years ago and are only in the Afghan theater of war because the United States chose to send them there."[151] Ultimately, the District Court rules in *Al Maqaleh*:

> [The] Bagram detainees who are not Afghan citizens, who were not captured in Afghanistan, and who have been held for an unreasonable amount of time – here, over six years – without adequate process may invoke the protections of the Suspension Clause, and hence the privilege of habeas corpus, based on the application of the Boumediene factors. Three petitioners are in that category. Because there is no adequate substitute for the writ of habeas corpus for Bagram detainees, those petitioners are entitled to seek habeas review in this Court. [As] to the fourth petitioner, Wazir, the Court concludes that the possibility of friction with Afghanistan, his country of citizenship, precludes his invocation of the Suspension Clause under the Boumediene balance of factors.[152]

From this conclusion, it is determined that the factors given the most weight in Bates' decision are, as in *Boumediene*, (3) adequacy of process, (5) site of detention, and (6) practical obstacles.

However, it is important to point out that Wazir, the Afghan national, only differed with the other three petitioners, non-Afghan nationals, on the sixth factor – in particular, the issue of potential friction with the host nation – and yet he was the only one denied the privilege of invoking the writ of habeas corpus. It seems then that the District Court in *Al Maqaleh* affords the greatest weight to the practical obstacles facet of the *Boumediene* framework, as does the District Court of Appeals[153]. "In sum, taken together," the appeals court concludes, "the second and <u>especially</u> the third factors compel us to hold that the petitions should have been dismissed."[154] However, should this sixth factor be determinative? Although both the D.C. District Court and the D.C. Court of Appeals ruled the practical obstacles facet of the *Boumediene* test to be the determining factor in whether or not the Suspension Clause extended

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[151] 553 U.S. ___ (2008), at 45.
[152] 553 U.S. ___ (2008), at 52-53.
[153] Nos. 09-5265, 09-5266, 09-5277, --- F.3d ---, 2010 WL 2010783, at 22-26 (D.C. Cir. May 21, 2010).
[154] Nos. 09-5265, 09-5266, 09-5277, --- F.3d ---, 2010 WL 2010783, at 26. d

to Bagram, these two courts came to entirely opposite conclusions. It seems then that more ought to be considered beneath the umbrella of "practical obstacles" beyond that of Bagram's status as an active theater of war and the subsequent difficulties that come with such a status, the length of time the petitioner has been detained at Bagram, as well as the potential friction with the host nation – we ought to also include in our practical obstacles analysis issues of foreign policy.

In the Aftermath of *Boumediene*: Towards the Next Decision

By no means is the Supreme Court's decision in *Boumediene* an indication of a fight's end. Yes, the Court's 5-4 decision in 2008 can be perceived as the culmination of its previous detainee jurisprudence, i.e. *Rasul* v. *Bush, Hamdi* v. *Rumsfeld,* and *Hamdan* v. *Rumsfeld*. In line with existing precedent, the *Boumediene* Court too rejected the government's claim that the executive branch alone, in times of emergency, ought to have enough discretion to detain as it sees fit– unburdened by any judicial supervision. At the same time, the *Boumediene* decision went further than the previous three insofar as it definitively ruled that because "indefinite military detentions in Guantánamo violated fundamental separation-of-powers principles enshrined by the Suspension Clause, even if [p]ursuant to standards set by Congress,"[155] the writ of habeas corpus could be extended beyond the territorial borders of the United States. Equally significant is the fact that the Court did not restrict the extraterritorial extension of habeas corpus to that of Guantánamo – a unique location inasmuch "[i]n every practical sense Guantánamo is not abroad."[156] Instead, it chose to create a flexible judicial framework – i.e. the three, or six, factor functional test applied in *Al Maqaleh* – to ascertain whether the Suspension Clause, which

[155] Baher Azmy, "Executive Detention, *Boumediene*, and the New Common Law of Habeas," *Iowa Law Review* 95 (2010), at 449.
[156] Falkoff, "Bagram, *Boumediene,*" at 853.

guarantees the availability of the writ of habeas corpus absent congressional suspension, might extend further than Guantánamo to other sites of American executive detention.

Ultimately, the *Al Maqaleh* decisions reveal the flexibility of the *Boumediene* test as both a blessing and a curse for detainees held elsewhere in the world:

> [W]hile it created the possibility that extraterritorial detentions by the United States would be subject to habeas review, it by no means ensured that review. To the contrary, it gave judges wide discretion to balance various factors and decline to exercise jurisdiction based on what they perceived as practical concerns. Without a reversal of *al-Maqaleh*, no Bagram detainee would have access to habeas corpus, no matter how long he had been held or how inadequate the process he had received, at least without additional evidence that he had been brought to Bagram deliberately to avoid habeas review.[157]

In many ways, Guantánamo represents the easy case in the greater landscape of long-term extraterritorial executive detention. In addition to the fact that the United States, in effect, is sovereign at Guantánamo, information on detainees and their plight at prisons in Afghanistan, Iraq, or elsewhere is even more difficult to come by. The American public is thereby less aware of what exactly is taking place at these far away sites – and how are we to care about something if we are simply unaware? It is already difficult enough to be concerned about the rights of foreign suspected terrorists held a few hundred miles away, never mind an ocean away.

"[A]s a purely legal matter, too," Falkoff remarks, "challenges to extrajudicial detention grow more difficult as the prisoners' connections to the United States grow increasingly remote."[158] At the same time, the judicial decisions thus far in the "enemy combatant" cases nonetheless reject the interpretation of the reach of habeas corpus to turn on such bright-line classifications as the detainees' citizenship or territorial sovereignty. However, as evident by the Circuit's overruling of the District Court's decision in *Al Maqaleh*, there is still more to be

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[157] Hafetz, *Habeas Corpus After 9/11*, at 167.
[158] Falkoff, "Bagram, *Boumediene*," at 853.

clarified as to the scope of the writ of habeas corpus as enshrined in the Suspension Clause. The ensuing legal fight in the aftermath of *Boumediene* will primarily concern the decision's scope. Two questions will be at the forefront: (1) *Does* the Suspension Clause, in light of *Boumediene*, extend beyond the unique territorial space of Guantánamo? (2) How far *should* the Suspension Clause reach extraterritorially? The *Boumediene* Court left both these questions open for the lower courts to answer – purposely so.[159] It is unsurprising, therefore, that there has been disagreement amongst the lower courts – e.g. between the District and Circuit Court in *Al Maqaleh*. Indeed, it will take, at minimum, another Supreme Court decision to truly resolve the two questions *Boumediene* left unresolved. What, in this next decision, should the Court say?

To be clear, *Boumediene* is not an uncontroversial decision. People neither agree on what the decision says nor does everyone think that it was rightly decided. Those who believe it was a mistake argue that the Court intruded where it was not welcome: preventive detention in the context of emergency or war should remain under the sole discretion of the executive. The court ought to defer to the superior judgment of the executive when handling matters of national security.[160] As Chief Justice John Roberts criticized in his dissenting *Boumediene* opinion:

> So who has won? … Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.[161]

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[159] Or as Azmy puts it: "*Boumediene* issued a largely unlimited invitation to the lower courts to create a whole new corpus of habeas law in the context of military detention – a body of law that, save for several marquee, Civil War-era cases, has largely remained undeveloped since Reconstruction." Azmy, "Executive Detention," at 450.

[160] For a detailed defense of this position *see* Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2007); Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006).

[161] 553 U.S. ___ (2008), (Roberts, J., dissenting).

Others further argue that *Boumediene* unacceptably burdens the military forces on the battleground, in particular, as well as the 'war' against terror, in general.[162] Still others argue that *Boumediene* didn't go far enough with its decision. Christina Duffy Burnett is one such example. She believes that the Court was mistaken in that it allowed its ruling to be so open-ended and subject to practical considerations: "'[T]he impracticable and anomalous' test has subordinated constitutional guarantees to functional considerations, even as it has paid lip service to the notion that the Constitution does not stop at the border."[163] We require, Burnett argues, more certainty in the doctrine.

In response to the executive deference criticism, at the very minimum, *Boumediene* serves as a reminder to the executive that the court does not exist to write off its demands, even in exigent times. After all, both history and present events speak for themselves: the executive branch has proven unreliable in upholding and abiding by the rule of law absent judicial review. As to the critique that *Boumediene* left too much for the lower courts to decide, I both agree and disagree. The reality is that the facts on the ground change all the time. The time in when *Boumediene* was first decided in 2008 looks very different than today's 2011. Indeed, the escalating insurgent violence in Afghanistan led President Obama to commit an additional 47,000 troops to the region in late 2009. Then towards the end of 2010, the Obama administration declared that U.S. troops would remain in Afghanistan until, at least, the end of

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[162] "[L]eaders within the DoD may be forced to consider *Boumediene* in planning and waging future military operations. Organizational change, including adjustments to policy, structure, and tactics may be required. Additionally, troops on the ground may be forced to operate within the confines of *Boumediene*, figuratively loading their already full combat assault packs with heavy rocks of constitutional procedures and protections normally reserved for domestic police operations." Colonel Fred K. Ford, "Keeping *Boumediene* off the Battlefield: Examining Potential Implications of the *Boumediene v. Bush* Decision to the Conduct of United States Military Operations," *Pace Law Review* 30 (2010), at 397.

[163] Christina Duffy Burnett, "A Convenient Constitution? Extraterritoriality After *Boumediene*," *Columbia Law Review* 109 (2009), quoted in Falkoff, "Bagram, *Boumediene,*" at 883. *See* also Glenn Sulmasy, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror* (Oxford: Oxford University Press, 2009).

2014. In other words, Afghanistan will remain a battlefield for at minimum, three more years. The lower courts may well be better equipped to address such practical issues in a timelier and more effective manner than the Supreme Court could have had it issued a more concrete decision. After all, the Court is unable to foresee future events.

On the other hand, I agree that if *Al Maqaleh* – or another case like it – comes before the Supreme Court again, the justices ought not be so open-ended this second time around. Why? The government was given a few years to fix the issues with their preventive detention schema, but they have not completely. One hundred and seventy-two prisoners still remain at Guantánamo, and as of March 2011, military trials have resumed – although with revamped procedures.[164] Even the District of Columbia Circuit Court has begun to infringe upon the core of *Boumediene*: the power of the judicial branch to serve as a substantive check on the arbitrary exercise of executive power.[165] Now, given the opportunity, it is time for the highest court in the land to take the lead. They ought to state definitively that (a) *Boumediene* allows for the extension of Suspension Clause beyond that of Guantánamo and (b) the determining question should not be whether the writ extends to, for example, Bagram Air Base in Afghanistan, but why the writ should *not* extend to Bagram. The Court ought to unambiguously rule that future executive overseas detentions cannot evade review. In other words, the Court should take the next preventive case to come before them as an opportunity to show that no matter where detainees are held – i.e., no matter where the Executive seeks to keep them hidden away – they still have hope of having their day in a U.S. federal court.

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[164] Scott Shane and Mark Landler, "Obama Clears Way for Guantánamo Trials," *The New York Times*, March 7, 2011, accessed March 10, 2011, http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html?scp=1&sq=obama,%20in%20reversal,%20clears%20way%20for%20guantanamo%20trials%20to%20resume&st=cse.

[165] "A Right Without Remedy," *The New York Times*, February 28, 2011, accessed March 10, 2011, http://www.nytimes.com/2011/03/01/opinion/01tue1.html?ref=guantanamobaynavalbasecuba.

Conclusion:

Towards a New Emergency Scheme

Looking Forward: Refining the Habeas Emergency Scheme

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

– Supreme Court Justice Louis Brandeis, *Olmstead v. United States* (1928)

[A]s we fight the wars in front of us, we must see the horizon beyond them – a world in which America is stronger, more secure, and is able to overcome our challenges while appealing to the aspirations of people around the world. To get there, we must pursue a strategy of national renewal and global leadership – a strategy that rebuilds the foundation of American strength and influence.

– Barack Obama, *National Security Strategy* (May 2010)

The writ of habeas corpus has historically symbolized as well as functioned as an important check against arbitrary executive detention power in exigent circumstances. Both the *Boumediene* decision and the Bates ruling in *Al Maqaleh* have set the stage for what the writ can do for the detainees previously thought to be exclusively under the discretion of the executive. But the writ can be made – and ought to be – even stronger in order to not only provide greater protection against arbitrary detention, but also to insure our government's commitment to the rule of law at all times: Unless Congress formally suspends the writ of habeas corpus, the Suspension Clause thereby guarantees the writ's application to all individuals detained by the United States, regardless of citizenship or location of detention.

Of course, there will be those who believe such an interpretation of the Suspension Clause – in the context of the ongoing fight against terrorism – unnecessarily burdens the government in a time of crisis. Instead, they argue, "judges, legislators, and the public should instead defer to the president's decisions about whom to imprison and for how long."[1] How the detainees are treated – i.e., how they are interrogated – too ought to fall beneath the executive's

[1] Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* (New York: New York University Press, 2011), at 175.

sole discretion in exigent times. Let the executive branch handle the response; they are best able to keep us safe from the next attack. The problem is, as has been discussed at length in this paper, in aftermath of an attack, rarely does the executive *not* fall under the call of "exceptional times call for exceptional measures" or become infected with the Jack Bauer Syndrome – thereby increasing the likelihood that he will resort to extralegal measures. "[I]t is the very nature of terrorism and the pressures it can exert on even well-intentioned public officials to exceed legal limits in the name of security," Hafetz warns, "that make habeas corpus so important."[2]

Fear, anxiety, and paranoia are what characterize the immediate aftermath of an attack. If we were allow the executive complete discretion to do as he thinks best in the short-term, then we risk irreparable harm to our civil liberties in the long-term. History, indeed, has proven that it is more prudent to be skeptical of the probability of self-constrained executive action in exigent circumstances. Recall what happened in the Palmer Raids of World War I and the Japanese internment of World War II. In fact, we need only look to the past decade to find examples of executive power gone rogue absent substantive constraint. To say the least, as Ackerman advises, "nothing that has happened in recent years requires us to throw overboard everything we know about power – most notably, that absolute power corrupts absolutely."[3] But who cares, the die-hard security apologist might scoff, so long as you are safe? You're alive aren't you? We can always regain our rights, but we only have this one life to live. In fact, rights' very existence is contingent upon a nation's security. On the other hand, why insist on security if there is nothing left to protect? America is still a nation that still speaks and believes in a discourse of rights, of individual freedom. Once we severely compromise the ethos of who we are as a nation, then

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[2] Hafetz, *Habeas Corpus After 9/11*, at 175.
[3] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006), at 121.

what is there left to protect? The life of a nation is not defined solely by its ability to survive on a biological or physical level, but also by the strength of its dedication to its abstract commitments. And insofar as it protects against arbitrary executive imprisonment by providing detainees with the opportunity to challenge the grounds of his detention, the Great Writ of Liberty would also serve as a reminder of our nation's dedication to legitimacy, freedom, and the rule of law.

For that matter, we cannot allow the government, the media, or ourselves to conflate the threat posed by terrorism. As Ackerman powerfully argues in *Before the Next Attack*, the terrorist threat is not as great as one might initially believe:

> September 11 was terrible, but there have been worse moments in our history….Osama and his many successors do not pose these existential threats, and if we pretend otherwise, we will only succeed in destroying our freedom in an endless "war on terrorism." We must distinguish, in short, between *existential struggles*, which threaten utterly to destroy the polity and *momentary affronts to effective sovereignty*, which don't.[4]

Whereas there is no need to distinguish between short and long term implications when confronting existential crisis[5], there is such a need to differentiate clearly between the short term and the long term when addressing the terrorist – i.e., non-existential – threat. In the event of the terrorist attack, our primary concern is not the survival of the state but the need of an exit strategy: "otherwise, short-term emergency responses will morph into the long-run destruction of freedom."[6] The writ of habeas corpus is a short-term remedy to potential executive abuses insofar as it mandates that detainees be provided the opportunity to challenge the grounds of their detention no matter where they are. This requirement will further encourage the executive

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[4] Ackerman, *Before the Next Attack,* at 170-171.

[5] "When fighting a powerful enemy seeking to destroy the state, leaders rightly suppose that they shouldn't spend much time on the long run – if they can't respond effectively in the short run, there won't be a long run: somebody else, very different, will be taking charge. And if they do succeed in destroying the enemy, the victory will be clear and decisive. With the enemy surrendering on the field of battle, it will be clear to the relieved citizenry that the time has come to return to the normal protection of individual rights." Ackerman, *Before the Next Attack*, at 173.

[6] Ackerman, *Before the Next Attack*, at 173.

to refine his detention policies – the emergency dragnets – in the immediate aftermath to focus more on capturing probable suspects, and not take the easy way out by simply rounding up as many suspects as possible to reassure the general public that its government is doing *something*. Detain first, ask questions later is an unacceptable policy. As for the long-term protection of our civil liberties, the Great Writ of Liberty would go a long way in preserving such freedoms as it is an effective constraint on overzealous executive power. We can do better, especially when the actual threat is neither so urgent nor so great. We must remember, as Michael Ignatieff urges us to, "arms without argument are used in vain."[7] Without justification, without legitimacy, force is simply violence – nothing more.

And what are we to say to the hard-core civil libertarian, who fails to see the need for any rights infringements at any time – crisis or not? When he says "come what may" in the face of exigent emergency, how are we to persuade him to get off a potentially sinking ship? The argument – though inverted – turns out to be very similar to that provided to the die-hard security advocate: liberties cannot survive without security. We cannot practice our freedoms in an insecure state. "Emergency periods and new vulnerabilities may," rights advocate David Cole even concedes, "warrant sacrifices of rights and liberties."[8] Not even the writ of habeas corpus is absolute: under the Suspension Clause, Congress can legitimately suspend the writ of habeas corpus in times on par with that of "rebellion" or "invasion." At the same time, liberty sacrifices cannot be made in vain. Security measures that do end up limiting rights must demonstrate that "the loss in liberty is made up for by sufficient gains in security."[9] We need to be vigilant of not

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[7] Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (New Jersey: Princeton University Press, 2004), at 170.
[8] David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003), at 233.
[9] Cole, *Enemy Aliens*, at 233.

only *what* liberties we are sacrificing, but also what the security *outcome* turns out to be. Are we, in fact, more safe?

Nonetheless it is entirely possible that these two extremist camps might never come to agree with what I am proposing. Indeed, I understand that for them security is security and rights are rights. There is no room for compromise. They, however, are not my audience. They are not the people I aim to reach with this paper. My hope, indeed, is to help those currently sitting on the fence, those waffling between the two values – security and liberty – better understand the stakes of this dilemma as well as offer up a potential solution.

On May 21, 2009, newly inaugurated President Obama spoke on the matter of Guantánamo in a national security speech given at the National Archives:

> Rather than keeping us safer, the prison at Guantánamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it.[10]

The legitimacy of our government, of what America stands for, is at stake in these recent habeas cases. The ways in which we choose to act in this global war on terror is monitored closely not only by our own populace, but – perhaps, to an even greater degree – by the world. "On the international stage, there is only the Court of World Public Opinion. [A]dvising the military about the law of war means making a prediction about how people with the power to influence our success will interpret the legitimacy of our plans."[11] We need to ask ourselves how will this action – the decision to render Guantánamo and Bagram legal black-holes – be seen from the perspective of our allies? For that matter, how will enemy governments utilize such hypocrisy to

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[10] U.S. Senate. Committee on the Judiciary. *The Legal, Moral, and National Security Consequences of "Prolonged Detention.* (S.HRG. 111-491) Washington: Government Printing Office, 2009, at 1.

[11] David Kennedy, "Modern War and Modern Law," *Baltimore Law Review* 36 (2007), at 11.

their advantage? How does it look when the United States engages in practices that it has historically condemned? As David Kennedy observes, "If we will need the cooperation of citizens in Iraq, or Lebanon, or Pakistan, what will they have to say. We have seen the cost in political legitimacy and international cooperation that comes when we play by rules others don't recognize."[12]

Indeed, the costs of indefinite detention without recourse to challenge the basis of that detention have, some have argued,[13] undermined America's efforts to defeat terrorists. Detention both steadied and empowered "the hand of al Qaeda rather than isolating and de-legitimizing the in the political struggle for hearts and minds. It has undermined critical cooperation with our allies on intelligence and detention. And it has done considerable damage to the reputation of the United States," impeding its efforts to take the lead on both counterterrorism and other key national priorities.[14] Indeed, as David Cole observes:

> [N]owhere is the maintenance of trust more important than in Arab and Muslim communities within the United States. Given al-Qaeda's ideological commitments and ethnic makeup, al-Qaeda operatives are likely to seek support from these communities, as did the al-Qaeda leader who convinced the young men from Lackawanna, New York, to attend an al-Qaeda training camp.[15]

We do ourselves no favors by alienating this community – a people that may, like Masuo Yasui, have felt more patriotism towards their country of choice, rather their country of birth, until they were ostracized for their race, their religion, their beliefs. They are not to blame for the actions and beliefs of an extremist, militant minority; and we, the government, should not punish them by rounding them up based solely on racial profiling – a tactic that has since proven to be

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[12] Kennedy, "Modern War," at 11.

[13] *See generally* U.S. Senate. Committee on the Judiciary. *The Legal, Moral, and National Security Consequences of "Prolonged Detention.* (S.HRG. 111-491) Washington: Government Printing Office, 2009.

[14] U.S. Senate. Committee on the Judiciary. *The Legal, Moral, and National Security Consequences of "Prolonged Detention,* at 13.

[15] David Cole and Jules Lobel, *Less Safe*, *Less Free: Why America is Losing the War on Terror* (New York: New Press, 2007), at 141.

unsuccessful. Nor should we as citizens punish them by refusing to board a plane if Middle Easterners are present, thereby giving our political representatives the green light to push for even more restrictive, discriminatory legislation.[16] Indeed, preventive detention rests on the problematic assumption that one can accurately predict the future. No one can know for sure what the future will bring. As a result, "[d]ecision makers all too often fall back on stereotypes and prejudices as proxies for dangerousness."[17] And so, as William F. Schulz advocates, when one particular ethnic or religious minority is being targeted for special scrutiny, the government ought to be held accountable for potential mistakes: "Due process exists, after all, not to make it harder to convict the guilty, but the innocent."[18] And the writ of habeas corpus is necessary in the aftermath of a terrorist attack for exactly that reason: to minimize the harms done to the unjustly detained – the innocent – by ensuring that the government has the right people in custody. Otherwise, without a voice to challenge the accusations levied against him, the wrongfully detained then becomes invisible – lost in the executive-created legal black hole.[19]

In the wake of 9/11 and since the start of the War on Terror, the government – including the Obama administration – has justified its self-expanded powers with the security argument. The government, its supporters argue, requires such powers in order to adequately protect the American people. In other words, the President did not seek out expansion of powers because *he* wanted to; no, it was for the safety and wellbeing of the American people. To say the least, it is a

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[16] Stephen T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* (New York: Other, 2008), at 320.

[17] David Cole, "Out of the Shadows: Preventive Detention, Suspected Terrorists, and War," *California Law Review* 97 (2009), at 696.

[18] William F. Schulz, *Tainted Legacy: 9/11 and the Ruin of Human Rights* (New York: Nation Books, 2003), at 89.

[19] "When a judge releases an individual who in fact poses a real danger of future harm, and the individual goes on to inflict that harm, the error will be emblazoned across the front pages. When, by contrast, a judge detains an individual who would not have committed any wrong had he been released, that error is invisible – and indeed, unknowable. How can one prove what someone would or would not have done had he been free?" Cole, "Out of Shadows," at 696.

difficult argument – that, we, the government, require greater discretion for your, the citizen's, own good – to outright reject. After all, who doesn't wish to feel safe, to feel protected, and well looked after? Are we to say, "No thanks, I'll keep my freedom and take my chances with the terrorists." Sure, some will; but the majority will not. Exploding bombs, collapsing skyscrapers, and the deaths of those we know are immediately cognizable and evoke strong emotional responses. Liberties, separation-of-powers concerns, on the other hand, are far less tangible and far more abstract. Yes, everybody can rally behind freedom as an idea; but when faced with the choice between continual fear and more restricted freedoms, most prefer to feel safe than sorry. As a result, our politics are skewed a certain way. As the greater public continually says, "Better safe than sorry," in turn the government justifies its actions with "Better safe than sorry, that's what America wants."

Put bluntly, this is not the case where the status quo is acceptable. We are not dealing with a situation in which we could or could not change – in which the wheel ain't broke so don't fix it. Preventive detention in the aftermath of emergency has time and time again shown itself to be abusive when allowed to be under the sole discretion of the executive. And in many ways, the practice is incompatible with our enduring values of freedom, transparency, due process, and minority protections. Remember, absolute power corrupts absolutely. Bruce Ackerman attempted with his emergency constitution to place it beneath the purview of the legislative branch, but as we have shown, such a solution does not adequately address the fundamental problem of preventive detention: mistaken imprisonment. Oftentimes, preventive paradigms cast broad dragnets which subsequently result in the imprisonment of countless innocents – that is, individuals of a targeted minority group, e.g. persons of Arab ancestry or Muslim faith. The national security theorists, the Jack Bauer enthusiasts, have tried to convince us that increased

security is all we require in times of emergency – that everything else is secondary. Exceptional times call for exceptional measures. Rights can be recovered, but can lives? Can nations? The reality is, however, the terrorist threat is not nearly as grave as these security apologists make it out to be. Yes, a terrorist attack is undoubtedly tragic and may even result in the loss of thousands of lives; nonetheless, it is not capable of toppling or overtaking governments. Isolated terrorist attacks, in short, are not existential threats. Too often, the safety – bought at the price of liberty – the government offers is illusory. As Steven T. Wax observes, "The searches of baby strollers at airports does little or nothing for safety in the air and nothing at all for the safety of trains, trucks, shipping, and chemical and power plants."[20] We need to be smart about our security and not buy into the fallacy of the more intrusive security measures automatically leads to greater safety.

Not to mention, as has been shown throughout this paper, rounding up people based on paranoia, profiling, or any other arbitrary reason, not only does nothing to help our security, but also harms us insofar as we fail to differentiate between the legitimate and the illegitimate. Indeed, such actions damage our integrity as a country that believes in the maxim "innocent until proven guilty," as a country that believes there is more to life than feeling safe and secure in our physical and material being. We need to instead ask ourselves exactly how much freedom we are willing to give up in the name of increased security? We must keep in mind the long-term costs, and not just the short-term benefits, of granting our president, our law enforcement, and our military freer and freer reign. Small sacrifices inevitably accumulate, and subsequently can morph into much bigger sacrifices than we are actually willing to give up. Furthermore, we owe those harmed – those wrongly detained – better than just monetary compensation. They deserve

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[20] Wax, *Kafka Comes to America*, at 318.

more than a "sorry" or an "our mistake, here's some cash to make you whole." They warrant, at the very least, an apology which vows this is the last time we make this recurring mistake: "We sincerely apologize for your wrongful detention, we will do our very best to make sure this does not happen again." And so, in arguing for a framework in which the Suspension Clause is the absolute minimum in the arena of preventive detention, we remain the most true to our American ideals.[21]

It is then, during times of crisis and emergency, the task of the judiciary – the most politically-insulated branch of government – to uphold the writ of habeas corpus in its constitutional form, i.e. the Suspension Clause, and thereby set the absolute minimum in times of exigency. It is the responsibility of judges to force the executive to justify his actions in a court of law as well as the court – domestic *and* international – of public opinion. Most importantly, it is the time-honored duty of this nation's legal guardians to ensure that the ideals which informed our founding are not lost. In more colloquial terms, it is up to our judges – through the vehicle of habeas corpus – to be the good man in the storm. After all, in the age of terror, "[i]f anybody destroys our legacy of freedom, it will be us."[22] Thus, the upkeep and preservation of our freedom, our values and beliefs, is our responsibility – and ours alone. Indeed, by the time *Al Maqaleh*, or another case like it, comes before the Supreme Court of the United States, we – the people, the lawyers, the judges – should be prepared to not simply enforce the new habeas emergency paradigm by extending the writ to all those detained by the United States, but also to do better, with each subsequent generation, as a nation dedicated to an enduring legacy of freedom.

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[21] Again, I am not categorically rejecting the idea of preventive detention itself, only the way that is has thus far been implemented.

[22] Ackerman, *Before the Next Attack*, at 4.

This much is clear: what we have done in the past has not worked. It is time that we take our history to heart, and to learn from our mistakes. Indeed, we ought to know that in the aftermath of a terrorist attack the siren song of absolute national security will inevitably sound. We therefore ought to possess the foresight to tie ourselves tightly to the mast – à la Odysseus – of habeas corpus so that even if we do succumb to the siren song, we remain nonetheless restrained. So the question at hand then becomes: what do we want future generations to remember when they look back on America in this age of terror? Do we want to be remembered as the generation of "better safe than sorry"? Or as the generation of unavoidable compromise? No, we can – and should – be better. Ultimately, the story we tell ought not be one of lesser evils, but of better solutions. So when the next emergency comes, let us not regress back into old habits, but challenge ourselves to stick to our greatest strength: America's enduring narrative of freedom, of rights, and of equality. Only then can the nation we so value triumph in the dark days ahead.