

Do We Have An Emergency Constitution?

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At this unusual moment in the history of the Constitution, I think it's fair to ask the question: Do we have an emergency constitution?

To start with a familiar heuristic device, let's separate out two polar views about how the Constitution operates in normal times, that is in peacetime, and in difficult times, that is in times of war, times of national security crises, times of emergency. In one view, we have a continuous constitution that is the same for war and peace, the same for normal times and emergencies – an invariant constitution. In the other view, we have a constitution that can be temporarily suspended in times of emergency.

As an example of the first view, consider the following lines of a United States Supreme Court decision called *Ex Parte Milligan*: "The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . no doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

That was written in 1866, a year after the Civil War had ended. After the war, the Court chastised President Abraham Lincoln for having suspended the writ of habeas corpus without the consent of Congress. But the Court did so after the fact, and we will consider later whether *Milligan* corrected a suspension of the Constitution.

Let me give you another example of an expression by the Supreme Court that we have one constitution for normal times and crisis times alike, namely, the *Steel Seizure* case of

1952. We had a wonderful commemoration of that case at Stanford Law School during the fiftieth reunion of the late Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor. They presided over a moot court with former Stanford President Gerhard Casper revisiting the *Steel Seizure* case – the case in which the Supreme Court told President Harry S. Truman that it was unconstitutional for the President to seize the steel mills without the consent of Congress because he had usurped legislative power. In that case there were a number of different

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opinions, but they united on a single point: the Constitution doesn't bend to the claimed need of the President to have the discretion, as commander in chief, to ensure that steel continue to be manufactured to provide munitions, supplies, tanks, weapons, and aircraft for the hostilities in Korea.

That decision was one of the rare instances when the Court told the President that he did not have discretion while the war was on. *Milligan* told the President only after the war was over that he lacked discretion when he suspended the writ. There was Justice Hugo Black, telling Truman that he had erred constitutionally by seizing the steel mills to keep production going. There was a dinner at Black's house not long after the decision, which, in the great decorum of

Washington, meant that the President was in attendance. It is reported that the conversation at the dinner table that evening between the President and members of the Court was rather stiff, except that after a great deal of liquor had flowed, Truman said to Black, "Sir, your law is no good but your bourbon is." So this is a form of checks and balances not written into the Constitution.

Let's contrast this idea from *Milligan* of one continuous constitution for war and peace with a very different tradition that goes back to sixteenth-century notions of *raison d'etat*. Some would trace it back, rhetorically, to the line of Cicero, "*Inter arma silent leges*" – When arms are engaged, the laws are silent. Or consider President Lincoln's own speech in support of his first unilateral suspension of the writ of habeas corpus on July 4, 1861, when he said to Congress, "Are all the laws but one to go unexecuted and the government, itself, go to pieces, lest that one [the Constitution] be violated?" Or to put it more succinctly as the Supreme Court did in 1964, the Constitution is "not a suicide pact."

This idea can also be gleaned from history. When asked whether President Franklin Delano Roosevelt had any regrets about internment 130,000 persons of Japanese descent after the bombing of Pearl Harbor, including 70,000 who had been born in the United States and thus were citizens, Francis Biddle, a close legal advisor to the President, said, "I do not think the constitutional difficulty troubled him. The Constitution has not greatly troubled any wartime president." We have Cicero, we have Lincoln, we have FDR.

For one last example of someone who theorized this alternative view that the Constitution can be suspended during wartime, consider the words of Robert Jackson, a great Supreme Court Justice. Not only did he not attend Stanford, but he had no college education. He became a lawyer with only a

high school degree. He was the prosecutor at Nuremberg and attorney general under FDR. He had a lot of experience in the political as well as the judicial realm. Jackson dissented from the *Korematsu* decision that held that the internment of Japanese citizens and aliens was constitutional even though it was clearly racial discrimination, based on ancestral background and not on individual fault. Although he maintained that the government was justified by a compelling need to ensure that the West Coast was safe from possible espionage or treason by people loyal to the emperor, he refused to proclaim it legal: "Of course the President had to go forward with what his commanders, General Clinton and others, told him he had to do, but I won't sign on to it as law. . . . Once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the court, for all time, has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." Here is the famous quote: "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Jackson's view says that, during wartime, simply suspend the Constitution, but don't claim that what the government is doing is constitutional.

Which of these views is more common in the world: the one continuous constitution for war and peace, *Milligan* and *Steel Seizure*, or the suspended constitution, *Inter arma silent leges*, Lincoln, FDR, Jackson? In all the other written constitutions of the world, it's far more common to have explicit emergency provisions for the suspension of the constitution during times of emergency, including civil unrest, invasions by foreign powers, and the like. A few examples: India says that in a state of emergency the parliament may vest legislative power in the president. The president may suspend judicial authority to enforce the constitution's fundamental rights, including even the right to equality and the rights to freedom of speech, assembly, movement, and religious practice. However, there are some exceptions: It does not suspend the right against compelled self-incrimination or rights to due process.

South Africa has a constitution written with far more conscious emulation of the U.S. Constitution than any other modern constitution, although it differs from ours in many respects. It says that parliament may declare

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and extend a state of emergency. But there are very specific rules. It needs an escalating majority, then supermajority, then higher supermajority, the longer the emergency lasts, and it may authorize derogation from their bill of rights, subject to judicial review. There is even a chart about which rights can be suspended for how long, subject to what kind of judicial oversight.

France has an emergency provision in its constitution that has been invoked only once until recently: Charles de Gaulle invoked it during the Algerian War, and it led to a general suspension of civil liberties. There are some scholars among my peers who say that we should do the same here. Let's get over this continuous constitution, they suggest. It's far better to have a parliamentary system in which Congress may suspend the Constitution, at least temporarily, as long as it is subject to review as to whether the suspension should go on.

I would like to argue very briefly tonight that the model of a continuous constitution is the better one for textual and historical reasons, and then apply this argument to a few contemporary debates. But I also want to qualify my comments by saying that one can't be naive about the continuous constitution or its inflexibility in contemporary circumstances.

To begin with the text: Other constitutions have general emergency provisions, ours does not. The framers of the U.S. Constitution had obviously considered the possibility of emergency provisions because they have a few mini-emergency provisions, the provision for suspending the writ of habeas corpus being one of them. Article 1, Section 9 says that "the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it." Clearly, they considered the suspension of one of our rights, the

one right in our tradition that comes from English common law that is fully constitutionalized. The President is not supposed to suspend the writ unilaterally; he needs congressional approval. But the framers didn't put in a general emergency provision, in stark contrast to India, France, South Africa, Germany, and many other countries that have written constitutions. There are other mini-emergency provisions, but you can look through the brief document of the U.S. Constitution and find no analogue to a general emergency provision.

If you take a textual approach, we thus have no emergency constitution. If you look at the theory of written constitutionalism, you find that a constitution exists to constrain you at the very moment when political forces or fear or sympathy will most likely lead you, as a matter of human psychology, to go against your commitment. So the very theory of written constitutionalism is somewhat incompatible with emergency exceptions.

Our history likewise is replete with examples of morning-after regret about our suspensions of the Constitution. Lincoln suspended the writ of habeas corpus during the Civil War, leading to the internment of up to 13,000 civilians in what we might now call military brigades and to trial before what we might now call military tribunals. Not all of them were blowing up railway trestles that Union troops were crossing. Some of them were political dissidents, sympathizers with the Southern cause. Clement Vallandigham, one of the people who challenged the suspension of the writ, was charged with declaring disloyal sentiments and opinions such as in a speech in which he urged his audience to help him "hurl King Lincoln from his throne."

One example of regret about the suspension of the writ after the war was the Supreme Court's expression in *Milligan*. Specifically, what the Supreme Court said was that it's improper to try civilian offenses that took place off the battlefield, including treason or its equivalent, in a military tribunal. It said that martial law can never exist where the courts, meaning the civilian courts, are "open and in the proper and unobstructed exercise of their jurisdiction."

A second example occurred during World War I. The Espionage and Sedition Acts of 1918 vastly expanded the power of the government to punish not only actual insubordination in the military ranks, but also any

speech, including mail and public speeches, that helped to obstruct recruiting or enlistment or tended to incite, provoke, and encourage resistance to the U.S. war effort, principally the effort against Germany.

You can have discretion eat up a little bit of the rule of law. The question is how far have you gone on that continuum?

This set of provisions was upheld against First Amendment free speech challenges in nineteen cases, but that set of First Amendment cases was overruled and repudiated later in the century, after McCarthyism and the Civil Rights Movement, in a series of cases that said you can't stop free speech until it is directed at and likely to incite serious and imminent violence. It took about fifty years, but again, the Supreme Court retreated from its earlier blessing of executive punishment of dissident speech in wartime.

Third example: I have referred to FDR's internment of the many Japanese American citizens and legal residents of the western states during World War II. That was upheld in *Korematsu* in 1944. The Supreme Court never expressly repudiated *Korematsu*, although a district court did by issuing an unusual writ saying the Court had been in error. Most important, Congress apologized and passed a reparations bill in 1988 saying that, on further review, the evidence presented to Congress, even *ex ante*, had been insufficient to justify the deprivation of property and liberty that it imposed on Japanese Americans.

Let me take one example from another culture that is much like our own, in some respects, but different from us in that it does not have a written constitution. Great Britain had an experience of terrible internal terrorism and violence that was especially intense in the 1970s when the Irish Republican Army and its sympathizers committed terrorist acts against civilians. In an attempt to break the IRA, the British took an approach of very severe internment without formal charges over extended periods of time. British officials later conceded that it didn't work – that the backlash effect dominated the gains to law enforcement.

So examples of regret are partly ones of human sympathy, partly ones of constitutional principle, partly ones of utility or pragmatism about whether or not the sacrifice of liberty had been worth the cost. The theory of constitutionalism is inconsistent with an emergency exception, and we've always come to regret the ones we have imposed through judicial deference to the executive, whether we regret it through an overturn in Supreme Court opinions, a congressional apology, or simply an expression of a confession of error.

Let me add a final argument that concerns international terrorism. In the current international context, there might be additional reasons to be reluctant to suspend the Constitution in times of emergency. If we don't uphold our Constitution during wartime, will other nations balk at reciprocity? When we've said please extradite terrorists to us, Spain and other nations have said no, because they can't be assured that these persons would be tried under our doctrines of due process and not before military tribunals. Let me quote from Judge James Robertson, a very distinguished and extremely moderate judge in the district court for the District of Columbia, who wrote a very interesting decision that essentially stopped military tribunals in Guantanamo. (The decision was later reversed and is now under review by the U.S. Supreme Court.) Among the reasons he gave was the evidence that our refusing to give due process to Afghani battlefield captives is something that can only weaken the United States' ability to demand application of the Geneva Convention to Americans captured during armed conflicts abroad. It's not just that Spain won't extradite Al Qaeda members to us; it's that we might not be accorded the same protections if our soldiers are captured abroad. Other governments have already begun to cite the U.S. Guantanamo policy to justify their own repressive policies.

The current international context gives us the additional moral and practical problem that the war on terrorism is indefinite in time and space. There is no V-T day in sight for the victory over terrorism. It's about substate actors out of uniform, representing not one state but many substate organizations, and the lack of boundaries in time and space makes it even more important that we not say we are going to have a temporary suspension of the Constitution as long as the war on terror is on.

So much for the justification for a continuous constitution. Now let's turn to applying it to current problems. Does it mean, for example, that you have to have full civilian due process for all kinds of terror suspects and there's no flexibility in the Constitution?

Any sophisticated audience like this one will see immediately that the interpretation of the Constitution over time is a continuum between law and discretion, the rule of judges who say this is the process you must provide and the executive branch that says this is all the process I can give you right now. The Constitution already operates on a continuum between law and discretion. The question for now is the choice between marginal or radical incursions by the realm of execution discretion upon the rule of law. You can have discretion eat up a little bit of the rule of law. The question is how far have you gone on that continuum? Can we have so much discretion that we have no more law left? Let me give three examples: detention, surveillance, and discrimination, or to use a more alliterative approach, the problems of procedure, privacy, and profiling.

Procedure: The background Constitution says that we have due process. We have the Fifth and Sixth Amendments, which provide for notice of the charges against you, burden on the government to prove those charges, no coercion or torture, right to counsel, right to confront witnesses against you, public trials accessible to the press, judicial review, and the writ of habeas corpus. There has always been an alternative realm of military justice that doesn't have all of those protections, but it has tended to be confined to battlefields. Since the terrible events of 9/11, the administration has taken a very extravagant litigating position. It said that there can be no constitutional process constraints on the trials of those suspected of being involved with terrorist activities. Aliens in Guantanamo were not covered by due process nor by the laws of war nor the Geneva Convention. Military tribunals could review them without even taking an oath to uphold the Constitution. Even citizens in military brigades in the United States were not covered by these protections if they were captured as enemy combatants against their own government, even if on U.S. soil. Special deportation proceedings could be closed. So we have absolute insistence that executive discretion was absolute with respect to those called enemy combatants. Well, the Supreme Court rejected that

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argument in its 2004 *Hamdi* decision. The administration went to the Supreme Court, and in the words of noted constitutional scholar Ralph Kramden, the Supreme Court gave them a pow in the kisser. The Court didn't go the *Steel Seizure* route. The justices didn't do what Black did to Truman. They didn't say, excuse me President Bush, you have no authority to round up enemy combatants and try them according to a system you just made up. They actually said, five to four, that the authorization for the use of military force in Afghanistan provided legislative authority for incarceration and trial of enemy combatants if they were caught in connection with Afghanistan. But eight to one they said that there had to be some due process constraints on government.

Unfortunately, the Court wasn't specific. It didn't say they had to have a right to lawyers, didn't rule out the possibility that some military tribunals would be good enough for due process, didn't say they had to go to civilian court. But there has to be some rule of law that constrains executive discretion. Only Justice Clarence Thomas said that the executive has absolute discretion.

Justice O'Connor, who wrote the principal decision in *Hamdi*, the case of the U.S. citizen caught in Afghanistan, gave classic homage to the idea of the continuous constitution. She said, "It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested, and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." The difficult question is whether she gave so much latitude for due process that the lower courts will be unable to protect the continuous constitution from executive discretion.

Privacy: We have no express right of privacy in the Constitution, but the Fourth Amendment limits how government can search or seize our persons, papers, houses, or effects, and that has been extended to telephones and the Internet. The notion of privacy is that there has to be some reason to suspect you of probable cause that you have committed or are about to commit a crime. Again, there is a realm of law that applies to law enforcement and the courts. There is also a realm of discretion that we already have in our constitutional scheme. The realm of discretion is what we apply to spies, and it has been the case throughout our history, even blessed by the same court that brought us strong civil liberties since the 1970s, that there is more latitude to go after spies than criminals. Why? You can't tip off the foreign powers that you are looking into their agents on our soil. Since the passage of the USA Patriot Act, we have seen an expansion of the discretionary rules that used to apply to foreign espionage into the realm of law enforcement, with new techniques like warrants issued without probable cause that any crime is afoot, by a secret court, a foreign intelligence court. You can now go after people who may or may not be terrorists, and certainly may or may not be spies, without the full protection of a warrant backed by probable cause.

Profiling: Here again, we have a realm of law. Except in *Korematsu*, citizens can't have their equal protection denied on account of race or ethnicity. But we have a more discretionary rule for aliens. The Fourteenth Amendment gives all persons the equal protection of the law. No state shall deprive any person of the equal protection of the law. It's not limited to citizens, even though other portions of the Fourteenth Amendment are.

Yet we have always had a tradition that allows more deprivation of liberties to aliens than to citizens. The question now is how far is the discretionary realm with respect to foreigners going to encroach upon the usual rules for citizens. Race- and ethnicity-based inquiries and detentions took place after 9/11. Ask any university president whether foreign students can get visas the way they did before. Special registration is now required. It is clear that profiling is happening. Again, the question is, will we relax the usual rule of equal protection and individual merit that we have for citizens with respect to aliens living in our country?

This evening I have tried to illustrate that the real question is can we have a continuous constitution that's somewhat flexible but still continuous. I believe the answer is yes. But it depends on whether we let the discretion of the executive overwhelm the rule of law. I am going to conclude by saying there is only one check that I think is institutionally viable in this situation, and that is the courts. This is a very old-fashioned view, and it's not common among my generation of constitutional scholars. It's the judges who have the political insulation and the freedom from executive zeal to actually put restraints on the executive.

I do want to concede that things could be a lot worse. We haven't seen mass internment. More difficult immigration procedures are not the equivalent of being uprooted from your home in the middle of the night and forced to leave all your possessions behind, as in the internment in World War II after Pearl Harbor. Some of the worst abuses of the Total Information Awareness system have been cut back through congressional action and deprivation of funds. Some of the more extravagant invasions of privacy, the more extravagant restrictions on liberty, have not recurred. We have had a learning curve. We haven't repeated the gross sins of earlier generations. But what I really worry about is the danger of an insidious encroachment of the role of discretion upon the rule of law that is so incremental and gradual that we don't know we are losing our liberties. It may be that the TIA is gone, but what other forms of data mining are taking place at the center that we don't know about because we don't have access to that information? It's an old-fashioned plea that goes back to *Milligan* and *Steel Seizure*, one constitution for war and peace, not an inflexible constitution, but a constitution that depends on the rule of law remaining dominant over the role of discretion. ■

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