

KEYNOTE ADDRESS

TERRORISM AND THE CONSTITUTIONAL ORDER

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We panicked the last time terrorists struck, and we will panic the next time. September 11 was merely a pinprick compared to the devastation of a suitcase A-bomb or an anthrax epidemic. The next major attack may kill tens of thousands of innocents, dwarfing the personal anguish of those who lost family and friends on 9/11. The political tidal wave threatens to leave behind a mass of repressive legislation far more drastic than anything imagined by the USA PATRIOT Act.

A downward cycle threatens: After each successful attack, politicians will come up with a new raft of repressive laws that ease our anxiety by promising greater security—only to find that a different terrorist band manages to strike a few years later. This new disaster, in turn, will create a demand for more repression, and on and on. Even if the next half-century sees only three or four attacks on a scale that dwarfs September 11, the pathological political cycle will prove devastating to civil liberties by 2050.

The root of the problem is democracy itself. A Stalinist regime might respond to an attack by a travel blockade and a media blackout, leaving most of the country in the dark, going on as if everything were normal.

This cannot happen here. 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.

Our traditional defense against such pathologies has been the courts. No matter how large the event, no matter how great the panic, they will protect our basic rights against our baser impulses.

Or so we tell ourselves—but it just is not true. The courts have not protected us sufficiently in the past, and they will not do better in the future. We need a strong and independent judiciary, but we need something more.

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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. Above all else, we must prevent politicians from exploiting momentary panic to impose long-lasting limitations on liberty. Given the clear and present danger, it makes sense to tie ourselves to the mast as a precaution against deadly enticements.

In speaking of an emergency constitution, I do not mean to be taken too literally. Almost nothing I propose will require formal constitutional amendment—the emergency constitution can be enacted by Congress as a framework statute governing responses to terrorist attacks. But this will not happen unless we conduct a constitutional conversation in the spirit of our eighteenth-century founders. As James Madison cautioned, “[e]nlightened statesmen will not always be at the helm.”¹ To check the descent into despotism, the framers created a system of checks and balances, and I continue this tradition. My emergency constitution adapts our inherited system to meet the distinctive challenges of the twenty-first century.

First and foremost, it imposes strict limits on unilateral presidential power. Presidents will not be authorized to declare an emergency on their own authority, except for a week or two while Congress is considering the matter. Emergency powers should then lapse unless a majority of both houses votes to continue them—but even this vote is valid for only two months. The President must then return to Congress for reauthorization, and this time a supermajority of sixty percent is required; after two months more, the supermajority will be set at seventy percent; and then eighty percent for every subsequent two-month extension. Except for the worst terrorist onslaughts, this “supermajoritarian escalator” will terminate the use of emergency powers within a relatively short period. It will also force the President to think twice before requesting additional extensions, unless he can make a compelling case to the broader public.

Defining the scope of emergency power is a serious and sensitive business. But at its core, it involves the short-term detention of suspected terrorists to prevent a second strike. Nobody will be detained for more than forty-five days, and then only on reasonable suspicion. Once the forty-five days have lapsed, the government must satisfy the higher evidentiary standards that apply in ordinary criminal prosecutions. And even during the period of preventive detention, judges will be authorized to intervene to protect against torture and other abuses.

There is much to be said on these and many other matters developed at tedious length in my new book, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (“*The Next Attack*”).²

1. The Federalist No. 10, at 60 (James Madison) (Jacob E. Cooke ed., 1961).

2. Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2006) [hereinafter *The Next Attack*].

My aim here is to sketch the concerns that led me to the proposal in the first place. Words are the lifeblood of our constitutional life, and we are off to a bad start in describing our current disease. The “war on terror” has paid enormous political dividends for President George W. Bush, but it sends all the wrong signals for purposes of panic control. Calling the challenge a war tilts the constitutional scales in favor of unilateral executive action, and against our tradition of checks and balances.

There is something about the Presidency that loves war talk. Almost two centuries ago, Andrew Jackson was already declaring war on the Bank of the United States, indulging in legally problematic uses of executive power to withdraw federal deposits from “The Enemy,” headed by the evil one, Nicholas Biddle.³ And more recent Presidents have declared war on poverty, crime, and drugs. Even at its most metaphorical, martial rhetoric allows the President to invoke his special mystique as Commander-in-Chief, calling on the public to sacrifice greatly for the good of the nation. The clarion call to pseudo-war is just the thing to provide rhetorical cover for unilateral actions of questionable legality.

The war on terrorism is not as obvious a rhetorical stretch as the war on poverty. Classical wars traditionally involve a battle against sovereign states, and it may seem a smallish matter to expand the paradigm to cover struggles with terrorist groups. But appearances are misleading.

Terrorism is merely the name of a technique: the intentional attack on innocent civilians. But war is not a technical matter; it is a life-and-death struggle against a particular enemy. We made war against Nazi Germany, not the V-2 rocket. Once we allow ourselves to declare war on a technique, we open up a dangerous path, authorizing the government to lash out at amorphous threats without the need to define them. There are tens of millions of haters in the world, of all races and religions. All are potential terrorists, and all the rest of us are at risk of being linked to one or another terrorist band.

There is another big flaw. By calling it a war, we frame our problem as if it involved a struggle with a massively armed major power. But modern

3. Given the rhetorical restraint practiced by Presidents of the period, see Jeffrey K. Tulis, *The Rhetorical Presidency* 61-93 (1987), Andrew Jackson left the explicit war mongering to his political lieutenants, most notably Senator Thomas Hart Benton, who seems to have been a rhetorical pioneer in his then-famous defense of the President’s veto on the floor of the Senate:

[T]he bank is in the field; enlisted for the war; a battering ram—the *catapulta*, not of the Romans, but of the National Republicans; not to beat down the walls of hostile cities, but to beat down the citadel of American liberty; to batter down the rights of the people The war is now upon Jackson, and if he is defeated, all the rest will fall an easy prey.

1 Thomas Hart Benton, *Thirty Years’ View* 257, 263 (1865). On the problematic legality of Jackson’s decision to withdraw federal deposits from the Bank of the United States, see Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 *Neb. L. Rev.* 205, 236-37 (1999).

terrorism has a very different genesis. It is more a product of the unregulated marketplace than massive state power.

We are at a distinctive moment in modern history: The state is losing its monopoly over the means of mass destruction. And once a harmful technology escapes into the black market, it is almost impossible for government to suppress the lucrative trade completely. Think of drugs and guns. Even the most puritanical regimes learn to live with vice on the fringe. But when a fringe group obtains a technology of mass destruction, it will not stay on the fringe for long.

The root of our problem is not Islam or any ideology, but the free market in death. If the Middle East were magically transformed into a vast oasis of peace and democracy, fringe groups from other places would rise to fill the gap. We will not need to look far to find them. If a tiny band of extremists blasted the Federal Building in Oklahoma City, others will want to detonate suitcase A-bombs as they become available, giving their lives eagerly in the service of their self-destructive vision.

This is a very serious problem, but it is not illuminated by war talk. Even the greatest wars have come to an end: When Lincoln or Roosevelt asserted extraordinary war powers, everybody recognized that they would last only until the Confederacy or the Axis was defeated. But the black market in weaponry—which is the source of the “war on terror”—will never come to an end; whatever new powers are conceded to the President in this metaphorical war will be his forever.

Preventive measures will sometimes fail. Once the state no longer monopolizes a technology of destruction, the laws of supply and demand will inexorably put weapons in the hands of the richest and best-organized terrorists in the marketplace, and government will be playing catch-up. The only question is how often the security services will drop the ball: once out of ten threats, once out of one hundred, once out of one thousand?

These basic points are obscured by the fog of war talk. Real wars do not come out of nowhere because the government has dropped the ball. They arise after years of highly visible tension between sovereign states, and after the failure of countless efforts at diplomacy. They occur only after the public has reluctantly recognized that the awesome powers of war-making might be justified. Even sneak attacks, as at Pearl Harbor, are preceded by years of escalating tension that put the public on notice that a powerful nation-state, with an aggressive military force, threatens overwhelming harm to all we love.

But when terrorists strike, all we really know is that they managed to slip through a crack that the government failed to close. Given the free market in destructive technologies, we do not 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. By lapsing into war talk, we trigger a set of associations that are often false and frequently encourage the worst of panic reactions. We head down a misleading path

by suggesting that not only are “the terrorists” numerous and well organized, but that they are somehow capable of wielding the earth-shattering forces mobilized by major nation-states. This is very unlikely; Osama in his cave does not remotely represent the totalizing threat of Hitler in his Chancellery. But in 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.

The emergency constitution is predicated on a more accurate description of our situation: We are reeling in the wake of a surprise attack, and we do not know whether the terrorists were just plain lucky, whether they have the capacity to organize a rapid second strike, or whether they are in it for the long haul. So let us do what is necessary in the short term, and buy some time to figure out what is appropriate in the longer run.

The short-term problem is the second strike. Though the government may be deeply embarrassed by the initial attack, it is the only government we have. The terrorist strike will predictably generate bureaucratic chaos, but we should grant the security services the extraordinary powers needed to preempt the second strike that may (or may not) be coming. This is the real danger at the moment, and we should focus all our collective energies on preventing it from happening, rather than launching a never-ending war on terrorism.

This is the point of the “supermajoritarian escalator.” While the country might go on emergency alert for two months, or even six, the escalator assures a return to normalcy if the security services manage to disrupt the conspiracy, or the terrorists prove to be a passing threat. Without a suitable constitutional framework, Presidents will predictably respond by calling on us to sacrifice more and more of our freedom if we ever hope to win this “war.” But with an emergency constitution in place, collective anxiety can be channeled into more constructive forms. If the framework operates according to plan, a shocked nation will hear a different message after the next attack:

My fellow citizens, as we grieve together at our terrible loss, you should know that your government will not be intimidated by this terrorist outrage. This is no time for business as usual; it is a time for urgent action. I am asking Congress to declare a temporary state of emergency that will enable us to take aggressive measures to prevent a second strike and seek a speedy return to a normal life, with all our rights and freedoms intact.

The “war on terror” not only invites an aroused public to support the President in an endless struggle against an amorphous enemy, it also makes it easier for the President to fight real wars against real countries. Although the Constitution grants Congress the power to “declare war,” the Supreme

Court has ostentatiously refused to tell the President what a “war” is and when the consent of Congress is required.⁴ This means that a President pondering an old-fashioned war against a sovereign state has to prepare a political campaign on two domestic fronts as well. It is not enough for him to convince ordinary Americans that it is right to fight one or another rogue state; he must also battle Congress for the right to make the final decision on whether to go to war. If it proves politically impossible for him to go to war without gaining the consent of Congress, he must try to squeeze the House and Senate into a political corner, giving them no choice but to rubber-stamp his decision.

Transforming the problem of terrorism into a “war” helps the President on both fronts. Under the traditional understanding, each war against a sovereign state has to be justified on its own merits. The war against Afghanistan is distinct from the one against Iraq, and so forth. But once the public is convinced that a larger “war on terrorism” is going on, these old-fashioned wars can be repackaged as mere battles—as in President Bush’s famous description of Iraq as “the central front” in the war on terrorism.⁵

Rhetorical repackaging also makes it easier for the President to win on his second front, enabling him to take unilateral action without the consent of Congress. Everybody knows that the President, as Commander-in-Chief, has the constitutional authority to initiate “battles.” It is only when he proposes an entirely new “war” that the consent of Congress comes into play. Even here, Presidents often have committed military forces without clear congressional consent—but especially in major initiatives, their authority to do so will encounter fierce, and often successful, political resistance.

As the President and Congress square off against each other, the public understanding of the nature of war becomes an important factor in determining the outcome.⁶ To be sure, his opponents will predictably insist that the Constitution expressly grants Congress the power “[t]o declare war”⁷ before the President can target his designated “rogue state.” But the President can easily dismiss this point if the public is convinced that we are

4. During the Vietnam War, only Justices Potter Stewart and William O. Douglas raised their voices in protest, but they failed to gain the four votes needed for the U.S. Supreme Court to hear a case. See Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* 84 (2d ed. 1991). Nobody supposes that the present Court will act any differently. See Ryan C. Hendrickson, *The Clinton Wars: The Constitution, Congress, and War Powers* 3-5 (2002).

5. Press Release, The White House Office of the Press Secretary, *President Addresses the Nation* (Sept. 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030907-1.html>.

6. For a thoughtful discussion of the role of public opinion in national security policy, see Bruce Russett, *Controlling the Sword: The Democratic Governance of National Security* 87-118 (1990). Of course, public opinion is hardly the sole factor determining the extent of congressional involvement in the exercise of the war power. For an overview of the complex history, see generally Louis Fisher, *Presidential War Power* (1995).

7. U.S. Const. art. II, § 8, cl. 11.

already fighting a war (on terror) and that the President is simply opening a new battlefield (against another sovereign state). Once the larger point is conceded, the President's powers as Commander-in-Chief will predictably carry the day in the court of public opinion.

In contrast, an emergency constitution invites the public to discriminate between the domestic and foreign aspects of a terrorist threat. It authorizes the President and Congress to take aggressive steps domestically to stop a second attack, but it does not authorize a foreign invasion of any sort. If this is required, there will be a need for a separate debate.

No less important, the emergency constitution permits a far more modulated domestic response than the one invited by war talk. Once judges and lawyers allow themselves to describe our present challenge as a "war on terror," they are in grave danger of treating a terrorist attack as if it raised the same constitutional stakes as our life-and-death struggle against Germany and Japan. This is a fatal mistake. I do not minimize the terrorist threat. But we should not lose all historical perspective: Terrorism is a very serious problem, but it does not remotely suggest a return to the darkest times of the Civil War or World War II.

In confronting terrorism, we need to distinguish between two different dangers: the *physical* threat to the population and the *political* threat to our constitutional system. Future attacks undoubtedly pose a severe physical threat: Terrorist strikes may kill tens of thousands at a single blow. But they will not pose a clear and present danger to our political system. Even if Washington or New York were decimated, Al Qaeda could not displace the surviving remnants of political authority with its own rival government and military force. The terrorists would remain underground, threatening another strike, while the rest of us painfully reconstruct our traditional scheme of government—providing emergency police and health services, filling vacancies in established institutions, and moving forward, however grimly, into the future.

Our most terrible wars not only involved mass slaughter, but genuine threats to the very existence of our government. Imagine that the Second World War had turned out differently: Rather than suffering a defeat at Stalingrad, the Germans conquered Moscow and invaded Britain, while the Japanese won the Battle of Midway, and later landed on the West Coast. At that point, our future as an independent republic would have been at stake. Call this an *existential* threat to the nation. Before the Second World War, we faced it only once in history.

This was during the Civil War, and it was precisely the existential character of the threat that Abraham Lincoln emphasized when suspending fundamental rights against arbitrary arrest and detention. To repeat Lincoln's famous line: "[A]re all the laws, *but one*, to go unexecuted, *and*

the government itself go to pieces, lest that one be violated?"⁸ Lincoln was acting to sustain political survival, not to reduce the tragic loss of life. His efforts to save the Union almost certainly increased the carnage. If he had been interested in saving lives, he would have followed the advice of his predecessor, President James Buchanan, and allowed the South to leave the Union in peace.⁹ It was his insistence on saving the Union, at whatever the cost, that led him to suspend constitutional rights against arbitrary arrest and detention.¹⁰

This fundamental point is erased by the remorseless repetition of war talk to describe our present situation. If the struggle with terrorism counts as a "war," it is all too easy for lawyers and judges to cite the real-war precedents of Lincoln and Franklin D. Roosevelt as if they were germane to our present predicament. After all, war is war, is it not?

The U.S. Supreme Court is already on the verge of making this mistake. In her plurality opinion in *Hamdi v. Rumsfeld*,¹¹ Justice Sandra Day O'Connor explicitly reaffirmed the shameful Supreme Court decision in *Ex parte Quirin*,¹² which upheld Roosevelt's power to subject American citizens to summary justice by military tribunals.¹³ And while *Hamdi*

8. Abraham Lincoln, *Message to Congress in Special Session (July 4, 1861)*, in 4 *The Collected Works of Abraham Lincoln* 421, 430 (Roy P. Basler ed., 1953) (second emphasis added).

9. See James Buchanan, *Fourth Annual Message (Dec. 3, 1860)*, in 5 *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 626, 635-36 (James D. Richardson ed., 1897).

10. Congress retrospectively ratified Lincoln's unilateral suspension of habeas corpus at the special session convened on July 4, 1861, declaring that "all the acts, proclamations, and orders of the President of the United States after the fourth of March, eighteen hundred and sixty-one, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States," giving them the "same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States." Act of Aug. 6, 1861, ch. 63, 12 Stat. 326, 326. It is possible to deny that this text authorized Lincoln's suspension of habeas corpus, since the Great Writ is a remedy for civilians, not soldiers. But this restrictive reading does not do historical justice to Congress's intentions at this moment of grave crisis, especially since the same special session of Congress had cabined the President's proclamations calling out the militia, restricting their operation to times and places where the President deemed the ordinary civil authorities inadequate to secure the orderly administration of the laws. See Act of July 29, 1861, ch. 25, 12 Stat. 281, 281-82.

11. 542 U.S. 507 (2004).

12. 317 U.S. 1 (1942).

13. "*Quirin* was a unanimous opinion. It . . . provid[es] us with the most apposite precedent that we have on the question of whether citizens may be detained . . . Brushing aside such precedent—particularly when doing so gives rise to a host of new questions never dealt with by this Court—is unjustified and unwise." *Hamdi*, 542 U.S. at 523 (plurality opinion). It should be emphasized that Justice Sandra Day O'Connor was only speaking for a plurality of four Justices. Two others—Antonin Scalia and John Paul Stevens—had explicitly called on the Court to rethink *Quirin*, stating that "[t]he case was not this Court's finest hour." *Id.* at 569 (Scalia, J., dissenting). They were right. For further discussion, see *The Next Attack*, *supra* note 2, at 22-24. For a fine book-length treatment, see Pierce O'Donnell, *In Time of War: Hitler's Terrorist Attack on America* (2005).

involved very special facts, the judicial treatment of Jose Padilla provides a sobering glimpse into the future.¹⁴ The case involved the seizure of an American citizen, Jose Padilla, upon his arrival at Chicago O'Hare Airport shortly after September 11. Padilla's appearance was entirely innocent—civilian clothes and no dangerous weapons. Nevertheless, he was thrown into a military brig, with Attorney General John Ashcroft going on television to accuse him of plotting to destroy an American city with a radioactive dirty bomb: “We know from multiple, independent and corroborating sources that [Padilla] was closely associated with al Qaeda and that, as an al Qaeda operative, he was involved in planning future terrorist attacks on innocent American civilians in the United States.”¹⁵ Although Ashcroft made sweeping charges in public, he never informed Padilla “of the nature and cause of the accusation,” nor provided him with *any* opportunity, during his three years of detention, to establish his innocence before *any* tribunal, either civilian or military. This breathtaking breach of due process took place despite the Administration's rapid retreat from Ashcroft's apocalyptic charges; within months, anonymous officials were describing him as a “small fish”¹⁶ and conceding serious problems with their evidence.¹⁷

To top it off, the Justice Department engaged in transparent efforts at manipulation in a desperate effort to insulate the case from review by the Supreme Court. After three long years of complex litigation,¹⁸ the case was finally coming up to the Court for a decision on the merits. The Fourth Circuit, in an opinion by Judge J. Michael Luttig, had handed the President a ringing victory by squarely upholding his right, as Commander-in-Chief, to seize an American citizen on American soil.¹⁹ Rather than preparing itself for a decisive test before the Supreme Court, however, the Justice Department suddenly swerved: After three years of stonewalling, the Administration granted Padilla everything he wanted—release from military prison and a normal criminal trial in the civilian courts, with all the protections of the Bill of Rights. The strategic purpose was plain: Once

14. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

15. Dan Eggen & Susan Schmidt, “*Dirty Bomb*” Plot Uncovered, *U.S. Says; Suspected Al Qaeda Operative Held as “Enemy Combatant,”* Wash. Post, June 11, 2002, at A1.

16. “*Dirty Bomb*” Suspect a Nobody?, CBSNews.com, Aug. 14, 2002, <http://www.cbsnews.com/stories/2002/08/27/terror/main519996.shtml>.

17. During the course of its litigation, the Government relied on an affidavit by Michael Mobbs to describe its evidence against Jose Padilla. Like John Ashcroft, Mobbs relied on “multiple intelligence sources,” but he admitted that two key sources “have not been completely candid about their association with Al Qaeda,” that some of their information “may be part of an effort to mislead or confuse U.S. officials,” and, finally, that “one of the sources was being treated with various types of drugs.” Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy 2 n.1 (Aug. 27, 2002), available at <http://www.cnss.org/Mobbs%20Declaration.pdf>.

18. I summarize this litigation in *The Next Attack*, *supra* note 2, at 24-27, 31-33, but the book was published before the Court's final disposition of the case, discussed here.

19. *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005).

Padilla was out of the military brig, the Government hoped to persuade the Court to deny certiorari and allow Luttig's judgment to stand as a precedent for the future.

Much to their credit, these strategems appalled Judge Luttig and his colleagues. Though they had upheld the Government's position on the merits, they enjoined Padilla's transfer, with Judge Luttig declaring that "the purpose of these actions may be to avoid consideration of our decision by the Supreme Court."²⁰ Worse yet, the new criminal charges against Padilla bore no relationship to the sensational claims made by Ashcroft before the television cameras: "[A]s the government surely must understand, . . . its actions have left . . . the impression that Padilla may have been held for these years . . . by mistake . . ."²¹

Despite the government's serial provocations, the Supreme Court allowed the government's gambit to succeed. It first vacated Luttig's order,²² and then denied certiorari, with only three justices dissenting.²³ In an opinion by Justice Anthony Kennedy, three others recognized that the case raised "fundamental issues," but did not think the time was right to call a halt to such shattering abuses.²⁴

Justice Kennedy's appeals to "pruden[ce]" were profoundly misguided.²⁵ As the Justices considered the matter in early 2006, the country was slowly recovering from the panic of September 11. The Court would have made a precious contribution to national sobriety by drawing a clear constitutional line between the classic wars of the past and the metaphorical "wars on terror" that threaten us in the future. Americans would have readily accepted a strong Supreme Court decision restraining presidential power, especially where the abuses are so appalling. But the next time around, the Court may be obliged to confront an aggressive President demanding deference in the immediate aftermath of a devastating attack—and the case may involve not one, but thousands of Americans, swept up into military prisons.²⁶

20. *Id.* at 585. J. Michael Luttig's opinion gained a majority of his panel, with Judge William B. Traxler disassociating himself from the aspects of the decision discussed in this essay. *Id.* at 588 (Traxler, J., concurring in part).

21. *Id.* at 587. The new indictment describes a small-scale operation, in which the alleged conspiracy raised less than \$100,000 over nine years, without Padilla leaving the country. Superceding Indictment, United States v. Hassoun, No. 04-60001-CR (S.D. Fla. Nov. 17, 2005), available at <http://news.findlaw.com/hdocs/docs/padilla/uspad111705ind.pdf>.

22. *Hanft v. Padilla*, 126 S. Ct. 978, 978 (2006).

23. Justice Ruth Bader Ginsburg dissented in an opinion. *Padilla v. Hanft*, 126 S. Ct. 1649, 1651 (2006) (Ginsburg, J., dissenting). Justices Stephen Breyer and David Souter simply noted their dissent. *Id.* at 1649.

24. *Id.* at 1650 (Kennedy, J., concurring).

25. *Id.*

26. I discuss the relevance of the Supreme Court's notorious decision in *Korematsu v. United States*, 323 U.S. 214 (1944), upholding the detention of 120,000 Japanese-Americans during World War II, in *The Next Attack*, *supra* note 2, at 61-64.

Suppose, in contrast, that Congress had anticipated the tragic possibility of September 11, and had adopted a framework statute that required escalating supermajoritarian approval for emergency detentions. Can there be any doubt that, three years after September 11, the required supermajority would long ago have evaporated into thin air?

Even if Congress had rejected my proposal to limit individual detentions to forty-five days, the termination of the emergency would have put the government to the test—either convict Padilla of a crime before a jury of his peers or set him free. Under the system of political checks and balances established by my emergency constitution, Padilla would have received due process long ago.

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So much for my main ambition: to replace the logic of war with the logic of a temporary state of emergency. If we ever achieve this regime shift, some basic issues will immediately emerge within the new legal horizon. Consider, for example, the fate of the principal victims of the state of emergency. Acting with extraordinary powers, the police and FBI may pick up thousands of terrorist suspects for preventive detention. Most of these people—probably the overwhelming majority—will turn out to be perfectly innocent. But under the emergency constitution, they must wait for forty-five days before they can gain their freedom through the standard mechanisms of the criminal law. While this is deeply regrettable, there is something we can do to soften the blow. The emergency constitution should guarantee each detainee a substantial payment for every day that his life has been disrupted for the greater good—say \$500 a day.

This demand is based on elementary principles of justice, but it will also have a desirable impact on the relevant bureaucracies. The emergency administration should be obliged to pay these costs out of its own budget, and this prospect will concentrate the bureaucratic mind on what is most vital in a democracy. The security forces will have new incentives to spend time and energy determining who has been snared by mistake.

Money payments will hardly suffice to assure decent treatment of the detainees. While courts should defer an inquiry under the criminal law for forty-five days, they should be prepared to immediately enforce a rigorous ban on torture. An increasing number of legal commentators—most recently Eric A. Posner and Adrian Vermeule—have followed Alan Dershowitz in raising the specter of the “ticking-bomb” to call the ban on torture into question.²⁷

27. See Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 Mich. L. Rev. 671, 676 (2006); see also Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 142-63 (2002).

I am entirely unimpressed with the relevance of these musings to real-world emergency settings. Security services can panic in the face of horrific tragedy. With officials in disarray, with rumors of impending attacks flying about, and with an outraged public demanding instant results, there will be overwhelming temptations to use indecent forms of interrogation. This is the last place to expect carefully nuanced responses.

The apologists for torture recognize the problem and propose to solve it by inviting judges to restrict the conditions under which the security services impose their cruelties. But judges are no more immune from panic than the rest of us. To offset the rush toward torture in an emergency, they would be obliged to make their hearings especially deliberate and thoughtful. But if they slow the judicial proceedings down to deliberate speed for diligent review, the terrorists' second strike will occur before the torture warrant can issue.

Serious deliberation is simply incompatible with the speedy response required in the aftermath of an attack. Once the ban on torture is lifted, judges cannot be depended on to stand up to the enormous pressure for instant results. Some—if not all—will become rubber stamps, processing mounds of paper to cover up the remorseless operation of the torture machine. Once these judicial collaborators have been identified, the torturers will steer their warrant requests toward their allies on the bench and away from judges with the strength to withstand bureaucratic pressure and the integrity to seek out the truth.

Even a few judicial lapses will have a devastating impact on the general public. Their complicity with the torturers will carry a message that transcends the cruelties and indecencies involved in particular cases: "Beware all ye who enter here. Abandon all hope of constitutional protection. No one swept into the emergency dragnet can be sure of returning with his body and soul intact. The state is hurtling down the path of uncontrolled violence." Once word gets around that judges cannot be trusted to guard against abusive torture, ordinary people will wonder whom they *can* trust.

The apologists fail to take these problems seriously. Yet the overriding constitutional aim should be to create an emergency regime that remains subordinated—both in symbol and in actual fact—to the bedrock principles of human dignity that lie at the foundation of liberal democracy. The courts must never abandon the mission of assuring the general public that the emergency administration is operating in a way that is tolerable, if never entirely satisfactory. Without this institutional assurance, it is far too easy for the regime to spiral out of control, as public support evaporates.

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We may be lucky; perhaps there will be no repetition of September 11. Or when the next strike occurs, perhaps the sitting President will be a heroic

defender of civil liberties and refuse to succumb to the political dynamics of fear and repression. But things might turn out worse the next time around—perhaps the sitting President will combine the simplistic beliefs of George W. Bush, the rhetorical skills of Ronald Reagan, the political wiles of Lyndon Johnson, and the sheer ruthlessness of Richard Nixon into a single toxic bundle.

No constitutional design can guarantee against the very worst case, and no constitutional design is needed for the best of all possible worlds. But there is plenty of room in the middle, and this is where human beings generally live out their lives. This is where the emergency constitution can make a big difference.

We are in a race against time. It takes time to confront the grim constitutional future that lies ahead; and more time to separate good proposals from bad ones; and more time to engage in a broad-based public discussion; and more time for farsighted politicians—if there are any—to enact a constitutional framework into law. During all this time, terrorists will not be passive. Each major attack will generate further escalations of military force, police surveillance, and repressive legislation. The cycle of terror, fear, and repression may spin out of control long before a political consensus has formed behind a constitution for an emergency regime.

Only one thing is clear: We will not get anywhere if we do not start a serious conversation. Not that we have not been trying, but we have been moving down a different track. Rather than building on our Founding tradition of checks and balances, our leading institutions have been relying on the more familiar models inherited from New Deal constitutionalism. When Congress began to take an institutional approach to the problem of terrorism, it created a gigantic Department of Homeland Security—a New Deal solution, if there ever was one. Meanwhile, the President's lawyers were playing another New Deal theme, spinning out theories of the unitary Executive similar to those advanced by Franklin Roosevelt in defense of his executive reorganization program of 1937.²⁸

28. While Franklin D. Roosevelt's "court-packing" is more famous amongst constitutional lawyers, 1937 also witnessed an aggressive presidential effort to establish a unitary Executive subordinating all independent agencies to direct presidential authority. See Franklin D. Roosevelt, *Message from the President of the United States, in Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management* [unnumbered] (Jan. 12, 1937) ("In placing this program before you I realize that it will be said that I am recommending the increase of the powers of the Presidency. This is not true In spite of timid souls in 1787 who feared effective government the Presidency was established as a single strong Chief Executive Office in which was vested the entire executive power of the National Government, even as the legislative power was placed in Congress, and the judicial in the Supreme Court."). Congressional opponents denounced this measure as a "dictator bill," and it went down to defeat in 1938, after Congress had rejected the President's court-packing initiative. See generally Richard Polenberg, *Reorganizing Roosevelt's Government: The Controversy over Executive Reorganization 1936-1939* (1966).

Now, to put it mildly, I have nothing against the New Deal—and I must confess to ironic satisfaction in observing how current events are confirming the power of my theories of constitutional development. But I have never claimed that the New Deal is our only relevant constitutional moment—merely that it is one of them. And in the present case, it very much requires supplementation by constitutional traditions inherited from our deeper past.

In looking to the Founding to provide inspiration, I am not calling for yet another round of “law office history” that tells us how the founders would have solved the problems we confront today. This is the tack taken by John Yoo in his recent book,²⁹ which will undoubtedly provoke a host of historical refutations.³⁰ Our larger scholarly task is to provide intellectual leadership in the larger effort to develop an emergency constitution for the twenty-first century.

We have a serious problem, but it makes no sense to call it a war and ask the Commander-in-Chief to fight it for us. We must invite our fellow Americans to build a new system of checks and balances that will withstand the tragic attacks and predictable panics of the twenty-first century. This is the promise of an emergency constitution, and if we fail to fulfill this promise, our children may live to see the end of constitutional government in America.

29. John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (2005).

30. The place to start is Stephen Holmes, *John Yoo's Tortured Logic*, *The Nation*, May 1, 2006, at 31, available at <http://www.thenation.com/doc/20060501/holmes>. Holmes's incisive commentary exposes Yoo's pervasive tendency to use history in the manner of a lawyer presenting a one-sided brief, rather than as a source for scholarly perspective. While Holmes's critique hits many of the main points, he does not provide the rich historical analysis of the sources which is required to place in high relief the one-sided character of Yoo's treatment of the Founding period.