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## No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint

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Georgetown Public Law and Legal Theory Research Paper No. 1272206  
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### No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint

75 U. Chi. L. Rev. 1329-1364 (2008) (reviewing ERIC A. POSNER & ADRIAN  
VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007))

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## REVIEW

### **No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint**

*David Cole*†

*Terror in the Balance: Security, Liberty, and the Courts*  
Eric A. Posner and Adrian Vermeule. Oxford, 2007. Pp 3, 319.

#### INTRODUCTION

Most observers of American history look back with regret and shame on our nation's record of respecting civil liberties in times of crisis. The list of abuses is all too familiar: incarcerating peace activists for mere speech during World War I; rounding up thousands of foreign nationals on political affiliation charges in the Palmer Raids of 1919–1920; interning approximately 110,000 Japanese-Americans and Japanese immigrants during World War II; targeting millions for loyalty inquisitions, civil sanctions, blacklisting, and criminal punishment based on suspected political affiliations in the Cold War; and rounding up thousands of Arab and Muslim foreign nationals who had no connection to terrorism in the wake of the terrorist attacks of September 11, 2001, while authorizing torture and cruel treatment as an intelligence gathering tool.<sup>1</sup> In each case, the government cast a dramatically overbroad net, sweeping up many thousands of people who posed no danger whatsoever and thus infringed on basic liberties without any evident security benefits. At the same time, the victims of government overreaching were not evenly or randomly distributed among the general populace but were concentrated in disempowered minority groups—groups unlikely to have the political clout to object effectively to their mistreatment. And in each instance, government officials seemed to be driven to compromise some of our most fundamental principles by grossly exaggerated fears. In retrospect, most

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<sup>1</sup> See David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* 22–46, 85–153 (New Press 2003).

commentators recognize that these were terrible mistakes.<sup>2</sup> The challenge is generally thought to be how not to repeat them.

In *Terror in the Balance: Security, Liberty, and the Courts*, Eric Posner and Adrian Vermeule offer a strikingly contrarian and radically skeptical perspective on these historical events. In their view, the system worked exactly as it should because in each instance, executive officials took aggressive action in response to perceived security threats, and courts and Congress deferred to or approved of the executive's initiatives. "There is a straightforward tradeoff between liberty and security" (p 12), the authors contend, and it is therefore desirable and indeed inevitable that liberties will be sacrificed when security threats arise. Theirs is not simply a descriptive account but a normative prescription: "If dissent weakens resolve, then dissent should be curtailed" (p 16). Given the inescapable tradeoffs involved, all we can realistically hope for is an optimal balance of liberty and security; and in the authors' views, during an emergency no one is better situated than the executive to strike that balance. The rest of us—whether Article III judges, members of Congress, academics, lawyers, philosophers, or ordinary citizens—should simply sit back and trust the executive. Because those of us outside the executive branch are unqualified to assess the balance struck, our position must be one of outright deference.

The first half of Posner and Vermeule's book advances this executive deference thesis. In the second half, however, the authors heedlessly abandon their own injunction and opine at length on such liberty-security questions as whether, during emergencies, torture is permissible (yes), dissent should be suppressed (yes), procedural protections for criminal trials should be jettisoned (yes), ethnic profiling should be permitted (yes),<sup>3</sup> and the laws of war should govern the treatment of al Qaeda detainees (no). Had the authors adhered to the jurisprudential approach that they recommend for the rest of us, they would have simply argued that these decisions are correct because the executive branch made them. That certainly would have made for a

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<sup>2</sup> See, for example, Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 12–13, 528–30 (Norton 2004) (lamenting the excessive sacrifice of civil liberties during tumultuous periods in United States history); John Higham, *Strangers in the Land: Patterns of American Nativism 1860–1925* 229–33 (Rutgers 2d ed 1988) (describing the Palmer Raids as a shocking attempt to satisfy the public's temporary antiradical nativism); Peter Irons, *Justice at War* viii (Oxford 1983) (describing the background of Japanese-American wartime cases as "a legal scandal without precedent in the history of American law"); Zechariah Chafee, Jr., *Free Speech in the United States* 204–15 (Harvard 1946) (describing and criticizing the Palmer Raids).

<sup>3</sup> In fact, the authors do not even save their discussion of ethnic profiling until the book's latter half. They choose, instead, to address it on pages 45 and 116–17.

shorter book. But at the same time that the authors disclaim any intention or ability to evaluate the Bush Administration's policies, they make extensive arguments—beyond mere deference to the executive—in defense of each of the Administration's choices. When one concludes the book, one cannot help but wonder whether Posner and Vermeule advocate a deferential approach because, without deference, they would have reached the same conclusions on the merits that the Administration reached. After all, it is easy to defer to those with whom one agrees.

It is no secret that the Bush Administration has pressed aggressively since September 11 for an expansive executive role, and has objected to any checks and balances imposed by the judicial or legislative branches. Others, especially Jack Goldsmith, Ron Suskind, and Bob Woodward, have shed important light on the ideological commitments and political pressures that drove the White House to adopt such positions—even when a more restrained and cooperative approach might have actually served their interests far more effectively.<sup>4</sup> But with the exception of John Yoo and Richard Posner, no one has offered much of an intellectual defense of the vision of executive power that has driven United States policy in the “War on Terror.”<sup>5</sup> This book is by far the most serious, sustained, and thoughtful effort to

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<sup>4</sup> See, for example, Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* 71–98 (Norton 2007) (describing how the combination of an ideological commitment to unrestrained executive power and the fear of another terrorist attack led the executive branch to advance legal theories of an unchecked commander-in-chief power); Ron Suskind, *The One Percent Doctrine: Deep inside America's Pursuit of Its Enemies since 9/11* 79–81 (Simon & Schuster 2006) (arguing that the Bush Administration was driven after 9/11 by the sense that even a 1 percent chance of a terrorist attack justified harsh preventive intervention, including the invasion of Iraq); Bob Woodward, *Bush at War* 42 (Simon & Schuster 2002) (discussing John Ashcroft's advice that the government's principal job was to prevent another attack through any means necessary, even if subsequent criminal prosecutions would not be possible).

<sup>5</sup> See John Yoo, *War by Other Means: An Insider's Account of the War on Terror* 119–20 (Atlantic Monthly 2006) (arguing that both the modern realities of the twenty-first century and the intentions of the Framers of the Constitution support unchecked executive power “to manage foreign affairs and address emergencies which, almost by definition, cannot be addressed by existing laws”); John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* 143–57 (Chicago 2005) (looking to the Constitution's text, structure, and history to contend that the president has flexible warmaking and foreign affairs powers); Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* 7 (Oxford 2006) (characterizing constitutional law as a “loose garment” that permits substantial infringements on constitutional rights when the nation's security is at risk). For my critiques of Yoo's and Posner's arguments, see generally David Cole, *What Bush Wants to Hear*, NY Rev of Books 8 (Nov 17, 2005) (reviewing Yoo); David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty after 9/11*, 59 Stan L Rev 1735 (2007) (reviewing Posner).

defend the broad executive emergency power that has appeared since September 11, so it deserves careful consideration.

The most troubling aspect of Posner and Vermeule's book is not its internal inconsistency but its baseline skepticism about constitutionalism itself—a skepticism that is at once radical and deeply conventional. The skepticism is radical because it suggests that any effort to precommit a nation to a set of higher values in periods of emergency is futile, as they put it, “whistling in the wind” (pp 56, 129). In their view, there is no reason to precommit to anything other than deference to the executive and survival of the state when it comes to an emergency (p 76). They claim that we cannot know whether emergencies make our collective judgment better or worse, and that even if we could know, there's literally nothing we could do about it (p 85).

At the same time, the authors' skepticism is deeply conventional because it seems to rest, much like their argument for deference, on an all-too-comfortable acceptance of the way things are. Just as it is costless to defer to those with whom one agrees, so is it easy to be skeptical about the possibility of constitutional protections when your own rights are unlikely to be threatened. In every period of crisis in the United States, the victims of official overreaction have been members of disempowered minority groups, especially foreign nationals, and not law professors who defend government prerogative. Posner and Vermeule can afford to be skeptical about rights because their own rights are not likely to be imperiled.

In my view, the Constitution at its best reflects a collective commitment to a set of ideals about fairness, justice, and dignity adopted precisely because we know that we will be tempted, especially in times of stress, to fall short of those ideals. In particular, the Constitution is predicated on an understanding of a shortcoming inherent in democracies and exacerbated by emergencies—the tendency of the majority to avoid hard choices by selectively imposing burdens on minority groups.<sup>6</sup> Democracies are good for many things, but they are not good at distributing costs fairly when there are easy ways to concentrate them on minorities. If the Constitution is designed to forestall such responses, and if such responses are more likely in emergencies, then it is critical

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<sup>6</sup> See Federalist 51 (Madison), in *The Federalist* 347, 352 (Wesleyan 1961) (Jacob E. Cooke, ed) (“In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger.”).

that the judiciary, the least democratic branch, maintain an active role in enforcing our constitutional commitments during emergency periods.<sup>7</sup>

Posner and Vermeule's principal aim is to challenge this "civil libertarian" perspective and, in particular, its emphasis on maintaining constitutional constraints on the executive in times of emergency (p 5). In the authors' view, there is no reason to believe that the executive will overreach in times of emergency (pp 53–57); no reason to believe that the burdens the executive imposes on liberty in emergencies will be selectively targeted at minority groups any more than during ordinary times (pp 110–15); and no reason to believe that infringements on liberty adopted in times of emergency will persist when the emergency draws to a close (pp 134–42). They acknowledge that the executive will sometimes make mistakes in balancing liberty and security (pp 29–31) but insist that there is no reason that the other branches would make better choices. Indeed, they contend, judicial and legislative interference with executive initiative during emergencies can only make matters worse (pp 45, 47).

To some extent, Posner and Vermeule's argument rests on a straw man. I am aware of no civil libertarian, and the authors cite none, who insists that the constitutional balance should remain unchanged during emergencies. Few constitutional rights are absolute, and civil libertarians widely accept that as the government's interests grow more compelling, it has broader leeway to infringe on liberties. Examples of this are legion in established constitutional jurisprudence. The Fourth Amendment protects privacy; but where police develop objective grounds to believe that an individual has committed a crime, they can intrude on his privacy and liberty through searches and seizures that would not be justified in the absence of such grounds for concern. Similarly, a stop-and-frisk to confirm or dispel suspicion that an individual may be a suicide bomber may be reasonable where a stop-and-frisk to confirm or dispel suspicion that an individual is carrying drugs might be barred.<sup>8</sup> When a government interest becomes sufficiently compelling, it can justify even discrimination based on race or sex, or penalties for speech.<sup>9</sup> But these are the results of a direct application

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<sup>7</sup> See Federalist 78 (Hamilton), in *The Federalist* 521, 528 (cited in note 6) (declaring an independent judiciary "an essential safeguard against . . . the injury of the private rights of particular classes of citizens, by unjust and partial laws").

<sup>8</sup> See *Florida v J.L.*, 529 US 266, 272–74 (2000).

<sup>9</sup> See, for example, *Grutter v Bollinger*, 539 US 306, 343 (2003) (upholding affirmative action in law school admissions as a narrowly tailored means of furthering the compelling interest of diversity). Much of First Amendment jurisprudence can be understood as an attempt to identify, as a categorical matter, where government interests are sufficiently compelling to warrant sup-

of constitutional doctrine, not the adoption of some general stance of deference by which the executive's actions are shielded from searching judicial review. Where fundamental rights are at stake the government should be put to the test of demonstrating the compelling nature of its interest and the narrow tailoring of its initiatives; courts ought not simply defer because the executive action arose in a time of emergency.

Posner and Vermeule's principal critiques of the civil libertarian approach—that there is no reason to fear executive overreaching and targeting of minorities during emergencies and no reason to worry that emergency measures will outlast the emergency—are ultimately unpersuasive, not so much because they misstate civil libertarianism but because they are blind to history, the social psychology of fear, and the extraordinary pressures to safeguard security at all costs that executives inevitably experience during emergency periods.

I will argue that Posner and Vermeule's argument for deference to the executive is misguided for three reasons. First, their assumption that there is a necessary and "straightforward tradeoff between liberty and security" (p 12) is far too simplistic. Executives often sacrifice liberty without achieving an increase in security. Security may be advanced in a variety of ways without infringing on liberty. And even where there are tradeoffs between liberty and security, there are many complicating factors in the "balance" that make it anything but "straightforward." Thus, there is no reason to assume that sacrificing liberty is necessary to further security or that such sacrifices are warranted simply because the executive chooses to make them.

Second, Posner and Vermeule's account of the political dynamics of emergency periods fails to take into account significant factors that predictably contribute to overreaching by the executive, infringement of human rights, selective targeting of disempowered minority groups, and institutionalization of authorities that last well beyond the emergency itself. Once these factors are properly considered, there are strong reasons not to defer to executive power, especially in emergencies.

Third, the authors' argument that the executive is best situated to balance liberty and security in emergencies fails to consider the full

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pression or regulation of speech. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv L Rev 1482, 1484 (1975) (observing that such attempts include a "less restrictive alternative" analysis [that] is common in constitutional law generally and in first amendment cases in particular"). With the idiosyncratic exception of Justice Black, few if any commentators or jurists have taken literally the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech" and instead have insisted that the government identify a compelling justification and narrowly tailored means where it seeks to regulate speech.



range of qualities that one might want in an agency tasked to strike such a balance. The authors correctly note that the executive has advantages in terms of speed, experience, flexibility, and access to secret information. But while these attributes are certainly important from a security standpoint, they are not necessarily sufficient to *balance* liberty against security. Precisely because we rely so heavily on the executive to maintain our security, we should be skeptical of its ability to give sufficient weight to the liberty side of the balance. Just as Fourth Amendment doctrine insists on warrants issued by magistrates because we do not trust the police, whose primary responsibility is law enforcement, to balance privacy interests fairly, so we cannot trust the executive to balance liberty and security fairly on its own. This is especially true in an emergency when the executive is under intense pressure to deliver security. As in the Fourth Amendment setting, judicial review plays an essential role in achieving an appropriate balance; deference to the executive undermines that role.

### I. THE TRADEOFF THESIS

What if we sacrificed liberty and got little or no added security in return? Posner and Vermeule's analysis rests on the claim that "[t]here is a straightforward tradeoff between liberty and security" (p 12). But this is far from self-evident. There is in fact no necessary relationship between the two values. One can increase security in many ways without sacrificing liberty at all. After consulting with most of the country's leading counterterrorism experts, the 9/11 Commission, for example, suggested forty-one measures designed to increase security and help forestall another terrorist attack, such as safeguarding nuclear stockpiles in the former Soviet Union, increased monitoring of cargo coming into the nation's ports, better coordination among intelligence agencies, a greater emphasis on public diplomacy, encouraging and supporting moderate Muslims around the world, and a variety of foreign policy initiatives designed to reduce the tensions that produce terrorism in the first place.<sup>10</sup> These measures would increase security at little or no cost to civil liberties.

At the same time, one can sacrifice liberty without gaining much in the way of additional security. By the government's own admission, it subjected more than five thousand foreign nationals in the United States to preventive detention in antiterrorism initiatives during the

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<sup>10</sup> See National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* 362–64, 367–81, 390–92, 399–428 (Norton 2004).

two years following 9/11.<sup>11</sup> Yet not one has been convicted of any terrorist crime pertaining to those attacks.<sup>12</sup> Locking up five thousand individuals represents a massive infringement on liberty—yet as far as we know, the initiative has had no discernible security benefits. The Administration also launched a sweeping Special Registration program, requiring foreign nationals from predominantly Arab or Muslim countries to report to immigration offices for fingerprinting, photographing, and interviews on pain of deportation.<sup>13</sup> This nationwide campaign of ethnic profiling ultimately brought more than eighty thousand persons forward—but the Administration has not pointed to a single terrorist identified and convicted as a result.<sup>14</sup>

Sacrifices of liberty can also often have negative effects on security. Thus, when the Administration chose to authorize coercive interrogation and torture as a way of obtaining information from suspects,<sup>15</sup> it compromised its ability to prosecute those individuals—and anyone else their testimony helped us discover—and thereby undermined our long-term security. Similarly, when President Bush authorized the National Security Agency (NSA) to undertake warrantless wiretapping of Americans' phone calls and email communications with persons

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<sup>11</sup> See Cole, *Enemy Aliens* at 25–26 (cited in note 1).

<sup>12</sup> See *id.* See also David Cole and Jules Lobel, *Are We Safer?: A Report Card on the War on Terror*, LA Times M4 (Nov 18, 2007) (detailing the failed results of the war on terror initiatives including the preventive detention of foreign nationals in the United States), citing DOJ, Counterterrorism Section, *Counterterrorism White Paper* 11–67 (June 22, 2006), online at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf> (visited June 8, 2008).

<sup>13</sup> See Department of Homeland Security, Immigration and Customs Enforcement, *Special Registration Archives* (Mar 17, 2006), online at <http://www.ice.gov/pi/specialregistration/archive.htm#special> (visited June 8, 2008) (listing nationalities called in for Special Registration). With the lone exception of North Koreans, all of the nationalities called in were from predominantly Arab or Muslim countries.

<sup>14</sup> See Hearing on the Reauthorization of the Patriot Act before the House Judiciary Committee 6–7 (June 10, 2005) (testimony of Carlina Tapia Ruano, First Vice President, American Immigration Lawyers Association), online at <http://www.aila.org/content/default.aspx?docid=16686> (visited June 8, 2008) (stating that “none of the call-in registrants was charged with a terrorist-related offense”).

<sup>15</sup> See generally DOJ, Office of Legal Counsel, Office of the Assistant Attorney General, *Memorandum for Alberto R. Gonzales, Counsel to the President: Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug 1, 2002), online at [http://www.washingtonpost.com/wp-srv/politics/documents/chenev/torture\\_memo\\_aug2002.pdf](http://www.washingtonpost.com/wp-srv/politics/documents/chenev/torture_memo_aug2002.pdf) (visited June 8, 2008) (providing the principal foundation for such authorization by the executive branch). For one example of this authorization, see Scott Shane, David Johnston, and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, NY Times A1 (Oct 4, 2007) (describing a DOJ opinion that “provided explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures”).

abroad who were thought to be affiliated in some way with al Qaeda,<sup>16</sup> he made it virtually certain that he would not be able to use any evidence obtained through such an illegal program to hold responsible guilty actors so discovered, or even to justify further electronic surveillance. When the Foreign Intelligence Surveillance Court learned of the NSA spying program, it ordered the Administration to ensure that none of the information obtained through the program would be used in any way as a basis for applications for judicially authorized electronic surveillance under the Foreign Intelligence Surveillance Act (FISA).<sup>17</sup> The President's decision to bypass the legally sanctioned route for conducting electronic surveillance in effect erected an unnecessary wall between the NSA on the one hand and intelligence and law enforcement agencies using FISA to conduct surveillance on the other. Had the President acted under FISA rather than contrary to it, no such law would have been necessary, and intelligence could have been more effectively coordinated.<sup>18</sup>

At a less obvious but more important level, sacrificing liberty often has negative security consequences by undermining the nation's legitimacy and playing into our enemy's hands. As the recently retired president of the Supreme Court of Israel, Aharon Barak, pointed out, "The rule of law and the liberty of an individual constitute important components in [a democratic state's] understanding of security."<sup>19</sup> A nation that responds to terrorism within the rule of law, with respect for individual liberties, is more likely to be viewed as legitimate. The state that overreacts and is seen as trampling on the rights of individuals undermines its own legitimacy and consequently breeds both an-

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<sup>16</sup> Dan Eggen, *Bush Authorized Domestic Spying; Post-9/11 Order Bypassed Special Court*, Wash Post A01 (Dec 16, 2005).

<sup>17</sup> See Carol D. Leonnig and Dafna Linzer, *Spy Court Judge Quits in Protest; Jurist Concerned Bush Order Tainted Work of Secret Panel*, Wash Post A01 (Dec 21, 2005) (reporting that the FISA court's presiding judge, after learning about the NSA warrantless wiretapping program, "insisted that the Justice Department certify in writing that [FISA warrants were not being obtained with tainted information from the NSA program]").

<sup>18</sup> Posner and Vermeule might respond that these consequences flow from the perceived illegality of these measures and that if we simply recognized that such measures are lawful in an emergency, these negative consequences would disappear. But the authors do not in fact argue against these legal consequences. Thus, while they advocate the use of torture to prevent imminent threats, they do not advocate the use of such information to convict the perpetrators, a conclusion that is barred by the Fifth Amendment's well-established prohibition on coerced confessions.

<sup>19</sup> *Public Committee against Torture in Israel v Israel*, H CJ 5100/94, ¶ 39 (1999), online at [http://elyon1.court.gov.il/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf) (visited June 8, 2008) (concluding that the Israeli government may not employ physical coercion against suspected terrorists in the course of an interrogation).

tipathy towards itself and sympathy for its opponent.<sup>20</sup> Posner and Vermeule pronounce skepticism on this point (p 206), but it seems difficult to deny. World opinion polls show a sharp rise in anti-American sentiment since 9/11 and have tied that trend to perceptions that the United States has responded to the threat of terrorism in ways that the world considers illegitimate—refusing to play by the rules that govern everyone else, imposing burdens and obligations on other countries' nationals we would not tolerate being imposed on our own citizens, and ignoring the will of the world in attacking Iraq against the considered views of the UN Security Council and world opinion.<sup>21</sup>

Moreover, this is not simply an insight recognized by Supreme Court justices and pollsters but by the very executive branch officials to whom Posner and Vermeule insist we must defer. The Army's Counterinsurgency Field Manual, drafted under the direction of General David Petraeus, sounds a similar theme in arguing that any effective strategy for defeating an insurgent group requires us to pay careful attention to our legitimacy. The Manual argues that “[t]he primary objective of any [counterinsurgency] operation is to foster development of effective governance by a legitimate government.”<sup>22</sup> Legitimacy, it argues, makes it easier to govern effectively, and ultimately rests in large part on adherence to the rule of law:

The presence of the rule of law is a major factor in assuring voluntary acceptance of a government's authority and therefore its legitimacy. A government's respect for preexisting and impersonal legal rules can provide the key to gaining it widespread, enduring societal support. Such government respect for rules—ideally ones

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<sup>20</sup> See Louise Richardson, *What Terrorists Want* 98–103, 206–07 (Random House 2006) (arguing that terrorists are motivated by a desire for renown and reaction and that if democratic states are to defeat terrorists, they must seek to avoid overreaction because that overreaction is precisely what the terrorists want to trigger).

<sup>21</sup> See, for example, David Cole and Jules Lobel, *Less Safe, Less Free: Why America Is Losing the War on Terror* 142–43, 152, 157–58 (New Press 2007) (citing and discussing such polls); Jonathan Marcus, “Listen More” Is World's Message to US, BBC News (Jan 23, 2007), online at <http://news.bbc.co.uk/2/hi/americas/6288933.stm> (visited June 8, 2008) (referencing a BBC World Service poll of twenty-five countries showing rising anti-American sentiment and concluding that “America's soft power—its ability to influence people in other countries by the force of example and by the perceived legitimacy of its policies—is weakening”); Pew Global Attitudes Project, *What the World Thinks in 2002* (Dec 4, 2002), online at <http://pewglobal.org/reports/print.php?ReportID=165> (visited June 8, 2008) (interpreting its poll data to show that “[d]espite an initial outpouring of public sympathy for America following the September 11, 2001 terrorist attacks, discontent with the United States has grown around the world over the past two years”).

<sup>22</sup> Department of the Army, *The U.S. Army/Marine Corps Counterinsurgency Field Manual* 37 (Chicago 2007).

recorded in a constitution and in laws adopted through a credible, democratic process—is the essence of the rule of law. As such, it is a powerful potential tool for counterinsurgents.<sup>23</sup>

As Jules Lobel and I have sought to show in detail elsewhere, the Bush Administration's many sacrifices of liberty in the "War on Terror" have often netted little in terms of measurable security gains, while producing substantial negative security consequences.<sup>24</sup> The Administration has pursued ethnic profiling, warrantless wiretapping, torture, prolonged detention without fair hearings, disappearances into secret CIA prisons, and renditions to third countries known for using torture as a means of interrogation.<sup>25</sup> All of these initiatives were adopted in the name of security. But there is little evidence that most of these methods have in fact increased our security in ways that more lawful, liberty-respecting methods would not have and substantial reason to believe that they have made us less safe, for example by limiting our options, alienating potential allies and sources of intelligence, and promoting al Qaeda's cause by handing it better propaganda than it ever could have developed on its own.<sup>26</sup> In other words, the Administration has compromised liberty *and* security at the same time, in part because of its failure to recognize the inextricable relationship between the rule of law and security.

If one treats individual liberties as nothing more than "straightforward" obstacles to security, it is perhaps inevitable and indeed salutary that liberty will be sacrificed to security in times of emergency. But if security gains can be made at little or no cost to liberty, if liberty sacrifices can be made with no gains in security, and if infringements on liberty will often have counterproductive security consequences, the tradeoffs are not as straightforward as the authors suppose, and sacrifices of liberty for security may not be as inevitable or as necessary as they presume.

Posner and Vermeule bracket all of these complications by arguing that to the extent security can be improved without undermining liberty, or that liberty can be maintained or furthered at no cost to security, there is no reason to think that a government will not adopt those initiatives of its own accord (pp 33–34). They posit a rational government that will seek to maximize both liberty and security, and

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<sup>23</sup> Id at 39.

<sup>24</sup> See Cole and Lobel, *Less Safe, Less Free* at 95–170 (cited in note 21).

<sup>25</sup> See id at 23–69.

<sup>26</sup> See id at 95–170.

will therefore pursue measures along both axes that do not entail costs along the other axis. But this conclusion does not follow in the real world, for a variety of reasons. First, the costs and benefits of government security initiatives are extremely difficult—and often impossible—to measure. At the time any given initiative is adopted, its costs and benefits must be predicted, and such predictions are necessarily speculative. Moreover, the costs and benefits of particular initiatives are often difficult to assess even in hindsight. It is conceivable, for example, that detaining five thousand foreign nationals who had no connection to terrorism in the first two years after 9/11 deterred some would-be terrorists from entering the United States, even if it failed to identify any actual terrorists here. But no one can know that. Terrorists who don't come don't fill out survey questionnaires explaining why they stayed away.

At the same time, it is also possible—indeed much more likely—that detaining so many foreign nationals with nothing to do with terrorism undermined our security by fomenting distrust within Arab and Muslim communities here and abroad, and thereby deterring potential sources from coming forward with useful information, out of fear that the government might misuse the information to lock up people who in fact pose no danger to the community. (Some of those who voluntarily came forward with information immediately after 9/11 found themselves locked up as “material witnesses.”<sup>27</sup>) Again, it is difficult to measure that effect—although surely it is easier to assess the Arab and Muslim communities' reaction than it is to assess the reaction of unidentified would-be terrorists.<sup>28</sup> But if these effects cannot be precisely measured, before or after the fact, the “tradeoff” calculus will be difficult or impossible to make, even if there were only straightforward tradeoffs to be made.

Second, the very fact that the effects of security measures are difficult to measure may well prompt the executive in times of crisis to favor dramatic initiatives that look tough over less dramatic but possibly more effective responses. After an event like 9/11, the public wants to be reassured that its government is doing all it can to protect their security. Because of the difficulty of demonstrating that its poli-

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<sup>27</sup> For example, Eyad Alrababah was held for six weeks as a material witness after he voluntarily approached the FBI to tell them that he had had casual contacts with several of the hijackers. John Riley, *Held without Charge; Material Witness Law Puts Detainees in Legal Limbo*, *Newsday* A06 (Sept 18, 2002) (reporting that Alrababah was eventually deported).

<sup>28</sup> Consider Frank Newport, *Gallup Poll of the Islamic World 4* (Gallup 2002) (describing a Gallup Poll survey of nine Muslim societies, five of which were Arab, and finding substantial anti-American resentment).

cies are working, the government may be inclined to undertake visible measures that at least create the perception of increased security, even if in fact they do not have that effect. For example, when Attorney General John Ashcroft made public statements in the weeks after 9/11, he would frequently report how many hundreds of suspected terrorists the government had detained.<sup>29</sup> It turned out that nearly all of those detained in those initial weeks proved to have no connection to terrorism, but the announcements nonetheless made it appear that the government was keeping us secure by rounding up and incapacitating hundreds of would-be terrorists.

Third, assessing costs and benefits is complicated by the temporal tradeoffs between long-term and short-term effects. What may seem in the short term to be in our security interest may prove disastrous in the long term—the Administration’s decision to subject al Qaeda leaders to waterboarding offers a ready example.<sup>30</sup> The Constitution is predicated on the idea that democracies and political officials will often be tempted to take actions that appear to offer short-term benefits even if they are contrary to our collective long-term interests. Politicians by institutional design think in the short term. But as a society, we recognize that long-term effects are important to take into consideration. Inscripting commitments in a constitution, enforceable by judges who need not worry about reelection, is an institutional way to encourage consideration of long-term as well as short-term effects. If courts simply defer to the executive in times of crisis—when the pressure to react short-term is probably at its highest—long-term effects will predictably be discounted in the calculus. Elected officials’ assessments of what serves our liberty and security interests will be necessarily skewed.

Fourth, there are many more interests at stake in the “balance” than liberty and security. In a world of limited resources, decisions always have multiple opportunity costs. A decision to increase security by safeguarding nuclear stockpiles, hiring more Arabic translators, or improving intelligence analysis may be costless from a civil liberties standpoint but costly from a budgetary standpoint. Money spent on

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<sup>29</sup> See, for example, John Ashcroft, *Prepared Remarks for the US Mayors Conference* (Oct 25, 2001) (2001), online at [http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm) (visited June 8, 2008) (announcing the arrest or detention of “nearly 1,000 individuals as part of the September 11 terrorism investigation” before acknowledging that “[t]aking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders”).

<sup>30</sup> See generally Dan Eggen, *White House Defends CIA’s Use of Waterboarding in Interrogations*, Wash Post A03 (Feb 7, 2008).

those initiatives is money that cannot be spent on other security (or liberty) measures. It is also money that cannot be spent on education, transportation, social security, or any of the myriad other services that government provides. The Bush Administration's choice to launch a preventive war against Iraq, for example, radically reduced the resources that could be devoted to other security measures—including, most notably, fighting al Qaeda in Afghanistan and Pakistan, but also including any number of domestic security initiatives.<sup>31</sup>

I do not mean to suggest that security and liberty interests are never in tension; they frequently are. Undoubtedly, there are many instances in which rules protecting individual liberty from state authority will entail costs from a security standpoint because individuals may be able to exploit those liberties to engage in socially harmful behavior. Society has long recognized the tension between protecting citizens from criminals and protecting citizens from the state. But the thesis that tradeoffs between liberty and security are “straightforward” is astonishingly reductive, and any analysis that treats such tradeoffs as simple one-for-one exchanges distorts reality beyond recognition. Security policy in fact involves difficult and complex choices among a multitude of competing interests and options necessarily undertaken in varying degrees of uncertainty. To ascribe rationality to this process is to engage in a leap of faith, not an application of pure reason. If liberty and security are not opposites but inextricably related, institutional mechanisms designed to preserve liberty when political pressures drive executive officials to emphasize security at all costs may be critical, not only to preserving liberty but to maintaining security as well. Moreover, as the next Part will suggest, there is good reason to believe that executive decisionmaking in times of emergency is particularly unlikely to strike an appropriate balance.

## II. DECISIONMAKING IN EMERGENCIES

The core of Posner and Vermeule's argument is that we have no reason to believe that executive decisionmaking during emergencies will be any worse than during ordinary times and that even if we did, there is nothing judges or the Constitution can possibly do about it. In particular, they seek to refute three claims that they see as underlying

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<sup>31</sup> Joint Economic Committee Majority Staff, *War at Any Price?: The Total Economic Costs of the War beyond the Federal Budget 2* (Nov 2007), online at [http://jec.senate.gov/index.cfm?FuseAction=Files.View&FileStore\\_id=e8a3298d-0007-40c8-9293-8bdb74e6d318](http://jec.senate.gov/index.cfm?FuseAction=Files.View&FileStore_id=e8a3298d-0007-40c8-9293-8bdb74e6d318) (visited June 8, 2008) (showing the total costs to be \$1.3 trillion).



civil libertarian arguments that emergencies pose heightened risks to liberty: (1) that fear drives government officials to overreact to perceived threats; (2) that officials seek out ways to impose costs and burdens selectively on minority groups; and (3) that initiatives adopted during emergencies often have negative long-term consequences that outlast the emergency that occasioned them. While the authors raise important questions about each claim, in the end they fail to refute any of these concerns.

#### A. The Politics of Fear

Posner and Vermeule first argue, in effect, that we have nothing to fear from fear itself. They seek to refute the civil libertarians' claim that fear produces bad policy, and in particular the claim that fear often produces measures that overvalue security and undervalue liberty. The authors analogize fear to the sort of panic response triggered by stumbling upon a tiger in the jungle and argue that because government decisionmaking in emergencies has a longer time horizon, that sort of panic is not a real threat (pp 64–65). When one comes across a tiger (or a shadow that looks like a tiger), one hardly has time to think. By contrast, emergency measures may be developed over the course of days, weeks, or even years. Even the Patriot Act,<sup>32</sup> widely criticized for having been rushed through Congress in the wake of 9/11, took six weeks to become law. Therefore, Posner and Vermeule argue, concerns about panic-driven policies are grossly overstated.

But no one really claims that emergency policies are the result of the kind of adrenaline-charged panic that seeing a tiger in the jungle induces. The concern is rather a more nuanced one about the dynamics and politics of collective fear over a much longer period of time—more often measured in years rather than in seconds. As history demonstrates, fear tends to lead the populace to seek reassurance from the authorities, and as a result there is always a risk that authorities will exploit fear to their advantage. One need only recall that President Bush's approval rating, quite unimpressive on September 10, 2001, shot up to over 80 percent almost immediately thereafter.<sup>33</sup> The majority is

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<sup>32</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act"), Pub L No 107-56, 115 Stat 272.

<sup>33</sup> See Frank Newport, *Bush Job Approval Was at 51% Immediately before Tuesday's Attacks*, Gallup News Service (Sept 12, 2001), online at <http://www.gallup.com/poll/4882/Bush-Job-Approval-51-Immediately-Before-Tuesdays-Attacks.aspx> (visited June 8, 2008); *Latest Summary: American Public Opinion and the War on Terrorism*, Gallup News Service (Dec 21, 2001), online at <http://www.gallup.com/poll/5113/Latest-Summary-American-Public-Opinion-War-Terrorism.aspx>

willing to tolerate much more concentrated executive power, for example, during wartime than during peacetime. Some of this toleration of concentrated power makes sense, to be sure, but if it is driven by irrational fears, there may be an inclination to vest too much power in the executive's hands during emergencies—and a tendency on the executive's part to stoke the fires of fear to keep his authority unquestioned.

Fear often causes us to make demonstrably irrational decisions even when we have plenty of time to think. Social scientists have found that a variety of influences associated with fear undermine our ability to make rational judgments. One such effect, the “availability heuristic,” leads people to overestimate risks associated with vivid, immediate images and to discount more gradual, long-term, or abstract risks. Travelers are willing to pay more for flight insurance that insures only against the risk of terrorist action than for insurance that covers all risks, including but not limited to the risks associated with terrorism.<sup>34</sup> After 9/11, many people chose to drive rather than fly, even though the risks of death by accident while driving are much greater than the risk that one will be the victim of a terrorist attack.<sup>35</sup> After 9/11, people in the United States grossly exaggerated the likelihood that they would personally be victims of another terrorist attack.<sup>36</sup> And after a single incident of the SARS virus appeared in Canada, Canadians considered themselves far more likely to be exposed to SARS than did Americans, even though citizens of the two nations

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(visited June 8, 2008) (“Bush’s approval rating has remained in the high-80% range since mid-September, and the 10 readings of Bush’s approval rating since that time are among the highest Gallup has ever recorded.”).

<sup>34</sup> Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* 40 (Cambridge 2005) (postulating that “the word ‘terrorism’ evokes vivid images of disaster, thus crowding out probability judgments”), citing Eric J. Johnson, et al, *Framing, Probability Distortions, and Insurance Decisions*, 7 *J Risk & Uncertainty* 35 (1993).

<sup>35</sup> See Jeffrey Rosen, *The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age* 72 (Random House 2004) (noting the misperception that risk is reduced when an individual can “control” the situation). For a calculation of the relative risks, see Michael Sivak and Michael J. Flannagan, *Flying and Driving after the September 11 Attacks*, 91 *Am Scientist* 6, 8 (2003) (calculating that “driving the length of a typical nonstop segment is approximately 65 times as risky as flying”). For the consequences of ignoring these risks, see Maia Szalavitz, *10 Ways We Get the Odds Wrong*, *Psych Today* 96, 98 (Jan/Feb 2008) (“After 9/11, 1.4 million people changed their holiday travel plans to avoid flying. The vast majority chose to drive instead. But driving is far more dangerous than flying, and the decision to switch caused roughly 1,000 additional auto fatalities.”).

<sup>36</sup> See Rosen, *The Naked Crowd* at 73–74 (cited in note 35) (discussing a study in which participants “saw a 20 percent chance that they would be personally hurt in a terrorist attack within the next year” and noting that these predictions “could have come true only if an attack of similar magnitude [to 9/11] occurred nearly every day for the following year”).

in fact faced the same risk.<sup>37</sup> As Cass Sunstein has noted, “worst-case scenarios have a distorting effect on human judgment, often producing excessive fear about unlikely events.”<sup>38</sup> In particular, Sunstein has argued that fear of terrorism is likely to be exaggerated because terrorist attacks are so vivid and catastrophic; and as a result, cost-benefit analysis is likely to be of limited utility.<sup>39</sup>

These distorting effects of fear are likely to be exacerbated, not mitigated, by representative democracy. As noted above, government officials who must think about reelection are likely to have a short time horizon, and so will favor short-term responses even where they might not be rational when long-term effects are also considered. In addition, the politician’s calculus is affected by majoritarian sentiment. After 9/11, Administration officials in all likelihood knew that they would pay much more dearly as a political matter for failing to stop another terrorist attack than for arresting and detaining even a large number of innocent Arabs and Muslims. A terrorist attack is a highly visible and undeniable fact. The detention of a person who in fact poses no threat to society is a largely invisible error, especially since one can never rule out entirely the possibility that any given individual will commit a terrorist act. Government officials presumably know this, and that may be why the great security crises in our history have prompted such widespread roundups of people who turned out to pose no threat to the country.

Posner and Vermeule caution that fears occasioned by emergencies may have beneficial as well as negative effects; therefore, there is no reason to be skeptical about fear-induced decisionmaking (pp 63–64). Fear focuses the mind and is a great motivator, as many a practitioner of the traditional Socratic method will attest. Many of the reforms in intelligence gathering, border control, and law enforcement prompted by the attacks of 9/11 were much-needed and relatively uncontroversial; but they did not occur until we were spurred to action by fear. But the fact that emergencies may prompt government to take responsible actions that it should have taken before the emergency is not a response to the concern that fear may also prompt overreactions that unnecessarily infringe on constitutional freedoms. No one suggests that the Constitution should be construed to forbid the executive from taking *any* action in an emergency. The civil libertarian claim is simply that courts

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<sup>37</sup> See Neal Feigenson, Daniel Bailis, and William Klein, *Perceptions of Terrorism and Disease Risks: A Cross-national Comparison*, 69 *Mo L Rev* 991, 994–95 (2004).

<sup>38</sup> Sunstein, *Laws of Fear* at 105 (cited in note 34).

<sup>39</sup> See *id.* at 205.

should not defer to the executive on issues of constitutional rights and liberties simply because an emergency has arisen. Constitutional scrutiny will not in any way impede Congress or the president from responding to emergency threats, but simply insists that when such initiatives infringe on basic liberties, judicial review is warranted.

Posner and Vermeule also argue that society may be overtaken by libertarian panics as well as by security panics (pp 66–67, 77–82). A vivid example of an abuse of liberties may lead people to overestimate the risk that they will suffer such abuses themselves and may cause them to push for reforms that impose overly restrictive rules on law enforcement and intelligence officials (p 67). This is certainly possible, but it seems almost frivolous to suggest that the fear occasioned by a terrorist incident like 9/11 could be approximated in any degree by an account of a civil liberties abuse. This is in part because those in the majority are much more likely to fear the threat of a terrorist attack than to fear government abuse. The apparently random and unpredictable nature of terrorist attacks means that everyone will share the fear that they, or someone they love, will be affected. Civil liberties abuses, by contrast, tend to target the most vulnerable groups, allowing many in the majority to discount the likelihood that they, or anyone they know, will be victimized. In June 2003, for example, the Justice Department's own inspector general reported that in the wake of the terrorist attacks there had been extensive and shocking civil liberties abuses of foreign nationals detained on immigration charges and labeled "of high interest" to the 9/11 investigation.<sup>40</sup> Yet the report occasioned no "libertarian panic," presumably because those whose rights had been abused were foreign nationals subjected to immigration authority, so Americans did not feel their rights directly threatened.

The authors' examples of "libertarian panics" are peculiar. They cite two such examples: the American Revolution and concerns about abuse of the Patriot Act (pp 78–80). As to the Revolution, the authors cite no evidence that in fact the British were not abusing the colonists' rights and fail even to acknowledge the fundamental objection of the colonists—the denial of the preeminent civil right to self-determination, a cause that has inspired countless revolutions and uprisings throughout history. To dismiss the colonies' struggle for self-

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<sup>40</sup> See Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003), online at <http://www.usdoj.gov/oig/special/0306/chapter7.htm> (visited June 8, 2008).

determination as a “libertarian panic” is to reject the central premise of the Declaration of Independence.<sup>41</sup>

As for the Patriot Act, Posner and Vermeule do not make a case that its critics were beset by a libertarian panic but simply have a different normative assessment of their criticisms of the Act (p 79). And even if one granted the authors’ claim that critics overreacted, they cite no evidence of any *official* overreaction in the direction of too much liberty as a result of the criticisms and complaints that they deem overheated. On the contrary, when the few provisions of the Patriot Act that had been subject to a sunset came up for renewal, they were all renewed or made permanent, with only minor modifications.<sup>42</sup> The fact that Posner and Vermeule disagree with the critiques that many have made of the Patriot Act powers hardly establishes the existence of a libertarian panic, much less one that comes anywhere close to the kinds of security panics we have witnessed throughout our history.

Moreover, even if libertarian panics were just as common as security panics (p 82)—a highly dubious proposition—that would have no bearing on whether courts should exercise constitutional scrutiny of rights-infringing executive initiatives during emergencies. The fact that government officials may overreact, presumably in times of calm, to exaggerated fears about restrictions on liberty does not mean that they do not also overreact, in times of crisis, to exaggerated fears about the need for security. And there is certainly no reason to believe that such panics serendipitously balance each other out. Therefore, even accepting the possibility of libertarian panics, there is still a crucial role for courts to play in safeguarding liberties in times of emergency, when security panics are most likely to occur.

## B. Democratic Failure—The Course of Least Resistance

When terrorists exploded eight bombs in eight different cities on the same day in 1919, the federal government understandably took the threat very seriously. Under the leadership of a young Justice Department lawyer named J. Edgar Hoover, federal authorities launched

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<sup>41</sup> United States Declaration of Independence (1776) (“[I]t is the Right of the People to alter or to abolish [a destructive Government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”).

<sup>42</sup> See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub L No 109-177, 120 Stat 192 (2006); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub L No 109-178, 120 Stat 278. See also Brian T. Yeh and Charles Doyle, *USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis* (Congressional Research Service Dec 21, 2006), online at <http://fas.org/sgp/crs/intel/RL33332.pdf> (visited June 8, 2008).

a plan to sweep up thousands of foreign nationals in coordinated raids across the country. There was only one problem—not one was charged with involvement in the bombings. Instead, the government used guilt by association and technical immigration violations to round up suspected Communists and deport them. As Louis Post, Assistant Secretary of Labor at the time, later wrote of the federal government's response, "[T]he delirium [caused by the bombings] turned in the direction of a deportations crusade with the spontaneity of water flowing along the course of least resistance."<sup>43</sup> The federal government rounded up foreign nationals because it could round them up on charges that would not have been sustainable against citizens.<sup>44</sup> (In fact, Congress had refused several efforts by the executive to enact similar guilt by association provisions in the criminal law, which would then have applied to citizens.<sup>45</sup>)

As Louis Post's remark suggests, democracies are not especially well suited to protecting the rights of minorities. A winner-take-all majoritarian system by design disadvantages the minority. Democracies do even worse at protecting the rights of foreign nationals, who lack a vote. One of the core purposes of the Constitution (and of international human rights treaties) is to offset this feature of democracies by identifying individual rights that ought not be captive of ordinary domestic politics—both because these rights are seen as too important to leave to majoritarian processes and because they are especially likely to be the targets of majorities. Thus, the Constitution and most international human rights treaties require equal treatment, prohibit discrimination on suspect criteria, and protect the rights of dissenters, religious and political minorities, and persons accused of committing crime.<sup>46</sup> As John Hart Ely famously argued, in the domestic American context these rights can be understood as reinforcing representative democracy. Precisely because they are designed to counter democratic failures, they justify countermajoritarian judicial intervention.<sup>47</sup>

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<sup>43</sup> Louis F. Post, *The Deportations Delirium of Nineteen-Twenty: A Personal Narrative of an Historic Official Experience* 307 (Kerr 1923) (describing the effects of "a war frenzy" in "breed[ing] popular hysteria").

<sup>44</sup> See *id.* at 310 (describing proscriptions on alien, but not citizen, membership in certain groups).

<sup>45</sup> See Cole, *Enemy Aliens* at 126 (cited in note 1).

<sup>46</sup> See US Const Amend I, V–VI, VIII, XIV–XV, XIX. For an example of an international human rights treaty with these same requirements, see International Covenant on Civil and Political Rights, 999 UNTS 171, 173–79 (Dec 19, 1966, entered into force Mar 23, 1976).

<sup>47</sup> See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 135–83 (Harvard 1980).

Posner and Vermeule trot out some well-worn, standard critiques of the representation reinforcement model, but their principal contention is that even if democratic failure is a problem during ordinary times, there is no reason to think that the problem is worse during emergencies (pp 114–15, 128). They argue that because the structures and institutions of democratic decisionmaking are the same during emergencies, the risks of democratic failure should be no greater (pp 88, 103, 106–07). Indeed, they suggest that emergencies sometimes spur the country to come together and adopt reforms that help members of minority groups (pp 108–11, 113–14). At the same time, security risks are greater during emergencies, and classified information plays a larger role in decisionmaking. Thus, courts should be more deferential to executive power (pp 118–23).

Whatever one thinks of this argument as a matter of theory, it bears no relation to historical fact. The history of emergencies in the United States reflects a consistent pattern in which government officials target liberty-infringing security measures at the most vulnerable, usually foreign nationals, while reassuring the majority that their own rights are not being undermined. In World War I, the government targeted peace activists; in the Palmer Raids, Eastern European immigrants thought to have Communist affiliations; in World War II, Japanese immigrants and Japanese-Americans; in the Cold War, Communists; and in the raids launched in the wake of 9/11, Arab and Muslim immigrants. In a majoritarian democracy, there is little incentive for government officials to target the majority with repressive measures and strong incentive to reassure the majority that it is not their rights that are at stake, but only those of some “other” group.<sup>48</sup>

Posner and Vermeule are correct that incentives to externalize costs on minority groups operate in ordinary times as well as emergencies (p 88). But their claim that targeting of vulnerable minorities is no worse during emergencies and wars ignores history. The forces at play are not limited to the formal structures of voting rules and political institutions. When an emergency that threatens the nation arises, the nation tends to band together and to strike out against “the enemy.” Nothing unifies more than an enemy. But that means that those who are identified as associated with the “enemy”—often on grounds of race, religion, ethnicity, or nationality—are especially vulnerable when emergencies arise. The divisive and dangerous politics of “us-them,” while an ever-present danger in democracies, are dramatically

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<sup>48</sup> See Cole, *Enemy Aliens* at 4–8 (cited in note 1).

intensified when the nation feels threatened from without (and from “foreign” elements within). Precisely because the lines of difference are most pronounced when we feel threatened, the danger that the majority will abuse the rights of minorities is greatest when we are responding to a threat.

Indeed, the very tradeoff thesis upon which Posner and Vermeule predicate their analysis suggests that there will be greater pressure to externalize costs on minorities during emergencies. In crises, public demand for security will be much greater, and the pressure to restrict liberties seen as interfering with security will often be intense. At the same time, the majority continues to value its own liberty, even as it demands increased security. Accordingly, politicians will pursue “the course of least resistance”—selectively sacrificing the liberties of vulnerable groups in the name of furthering the security of the majority. It is much easier to sell an initiative that denies the rights only of foreign nationals than one that requires everyone to sacrifice their rights. It is no coincidence that the only security initiatives that Congress blocked in the first couple of years after 9/11 were proposals that would have affected the majority—a national identity card, a program to recruit millions of utility and delivery workers to spy on their customers and report suspicious activity to the FBI, and a Pentagon data-mining initiative that, as described, would have gathered computer data on all of us from a multitude of private and public sources and then would have trolled the data for suspicious activity.<sup>49</sup> When Congress learned about these programs, it barred the executive from spending any money on them.<sup>50</sup> By contrast, Congress took no steps to respond to the plight of Guantánamo detainees, the disappearance of foreign suspects into CIA black sites, or the abuse of immigration law to target thousands of Arabs and Muslims who had no connection to terrorism. Posner and Vermeule’s claim that “there is no reason to believe” (p 114) that democratic majorities are more likely to target the liberties of minority groups during emergencies ignores the ineluctable dynamics of “the course of least resistance.”

Posner and Vermeule also argue that we need not be concerned about externalized costs of security because majorities might be just as likely to externalize the costs of liberty (p 100). In conditions of segregation, a majority might well be tempted to externalize the costs of liberty. For example, a majority that lives in areas that are not pla-

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<sup>49</sup> See *id.* at 6.

<sup>50</sup> See *id.*



gued by high crime rates may strike a different balance between liberty and security than an impoverished inner-city community suffering from extensive criminal behavior (pp 100–01). But absent segregation, it is much more difficult to externalize the costs of liberty than the costs of security. The threat of terrorism affects the majority generally, while the threat of being targeted by abusive counterterrorism initiatives is felt much more intensely by Arabs and Muslims. Thus, while under some conditions, particularly segregation, it may be possible for a majority to isolate and downplay security concerns that disproportionately imperil a minority group, it is much more common, especially in a “national emergency,” that the security threat will be felt by all, while the liberty-infringing responses can be targeted at a minority.

History suggests that by far the most vulnerable persons during national emergencies are foreign nationals, particularly those associated, even in very weak ways, with “the enemy.” Al Qaeda is the enemy in the current conflict, for example, but it is Arab and Muslim foreign nationals who have borne the brunt of the Administration’s counterterrorism policies, regardless of whether they have any connection with al Qaeda. Posner and Vermeule argue, however, that we need not be concerned about the selective targeting of foreign nationals in emergencies for a variety of reasons: government officials have incentives to protect them because at some point they may become citizens; they are free to leave (or not enter) if they don’t like their treatment here; they have virtual representation from family, friends, and their home governments; and reciprocity concerns will limit what the government does to foreign nationals out of concern about possible mistreatment of its own foreign nationals abroad (pp 125–26).

The problem with these claims, like much else in Posner and Vermeule’s attempt to discount the dangers of democratic failure, is that they find little or no support in reality. Posner and Vermeule cite not a single national emergency in which the rights of foreign nationals were *not* substantially and selectively infringed. Posner and Vermeule dismiss the well-documented past abuses on the ground that they were motivated not by the vulnerable status of foreign nationals but by their “connection [to] the enemy” (p 112). But this is a non sequitur. Arabs and Muslims today have no more of a connection to al Qaeda than I, as a white, American, Christian male, have to Timothy McVeigh. The authors suggest that the targeting of Arab and Muslim foreign nationals from “Afghanistan, Pakistan, Saudi Arabia, and other countries with a significant al Qaeda presence” is explained by the fact that “aliens are assumed to be loyal to their home countries” (pp 124–25). But we were not at war with Pakistan, Saudi Arabia, or “countries with

a significant al Qaeda presence.” Even in Afghanistan, we were at war only with the Taliban, and surely Afghani citizens are not presumed loyal to the Taliban. To borrow the authors’ favorite phrase, there is “no reason to believe” that citizens of those countries are by virtue of their citizenship, much less their ethnicity or religion, loyal to al Qaeda.

The rest of Posner and Vermeule’s arguments for dismissing the need for judicial protection of foreign nationals’ rights are equally unpersuasive. Virtual representation is no substitute for actual representation. To say that foreign nationals have an “exit option” (p 126), when so many have made their lives here and consider deportation a worse fate than incarceration, is to lack any sense of the realities facing immigrant communities, many of whom came here to escape oppression at home. The notion that politicians cater to foreign nationals because they may someday be constituents, or because their citizen constituents may someday be mistreated abroad, is to attribute to politicians the very long view that they typically lack.

When communities feel that they are under attack, they tend to unite in part by distinguishing themselves from whatever group they identify with their attackers—even where, as is nearly always the case, the group itself did not conduct the attack, and the actual attackers are only a small subset of the group targeted.<sup>51</sup> We were attacked by al Qaeda, and we targeted Arabs and Muslims. In addition, when communities feel threatened, they demand heightened security. When politicians can achieve the appearance of greater security by sacrificing the liberties of those who lack the vote and have been demonized as the enemy, they have found “the course of least resistance.” It is precisely because these phenomena are so familiar, and so invidious, that we need to hold true to constitutional constraints in times of emergency.

### C. The Long Term and the Short Term

Posner and Vermeule’s final target for criticism is the idea that sacrifices in liberties adopted during emergencies create a “ratchet effect” and are difficult, if not impossible, to rectify in the long run. They argue that there is no reason to believe that liberty-infringing decisions have any more of a ratchet effect than liberty-protecting decisions (pp 131–32).

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<sup>51</sup> See *id.* at 85–179 (reviewing the history of responses to national security crises in the United States and noting that those targeted are almost always, at least initially, foreign nationals loosely associated with “the enemy”).

It is true, of course, that precedents can work both ways. A precedent that protects liberty can conceivably last well into an emergency period, while a security measure adopted in an emergency could conceivably outlast its perceived necessity. But here, too, Posner and Vermeule have erected a straw man. The civil libertarian argument is not that there is no going back once a liberty has been infringed—any student of history will see that that is not true. Rather, it is that there is a tendency for governments to hold on to emergency powers long after the emergency is over and that to the extent that an emergency might justify extraordinary authorities that infringe on civil liberties, such measures ought not outlast the shelf life of the emergency.

Our own history demonstrates that it is far easier for government officials to declare emergencies and take on new powers than to declare the emergency over and give up those powers. The National Emergencies Act,<sup>52</sup> for example, was enacted in 1976 in response to a congressional study finding that countless emergency statutes remained on the books, their authorities ongoing, years and decades after the emergency that prompted their initiation had concluded.<sup>53</sup> That law has proven an utter failure in terms of imposing congressional oversight and justiciable limits on the executive with respect to emergency powers, only reinforcing the lesson that emergency powers tend to outlast the emergencies that bred them.<sup>54</sup>

The point is not so much that there is no going back once extraordinary emergency powers are adopted but that the road back is very often a long, slow, and grueling one; and in the meantime, many people's rights may be unnecessarily infringed by emergency authorities that, even assuming they were once warranted, are no longer justified once the emergency has passed. The reason this is a common pattern should be obvious. To alter the status quo in Congress, one generally needs a catalyzing event, a leader to take the initiative, and signif-

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<sup>52</sup> Pub L No 94-412, 90 Stat 1255 (1976), codified as amended at 50 USC §§ 1601-51 (2000 & Supp 2002).

<sup>53</sup> See National Emergencies Act, S Rep No 94-1168, 94th Cong, 2d Sess 2 (1976) ("Enactment of this legislation would end the states of emergency under which the United States has been operating for more than 40 years."). See also Bruce Ackerman, *The Emergency Constitution*, 113 Yale L J 1029, 1078 & n 108 (2004) (describing the congressional study and stating that the National Emergencies Act was "in response to abuses of executive power").

<sup>54</sup> See Ackerman, 113 Yale L J at 1079-81 (cited in note 53) (observing that Congress has not fulfilled its duties under the Act, the judiciary has found there to be no legal remedy for this failure, and the president could easily circumvent the Act's mandate regardless of whether Congress actually obeyed it).

icant political demand.<sup>55</sup> A national emergency, particularly when it comes in the form of an attack, is the most powerful catalyst a community ever experiences. The executive is inevitably treated as a leader during such moments,<sup>56</sup> and the public demands increased security. Moreover, legislation adopted in such periods, such as the Patriot Act, often contains no explicit limitation to the emergency that prompted it. The new status quo—for ordinary as well as emergency times—will then include whatever changes were adopted in the course of the emergency and not expressly limited to a specified emergency period.

For the pendulum to begin to swing back, one again generally needs a catalyst, a leader, and political demand. Civil liberties abuses may provide a catalyst, as Posner and Vermeule argue (pp 77–80, 142–43). But evidence of such abuse generally comes out in dribs and drabs, is often contestable, and frequently involves victims with whom the majority is unlikely to sympathize. It is difficult to imagine a civil liberties abuse that might have even a fraction of the catalyzing effect that 9/11 had. Moreover, there is no “natural” leader for civil liberties reform with anything remotely approaching the power and resources of the president during an emergency. As a result, changes in the direction of increased security are likely to be much more difficult to repeal than changes in the direction of increased liberties.

In sum, contrary to Posner and Vermeule’s account, there is substantial reason to believe that fear will prompt executive officials to overreact in times of emergency; that their responses will often target groups that lack the political clout to protect themselves; and that measures adopted to respond to emergencies, even if justified for the emergency period itself, will tend to outlast the emergency. These are all good reasons to be skeptical about deference to the executive on matters of constitutional rights during emergencies and to insist that judicial review, a critical feature of constitutionalism in ordinary times, is just as important—if not more important—in times of crisis.

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<sup>55</sup> I am indebted to Carissa Siebenek, a Georgetown law student, for this point. See also John W. Kingdon, *Agendas, Alternatives, and Public Policies* 87 (HarperCollins 2d ed 1995) (describing federal government decisions as an amalgam of issue recognition, policy creation, and political winds). For an overview of modern critiques of public choice theory, see William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 60–65 (West 4th ed 2007).

<sup>56</sup> See John E. Mueller, *War, Presidents and Public Opinion* 196–240 (Wiley 1973) (applying statistical analysis to poll data to confirm the “rally ‘round the flag’” variable’s strength during international crises manifestly impacting the United States and indicating this variable correlates to a marked decrease in presidential popularity for each year that passes since the country’s last “rally point”).

## III. THE JUDICIAL ROLE

Posner and Vermeule's trump card is their claim that even if there are reasons to be concerned about civil liberties infringements in times of crisis, there is nothing we can do about it. We cannot tie ourselves to the mast as Ulysses did in *The Odyssey* so that he could hear the Sirens but not be coaxed to step onto their deadly island (p 76). If executive branch officials are likely to fall prey to the dynamics and pressures outlined above, Posner and Vermeule maintain, judges are also likely to fall prey to them (pp 43–44, 56). Furthermore, judges are not equipped to decide the issues anyway because only the executive has the access to classified evidence and the intelligence expertise to make the call (p 44).

Posner and Vermeule take this point so far as to say that we cannot know, even in hindsight, whether the Japanese internment during World War II was justified (p 113). This seems to be taking “no reason to believe” skepticism to almost absurd extremes. The internment of 110,000 people simply because they were Japanese immigrants or Japanese-Americans, defended by presenting false evidence to the Supreme Court, was wrong—regardless of whether any of them individually posed a threat to national security. It was driven in part by prejudice and racism—how else to presume that American citizens were not loyal to their own country if they were of Japanese heritage? How else to explain the mass internment of the Japanese as compared to the much more individualized internment of those German and Italian foreign nationals who we had some reason to believe might have posed a threat? How else to explain the fact that only Americans of Japanese descent, and not Americans of German or Italian descent, were presumed disloyal and targeted for detention? Yet Posner and Vermeule insist that because only the executive branch has access to all the classified information, we cannot judge.

This is not deference but abdication. While it is certainly true that the executive branch has broader access to classified intelligence than the other branches and that there are good reasons for keeping it that way as a general matter, it does not follow that we should defer to the executive to *balance* liberty and security during emergencies. To turn one of Posner and Vermeule's favorite arguments against them, the executive has much greater access to classified intelligence and foreign policy expertise in ordinary times as well, so why should their argument for deference be limited to emergencies?

The point of the Constitution is that we ought not place all our trust in any one branch at any time. Precisely because the executive is primarily responsible for security, it would be a mistake to rely on the

executive to balance liberty and security. In the Fourth Amendment context, for example, one might say that the police are best situated to assess when someone has committed a crime or might have contraband or evidence of crime in his home—there, too, the executive has the best access to information, much of which must remain secret for legitimate law enforcement reasons. Yet Fourth Amendment jurisprudence is constructed on the premise that because the police officer's job is to catch criminals, we ought not rely on the police officer to balance privacy or liberty rights against law enforcement; the officer's balance is likely to be skewed by his institutional law enforcement role. Instead, the Court has long relied on independent judges and magistrates to make the probable cause determination that justifies a search or an arrest. The magistrate's job description, significantly, is not to catch criminals, but to balance privacy and law enforcement, and to issue warrants only where law enforcement outweighs privacy because there is probable cause.

For the same reasons, to rely on the president in a time of crisis to balance liberty and security is to invite a skewed balance. Justice Souter made precisely this point in *Hamdi v Rumsfeld*:<sup>57</sup>

The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."<sup>58</sup>

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<sup>57</sup> 542 US 507 (2004).

<sup>58</sup> *Id.* at 545 (Souter concurring in part and dissenting in part), quoting Federalist 51 (Madison), in *The Federalist* 347, 349 (cited in note 6).

Posner and Vermeule discount this risk entirely. In their eyes, the only question is which branch has better information, not which branch is institutionally designed to strike a fair balance between liberty and security, between short-term and long-term, between the passions of the moment and the principles to which we have committed ourselves for the long haul. In my view, courts, institutionally defined as neutral arbiters and accustomed to weighing competing interests, are best suited to make decisions of principle where competing interests of liberty and security are at stake. That is why we have a Constitution and why judicial review plays such a central role in its application.

The fact that the executive has better access to classified information is not a reason to grant the executive carte blanche to strike its own, inevitably skewed, balance. Courts have long shown that they can handle classified information with as much care, if not more, than the executive branch. Indeed, if the post-9/11 record is any indication, courts seem far less likely to leak classified information than the executive branch.<sup>59</sup> Nor does executive branch “expertise” warrant substantial deference. It is not clear that any branch of government has more or less expertise dealing with emergencies; they simply have different roles to play in those emergencies. To call for consistent application of constitutional principles and judicial review in times of emergency is not to suggest that courts make national security policy. It is to insist only that where policy made by the other branches appears to intrude on constitutionally protected interests, the judiciary has a legitimate and important role to play in ensuring that the balance is struck fairly. As Justice O’Connor wrote for the Supreme Court in *Hamdi*, “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”<sup>60</sup>

The Supreme Court’s decisions in *Hamdan v Rumsfeld*,<sup>61</sup> *Rasul v Bush*,<sup>62</sup> and *Hamdi*, as well as recent decisions of the Israeli Supreme Court, the Canadian Supreme Court, and Great Britain’s Law Lords refute Posner and Vermeule’s contention that deference to the execu-

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<sup>59</sup> Consider Dan Eggen, *Justice Dept. Investigating Leak of NSA Wiretapping; Probe Seeks Source of Classified Data*, Wash Post A01 (Dec 31, 2005) (conveying President Bush’s ire at a leak originating from the executive branch).

<sup>60</sup> 542 US at 536.

<sup>61</sup> 126 S Ct 2749 (2006).

<sup>62</sup> 542 US 466 (2004).

tive is “inevitable” in times of emergency and that an active judicial role in rights protection during emergencies is “whistling in the wind.” In its enemy combatant decisions, the US Supreme Court strongly affirmed that the judiciary has an important role to play when the liberty of individuals is at stake and rejected executive claims that deference is the only appropriate judicial stance.<sup>63</sup> Israel’s Supreme Court has reviewed a wide range of counterterrorism measures from the use of coercive interrogation tactics to the targeted assassination of suspected terrorists, to administrative detention and the building of a security wall between Israel and Palestine.<sup>64</sup> Canada’s highest court invalidated reliance on secret evidence as a basis for detaining suspected terrorists.<sup>65</sup> And the Law Lords ruled out any reliance on evidence obtained from torture and held that indefinite detention of foreign nationals who were suspected terrorists was incompatible with the European Convention on Human Rights.<sup>66</sup> Posner and Vermeule might well argue that these developments are undesirable as a normative matter, but they refute their stronger and more skeptical claim that deference to the executive is all there is or can be.

#### IV. APPLICATIONS

The latter half of Posner and Vermeule’s book abandons the deference that the authors insist those of us outside the executive must adopt and proceeds to opine on the legality of a variety of liberty-

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<sup>63</sup> See *Hamdan*, 126 S Ct at 2798 (concluding that the executive may not disregard “the Rule of Law” in seeking to prosecute a foreign national); *Hamdi*, 542 US at 538 (stating that courts have a duty to guarantee minimum standards of due process when they appear lacking); *Rasul*, 542 US at 485 (confirming that federal courts may review and pronounce illegal the executive branch’s prolonged detention of individuals proclaiming their innocence).

<sup>64</sup> See Yigal Mersel, *Judicial Review of Counter-terrorism Measures: The Israeli Model for the Role of the Judiciary during the Terror Era*, 38 NYU J Intl L & Polit 67, 73–77, 79–83, 86 (2006). For the views of the former President of the Israeli Supreme Court relating to the judicial role in emergencies, see Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight against Terrorism*, 58 U Miami L Rev 125, 136–40 (2003) (recognizing that judicial review benefits national security in the long term).

<sup>65</sup> See *Charkaoui v Canada*, [2007] 1 SCR 350, 363, 419 (holding that failure to disclose evidence obtained upon for prolonged detention violates the justice guaranteed by the Canadian Charter of Rights and Freedoms).

<sup>66</sup> See *A(FC) v Secretary of State for the Home Department*, [2005] UKHL 71 (holding that evidence obtained through torture is inadmissible in all legal proceedings, even where British officials had no role in the torture); *A v Secretary of State for the Home Department*, [2004] UKHL 56 (declaring that the statute authorizing indefinite preventive detention of foreign nationals suspected of terrorist ties was incompatible with the European Convention of Human Rights, as incorporated in British law by the Human Rights Act 1998 because the statute discriminated unlawfully between British citizens and foreign nationals).



security tradeoffs. They advocate legalizing torture for intelligence gathering purposes (pp 184–85), censoring “public threats” (pp 230–34), reducing the procedures afforded to the same “public threats” to ensure their criminal convictions even where they have not yet engaged in any criminal conduct (pp 234–48), detention of enemy combatants without abiding by the laws of war (p 254), and more. These arguments are more interesting for what they reveal about the authors’ normative commitments than for their contributions to the legal debates themselves. It seems that the authors have never met a civil liberty that they would not be willing to trade away for a promise of security. Taken as a whole, Part II of the book suggests that what may in the end drive the authors’ defense of deference is their lack of commitment to the rights that are likely to be threatened by the executive in emergency periods. If one believes that torture, censorship, shortcuts on fair process, and long-term detention are justified at the end of the day, why not defer to the executive?

The authors’ treatment of dissent and due process is illustrative. Pointing to the fact that we have often suppressed dissent in times of crisis, they argue that there is nothing inherently wrong with doing so again (pp 228–34). But that history is better understood as a series of mistakes followed by lessons learned. In World War I, the Supreme Court upheld the prosecution of peace activists for merely speaking out against the war, and in the Cold War we incarcerated people for their mere association with the Communist Party. Our constitutional doctrine today, however, is designed to avoid a repetition of such mistakes. Thus, the Court has ruled that one cannot be penalized for association with a proscribed group absent proof of specific intent to further the group’s illegal ends.<sup>67</sup> And the Court has similarly ruled that speech advocating criminal conduct may not be punished absent proof that the speech was intended and likely to incite imminent violence.<sup>68</sup> These precedents have put certain security options off the table, and there have been no laws enacted since 9/11 that punish speech or association *per se*.<sup>69</sup>

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<sup>67</sup> See *Scales v United States*, 367 US 203, 207–08 (1961).

<sup>68</sup> See *Brandenburg v Ohio*, 395 US 444, 447 (1969) (per curiam) (“[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

<sup>69</sup> In my view, the laws punishing “material support” in effect permit the imposition of guilt by association, and I have been involved in constitutional litigation challenging their validity. See generally *Humanitarian Law Project v Mukasey*, 509 F3d 1122 (9th Cir 2007); *Humanitarian Law Project v Reno*, 205 F3d 1130 (9th Cir 2000); *Humanitarian Law Project v Department of Treas-*

As Vincent Blasi, Geoffrey Stone, and others have persuasively argued, the history of censorship of political speech in this country confirms that there is a real danger that laws will be used to target dissent long before it poses any real threat to the nation, and that it is essential, therefore, that First Amendment law erect a substantial bulwark against such laws.<sup>70</sup> Posner and Vermeule demonstrate little appreciation for this history. They treat the incarceration of Communist Party leaders and anti-war activists for their associations and beliefs as inevitable reflections of the security concerns that existed during those periods. Thus, they advocate that, at least in emergency periods, we should abandon the protective test from *Brandenburg v Ohio*<sup>71</sup> for the more relaxed cost-benefit approach used in *Dennis v United States*<sup>72</sup> to affirm the convictions of the Communist Party leadership<sup>73</sup> (pp 232–34). But the fact that censorship was employed and upheld in the past does not establish that it is either inevitable or normatively defensible. In the end, Posner and Vermeule offer little more than an assertion that speech and associational rights should be traded off against security interests. Both *Brandenburg* and *Scales v United States*<sup>74</sup> permit such a tradeoff only when the government can meet a very high threshold.<sup>75</sup> Posner and Vermeule offer no reason why we should reduce the thresholds that have been developed over time, particularly in light of the abuses that lower thresholds have historically produced.

They also treat due process as something to be traded away in the name of security. They argue that, in times of emergency, certain types of errors—namely, letting a “public threat” go free—are more costly, and therefore procedural protections should be relaxed to reduce the likelihood of such errors (p 234). But this begs the question of who is a

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*sury*, 484 F Supp 2d 1099 (CD Cal 2007). The courts have thus far mostly rejected that contention, reasoning that the laws permit association itself and invalidating the laws that penalize association or speech. See, for example, *Mukasey*, 509 F3d at 1130–37 (holding that the First and Fifth Amendments do not require specific intent, but holding parts of the statute impermissibly vague); *Reno*, 205 F3d at 1136–38 (recognizing that the First Amendment does not require proof of specific intent, but holding the prohibitions on providing “personnel” and “training” unconstitutionally vague). The Supreme Court has not yet addressed the validity of the material support laws.

<sup>70</sup> See, for example, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum L Rev 449, 449–59 (1985); Stone, *Perilous Times* at 532–37 (cited in note 2).

<sup>71</sup> 395 US 444 (1969).

<sup>72</sup> 341 US 494 (1951).

<sup>73</sup> See *Brandenburg*, 395 US at 447; *Dennis*, 341 US at 509–11.

<sup>74</sup> 367 US 203 (1961).

<sup>75</sup> See *Brandenburg*, 395 US at 447–48 (stating that a statutory restriction of speech is permissible only when the speaker has the specific intent to incite unlawful action, and this incitement is in fact likely to occur); *Scales*, 367 US at 207–08 (requiring specific intent and active membership before the Smith Act can restrict the freedom of association).

“public threat.” Posner and Vermeule argue, for example, that “[n]ormal process no longer functions smoothly when the defendant is a public threat who has not committed any crime” (p 240). In that setting, they continue, “the judge can ensure conviction of the public threat only by relaxing the rule of law” (p 240). But how do we know that a person is a “public threat” if he has not engaged in any wrongdoing? The point of the criminal process is to distinguish those who pose a public threat, because they have committed serious past crimes, from those who do not. It is the very notion that we should abandon those procedures in order to convict ill-defined “public threats” that has caused so much trouble in the past. Posner and Vermeule simply assume that we can identify public threats before they undertake any criminal action. But absent the ability to foretell the future, we cannot do so.

Nothing better illustrates Posner and Vermeule’s view of rights as dispensable whenever security concerns are raised than their discussion of torture. Their entire analysis is based on the premise that torture is sometimes justified—a premise the world has rejected as a matter of law. The Convention against Torture, signed by virtually every nation in the world, absolutely prohibits torture under all circumstances, without exception.<sup>76</sup> Federal law, enacted to implement that ban, similarly recognizes no exception.<sup>77</sup> And customary international law treats the prohibition on torture akin to the prohibition on genocide, as a *jus cogens* norm, meaning a norm whose violation is never legally justified.<sup>78</sup> The right not to be tortured, unlike most other rights, is absolute under both federal and international law. As such, it cannot be traded away when executive officials feel that security concerns outweigh the right.

The reason for the absolute prohibition on torture should be apparent in the aftermath of 9/11; once one relaxes the prohibition and allows an interrogator to treat a suspect without respect for his basic

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<sup>76</sup> See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 112, 114 (Dec 10, 1984, entered into force June 26, 1987) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”). For a list of the 145 countries that have signed this Convention, see Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2007, Section 2: Multilateral Agreements* 182, online at <http://www.state.gov/documents/organization/89668.pdf> (visited June 8, 2008).

<sup>77</sup> See 18 USC §§ 2340–40A (2000 & Supp 2004) (making it a crime to commit torture outside US borders).

<sup>78</sup> See *Filartiga v Pena-Irala*, 630 F2d 876, 878 (2d Cir 1980) (“We hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights.”).

human dignity, the slippery slope is steep. Torture proponents inevitably invoke the “ticking time bomb” scenario as the case that justifies torture, as do Posner and Vermeule here (pp 196–97). But as far as we know, none of the torture employed by US agents at Abu Ghraib, Guantánamo, or secret CIA prisons was employed in a “ticking time bomb” scenario, that is, when we knew that the only way to prevent an actual ticking bomb from exploding and killing many innocent civilians was to torture the person who hid the bomb. These scenarios are common on television shows, but extraordinarily rare in the real world. And, as we have seen, in the real world the rationale for torture quickly slips from preventing a specific imminent explosion to the much more abstract one of gathering intelligence about a foe’s capabilities.

In addition, once interrogators are authorized to treat their suspects as less than human, there is little to stop extended abuse. One need only consider the interrogation log of Mohammed al-Qahtani at Guantánamo Bay to see the point. There, Army interrogators were authorized to use only certain coercive tactics considered less extreme than outright torture. They held him in total isolation for 160 days straight. During one period, he was interrogated for forty-five out of fifty days, in sessions lasting nineteen to twenty hours each day. He was threatened with dogs, made to wear a leash, and ordered to bark like a dog. He was stripped naked in front of a female interrogator and made to wear women’s underwear. He was injected with intravenous fluids and not allowed to go to the bathroom until he urinated on himself.<sup>79</sup> An FBI agent who observed al-Qahtani during his captivity described him as “evidencing behavior consistent with extreme psychological trauma (talking to nonexistent people, reporting hearing voices, cowering in a corner of his cell covered with a sheet for hours on end).”<sup>80</sup>

It is real-world evidence such as this that has led the world to conclude that the best approach to torture is an absolute legal ban. The concept of an absolute right is so foreign to Posner and Vermeule’s cost-benefit approach, however, that they do not even entertain seriously the conclusion that the world has reached. Instead, they assume that torture is permissible under certain circumstances, and then focus exclusively on how we might most efficiently regulate its deployment, ultimately concluding that something like Alan Dershowitz’s

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<sup>79</sup> See *Interrogation Log: Detainee 063*, online at <http://www.time.com/time/2006/log/log.pdf> (visited June 8, 2008); Corine Hegland, *Guantanamo’s Grip*, *Natl J* 19, 25, 27 (Feb 4, 2006).

<sup>80</sup> Quoted in Hegland, *Natl J* at 25 (cited in note 79).

warrant approach would work well (pp 208–09, 212).<sup>81</sup> But just as there is no point setting up a warrant process if you believe torture should never be legally authorized, so there is no need to consider how to regulate its deployment if we agree that torture should never be legally deployed.

### CONCLUSION

Posner and Vermeule’s arguments for deference to the executive in times of emergency ultimately rest on their radical skepticism about constitutional rights. If there is indeed “no reason to believe” that governments are likely to overreact, abuse minorities, and aggrandize power in times of emergency—and if there is in any event “no reason to believe” that law can do anything about these tendencies—then the executive’s comparative advantages in terms of access to information and expertise might well support deference. The extent of the authors’ skepticism is revealed in their treatment of the rule of law itself. They acknowledge in a sentence that some think the rule of law serves to promote values such as fairness, welfare, respect for human dignity, or peace (p 221). But the authors instead characterize the rule of law as, in effect, a public relations ploy designed to maximize political support and minimize political opposition. On this entirely instrumental view, there is nothing to stop government from compromising or abandoning the rule of law where it feels it unnecessary to further its public relations purposes or when other instrumental values trump such public relations concerns.

This is precisely where civil libertarians are likely to part most fundamentally with Posner and Vermeule. We do not see rights as fungible commodities to be traded off by some quasi-official version of the market. Rather, we see them as identifying a set of preferred values or fundamental cornerstones of our human and political existence. They are given supramajoritarian protection because they are integral to human dignity, because they are essential to a well-functioning democracy, and because history shows that they are especially likely to be targeted whenever the government or the majority feels threatened. For these reasons, American and international law elevate them above the multitude of other routine interests subject to ordinary cost-benefit calculations, such as whether to devote more

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<sup>81</sup> Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 158–63 (Yale 2002) (reasoning that if illicit torture will occur anyway, we may as well involve the judiciary in the hope that this would reduce the overall amount of torture).

resources to fixing up roads, developing alternative energy sources, beefing up security, or educating our children.

The elevation of rights to a preferred, supramajoritarian position does not mean that they are absolute. With very limited exceptions, such as the ban on torture, most rights protections recognize that they may sometimes be overridden by compelling government interests, so long as the sacrifice is necessary and narrowly tailored. But the very reasons that led us to safeguard these rights in a Constitution (and at the international level, in human rights treaties) ought to make us skeptical of suggestions that we should simply defer to executive officials to safeguard those rights in times of crisis. We safeguard the rights precisely because we fear that government officials will be tempted to disregard them. We can and do ask a great deal of the executive branch in times of emergency. But asking it to strike a fair balance between liberty and security is, as Posner and Vermeule might put it, to “whistle in the wind.” Unless, that is, one does not see the rights as special in the first place.