



# The Yale Law Journal

This Is Not a War

by  
*Bruce Ackerman*

113 YALE L.J. 1871

Reprint  
Copyright © 2004 by  
The Yale Law Journal Co., Inc.

**Volume 113**

**June 2004**

**Number 8**

# Response

## This Is Not a War

**Bruce Ackerman**<sup>†</sup>

I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got. [Applause.]

—President George W. Bush, State of the Union, January 20, 2004<sup>1</sup>

The Cold War. The War on Poverty. The War on Crime. The War on Drugs. The War on Terrorism. Apparently, it isn't enough to call a high-priority initiative a High-Priority Initiative. If it's really important, only a wimp refuses to call it war, almost without regard to its relationship to the real thing.

---

<sup>†</sup> Sterling Professor of Law and Political Science, Yale University. Many thanks to Yochai Benkler, Gerard Magliocca, Robert Post, Jed Rubenfeld, and to my splendid research assistants: Ivana Cingel, Andrew DeFilippis, Justin Florence, and Anand Kandaswamy.

1. Address Before a Joint Session of the Congress on the State of the Union, 40 WEEKLY COMP. PRES. DOC. 94, 96 (Jan. 20, 2004) [hereinafter Bush State of the Union]. For an unofficial version of the speech that includes the audience's applause, see State of the Union Address (Jan. 20, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

There is something about the presidency that loves war-talk.<sup>2</sup> Even at its most metaphorical, martial rhetoric allows the President to invoke his special mystique as Commander in Chief, calling the public to sacrifice greatly for the good of the nation. Perhaps the clarion call to pseudo-war is just the thing the President needs to ram an initiative through a reluctant Congress. Perhaps it provides rhetorical cover for unilateral actions of questionable legality. We are not dealing with a constitutional novelty: Almost two centuries ago, Andrew Jackson was famously making 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.<sup>3</sup>

*The Emergency Constitution* aims to provide a new framework for controlling this presidential dynamic in its present boom cycle.<sup>4</sup> To be sure, the war on terrorism isn't as obvious a rhetorical stretch as the war on poverty. Classical wars traditionally involve a battle against sovereign states, and it may seem a small matter to expand the paradigm to cover struggles with terrorist groups. But appearances are misleading: An embrace of the "war on terrorism" can generate a dynamic that justifies the

---

2. See, e.g., Address Before a Joint Session of Congress on the State of the Union, 1988 PUB. PAPERS 84, 88 (Jan. 25, 1988) ("The war against drugs is a war of individual battles, a crusade with many heroes . . ."); Address Before a Joint Session of the Congress on the State of the Union, 1983 PUB. PAPERS 102, 107 (Jan. 25, 1983) ("This administration hereby declares an all-out war on big-time organized crime and the drug racketeers who are poisoning our young people."); Annual Message to the Congress on the State of the Union, 1963-1964 PUB. PAPERS 112, 114 (Jan. 8, 1964) ("This administration today, here and now, declares unconditional war on poverty in America."); The President's Farewell Address to the American People, 1952-1953 PUB. PAPERS 1197, 1199 (Jan. 15, 1953) ("I suppose that history will remember my term in office as the years when the 'cold war' began to overshadow our lives. I have had hardly a day in office that has not been dominated by this all-embracing struggle—this conflict between those who love freedom and those who would lead the world back into slavery and darkness.").

3. In light of the rhetorical restraint practiced by presidents of the period, see JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 61-87 (1987), 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 Bank is in the field, and the West,—the Great West, is the selected theatre of her operations.

. . . .

. . . 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* 256-63 (New York, D. Appleton & Co. 1859). "Say to Benton," President Jackson remarked, "the people soon will vote him a golden medal for his conduct in the Senate." ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR: A STUDY IN THE GROWTH OF PRESIDENTIAL POWER* 140-41 (1967) (internal quotation marks omitted). On the problematic legality of the withdrawal of federal deposits, see Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 236-37 (1999).

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

2004]

This Is Not a War

1873

permanent and broad-scale destruction of fundamental rights. Or so I argued in my essay.<sup>5</sup>

While it is easy enough to condemn this tendency toward war-talk, the State of the Union suggests that more than moralizing will be required to check the presidential dynamic. Consider the artful way that the speech sets up a sharp dichotomy as the foundation for its martial conclusion. The only alternative to war, President Bush suggests, is to “view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments.”<sup>6</sup> So far as he is concerned, September 11 demonstrated the futility of “serv[ing] our enemies with legal papers.”<sup>7</sup> According to the President, that leaves us with a single remaining alternative: “The terrorists and their supporters declared war on the United States, and war is what they got.”<sup>8</sup>

I want to prevent this rhetorical slide to war by creating a third framework that disrupts the President’s false dichotomy: This is not a war, but a *state of emergency*. I build upon ideas and practices that are already in common use. The newscasts constantly report declarations of emergency by governors responding to natural disasters—and though this is less familiar to ordinary citizens, presidents regularly declare emergencies in response to foreign crises and terrorist threats.<sup>9</sup> My aim is to develop these well-established practices further and construct a new bulwark against the presidential war-dynamic. When the next terrorist strike occurs, we should not turn to our television sets to see the President of the United States heating up the war-talk to an even higher pitch. It would be far better to see him go before Congress and somberly request its support for a declaration of a limited state of emergency.

In their thoughtful essays, David Cole and the team of Laurence Tribe and Patrick Gudridge point to many problems and imponderables raised by my proposal<sup>10</sup>—and they are right to be skeptical. I have one or another response to one or another of their concerns, but all of us find ourselves in a dark place far removed from the happy land of conventional legal analysis, where all our answers are clear and our reasoning compelling. To their credit, my commentators don’t suggest otherwise. They prefer to rely on courts as our one great bulwark against the presidential war-dynamic, but they are perfectly aware of the dangers involved. They simply prefer the

---

5. *See id.* at 1070.

6. Bush State of the Union, *supra* note 1, at 96.

7. *Id.*

8. *Id.*

9. *See Ackerman, supra* note 4, at 1078-79.

10. *See* David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004).

devils they know to the devils they imagine—and who can doubt the attractions of this familiar conservatism?

And yet there are times when we best conserve our basic values through creative acts of reform. The big question is not whether we should displace courts entirely, but whether we can build a new emergency regime in which courts, presidents, and legislatures interact with one another in ways that are superior to traditional forms that put the overwhelming weight on judges.

My answer begins by emphasizing one large limitation of my commentators' court-centered approach: While judges may (or may not) defend individual rights, courts definitely won't constrain the larger dangers involved in the prevailing war-talk. Part I of this Response suggests how this rhetoric, if left unchecked, will increase the likelihood of unilateral presidential war-making. Part II explores the morality of my proposal and Part III addresses the complex matters of statecraft raised by my commentators. I conclude with some imponderables.

### I. THE DANGERS OF WAR-TALK

The constitutional text grants the power to Congress to “declare war,”<sup>11</sup> creating an opening for judges to tell the President and Congress what a “war” is and when the consent of Congress is required. Yet, for all the recent discussion of an imperial judiciary,<sup>12</sup> nobody is expecting the Justices to intervene forcefully on the war question anytime soon.<sup>13</sup> This means that the court-centered tradition will permit future presidents to

---

11. U.S. CONST. art I, § 8, cl. 11.

12. See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) (historicizing the critique of contemporary judicial pretensions); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (critiquing recent cases limiting Congress's Section 5 powers under the Fourteenth Amendment).

13. Throughout the Vietnam War, the Supreme Court systematically refused to grant certiorari in any case challenging the constitutionality of the war. Only Justices Douglas and Stewart raised their voices in protest in *Mora v. McNamara*, 389 U.S. 934, 934 (1967) (Stewart, J., dissenting from denial of certiorari); *id.* at 935 (Douglas, J., dissenting from denial of certiorari), and Justice Douglas issued a lone dissent three years later:

Today we deny a hearing to a State which attempts to determine whether it is constitutional to require its citizens to fight in a foreign war absent a congressional declaration of war. Three years ago we refused to hear a case involving draftees who sought to prevent their shipment overseas. The question of an unconstitutional war is neither academic nor “political.” This case has raised the question in an adversary setting. It should be settled here and now.

*Massachusetts v. Laird*, 400 U.S. 886, 900 (1970) (Douglas, J., dissenting from denial of motion for leave to file bill of complaint) (citation omitted); see also EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 84 (2d ed. 1991). Nobody supposes that the present Court will act any differently. See, e.g., RYAN C. HENDRICKSON, THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS 3 (2002).

2004]

This Is Not a War

1875

continue exploiting the false dichotomy elaborated by President Bush in his State of the Union.

Under my emergency constitution, the President would be in a position to respond to the next terrorist strike with an address to the nation that would break with President Bush's recent State of the Union. Rather than speak of war, the President could invoke the more moderate—and more appropriate—notation of a state of emergency:

My fellow Americans, as we grieve together at our terrible loss, you should know that your government will not be intimidated by this terrorist outrage, nor treat it as an occasion for business as usual. 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.

Yet if my court-centered commentators have their way, this option will not be at the President's disposal. Instead, he will have only two choices. He can follow the example of President Bush and heat up the war-talk to fever pitch, or he can take the path proposed by Professors Tribe and Gudridge. Adapting their prose, I imagine them asking the President to say:

It is bound to be quite a long time—even if all goes well with efforts at coalition-building among the principal targets of each new wave of global terrorism, and even if democratic nation-building proceeds more smoothly than anyone has grounds at the moment to predict—before we can feel any confidence that . . . terrorist assault[s] . . . will not recur in the foreseeable future.

Such confidence seems unlikely to be warranted until we . . . have ceased to inspire resentment, fear, and blinding rage on the part of too many individuals in too many places. Fanatically, even suicidally, anti-American and anti-Western ideology—in combination with the resources and aptitude for deploying the technology and theater of terror—will continue to provide at least the preconditions for more of the same. . . . [We should refuse] to sell off larger and larger chunks [of the liberties that make us] what we are in a transparently masked attempt to make those attacks go away. For, as we will hopefully never have to learn from firsthand experience, not even a locked-down police state is totally immune to such attacks; not even a regime of state terror is an ironclad guarantee against terror from outside the state.<sup>14</sup>

---

14. Tribe & Gudridge, *supra* note 10, at 1815-16.

Call this the strategy of legalistic tough-talk: While it has substantial merit, how likely is it that future presidents will actually take this path?

Anything is possible, but all of us must keep one hard fact in mind. President Bush has already rejected the Tribe-Gudridge strategy, and he has *already won* in the court of public opinion. Thanks to the media's uncritical repetition of the President's rhetoric, (almost) everybody thinks it's obvious that we are in the middle of a "war on terrorism." Of course, many people disagree with the President's conduct of the "war," but leading opponents do not deny that we are fighting one.<sup>15</sup> It would take a lot of work for the next President to use his bully pulpit to try to persuade the American people otherwise. Professors Tribe and Gudridge refuse to recognize this painful fact. Indeed, they even suggest that, over time, the nation will be increasingly attracted to the strategy of legalistic tough-talk.<sup>16</sup>

This is wishful thinking: In the absence of a new emergency framework, there is a very large risk that future presidents—Republicans and Democrats alike—will escalate war-talk in response to terrorist attacks. And over time, this rhetorical tendency will have real-world consequences. So long as the general public accepts the notion that America can make "war" on something as amorphous as "terrorism," future presidents will have a much easier time convincing the nation to engage in old-fashioned wars against sovereign states. Under the classical paradigm, each of these wars had to be justified on its own merits—the case for invading Afghanistan treated distinctly from the case against Iraq, and so forth. But once the public is convinced that a larger "war on terrorism" is going on, these separate wars can be repackaged as mere "battles."<sup>17</sup>

---

15. Most importantly, the Democratic presidential candidate, John Kerry, has embraced the war metaphor with enthusiasm:

I do not fault George Bush for doing too much in the War on Terror; I believe he's done too little. . . . If I am Commander-in-Chief, I would wage that war by putting in place a strategy to win it. We cannot win the War on Terror through military power alone. If I am President, I will be prepared to use military force to protect our security, our people, and our vital interests. But the fight requires us to use every tool at our disposal. Not only a strong military—but renewed alliances, vigorous law enforcement, reliable intelligence, and unremitting effort to shut down the flow of terrorist funds.

John Kerry, Fighting a Comprehensive War on Terrorism, Remarks at the Ronald W. Burkle Center for International Relations, University of California at Los Angeles (Feb. 27, 2004), [http://www.johnkerry.com/pressroom/speeches/spc\\_2004\\_0227.html](http://www.johnkerry.com/pressroom/speeches/spc_2004_0227.html).

16. See Tribe & Gudridge, *supra* note 10, at 1815-16.

17. This tendency is very visible in President Bush's speeches. See, e.g., Remarks to Military Personnel and Families at Fort Stewart, Georgia, 39 WEEKLY COMP. PRES. DOC. 1197, 1198-99 (Sept. 15, 2003) ("In this new kind of war, America has followed a new strategy. We are not waiting for further attacks on our citizens. We are striking our enemies before they can strike us again. We're rolling back the terrorist threat not on the fringes of its influence but at the heart of its power. . . . We've sent a message that is now understood throughout the world: If you harbor a terrorist, if you support a terrorist, if you feed a terrorist, you're just as guilty as the terrorists. And we have pursued the war on terror in Iraq. . . . Iraq is now the central front in the war on terror. . . . Our military is confronting terrorists in Iraq and Afghanistan and in other places, so that our people will not have to confront terrorist violence in our own cities."); Remarks at Oak Park High

Repackaging will not only make it easier for a president to gain public support for his future “battles” against one or another “rogue state.” It will also make it easier for 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. Because the courts have not actively policed this constitutional boundary,<sup>18</sup> the public understanding of the nature of war will be an important factor in determining the limits of presidential unilateralism.<sup>19</sup> Once the President convinces the public that his proposed military invasion of the next “evil empire” is merely a “battle” in the “war on terrorism,” he is well on the way to winning his battle against Congress on the exercise of the war power. This overheated atmosphere, moreover, will provide a propitious environment for the hurried enactment of further rounds of repressive domestic legislation.

Yet none of this is within the purview of my court-centered critics. They seem to suppose that it is enough to establish that the courts can be trusted to serve as a bulwark of individual liberties, and that an elaborate new emergency framework is therefore unnecessary. But it is not enough: Without creating an alternative framework that might displace the stark dichotomy between war and crime, future presidents will find it too easy to take the path of war.

Of course, there are many imponderables involved in weighing this first factor. We may be lucky: Perhaps there will be no repetition of September 11, and if there is another terrorist strike, perhaps the sitting President will turn out to be a heroic defender of civil liberties. But it is also possible that things will turn out even worse the next time around—perhaps the sitting

---

School in Kansas City, Missouri, 38 WEEKLY COMP. PRES. DOC. 988, 990 (June 17, 2002) (“It also is a new kind of war, because we’re going to be confronted with the notion that these shadowy terrorists could hook up with a nation that has got weapons of mass destruction, the nations that I labeled ‘axis of evil’ . . . one thing we are going to do is defend the American people and make sure that these terrorist networks don’t hook up with these nations that harbor bad designs on us and at the same time develop the worst kind of weapons.”).

It deserves mention that the President did obtain congressional authorization before launching classical wars against Iraq and Afghanistan. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (to be codified at 50 U.S.C. § 1541 note); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (to be codified at 50 U.S.C. § 1541 note). Nevertheless, it should be clear that this kind of rhetoric could be used by future presidents to justify major interventions without congressional consent.

18. See *supra* note 13.

19. For a thoughtful discussion of the role of public opinion in the formation of foreign policy, see BRUCE RUSSETT, CONTROLLING THE SWORD: THE DEMOCRATIC GOVERNANCE OF NATIONAL SECURITY 87-118 (1990). Of course, public opinion is an important (but hardly the sole) factor determining the extent of congressional involvement in the exercise of the war power. For an overview of this complex history, see LOUIS FISHER, PRESIDENTIAL WAR POWER (1995). For some good case studies, see DAVID LOCKE HALL, THE REAGAN WARS: A CONSTITUTIONAL PERSPECTIVE ON WAR POWERS AND THE PRESIDENCY 135-262 (1991).

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 cases, where a truly demonic demagogue manages to exploit mass anxieties to destroy all sense of constitutional restraint. But we should soberly consider, in the manner of *The Federalist Papers*, that “[e]nlightened statesmen will not always be at the helm,”<sup>20</sup> and that the creative use of the *entire* system of checks and balances—not only the courts—may limit potential abuses of power that otherwise pose a clear and present danger to our most fundamental values. Call this the priority of statecraft.

## II. THE MORALITY OF STATECRAFT

Statecraft won’t come easily. Even during the present period of relative calm, it will be tough to build political support for an appropriate emergency statute. President Bush has been making extreme claims, as Commander in Chief, to sweeping powers of preventive detention. He will bitterly oppose any statutory effort to constrain these powers unless the Supreme Court rejects the premises of presidential unilateralism in the great cases now coming before it.<sup>21</sup> Even if the Court does stand up for human rights, politics may prove equally intractable. Once rebuffed by the Court, the President might be willing to accept an emergency statute that grants extraordinary powers under carefully controlled conditions. But civil libertarians will predictably try to block the statute in Congress. To personalize their strategic point, I already can hear my commentators responding to a libertarian decision by the Court in *Padilla*:

---

20. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961). Professors Tribe and Gudridge suggest that my dedication to the separation of powers is based on my reluctance to “destabilize existing patterns of power and privilege among those who govern,” and is otherwise “inexplicable,” since the “deliberate inefficiencies built into our fabled system of checks and balances may be among the greatest obstacles to a rapid and fully effective response to terror.” Tribe & Gudridge, *supra* note 10, at 1836. To the contrary, my devotion to separation of powers derives precisely from the “deliberate inefficiencies” that Tribe and Gudridge disparage: Rather than serve as an “obstacle,” an embrace of the *full* system of checks and balances can control the very real dangers of presidential unilateralism—in a way that a system that relies solely upon courts cannot.

21. See *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004) (No. 03-1027) (raising the issue whether the President has the authority to detain an American citizen captured on U.S. soil as an “enemy combatant”); *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir.), *cert. granted*, 124 S. Ct. 534 (2003) (Nos. 03-334, 03-343) (raising the issue whether U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and held at Guantánamo); *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004) (No. 03-6696) (raising the issue whether the President has the authority to detain an American citizen captured on the battlefield in Afghanistan as an “enemy combatant”).

See Bruce, we told you so, Americans *can* count on the Court when the going gets rough. Now that the Justices have held firm, it's silly to compromise our great victory by accepting the legitimacy of emergency powers. Let's stick with the status quo, and praise the virtues of our Non-Emergency Constitution.

To make my own strategic position clear: I will enthusiastically join the chorus in praise of the Justices if they emphatically reject presidential pretensions in the cases coming before them. But I suggest that we should use this moment of judicial triumph to take some of the load off the courts in the future. Though the Court may save us this time, it hardly follows that future courts will stand up for individual rights after the second terrorist strike, or the third, or beyond.

Whatever I say, many strong civil libertarians will follow the lead of my commentators and fight an emergency statute tooth and nail. We are dealing in imponderables, and thoughtful people will ponder the imponderables differently. Truth be told, I don't even want to convince all my critics that they are utterly wrong, since a good statute will emerge only if civil libertarians fight hard against the predictable efforts by the White House to get Congress to give the President a blank check. Fierce resistance is an absolutely essential part of the political environment needed to yield an emergency statute that creates an appropriate set of checks and balances. Nevertheless, it is important to explain why civil libertarians shouldn't be too disappointed if, despite their passionate opposition, a good statute does emerge in the end.

From this vantage point, some of Professor Cole's concerns deserve pride of place, since he considers my initiative nothing short of immoral. On his view, my proposal boils down to the proposition that it's okay to lock people up arbitrarily on the merest of suspicions simply to make a "panicked public . . . feel better"<sup>22</sup>—and this isn't something that decent people should seriously contemplate. He would grant priority to his clear moral intuitions over my murky musings on statecraft.

To confront his objections, I begin by clarifying the "reassurance rationale" that motivates my proposal. I then develop a hypothetical scenario, involving medical quarantine, that may serve as a test of some relevant moral intuitions—extending these moral intuitions to terrorism by pointing to common empirical features of the problems raised in the two domains. I conclude by refining some of my argument's policy implications.

---

22. Cole, *supra* note 10, at 1757-59.

A. *The “Second Strike” Rationale*

Professor Cole’s moralistic rejection of my approach may be a product of misunderstanding. Here is the way I defined the “reassurance” rationale which serves as my conceptual foundation: “It should be the purpose of a newly fashioned emergency regime to reassure the public that the situation is under control, and *that the state is taking effective short-term actions to prevent a second strike.*”<sup>23</sup> This is a two-prong test, and Professor Cole entirely ignores the second prong, perhaps because he is so certain that preventive detention cannot possibly “prevent a second strike.” In his view, the futility of the detention strategy is established conclusively by our past experience with the Palmer Raids, the Japanese-American internment, and the Ashcroft dragnet: “History suggests that we ought to do everything we can to *restrict* suspicionless preventive detention, not to *expand* it.”<sup>24</sup>

I don’t think that historical case studies can ever teach such categorical lessons. Rather than ransacking the history books for counterexamples, I will give some forward-looking reasons for thinking that a well-regulated and short-term practice of preventive detention may well significantly reduce the risk of very great harms.

To make my case, it is necessary to clarify a second issue. In describing emergency powers, I contemplated detention based “on mere suspicion, without the evidence generally required for arrest or continuing confinement.”<sup>25</sup> Professor Cole interprets these remarks to mean that I am a champion of utterly arbitrary detention, unsupported by evidence of any kind.<sup>26</sup>

This was not my intention. To the contrary, my framework statute requires “the prosecutor to state the grounds for detention on the record” to an Article III judge shortly after each arrest.<sup>27</sup> Such a demand would be pointless in a system of arbitrary detention, where (by definition) no grounds are required; moreover, my statute specifically guarantees punitive damages to victims of arbitrary power once their forty-five-day period of detention comes to an end.<sup>28</sup> Rather than tolerating arbitrary seizures, my aim is more modest, but no less important: to explicitly authorize detention on an evidentiary basis that is a good deal less substantial than is normally required. Despite his moralizing critique, Professor Cole occasionally allows his argument to swerve in my direction, as when he says, “[t]he

---

23. Ackerman, *supra* note 4, at 1031 (emphasis added); *see also id.* at 1037, 1040, 1050, 1057, 1059-60.

24. Cole, *supra* note 10, at 1755.

25. Ackerman, *supra* note 4, at 1058.

26. *See* Cole, *supra* note 10, at 1763-64, 1786-91.

27. Ackerman, *supra* note 4, at 1070-71.

28. *Id.* at 1075-76.

stakes in an emergency may well justify temporary detention on a less stringent showing of dangerousness than would be required during normal times.”<sup>29</sup> Perhaps, then, there is less of a disagreement than meets the eye? In any event, the question of morality is a serious one: Is it wrong to detain low-probability suspects in emergency conditions?

To put the problem in a practical context, here is a recurring scenario that serves as my paradigm case. I assume that, before the terrorist strike occurs, the security agencies have compiled “watch lists” of suspected terrorists. Under normal constitutional standards, their evidence does not amount to probable cause of involvement in crime. Now, suddenly, the attack occurs—and the security agencies are still in the dark. While they have some evidence of suspicious activities, they are not in a good position to link particular suspects to the particular conspiracy responsible for the recent attack. Does a sweeping preventive detention of suspects on their “watch lists” violate basic moral principles?

A single hypothetical should help destabilize Cole’s clear intuitions. Suppose that a new killer virus has escaped from a Defense Department laboratory in New Mexico, and that public health workers propose to quarantine the surrounding residents most likely to be infected. Given the novelty of the disease, there are no objective tests to determine whether any of these people are in fact infected, but the best guess is that the probability is very low. Unfortunately, the disease has a very long incubation period—it takes sixty days before its presence can be scientifically detected—and a single infected person could generate an epidemic chain reaction if allowed to mix freely with the general population.

As in my paradigm case, the quarantine authorities are not operating entirely without evidence—they have reason to believe that the neighbors have a greater chance of infection than the average resident of New Mexico, but they also have reason to believe that the chance of any individual’s infection is very low. Is it *immoral* to impose a sixty-day quarantine on these unlucky people, taking care to treat them decently and to provide them with financial assistance to cover their own losses and those of their dependents?

If you favor the quarantine, you must reject Professor Cole’s moral intuitions.<sup>30</sup> To be sure, the detention of low-probability disease carriers and

---

29. Cole, *supra* note 10, at 1787. Cole also writes, “Preventive detention is not arbitrary where narrowly circumscribed to meet a sufficiently compelling need.” *Id.* at 1795. But if Professor Cole believes such detentions to be utterly immoral, perhaps he should favor their complete prohibition (as in the case of torture).

30. Indeed, as a matter of morality, the preventive detention case is a bit easier than the standard quarantine. Generally speaking, a quarantine not only deprives the inmates of their liberty, but also increases their risk of infection, since they are in close contact with others under suspicion. See Daniel Markovits, Quarantines and Distributive Justice 2 n.1 (unpublished manuscript, on file with author). In contrast, preventive detention of suspected terrorists deprives

low-probability terrorists pose very different problems from the perspective of good statecraft. The plight of the quarantined neighbors surrounding the laboratory will generate a great deal of sympathy from the rest of the community, while the detained terrorist suspects will generate great antipathy. It will be a lot tougher to design a system that will reliably protect the latter group from a host of grave political and bureaucratic abuses. But this is a problem of *statecraft*, not *morality*. From the moral point of view, the cases are identical: We confront two groups of unlucky people who are asked to bear the burden of epistemic risk to avoid a very large harm that might otherwise be imposed on lots of other people.<sup>31</sup> If isolation is morally justified in the one case, it is morally justified in the other—provided, of course, that preventive detention of low-probability suspects will significantly reduce the risk of very serious harms that might otherwise occur in the aftermath of a major terrorist strike.

Since all my commentators seem very doubtful on this score, let me spell out my “second strike” rationale in greater detail.<sup>32</sup>

I assume, first, that the initial terrorist strike has generated a great deal of bureaucratic confusion. The security services have been caught by surprise and do not really know what is going on. They have a long list of the “usual suspects,” compiled over the years, but it will take time for them to sort out concrete clues that will provide much of an objective basis for linking particular suspects to the particular terrorist conspiracy involved.

---

them of their liberty, but it does not increase the risk of physical harm or death—provided that care is taken to assure them decent treatment.

31. As a matter of law, courts have experienced very little difficulty disposing of cases involving people suspected of carrying contagious diseases who refuse to submit to an appropriate medical test. Rather than allow them to impose the epistemic risk on others, judges have upheld the power of health authorities to impose a quarantine. *See, e.g.,* Jihad v. Newkirk, No. 95-1956, 1996 U.S. App. LEXIS 10740 (7th Cir. Apr. 17, 1996) (unpublished decision) (upholding a tuberculosis quarantine for an Indiana prison inmate who refused to submit to a TB test or treatment). The leading Supreme Court case upholding quarantines is *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, 186 U.S. 380 (1902), but the great case in this general area is *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which involved forced inoculations.

32. Professor Cole’s study of history convinces him that my “second strike” rationale has no merit, but Professors Tribe and Gudridge concede that a “second strike” is a serious risk. Nevertheless, they limit this concession to the “hours” immediately after an initial attack: “[A]s for the *months* that follow, the period that Ackerman’s proposal emphasizes, nothing suggests that attacks are more likely then than at any other time.” Tribe & Gudridge, *supra* note 10, at 1828-29.

Yet this entirely ignores the organizational dimension. The operational challenge for the security services is to sweep up the key terrorist operatives, and thereby destroy the group’s capacity to initiate further attacks. Given the prevailing levels of bureaucratic confusion, it is unrealistic to require them to sort out the relatively small number of high-probability operatives from the larger pool of low-probability suspects in a very short period of time. If normal constitutional standards apply in a matter of “hours,” as Tribe and Gudridge suggest, the likely result is the release of key terrorist operatives—a result that seems to me a serious problem, not a “nothing.” For further discussion in the context of my quarantine hypothetical, see *supra* text accompanying notes 29-30.

2004]

This Is Not a War

1883

Nevertheless, and this is my second premise, time is of the essence, because the initial terrorist strike increases the probability that a second major attack will occur within a relatively short time. To see why, consider that well-organized terrorists will want to plan for a series of strikes before the first one occurs. Once the nation goes on red alert after the first attack, it will be much harder to plant new terrorist cells and matériel. As a consequence, the first terrorist success is probative in two ways. Most obviously, it establishes that at least one terrorist group can actually achieve its goals, rather than merely talk about them. More subtly, if this group is competent enough to organize a large attack, it may well be competent enough to plan ahead and prepare for a series of terrorist strikes before the first bomb goes off.<sup>33</sup>

And if this turns out to be so—this is my third crucial premise—the damages of a second strike will be very great indeed. Not only will it kill many people, but it will also grievously demoralize the general public. When only a single attack has occurred in the recent past, the citizenry can retain the hope that the disaster will remain a rare and exceptional event. With another major attack, people face the open-ended prospect of great and unpredictable violence, leading to a quantum jump in general anxiety and outbursts of panic. This general unease, in turn, prepares the way for a new cycle of political demagoguery.

Within this context, the instrumental case for an emergency regime is straightforward. The system of preventive detention will allow the security services to detain suspects on their “watch lists,” and not only those who can be concretely linked to the terrorist conspiracy that has already demonstrated its potency. This dragnet will undoubtedly sweep many innocents into detention, but it may well catch a few key actors in the ongoing conspiracy, disrupting the second strike, saving numerous lives, and deflecting a body blow to the body politic.<sup>34</sup>

Professor Cole is right to insist that this instrumental logic has sometimes been terribly abused. But unless he is prepared to challenge its premises, he should not define it out of existence.

---

33. For example, it seems pretty clear that Ramzi Yousef, mastermind of the 1993 World Trade Center bombing, planned to follow up the attack with the simultaneous bombing of eleven airliners. Bruce Hoffman, *Terrorism Trends and Prospects*, in COUNTERING THE NEW TERRORISM 7, 13 (RAND ed., 1999). The intelligence community expected a second strike after September 11, according to many newspaper accounts. See, e.g., Peter J. Howe & Anne E. Kornblut, *US Probes a Possible Iraq Link; Battle Won't Be Quick or Easy, Warns Rumsfeld*, BOSTON GLOBE, Sept. 19, 2001, at A1; Josh Meyers, *U.S. Believes More Attacks Are Planned*, L.A. TIMES, Sept. 30, 2001, at A1. Without access to classified information, it is hard to know whether these predictions were well-founded, and if so, why they failed to materialize.

34. This is, at any rate, a finding by a leading student of police-Mafia relations. See Ackerman, *supra* note 4, at 1050 n.48.

*B. On Detaining the Innocent*

The logic of the “second strike” rationale also justifies another aspect of my proposal that puzzles Professor Cole. He notes that I allow the security services to detain individual suspects for a relatively brief time—forty-five or sixty days—even if the state of emergency continues for many months. He detects an inconsistency: If the point of my exceptional regime is reassurance, why scare people by allowing suspected terrorists to roam freely before the emergency ends?

Because the point isn’t to do everything possible to calm a panicky public, but to reassure the citizenry that the state is taking all reasonably effective steps to reduce the chance of further strikes. Given the way a major attack overwhelms the bureaucratic capacity of the security services, it is unreasonable to insist that they immediately back up their suspicions with the kind of particularized evidence generally required by the Fourth Amendment. Requiring them to support this judgment after forty-five days, however, usefully focuses their bureaucratic energies: If they can’t show “probable cause” by this point, it’s almost certainly because there is no cause to be shown.

Of course, there is always something arbitrary in establishing a bright line of forty-five days—why not thirty or sixty?—to force the security bureaucracy to put up or shut up. While reasonable people will predictably disagree as to the appropriate period of preventive detention, they should all keep in mind the sharply increasing burden imposed on detainees as their period of social isolation increases. Though it is always a very bad thing to detain innocent people, it gets worse over time as detainees lose touch with their families, friends, employers, and the rhythm of their lives.

Given his emphasis on morality, I am also surprised by Professor Cole’s skeptical treatment of my insistence on financial compensation for all innocent detainees caught up by the emergency sweeps. It is one thing to force unlucky people to bear the burden of epistemic risk for a limited period of time; quite another to refuse to compensate them for the special burden they are asked to bear for the general good.<sup>35</sup>

The claims of morality are particularly compelling here, and are rooted in basic principles of just compensation law that, unfortunately, have never been applied to matters involving detention. When society wants a better transportation system, it doesn’t simply seize the real estate it needs for the superhighway. It pays the landowners whose interests have, through no fault of their own, been sacrificed for the common good. The same should be true when society wants to improve its security, but somehow this

---

35. For an engaging elaboration of this moral intuition, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 78-84 (1974).

obvious moral point has eluded just compensation law. When an innocent is convicted of a serious crime in America, and the mistake is discovered ten years later, most states of the Union grant no financial compensation whatsoever for this grievous loss of “human capital.” The ex-convict leaves prison with a bus ticket to nowhere, and the courts have never seen fit to interpret the Just Compensation Clause to rectify this outrageous situation.<sup>36</sup> America is truly exceptional: European nations long ago recognized this injustice, and offer substantial compensation in such cases.<sup>37</sup>

To be sure, my proposed statute does not go this far. It simply focuses on the particular plight of innocent victims of emergency dragnets, who have been deprived of liberty without the full protections normally accorded by the criminal law. But by insisting on generous compensation in this case, the emergency constitution can usefully provoke a broader reappraisal of the meaning of just compensation in criminal law more generally.<sup>38</sup>

### III. FROM MORALITY TO STATECRAFT

Morality is a threshold question: If the emergency constitution requires decent people to do things that are just plain wrong, then we should not be going down this road, and that is that. But statecraft is much more complicated than morality. My initiative may not be blatantly immoral, but it may still be unwise or counterproductive.

Or unconstitutional. Significantly, the critiques don’t seriously contest my claim that Congress could constitutionally enact a framework statute imposing a supermajoritarian escalator on congressional decisions to

---

36. Despite Professor Cole’s suggestion to the contrary, Cole, *supra* note 10, at 1781, I do indeed challenge existing American law on the general issue, and not merely as it applies to the case of emergency dragnets. See Ackerman, *supra* note 4, at 1063-65 & n.86.

But Professor Cole usefully clarifies special problems involved in my proposal to deny compensation to detainees who are later found guilty of crimes. He points out that my “claw-back” provision might encourage prosecutors to convict detainees of minor crimes that are entirely unrelated to terrorism, and thereby save the state money. Cole, *supra* note 10, at 1782-83. I agree that this is an abuse, and would respond by stipulating that the “claw-back” should only apply to detainees subsequently convicted of offenses involving terrorism.

I am less persuaded by his point that convicted terrorists may be good at hiding their assets, and so “claw-backs” may be difficult to implement in some cases. See *id.* at 1783. This is a problem, but I do not think that it outweighs the injustice of failing to compensate the far larger number of detainees who will never be convicted. Moreover, convicted terrorists will be spending many years in prison, and even if the state fails to recoup its compensation payment, its interest in obtaining justice and deterring future crimes will be largely fulfilled.

37. See Ackerman, *supra* note 4, at 1064 & n.84.

38. Though Professors Tribe and Gudridge suggest that I view the emergency constitution as a “black hole,” Tribe & Gudridge, *supra* note 10, at 1820, points like this one suggest a rather more complex relationship between my proposed emergency regime and the operation of “ordinary” criminal law.

suspend habeas corpus for limited periods during a state of emergency.<sup>39</sup> I take comfort in this fact. My commentators are lawyers of the very first rank, and they are not generally shy about voicing strong opinions. If they had serious objections to my legal analysis, they would have made such concerns the centerpiece of their essays. Instead, they pitch their discussion at a different level. Their overriding concern is with wise statecraft, not constitutional legality, and many of their doubts are worth taking seriously.

Their most profound question challenges the imperative need for the government to calm the massive anxieties generated by a major terrorist attack: “The lack of [public] reassurance might, after all, reflect the lack of any sufficient ground for feeling reassured. Remove the pressure that a justly alarmed electorate can bring to bear, and the incentives for those who govern to remove the root causes of alarm will fall below the optimum . . . .”<sup>40</sup> Given this framework, Professors Tribe and Gudridge deny that “a responsible government” has any interest in reassuring the public beyond the point that is “objectively *justified*.”<sup>41</sup>

I reject this analysis categorically. The very notion that the political system may be presumed to respond “optimally” to “objectively justified” risks is precisely the problem, not the solution. When terrorists strike on the scale of September 11, *nobody has the slightest idea what may happen next*. To invoke Frank Knight’s famous distinction, we are in the world of uncertainty, not risk.<sup>42</sup> Rather than optimally calibrating risks, the citizenry confronts the shock of the unknown, and massive public anxiety is the likely result. The challenge is to assuage the pervasive sense of panic before the terrorists strike again, and take constitutional steps to check the clear and present dangers of demagogic excess. We must replace the standard kinds of rational choice analysis, which seek the optimal response to risk within a stable institutional framework,<sup>43</sup> with a higher-order constitutional rationality, which seeks to reshape institutions in the light of predictable pathologies.<sup>44</sup>

---

39. Professor Cole does suggest that the Suspension Clause should only operate in an “extreme emergency,” Cole, *supra* note 10, at 1791, but he does not confront the details of my particular arguments, see Ackerman, *supra* note 4, at 1083-91. In addition, he strongly contests the legality of entirely arbitrary detentions, but this is not part of my proposal. See *supra* text accompanying notes 27-29.

40. Tribe & Gudridge, *supra* note 10, at 1812; see also Cole, *supra* note 10, at 1757-58, 1786, 1788-89, 1795-99 (critiquing the reassurance rationale).

41. Tribe & Gudridge, *supra* note 10, at 1812.

42. FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 19-21, 197-232 (1921).

43. For a seminal essay, see Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503 (1981).

44. For me, *The Federalist Papers* provides the model. See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 165-99 (1991); see also JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1979) (discussing the design of mechanisms that anticipate and prevent predictable pathologies).

2004]

This Is Not a War

1887

This aspiration helps explain a feature of the framework statute that my critics find problematic. I suggest that the President and Congress should not be authorized to declare an emergency merely because they glimpse a “clear and present danger” of an attack—nothing short of a major terrorist event should suffice. Professors Tribe and Gudridge suggest that my high threshold “substantially underserve[s]” my overriding goal of reassurance.<sup>45</sup> But once again, this fails to appreciate the way radical uncertainty generates panic. As time goes on without another major attack, it becomes increasingly possible for politicians, bureaucrats, and ordinary citizens to evaluate the risks of another assault in a more-or-less responsible fashion.<sup>46</sup>

But there is more to constitutional statecraft than the recognition of the distinctive character of radical uncertainty. I begin by defining two large areas for further inquiry opened up by the critiques, and turn next to continuing disagreements about the vitality of the court-centered tradition and the need for fundamental reform.

#### A. *Of Repeal and Empowerment*

In introducing the general problem, my initial essay focused on a single—and very disturbing—use of emergency authority: the power to seize human beings and limit their freedom on grounds that would not pass muster under normal standards of constitutional law. But a lot more work will be required to elaborate a comprehensive legislative approach. On the one hand, we must fit the new statute into the body of existing law—and this will require reshaping the legal status quo in order to assure the effective operation of the emergency authority. On the other hand, we must move beyond the question of preventive detention and identify other powers that are appropriately granted in the aftermath of a major attack.

Begin with the obvious: Our new emergency statute will not do much good if other laws grant the President more sweeping powers. So long as this is true, the President will simply refuse to ask Congress to declare a short-term emergency, and rely instead on his preexisting sources of authority. Professor Cole is absolutely right to emphasize this point, but he fails to draw the necessary conclusion: The framework statute should contain a separate section that repeals preexisting provisions incompatible with the new regime. This isn’t the place to attempt a comprehensive canvass of existing law, but I can supply two criteria for guiding reappraisal. The first is minimalist, and I call it the requirement of *operational primacy*. This involves an aggregate assessment of the overall

---

45. Tribe & Gudridge, *supra* note 10, at 1824.

46. I also believe that Tribe and Gudridge seriously underestimate the extent to which a major terrorist attack increases the dangers of a second strike, and therefore justifies the emergency regime on instrumental grounds. *See supra* note 32.

legal authority granted to the President under existing law. The minimalist seeks to prune these authorities so that, over all, they grant the Executive significantly less power than that generated by the new regime. Without fulfilling this requirement, the new regime will not be invoked even when a massive terrorist strike occurs, rendering the entire exercise pointless.

Operational primacy helps explain why cases like *Padilla* are so important. If the Court grants the President extraordinary powers of preventive detention in his capacity as Commander in Chief, it will be much harder for Congress to cut back his overall authority to make the emergency regime an attractive alternative. But even if the Supreme Court decisively rebuffs extreme presidential claims to unilateral power, this should only begin a comprehensive review of his statutory authority. As Professor Cole suggests, there are a wide range of statutes—dealing with resident aliens, immigrants, “material witnesses,” and many other matters—that should be exposed to scrutiny under this first criterion.<sup>47</sup>

But motivations for repeal should move beyond a concern with operational primacy. On this second approach, the question is whether the new regime undermines the justifying rationale for preexisting law. Call this the *reappraisal criterion*, and if done in a serious way, it may well motivate a very substantial pruning of the statute books. Consider the USA PATRIOT Act. It was rushed through Congress in the wake of September 11 on the premise that the “war on terrorism” required a host of new tools for its successful prosecution—but fortunately Congress imposed a four-year sunset on some, though not all, of the statute’s most problematic provisions.<sup>48</sup> As a consequence, the next Congress will be obliged to revisit the statute in 2005. If this debate occurs as part of a larger consideration of an emergency framework statute, all parts of USA PATRIOT should be put on the table, and not only those scheduled for sunset, since Congress would be confronting a new option. As it reviews each provision, Congress should consider whether it is best put into operation only during emergency conditions immediately after a major terrorist strike.

With this new option in the mix, a distinctive pattern of decision may readily emerge. Some previously permanent provisions could well be demoted to emergency operation, along with others previously scheduled for sunset. In the aggregate, far fewer USA PATRIOT provisions might remain valid on a permanent basis. The availability of this new option does not guarantee wise decisions. If, for example, the debate occurs in the aftermath of another terrorist strike, it would be far better to postpone the entire subject of emergency legislation for some calmer moment in our

---

47. See Cole, *supra* note 10, at 1775-80.

48. See Ackerman, *supra* note 4, at 1087.

history. But if we are lucky, the addition of the emergency option may well channel the legislative outcome in a more constructive direction.

Consideration of USA PATRIOT brings us to a second major task—defining the range of powers that may appropriately be conferred on an emergency basis. None of my commentators believes that the scope of emergency power should be very large. Professors Tribe and Gudridge, for example, enumerate a broad class of measures that “fall outside the frame of” my proposal, including “curfews and evacuations, new types of border control, new forms of surveillance or of data compilation, government planting of deliberate disinformation, electronic signal interceptions, [and] tightened restrictions on access to hitherto-public information and facilities.”<sup>49</sup>

I disagree. The powers mentioned by Tribe and Gudridge require a more discriminating analysis: Some are obvious candidates for inclusion within the new framework; others should not be tolerated under any conditions; and still others represent genuinely hard cases. Begin with the easy cases for inclusion on the Tribe and Gudridge list: “curfews and evacuations, new types of border control, . . . [and] tightened restrictions on access to hitherto-public information and facilities.” Surely these are *precisely* the sorts of restrictions that may significantly reduce the risk of a second strike. Suppose, for example, that the emergency authorities respond to a terrorist attack on the Chicago water supply by restricting access to similar systems throughout the nation. They move quickly to require residents living within a mile of vulnerable reservoirs to carry special passes as they enter and leave the zone, insist that guests register in advance at checkpoints, and so forth. Without a terrorist strike, such interventions would plainly be unconstitutional, but the new framework statute should authorize them for the limited time periods established for the emergency.

Another power mentioned by Professors Tribe and Gudridge strikes me as an easy case for exclusion: “[G]overnment planting of deliberate disinformation” should be explicitly prohibited at all times, and especially in emergencies. Since I place great weight on a political system of checks and balances, it is imperative to assure the diffusion of accurate information to a broad political spectrum, especially those in the minority.<sup>50</sup> If the Executive were authorized to engage in widespread disinformation campaigns, he would have every incentive to bamboozle the political minority into extending the time limits for the emergency regime.

And then there are hard cases: “new forms of surveillance or of data compilation . . . [and] electronic signal interceptions.” A thoughtful approach to this issue requires more technical expertise than I possess.

---

49. Tribe & Gudridge, *supra* note 10, at 1830.

50. See Ackerman, *supra* note 4, at 1050-53.

Professor Cole is right to emphasize that especially intrusive data collection and surveillance during emergencies will have a pervasive chilling effect; even during more normal times, people will worry that their private lives will suddenly be stripped of confidentiality during the next emergency, and this concern may lead to drastic modifications of private conduct.<sup>51</sup> Perhaps this problem may be ameliorated by requiring security services to expunge their data once the state of emergency comes to an end. But this is a partial solution at best, and I suspect that determining the permissible scope of such surveillance will require some very hard choices.

Professors Tribe and Gudridge have provided only a very partial enumeration of powers that may be included within the emergency framework.<sup>52</sup> The merits of each proposed addition must, of course, be soberly weighed, and cautiously limited—though there will be many good faith disagreements on the extent to which the statutory text should explicitly constrain the exercise of one or another power.<sup>53</sup> All in all, this will be a complex and contestable business. In elaborating a “legal process” approach to emergency power, I am not in search of a “magic bullet” that will somehow eliminate the need for tough value judgments. Despite the contrary suggestion by Professor Cole,<sup>54</sup> my aim is quite different—to provide a framework allowing legislators to confront these complex value tradeoffs with reasonable confidence that, however they are resolved, extraordinary powers will be exercised only for limited time periods, and not for eternity.

Professor Cole does not believe that even this modest aim is achievable. In his view, different emergency powers may well require different time limits to operate with optimal efficiency. This simple point, he suggests, disrupts my neat scheme under which Congress votes every two months on the entire package.<sup>55</sup> As an abstract matter, Professor Cole may well be right about the optimal time limits for particular powers. To continue a previous scenario, it may be quite expensive to set up a complex control

---

51. See Cole, *supra* note 10, at 1770 & n.71.

52. Other emergency powers may well include expanded authority relating to searches and seizures, compulsory medical treatment/vaccination, destructive acts of “public necessity” (for example, shooting down a civilian aircraft), freezing of financial assets and restricting the operation of financial markets, temporary closure of businesses and prohibition on the sale of specific commercial items, increased federal control over state government agencies, reorganization of personnel and resources in federal agencies, an expanded domestic role for the military, and special limitations on the right to bear arms. The delineation of the scope of each of these powers is obviously controversial, and some useful powers may well be eliminated as part of the political compromise required to gain a broad consensus for the passage of the framework statute.

53. Tribe and Gudridge usefully explore some of the key variables. See Tribe & Gudridge, *supra* note 10, at 1824-25.

54. Cole, *supra* note 10, at 1757 (“Like many process scholars before him, Ackerman seeks a magic bullet where there is none.”).

55. *Id.* at 1770-73.

system around the nation's reservoirs, and a good deal of this investment might be "wasted" if Congress voted to terminate the emergency after only two months. Nevertheless, I don't think that such economic losses remotely justify a deviation from the requirement that Congress vote to reauthorize the entire package every two months. The point of packaging is political, not economic: to concentrate public attention and political responsibility on a single up-or-down vote. Once representatives can obfuscate their accountability by a host of votes—extending some powers, ending others—the broader public will no longer be in a position to penetrate the haze, allowing more focused bureaucratic pressures to assert undue influence in an effort to retain particular powers for excessive periods of time.

There is a lot more to be said about the overall shape of the emergency statute. But I hope that these reflections suffice to set the stage for an assessment of my critics' two larger complaints—that I am too optimistic when it comes to political checks and balances, and too pessimistic when it comes to the likely performance of the courts. I take up each critique in turn.

#### B. *Democracy and Distrust*

My commentators are deeply distrustful of politics—so distrustful, in fact, that they sometimes make me wonder whether I am a political naif. But compared to most mortals, I score pretty high on the "distrust index." Let me count the ways. First, I distrust the President. Above all else, I want him to return repeatedly to Congress every two months and make a continuing case for emergency powers. Second, I distrust the Congress. Each time the President returns, it becomes harder and harder for the House and Senate to give approval—the supermajoritarian escalator goes up and up, until it levels off in the stratosphere at eighty percent. Third, I distrust the CIA, the FBI, and the other security services—Congress can't declare an emergency merely because they spy a "clear and present" danger on the horizon. It must await a major terrorist strike.<sup>56</sup>

---

56. Ackerman, *supra* note 4, at 1059-60. Professors Tribe and Gudridge contribute an interesting discussion of the Indian experience with a state of emergency during the 1970s, *see* Tribe & Gudridge, *supra* note 10, at 1846-49, but they fail to remark on one significant aspect of the story. Prime Minister Indira Gandhi did not call an emergency in response to some catastrophic event, like a terrorist strike. Instead, her decision was provoked by a judgment of the Allahabad High Court finding her guilty of two counts of electoral wrongdoing. Gandhi appealed to the Indian Supreme Court, which gave her a conditional stay, but which also limited her participatory powers as a member of the Indian Parliament. She responded to this threat to her political position with a declaration of emergency. *See* VENKAT IYER, STATES OF EMERGENCY: THE INDIAN EXPERIENCE 152-55 (2000); *see also* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION 296 (1999) ("The Emergency's purposes were shown to be not those claimed for it. It was not to preserve democracy, but to stop it in its tracks. It was proclaimed to protect the political office of one individual."). I had this sad history in mind when

But all these manifestations of distrust are insufficient to calm my critics' anxieties. Despite my system of checks and balances, Professors Tribe and Gudridge believe that, over time, declarations of emergency may degenerate into a "fairly empty political exercise."<sup>57</sup> Anything is possible, but their prediction seems unlikely: The grant of extraordinary authority is an awesome thing, and it is hard to become hardened to its exercise. And the exercise of emergency power will generate very concrete problems for the politicians who vote to sustain the extraordinary regime. As dragnets and curfews begin, some constituents will be bitterly aggrieved by their operation—and after forty-five days, detainees will emerge to denounce their incarceration. No politician likes to deal with this kind of anger. To be sure, a major terrorist attack may induce them to take the heat and support the emergency in order to gain political credit from the rest of the terrorized population. But it is hard to suppose that they will ever treat the negative side of the political calculus as if it involved an "empty political exercise."

This is especially true when one considers that such legislators will not be rid of their angry constituents after a single vote. They must return again and again to vote for a continuation of the emergency under supermajoritarian ground rules that reflect a commitment to early termination. Professors Tribe and Gudridge so distrust the legislature that they doubt the efficacy of this supermajoritarian check. Citing recent work by Cass Sunstein, they suggest that such extraordinary supermajorities may only make things worse, encouraging increasing polarization as the dominant opinion overwhelms doubters: "Even the casual reader of Professor Sunstein's writings would worry about the procedural optimism implicit in Ackerman's regime."<sup>58</sup>

The operational word here is "casual." Sunstein's careful empirical work dealing with juries does not permit ready generalization to the very different world of experienced legislators. Jurors are novices in the business of decisionmaking, and once they are insulated in the deliberating room, they may well be impressed by asymmetries of argument and influence.<sup>59</sup> But experienced politicians have spent years in the maelstrom of competing interests, arguments, and perceptions. They go to many meetings each day, and certainly can't afford to be overwhelmed by the last group of people who present them with their grievances—otherwise, they don't have what it takes to win election to the House or Senate. This doesn't mean that skilled politicians won't sometimes pander to the sentiments of the moment—but if

---

insisting that an appropriate framework statute require a major terrorist strike as a condition for invoking the emergency. Anything less runs an unacceptable risk of Gandhi-like abuse.

57. Tribe & Gudridge, *supra* note 10, at 1814.

58. *Id.* at 1817.

59. See CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 43-61 (2002). For a more elaborate caution against the undue extrapolation of jury studies, see BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 61-65 (2004).

they do so, it is generally because they decide that pandering is the best policy, not because they have been overwhelmed by the polarizing influence of other politicians sitting with them in the Senate or House chamber.<sup>60</sup> There is simply nothing in Sunstein's work that challenges the insights of *The Federalist Papers*, which sees supermajority rules as a way of cooling the passions, not inflaming them.<sup>61</sup>

In proposing a supermajoritarian escalator, I am building on the same traditional theory that motivates a host of familiar constitutional checks—consider, for example, the requirement of a two-thirds majority for a congressional override of a presidential veto, or the supermajorities required for the approval of a constitutional amendment. I would be very surprised if Professors Tribe and Gudridge urged us to rethink these traditional requirements on the ground that they increase the likelihood of veto overrides and constitutional amendments. But if it really seemed likely that supermajority rules provoked overwhelming waves of polarization, they should be urging such counterintuitive revisions of our existing supermajoritarian practices.

While Professors Tribe and Gudridge speculate about the future operation of the new system, Professor Cole looks to the past and finds that Congress “generally rallies around the President, spurs him on, grants him expansive powers, and ratifies his initiatives.”<sup>62</sup> This is broadly true, especially in the immediate aftermath of a grave national crisis. But this is precisely the reason why we need a new framework statute, written at a time of relative calm, that seeks to channel congressional action into more constructive forms.

---

60. Of course, Sunstein's work does help explain why ordinary Americans will panic after a successful terrorist attack. See Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62-63 (2002) (“[T]he thesis of this Essay, is that when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood. That is, they are not closely attuned to the *probability* that harm will occur. At the individual level, this phenomenon, which I shall call ‘probability neglect,’ produces serious difficulties of various sorts, including excessive worry and unjustified behavioral changes.”); Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121 (2003) (applying the general thesis to terrorism). Given the population's propensity to “probability neglect,” many politicians may well respond by supporting a declaration of emergency until the panic abates. But this point makes the supermajoritarian escalator a particularly good idea, since it enables a minority of politicians—who are blessed with firmer backbones or less panicky constituents—to resist the undue extension of the emergency.

61. See, e.g., THE FEDERALIST NO. 73, *supra* note 20, at 446 (Alexander Hamilton) (discussing the desirability of requiring a two-thirds vote to override a presidential veto). As Hamilton wrote,

It is to be hoped that it will not often happen that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time; and this, too, in defiance of the counterpoising weight of the executive. It is at any rate far less probable that this should be the case than that such views should taint the resolutions and conduct of a bare majority.

*Id.*

62. Cole, *supra* note 10, at 1764.

Let there be no mistake: Future Congresses *will* rally to the President's side in response to massive terrorist strikes—the American people expect no less. But with the new framework in place, initial support for a state of emergency only serves as the beginning of an ongoing process of legislative reappraisal. It is quite true, as Professor Cole points out, that periodic oversight is also mandated by the existing National Emergencies Act of 1976, and that Congress has utterly failed to fulfill its requirement to review presidential declarations of emergency every six months.<sup>63</sup> But my proposal crucially differs from existing law. When Congress fails to discharge its review obligation under the present National Emergencies Act, this failure does not impair the ongoing validity of the presidential declaration. Under the new framework statute, in contrast, the state of emergency automatically lapses after two months unless it is explicitly reauthorized by a supermajority in Congress. This single change should make all the difference: Whereas the President is perfectly happy to allow Congress to ignore its review obligations under existing law, he will be demanding an up-or-down vote every two months under the new regime if he hopes to continue the emergency in force.

The crucial question, of course, is whether there will be enough support for civil liberties in the country to make it politically possible for congressional naysayers to exercise their minority veto as the supermajoritarian escalator makes reauthorization ever more difficult. Past congressional performance provides no guide here, and I am no prophet. My bottom line is this: If a significant minority of Americans will not support their senators and representatives when they stand up for civil liberties over time, there is no institutional solution—either legislative or judicial—that will save us in the long run.

### C. *The Role of the Courts*

My commentators mount an energetic and thoughtful defense of the courts as a bulwark in times of crisis. I hope they are right, since my own proposal continues to depend heavily on judges. I rely on them, first, to protect the integrity of the framework statute itself. For example, the judges should emphatically reject any presidential effort to continue the state of emergency in the absence of congressional reauthorization.<sup>64</sup> I also expect the courts to play a key role in case-by-case adjudication even while the emergency continues in effect. For example, judges should guarantee all detainees the immediate right to a lawyer, and they are solemnly charged to

---

63. See Cole, *supra* note 10, at 1765 (citing 50 U.S.C. § 1622 (2000)); see also Ackerman, *supra* note 4, at 1079-81.

64. Ackerman, *supra* note 4, at 1067-68.

2004]

This Is Not a War

1895

investigate aggressively the slightest suggestion of torture or other indecencies.<sup>65</sup> And finally, courts play a crucial role after the emergency has come to an end, providing punitive damages in individual cases of abuse and granting more structural relief that promises to correct systemic failures during future emergencies.<sup>66</sup>

I should also emphasize the provisional character of my own particular recommendations. For example, my essay gave the political branches a great deal of leeway on whether a particular terrorist attack is sufficiently major to warrant a declaration of emergency, limiting judicial review only to the most egregious cases. But others might reasonably take a more activist view.

Similarly, there is plenty of room for disagreement on my proposed standards for case-by-case adjudication during the emergency period. Rather than defending my particular position at length, it is more useful to offer two constraining principles to critics who want the judges to go beyond my own prescriptions and engage in more activist judicial intervention. The first is an *antinormalization principle*: Judicial standards framed for the emergency should be self-consciously and explicitly set at lower levels than those that are acceptable during normal times. This principle confronts one of the great dangers posed by the traditional approach commended by my commentators. If we allow courts to operate under the pretense that ours is a non-emergency constitution, the precedents established in the immediate aftermath of a major attack can easily linger on and greatly lower constitutional expectations over the long haul. By requiring courts explicitly to operate under emergency standards, the framework statute makes normalization of these low standards more difficult.

The second principle is *antiobstruction*: During the height of the crisis, judicial intervention should not divert excessive bureaucratic energy from security services that are already shocked and disorganized by the surprise attack. This not only makes common sense, but it is also in the long-run interest of the judiciary. Suppose, for example, that a lower court judge intervenes aggressively in the name of civil liberties, and orders the immediate release of a detainee on the basis of normal Fourth Amendment standards. Suppose further that the government's computers did contain evidence of probable cause, but that system operators had been overwhelmed by the emergency and could not come up with the data in time for the hearing. Suppose finally that the released terrorist actually participates in a successful second strike, and is later caught.

---

65. *Id.* at 1071-74.

66. *Id.* at 1074-76.

The consequences on the judiciary would be catastrophic and long-term. Even if there is a relatively small chance of this scenario occurring, friends of the judiciary should be mindful of its dangers. In contrast, my framework statute differently allocates responsibility for bureaucratic incompetence: It gives the security services forty-five days to come up with evidence that satisfies normal Fourth Amendment standards, and if the agency can't comply within this substantial period, it will be hard to make the courts a scapegoat for the agency's own bureaucratic failings.

Perhaps some period shorter than forty-five days may suffice to satisfy the antiobstruction principle, or perhaps some clever techniques might be developed to allow for the early discharge of plainly innocent victims of a dragnet; if so, I would be happy to accept these less restrictive proposals. But I do reject my commentators' seeming indifference to the twin dangers of normalization and obstruction. If we take them at their word, they would applaud courts that intervened immediately to insist that the security services comply with all standard constitutional requirements, even under the most chaotic bureaucratic conditions—so much for antiobstruction. They recognize, of course, that judges have often dramatically lowered constitutional protections in the past, but they insist on maintaining the pretense of a non-emergency constitution—so much for antinormalization.

To assuage my concerns, they merely hold out the hope that courts will reassess bad precedents over the longer run. Within this expanded time horizon, Professor Cole rightly suggests that the doctrinal picture becomes “decidedly less bleak,”<sup>67</sup> and Professors Tribe and Gudridge contribute an insightful case study of doctrinal rehabilitation in the aftermath of Joseph McCarthy's fall from power: “Why suppose that something equivalent is not possible now?”<sup>68</sup>

Because courts may no longer enjoy the luxury of time under twenty-first-century conditions. If terrorist strikes occur with some frequency, a vicious common law cycle may well displace the virtuous cycle of doctrinal rehabilitation described by my commentators: The bad judicial precedents produced in the immediate aftermath of each crisis may feed upon themselves, generating a thickening pattern of bad constitutional law. Professors Tribe and Gudridge write eloquently about the virtues of thick and contextualized judicial reason; they don't worry much about the dangerous way that judges can extrapolate from an accumulating field of crisis-generated precedent. Indeed, they don't reflect on the fact that the Supreme Court decisively departed from McCarthy-era precedent only after the demagogue had fallen from power.<sup>69</sup>

---

67. Cole, *supra* note 10, at 1761.

68. Tribe & Gudridge, *supra* note 10, at 1852.

69. When Senator Joseph McCarthy's power was at its peak, the Supreme Court handed down decisions like *Dennis v. United States*, 341 U.S. 494 (1951), upholding the conviction of

In a classic article, Professor Vince Blasi muses about some of the very precedents discussed by Professors Tribe and Gudridge, but from a very different angle.<sup>70</sup> He urges us to take a “pathological perspective” on the protection of civil liberties. We should frame our doctrine for the worst of times, when our collective sense of constitutional limitation is at its most vulnerable. In following his lead, I may well look foolish in retrospect if things turn out for the best. But if my darker scenarios turn into grim realities, political conditions may then be too chaotic to allow for the elaboration of a morally acceptable framework statute. Given the very real downside risks over the longer run, now is the time to take Professor Blasi’s pathological perspective seriously, and place the question of emergency powers at the top of the legislative agenda.<sup>71</sup>

My proposal gains further strength if we take a different temporal perspective. Although my commentators are optimistic about the recuperative capacities of judge-made law under twenty-first-century conditions, they seem—however grudgingly—to concede that the courts cannot be relied upon aggressively to protect fundamental rights in the immediate aftermath of attacks.<sup>72</sup> But if this is so, my framework statute may well prove more rights-protective in the short run than their exclusive reliance on courts. After all, the supermajoritarian escalator predictably will terminate emergencies within six or eight months, except in the most awful circumstances. At that point, the framework statute explicitly instructs judges to begin case-by-case adjudication under normal constitutional standards. As a consequence, courts will no longer be obliged to use the slow methods of the common law to dig themselves out of the doctrinal holes they created during the immediate emergency. They can proceed at once to implement the statutory command, and reassert traditional

---

leading Communists despite the First Amendment values at stake. The Court began to move beyond these repressive decisions only after the Senate censured McCarthy in December 1954, signaling his fall from power. It was only on June 17, 1957 that the Court handed down its four “Red Monday” decisions cutting back on the scope of the Smith Act (the statute at issue in *Dennis*), reversing a loyalty dismissal from the State Department, and restricting the powers of congressional committees to conduct abusive witch hunts. See *Service v. Dulles*, 354 U.S. 363 (1957); *Yates v. United States*, 354 U.S. 298 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Watkins v. United States*, 354 U.S. 178 (1957); see also ARTHUR SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 213 (1999). But as Professor Lucas Powe rightly emphasizes, it was not until the 1960s that the Court made a decisive break with its earlier McCarthy-era precedents. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 310-17 (2000). Professors Tribe and Gudridge fail to recognize the decisive importance of McCarthy’s rise and fall in presenting their uplifting version of doctrinal rehabilitation.

70. See Vince Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 465 (1985) (reflecting on McCarthyite excesses).

71. I should emphasize that Professor Blasi himself does not consider questions of emergency powers, and he may well reject my effort to extend his general approach to this field.

72. See Cole, *supra* note 10, at 1762 (“[C]ourts often appear overly deferential in the midst of an emergency . . . .”); Tribe & Gudridge, *supra* note 10, at 1846 (“It may be that American constitutional law, at that time [of the Japanese internment], did not possess the resources needed to address these matters adequately.”).

constitutional values at more-or-less full strength within months. My commentators don't seem sufficiently appreciative of this point, despite their recognition of the very real danger that judges will cave to short-run pressures before beginning the long, hard slog toward long-run rehabilitation.

D. *On Drawing Bright Lines*

But there is more to this dispute than a good faith disagreement about likely judicial behavior under competing regimes. There is a jurisprudential dimension to the critique proffered by Professors Tribe and Gudridge. Speaking broadly, their essay evidences a pervasive distrust of my formalistic effort to draw a bright legal line separating "emergency" from "normal" conditions: "The reality of American life in the post-September 11 world reveals something very different from a finite and legally bounded panoply of measures that one might imagine subsumed within the steps authorized under an Ackerman-like emergency constitution."<sup>73</sup> As they point out, September 11 has generated a ripple effect that has pushed the mores of "normal" life in authoritarian directions as we constantly repeat the mantra "better safe than sorry."<sup>74</sup>

But this shift has occurred in a world without an emergency constitution, so it hardly counts as evidence against my proposal. Before Professors Tribe and Gudridge can launch a convincing critique of bright-line methods, they must present some reasons to believe that my statute would provoke an even greater authoritarian shift in the definition of normality than would occur under their court-centered regime. Since their essay presents no such reasons, I suspect that their problem with bright lines has more to do with jurisprudence than empirics. They are antiformalists and are deeply suspicious of any sustained effort to mark off one legal regime from another by sharp lines and hard concepts.<sup>75</sup>

I take a different view. From our eighteenth-century Constitution to our twentieth-century Administrative Procedure Act, Americans have responded to large historical challenges by creating innovative regimes of public order. There is a Sisyphean aspect to this struggle for constitutional control. No legal architecture lasts forever. One generation builds, another sustains, another transforms the inheritance. Much of my work is devoted to

---

73. Tribe & Gudridge, *supra* note 10, at 1825-26.

74. *Id.* at 1826 (internal quotation marks omitted).

75. There can't be any question about Professor Gudridge's position, since he has contributed one of the most profound critiques of formalism in the last generation. See Patrick O. Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663 (1983). Although I have been an avid reader of Laurence Tribe's works for decades, I don't recall his making a sustained and self-consciously jurisprudential effort to confront this issue. But he has written an awful lot, and I have occasionally gone on vacation.

2004]

This Is Not a War

1899

this dialectic.<sup>76</sup> The rise and fall of formal structures emphasizes the fragility of all human creations. It does not suggest that we are better off retreating from the order-creating challenges of our own time, or that we should rely on a few judicial mandarins to do the heavy lifting for us.<sup>77</sup>

#### IV. CONCLUDING IMPONDERABLES

We are dealing with imponderables, and I conclude with a couple that weigh against my proposal. The first is anxiety about the sobriety of our politics. To see the point, I will assume, heroically, that I have convinced you of one large thesis: that a well-designed emergency statute will minimize short-run rights restriction and maximize long-run rights protection. Even granting this premise, it hardly follows that it is a good idea to make the matter a top legislative priority. Once the President and Congress get their hands on the issue, they might well make a mess of it: Rather than coming up with a carefully controlled framework, they might transform the measure into a sweeping authorization of all sorts of abominable practices. The idea that our representatives can resist the politics of fear, even during relatively calm moments, may be an academic fantasy.

I don't accept such a despairing analysis: If the Supreme Court shuts the door on executive unilateralism in the *Al Odah*, *Hamdi*, and *Padilla* cases, and if there is no further terrorist strike in the short run, there is a real chance that the President and Congress can reach a constructive agreement. Even if I turn out to be wrong, there is growing interest in this subject throughout the West, and perhaps breakthroughs in other countries may serve as models for the United States in the longer run.<sup>78</sup>

---

76. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (describing how formal rules for constitutional revision were revised and reconstructed at the Founding, Reconstruction, and the New Deal).

77. This too is a recurring theme in my work. See, e.g., BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992) (arguing for the centrality of written constitutions in the aftermath of the Eastern European revolutions of 1989); BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984) (describing legal realism as a passing phase in the legal response to the rise of activist government in America); 2 ACKERMAN, *supra* note 76, at 406-18 (arguing for the formal amendment of the rules for constitutional revision under Article V).

78. The British Parliament is presently considering emergency legislation, for example, but no breakthrough is in sight. The bill is not tightly tailored to the problem of terrorist attack, but authorizes emergency powers in response to "an event or situation which threatens serious damage to . . . human welfare . . . the environment . . . or the security of the United Kingdom or a Part or region." Civil Contingencies Bill, Bill 53, 2004, § 18(1). Worse yet, the bill does not insist on an actual attack: "[A]n event or situation which threatens serious damage" will do. There is no supermajoritarian escalator. Indeed emergency regulations can be promulgated initially by an individual cabinet minister, *id.* § 19(2), so long as he certifies that they are "necessary," *id.* § 20(2), and have "due proportion" to the threat, *id.* § 19(5). These regulations need only be presented to Parliament "as soon as is reasonably practicable," and they lapse after seven days unless approved by a resolution of each House of Parliament. *Id.* § 26(1)(b)(iii). Fortunately,

But obviously there is a danger that the push for emergency statutes will only generate bad legislation that gives greater legitimacy to sweeping acts of authoritarian oppression during moments of panic. Even if good legislation makes it through, there is also a danger that a majority will repeal it at a moment of panic, or that Congress will pass “supplementary” legislation that takes an end run around the supermajoritarian escalator.

Compared to these nightmare results, the court-centered conservatism of my commentators may seem benign: Even if the judges don’t do a very good job protecting rights on a systematic basis, they will engage in occasional sabotage, and the judicial myth of a non-emergency constitution will operate as a continuing benchmark for questioning the legitimacy of executive unilateralism.

My other worry proceeds on the optimistic assumption that the President and Congress will manage to pass a good statute, containing a strong supermajoritarian escalator and other essential guarantees. (So much for imponderable number one.) While this outcome will create a reasonable prospect of minimizing short-run restrictions and maximizing long-run liberties, my framework statute has an even more ambitious goal. When the next terrorist strike comes, it will offer the President a new vocabulary in his effort to bind up the nation’s wounds and move it forward. Rather than reassuring the country of his grim determination to respond effectively by escalating war-talk beyond the heights scaled by President Bush, he could instead gain congressional support for a temporary state of emergency, and avoid the transparent dangers of propelling the country further into an endless war against an amorphous enemy.

The obvious worry, of course, is that the President may choose to ignore the new framework statute and heat up the war-talk while reasserting his unilateral powers as Commander in Chief. After all, the mere availability of a new framework doesn’t guarantee its use. Nevertheless, the broad debate surrounding the enactment of the new statute will create a moral environment that will make such a presidential runaround a good deal less likely. And if the President were to engage in evasive maneuvers, the Supreme Court might well resist executive unilateralism with greater vigor, since it would know that judicial opposition would not generate

---

regulations are valid only for thirty days, but they may be renewed indefinitely through the same procedure. *See id.* § 25. The range of emergency powers is wide, including the authority to ban access to sensitive sites, to order evacuations, to deploy the armed forces, to prohibit public gatherings, to confiscate and destroy property, and to prohibit travel at specified times, *id.* § 21(3), though they do not include special powers of preventive detention, *id.* § 22(4). Nevertheless, the prohibition of public gatherings is something that should never be permitted in a framework statute that depends on political oversight for its legitimacy.

executive paralysis, but would simply force the President into the emergency framework.<sup>79</sup>

But there is a second scenario that is even more worrisome. Here the President embraces both war-talk and the new powers granted to him by the emergency statute: “My fellow Americans, the war on terrorism continues, and we are even more determined to fight the enemy wherever they may be hiding abroad; and in the meantime, we also will fight them at home, with all the weapons provided by the emergency statute.”

This dual approach may sometimes be appropriate—as in the case of Afghanistan, where a sovereign state was actively and visibly supporting a terrorist organization.<sup>80</sup> But in the standard case, where the links between terrorist cells and sovereign states will be much more cloudy, the war-emergency combination represents a clear failure of my more ambitious hopes for the new framework. Rather than enabling the country to break out of the false dichotomy of war and crime, the statute threatens to serve merely as an intensifier of war-rhetoric. This is a serious downside risk, but its magnitude is contained by the supermajoritarian escalator, which will terminate the emergency after a relatively short period, and thereby undermine the continuing credibility of the war-rhetoric. After all, if the emergency has come to an end, shouldn't we be a bit skeptical of a

---

79. I have a similar reply to Professors Tribe and Gudridge, who worry that, despite the existence of the emergency framework, Congress will respond to the next terrorist attack by passing bad new laws that enhance extraordinary powers on a permanent basis. See Tribe & Gudridge, *supra* note 10, at 1827-29. The moral environment created by the passage of the framework statute will make such runarounds less likely, though not impossible—see imponderable number one. Moreover, the framework statute will also make it more likely that the Court will strike down panic-driven legislation, for it assures the Court that it won't be rendering the government powerless. Instead, aggressive judicial review will push the government into the channels for emergency power established by the framework statute. For further discussion, see Ackerman, *supra* note 4, at 1081-82. Indeed, a well-crafted emergency statute should expressly stipulate that the Court give strict scrutiny to any new grants of extraordinary power enacted during the emergency period.

80. These links were confirmed by the Security Council. See S.C. Res. 1333, U.N. SCOR, 54th Sess., 4251st mtg. at 1, U.N. Doc. S/RES/1333 (2000) (condemning the operation of terrorist networks and the use of Afghanistan as a base for international terrorist operations); S.C. Res. 1267, U.N. SCOR, 53d Sess., 4051st mtg. at 2-3, U.N. Doc. S/RES/1267 (1999) (establishing a Security Council Committee concerning al Qaeda and the Taliban and condemning the use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts). They were also invoked on the House floor in connection with the congressional authorization for the use of military force in the aftermath of September 11. See, e.g., 147 CONG. REC. H5642 (daily ed. Sept. 14, 2001) (statement of Rep. Sherman) (“We must demand that the Taliban government hand Osama bin Laden and his henchmen over to us now and stop harboring terrorists. If they refuse, then we must initiate hostilities.”); *id.* at H5643 (daily ed. Sept. 14, 2001) (statement of Rep. Berman) (“Bin Laden is a guest of the Taliban regime. . . . The time has come for these and other governments to make a fundamental choice. . . . [I]f they choose to continue their present course, they are not states of concern, they are not rogue states, they are America's enemies.”); see also Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (to be codified at 50 U.S.C. § 1541 note).

presidential insistence that we must continue to engage in aggressive “battles” in the continuing war against an invisible enemy?

In weighing these imponderables, recall that they mainly impair the more ambitious goal of the statute, and not the central task of minimizing short-run restrictions and maximizing long-run protections.

There is a larger lesson here: No constitutional framework will suffice to compel the President to be a statesman if he is determined to play the part of demagogue. But frameworks can provide languages of reassurance that are responsive to the problems ahead, and thereby make the task of statesmanship more manageable for those lucky souls who aspire to it.<sup>81</sup>

#### POSTSCRIPT

As explained in the Editor’s Note,<sup>82</sup> my commentators have been given an opportunity to criticize this Response as well as my original essay. Whatever the merits of this decision, Professors Tribe and Gudridge correctly suggest that it has led to a certain “cumbersomeness”<sup>83</sup> as my critics shift repeatedly from one essay to the other in their assessment.

It would be a mistake to compound the confusion by revising my Response to respond to my critics’ responses, inviting yet another round in a potentially infinite regress. So I will leave my reply in its original condition, allowing readers to see the precise target at which my commentators were aiming, and provide a postscript containing a few reflections provoked by the last round of revisions.

1. I am puzzled by Professor Cole’s continuing insistence that I endorse suspicionless detentions. My Response makes my position perfectly clear. “Rather than tolerating arbitrary seizures, my aim is more modest, but no less important: to explicitly authorize detention on an evidentiary basis that is a good deal less substantial than is normally required.”<sup>84</sup> A good deal of Professor Cole’s critique depends on his continuing misapprehension. Nevertheless, his essay serves as a valuable caution for those who are tempted to endorse the extreme position he rightly condemns.

2. Professors Tribe and Gudridge suggest that my framework statute may increase overall risk by providing terrorists with a road map that clearly specifies the extent and duration of emergency powers. They fear that the terrorists won’t need “rocket science to find an optimal strategy”

---

81. See generally 1 ACKERMAN, *supra* note 44, at 198-99 (portraying the “economy of virtue” as an organizing theme of Federalist political thought).

82. See Editor’s Note, 113 YALE L.J. 1751 (2004).

83. Tribe & Gudridge, *supra* note 10, at 1803.

84. See *supra* text accompanying notes 28-30.

for “disrupt[ing] our normal routines”<sup>85</sup> once the metes and bounds of emergency response are plainly set out for all to see. But of course, the statute won’t tell terrorists how long the emergency will last—it will only tell them about the supermajority needed for its continuation, and the precise point of termination will be hard to guess.

In any event, the Tribe-Gudridge vision of “optimal” strategizing is implausible. Oftentimes terrorists won’t even have a centralized “command center” that can indulge in comprehensive planning. And even when a well-organized headquarters exists, it will be the rare terrorist commander who takes his cues from the enemy’s statute books. There are so many more important political, financial, strategic, and organizational factors in the equation. Speaking realistically, terrorist planners will call it a success if they can place a number of well-supplied “sleeper cells” into the enemy zone in the hope that they will evade detection long enough to make repeated strikes. The key to operational success will be skillful opportunism, not fine-tuning from central command.

This second strike scenario lies at the core of my rationale for emergency powers. Curiously, Professors Tribe and Gudridge continue to deny the plausibility of this rationale<sup>86</sup> even while they invent scenarios, involving exceptionally well-coordinated systems of sleeper cells, that presuppose its importance.

The clarity achieved by the framework statute won’t be of much strategic assistance to terrorists. But it will provide a vital resource for American citizens seeking to ensure that their most precious civil liberties won’t disintegrate in an endless “war on terrorism.”

3. There can be no absolute guarantees. The new emergency framework won’t make it impossible for presidents to continue with their unilateral war-talk. It will just make it less likely, and for three reasons. First, the President will have less of an institutional incentive, since a well-crafted statute will provide him with greater emergency powers than those generated by unilateral war-talk.<sup>87</sup> Second, his martial rhetoric will seem less credible once the state of emergency expires. After all, if Congress refuses to support the more modest notion that the country is in the midst of an “emergency,” the President’s “war on terrorism” will seem a transparent exaggeration. And third, the broad political discussion surrounding the original enactment of the framework statute will establish a clearer public understanding of the need for a distinctive approach to a distinctive

---

85. Tribe & Gudridge, *supra* note 10, at 1829.

86. *Id.* at 1813 (claiming that the “second strike” scenario is “beside the point”).

87. *See supra* text accompanying notes 46-47.

problem of twenty-first-century life—a “third way” between the stark alternatives of crime and war.<sup>88</sup>

As Professors Tribe and Gudridge suggest, I am offering “a reminder that constitutional ideas are not *just* frameworks, but starting points for politics.”<sup>89</sup> But without addressing my arguments, they dismiss my effort to encourage a shift from a politics of “war” to a politics of “emergency” as “too palpably problematic to be taken seriously as a real-world strategy.”<sup>90</sup>

This is much too quick. The time may be coming for a serious reappraisal of our present course. America’s tragic misadventure in Iraq is crystallizing a widespread recognition of the pathologies of ill-considered war-talk. But you can’t beat something with nothing: the “temporary state of emergency” offers a constitutional rubric for a new political departure. To be sure, it will take creativity to reorient public understanding—but Americans have shown such creativity on countless occasions in the past. The casual dismissal of the project by Professors Tribe and Gudridge provides further evidence of their pervasive skepticism about politics.

4. Their skepticism is on further display in their despairing discussion of the future. As they rightly point out, the new framework will not successfully eliminate all major attacks. Even if the use of emergency powers does stop second strikes after a devastating assault by a terrorist organization, other groups will spring up over time, and one will eventually succeed in striking again. According to Professors Tribe and Gudridge, each successful attack will generate a push to amend the framework, “virtually guarantee[ing] that the next emergency constitution will include fewer protections of rights than its predecessor.”<sup>91</sup>

This is possible, of course, but hardly “guaranteed.” Concrete experience with the operation of the framework will also generate strong pressures for rights enhancement. As my initial essay explained, after each emergency comes to an end, my proposed statute “require[s] a legislative inquest, chaired once again by an opposition member with an opposition majority, on the administration of the entire emergency.”<sup>92</sup> These hearings will serve as a magnet for people who have been especially abused by the emergency authorities, and they will serve as a prod for rights-protecting recommendations from the official inquiry.<sup>93</sup>

A similar push will come from the judiciary. While courts should act with restraint during the emergency period, my framework explicitly

---

88. Of course, it will sometimes be appropriate for Congress both to declare an emergency and to declare war. *See supra* text accompanying notes 80-81.

89. Tribe & Gudridge, *supra* note 10, at 1831.

90. *Id.*

91. *Id.* at 1829.

92. Ackerman, *supra* note 4, at 1053.

93. *See id.* (“A public report, with formal recommendations, would be due within a year.”).

2004]

This Is Not a War

1905

envisions a more active role in the aftermath: “[T]he challenge for courts is not only to provide punitive damages for abusive conduct, but to consider how they might encourage the bureaucracy to take structural measures to reduce [abuses] when future emergencies strike.”<sup>94</sup> The statute also encourages a sober second look at panic-driven legislation enacted during the emergency by “expressly stipulat[ing] that the Court give strict scrutiny to any new grants of extraordinary power enacted during the emergency period.”<sup>95</sup>

These frameworks don’t encourage judicial amnesia, let alone collective “black holes” of the sort that Professors Tribe and Gudridge rightly decry. To the contrary, the emergency constitution generates a continuing process of political and judicial reappraisal that aims “to learn from . . . experience and take ongoing measures that will make emergency administration tolerable, if never satisfactory.”<sup>96</sup>

5. My Response noted that my commentators did not spend much time disputing the constitutionality of my basic initiative.<sup>97</sup> This seems to have encouraged Professors Tribe and Gudridge to contribute a new constitutional discussion with a negative tone but without critical substance. They don’t actually analyze my historical and textual interpretation,<sup>98</sup> but they grudgingly recognize that I can “shoehorn”<sup>99</sup> my statute into the Suspension Clause, conceding that existing jurisprudence is not “well-developed,”<sup>100</sup> and that the ultimate issues may hinge on “nonjusticiably political” questions.<sup>101</sup> Given these uncertainties and indeterminacies, the Supreme Court should not—and will not—be eager to reach out and decide the underlying constitutional issues without compelling necessity, let alone aggressively strike down a sober effort by the President and Congress to take statutory responsibility. Judicial restraint would be especially appropriate if Congress, by enacting a supermajoritarian escalator, makes it hard for itself to continue emergencies for long periods of time: “By insisting on a supermajoritarian escalator, Congress is taking a reasonable step to assure that the concepts of ‘Invasion’ or ‘Rebellion’ do not expand over time to cover more and more doubtful cases.”<sup>102</sup> Nothing suggested by

---

94. *Id.* at 1076.

95. *Supra* note 79.

96. Ackerman, *supra* note 4, at 1076.

97. Professor Cole does present an elaborate critique of suspicionless detentions, but as I have mentioned, this is not something that I endorse.

98. *See* Ackerman, *supra* note 4, at 1084-91.

99. Tribe & Gudridge, *supra* note 10, at 1806.

100. *Id.*

101. *Id.* at 1806 n.16.

102. Ackerman, *supra* note 4, at 1089.

Professors Tribe and Gudridge leads to a different conclusion; if anything, the factors they mention render judicial approval more likely.<sup>103</sup>

6. First and last, there is the question of justice. Professor Cole suggests that I have betrayed the ideals that inspired *Social Justice in the Liberal State*,<sup>104</sup> and that my proposal could be “justified, if at all, only on the crudest utilitarian grounds.”<sup>105</sup> But utilitarians aren’t alone in thinking that

---

103. Professors Tribe and Gudridge also add a number of legal questions that they believe I have left unresolved. Here are my answers:

Q: “[W]ould the usual injunctive or declaratory actions be available even if habeas corpus writs were not?” Tribe & Gudridge, *supra* note 10, at 1807.

A: Under the “antiobstruction principle,” the courts should use their equitable discretion to deny injunctions and the like during the emergency period, except in truly egregious circumstances. *Supra* text accompanying notes 66-67.

Q: “What if officials [of the emergency administration] argue, after forty-five days have passed and they are required to come to court, that they are not sure whether various detainees pose risks? What if they evoke ambiguities in what they have learned?” Tribe & Gudridge, *supra* note 10, at 1821.

A: The statute explicitly instructs judges to use ordinary standards of probable cause after forty-five days. The entire point of the framework is to prohibit indefinite or prolonged detention. Ackerman, *supra* note 4, at 1074.

Q: “But what if Congress, in a given instance, failed to extend a state of emergency by the needed margin [required by the supermajoritarian escalator], even though a majority voted for it? Could the President claim that the majority vote was all that Congress could require constitutionally, and insist that the emergency remained in force?” Tribe & Gudridge, *supra* note 10, at 1842 n.139.

A: The Court should intervene and uphold the constitutionality of the supermajoritarian escalator, and declare the writ of habeas corpus immediately available to all detainees. Ackerman, *supra* note 4, at 1068, 1087-91.

All of these answers follow immediately from the cited texts, but I have left unresolved many complex issues of statutory draftsmanship. Professors Tribe and Gudridge are undoubtedly right, moreover, that any statute passed by Congress will contain many ambiguities. *See* Tribe & Gudridge, *supra* note 10, at 1825. But contrary to their suggestion, I don’t wish to prevent courts from playing a key role in resolving these uncertainties. Instead, I expect them to resolve ambiguities using the normal tools of statutory interpretation and basic constitutional principles. I only insist that judges should generally defer from undertaking this task until the emergency period ends, and the time for sober second thought begins.

104. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); *see also* Cole, *supra* note 10, at 1785-86, 1798.

105. Cole, *supra* note 10, at 1797. Professor Cole’s particular critique depends on his mistaken claim that I endorse suspicionless searches, so my discussion in the text confronts the larger issues raised by his question, not the details of his argument. However, I do want to agree with one point he makes about *Social Justice in the Liberal State*. He correctly emphasizes that my book articulates a principle of equal sacrifice of fundamental rights on those occasions when such sacrifices are necessary. *See id.* at 1798; *see also* ACKERMAN, *supra* note 104, at 231-49. This principle motivated my demand that generous financial compensation be provided for innocent victims of emergency detentions. While money obviously can’t fully compensate for the deprivation of liberty, it is the best that can be done under the circumstances. *See* ACKERMAN, *supra* note 104, at 246-49.

Unfortunately, I seem to have pressed the delete key on my computer in the last-minute rush to completion, omitting this point from note 35 above. As it appears in the text, this note directs the reader to Bob Nozick’s relevant discussion of just compensation, but fails to suggest that my own proposal is, unsurprisingly, motivated principally by my own philosophical commitments. I am grateful to Professor Cole for giving me an opportunity to rectify my techno-blunder in this Postscript.

2004]

This Is Not a War

1907

consequences matter. This broad view is shared by anybody who rejects the otherworldly notion that “justice should be done though the heavens fall.” I am happy to place myself amongst the multitude of practical statesmen who reject perfectionism and resolutely aim to achieve *as much justice as is possible*—neither more, nor less (with a strong emphasis on the latter point).

This abstract formulation may seem banal, but it has its uses. In particular, it suggests that the task of statecraft breaks down into two distinct questions: What is justice? What is possible?

These two problems call upon the exercise of different mentalities. The question of justice requires all the brilliance of philosophy—a willingness to challenge conventional wisdom, to risk new formulations, and to rigorously develop a systematic answer after confronting the leading alternatives. The question of possibility requires sound judgment more than philosophical brilliance—a sober sense of the most crucial problems and prospects confronting a particular society at a particular time. Both of these mentalities are necessary for the flourishing of a liberal society—brilliance without judgment can be quixotic, judgment without brilliance can be uninspiring.

Constitutional statecraft should be nourished by both sources. Madison warned us long ago that “[e]nlightened statesmen will not always be at the helm,”<sup>106</sup> but this should not stop us from trying to walk in his footsteps—rethinking the nature of our ideals while practicing the art of the possible.

This has been an essay in the art of the possible. I hope I am wrong in suspecting that we will be living with terrorism for a very long time and that courts alone will not be equal to the challenges ahead; but if I am right, the best way to move forward, however haltingly, toward the ideals sketched by *Social Justice in the Liberal State* is by adopting an emergency constitution.<sup>107</sup>

---

106. THE FEDERALIST NO. 10, *supra* note 20, at 80 (James Madison).

107. I should emphasize that my vision of the future is not limited to grimly defensive action against the worst excesses of a war against terrorism. For a more affirmative program, see BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999); BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002); and ACKERMAN & FISHKIN, *supra* note 59. But I do not believe that liberals will succeed in gaining political support for forward movement to a more just society unless they can respond credibly to the risks posed by the terrorist threat.