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TERROR IN THE BALANCE

SECURITY, LIBERTY, AND THE COURTS



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INTRODUCTION



When national emergencies strike, the executive acts, Congress acquiesces, and courts defer. When emergencies decay, judges become bolder, and soul searching begins. In retrospect, many of the executive's actions will seem unjustified, and people will blame Congress for its acquiescence and courts for their deference. Congress responds by passing new laws that constrain the executive, and courts reassert themselves by supplying relief to anyone who is still subject to emergency measures that have not yet been halted. Normal times return, and professional opinion declares that the emergency policies were anomalous and will not recur, or at least should not recur. Then, another emergency strikes, and the cycle repeats itself.

One can identify roughly six periods of emergency during American history, each with its own paradigmatic instance of alleged executive overreaching.¹ The undeclared war with France at the end of the eighteenth century produced the Sedition Act, which permitted Federalist authorities to lock up Republican critics of the John Adams administration. The Civil War from 1861 to 1865 produced Lincoln's suspension of habeas corpus and imposition of military rule, which included prosecutions of war critics. World War I and the Red Scare generated Espionage Act prosecutions of war critics and the harassment of immigrants and aliens. World War II produced the internment of Japanese Americans. The early cold war saw prosecutions of communists. The post-9/11 emergency resulted in an array of aggressive security measures, including detention without trial of members of al Qaeda and reliance on coercive interrogation. One might also include the period of civil unrest during the Vietnam War, which led, arguably, to political prosecutions of draft-card burners and others. On the other side of the ledger is the War of 1812, which is perhaps the only emergency where the executive was not accused of overreaching and indeed was condemned for its passivity.

Two opposite lessons may be drawn from this history. The weight of academic commentary argues that the history is one of political and con-

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stitutional failure. The emergency causes panic; the public characteristically misunderstands the source of the emergency, blames local groups which are conveniently within range of law enforcement but are essentially harmless, at the same time uses the emergency as a pretext to grab the property of those groups, and demands decisive action, including symbolic action, from the authorities. Political leaders also panic, and they implement irrational policies without sufficient deliberation; or, if they do not, they take advantage of the public's confusion in order to implement policies that the public rejects when it is calm and unafraid. Everyone undervalues the policies and values on which the long-term health of the nation depend—equality before the law, democratic deliberation, due process, political freedom—and places exaggerated weight on security. Policies justified on the basis of the emergency become entrenched and persist even after the emergency ends, resulting in long-term loss of freedom for Americans.

A different view, however, is that the history is largely one of political and constitutional success. The essential feature of the emergency is that national security is threatened; because the executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security, it is natural, inevitable, and desirable for power to flow to this branch of government. Congress rationally acquiesces; courts rationally defer. Civil liberties are compromised because civil liberties interfere with effective response to the threat; but civil liberties are never eliminated because they remain important for the well-being of citizens and the effective operation of the government. People might panic, and the government must choose policies that enhance morale as well as respond to the threat, but there is nothing wrong with this. The executive implements bad policies as well as good ones, but error is inevitable, just as error is inevitable in humdrum policymaking during normal times. Policy during emergencies can never be mistake-free; it is enough if policymaking is not systematically biased in any direction, so that errors are essentially random and wash out over many decisions or over time. Both Congress and the judiciary realize that they do not have the expertise or the resources to correct the executive during an emergency. Only when the emergency wanes do these institutions reassert themselves, but this just shows that the basic constitutional structure remains unaffected by the emergency. In the United States, unlike in many other countries, the constitutional system has never collapsed during an emergency.

The two views of history have opposite normative implications. Those who hold the first view devote their energies to persuading Congress and judges to scrutinize executive actions during emergencies. The simplest view,

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which we label the *civil libertarian view*, holds that courts should be willing to strike down emergency measures that threaten civil liberties to the same extent that they strike down security measures during normal times; perhaps courts should be even less deferential during emergencies, given that emergencies create new opportunities for taking advantage of the public. Some scholars who are sympathetic to the civil libertarian view, but who do not go so far, think that courts should be more deferential during emergencies than during normal times; but these scholars also think that the judges should assert themselves more than they have historically and that the judges should wield constitutional doctrines that require the executive to work in tandem with Congress. Except when the context requires greater precision, we will refer to both types of scholars as civil libertarians.

The second view of history suggests that the traditional practice of judicial and legislative deference has served Americans well, and there is no reason to change it. This view reflects the collective wisdom of the judges themselves, and although no one doubts that injustices occur during emergencies, the type of judicial scrutiny that would be needed to prevent the injustices that have occurred during American history would cause more harm than good by interfering with justified executive actions. Those who hold this view usually have little confidence in congressional leadership and argue that Congress should defer to the executive as well.

This book argues for the latter view. We maintain that the civil libertarian view, in any version, rests on implausible premises and is too weak to overcome the presumptive validity of executive action during emergencies.

Our argument has two components. First, the *tradeoff thesis* holds that governments should, and do, balance civil liberties and security at all times. During emergencies, when new threats appear, the balance shifts; government should and will reduce civil liberties in order to enhance security in those domains where the two must be traded off. Governments will err, but those errors will not be systematically skewed in any direction and will not be more likely during emergencies than during normal times, in which governments also make mistakes about quotidian matters of policy. Second, the *deference thesis* holds that the executive branch, not Congress or the judicial branch, should make the tradeoff between security and liberty. During emergencies, the institutional advantages of the executive are enhanced. Because of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times. The deference thesis does not hold that courts and legislators have no role at all. The view is that courts and legislators should be more

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deferential than they are during normal times; how much more deferential is always a hard question and depends on the scale and type of the emergency.

To that extent, we agree with the subset of civil libertarians who concede that courts and legislators should defer somewhat more during emergencies than during normal times. Nonetheless, even these civil libertarians criticize the courts and Congress for their excessive deference during emergencies. We agree with the descriptive premise, but not the normative one. Courts and legislators are far more deferential during emergencies than any civil libertarians would have them be, but we think this is good and, for the most part, inevitable. Accordingly, we will argue for a much higher degree of deference than any version of the civil libertarian view permits. In our view, the historical baseline of great deference during emergencies is also the right level of deference.

To be clear, we do not argue that government always acts rationally, or with public-regarding motivations, nor that it always strikes the correct balance between security and liberty. Our two theses are just two halves of our central claim, which is about the comparison of institutional performance during normal times, on the one hand, and during emergencies, on the other. Our central claim is that government is better than courts or legislators at striking the correct balance between security and liberty during emergencies. Against the baseline of normal times, government does no worse during emergencies, or at least its performance suffers less than that of courts and legislators. By contrast, the institutional structures that work to the advantage of courts and Congress during normal times greatly hamper their effectiveness during emergencies; and the decline in their performance during emergencies is much greater than the decline in governmental performance. Therefore, deference to government should increase during emergencies.

Chapter 1 introduces the affirmative arguments for both the tradeoff thesis and the deference thesis. We focus on judicial deference to the executive, but in some places (particularly in chapters 1 and 5) we bring in the legislature; in those cases, the deference thesis means that legislatures as well as courts do and should defer to the executive. The remaining chapters of part I address the main systemic arguments of the civil libertarians. They argue that the executive chooses bad policies during emergency because of panic, a failure to perceive the long-term costs of policies that limit civil liberties, and political failure generally. We argue that all of these claims are unpersuasive, for many overlapping reasons.

Part II traces the consequences of these arguments for a range of policy controversies. We emphasize that, as lawyers, we do not have any expertise regarding optimal security policy, and so we do not try to argue for or against any particular policy. Instead, we seek to show that the typical law-

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yers' arguments mustered by civil libertarians against standard emergency measures are not persuasive. These lawyers' arguments stress the legal and institutional damage that emergency policies might cause. Part II addresses, among other things, emergency framework statutes, coercive interrogation, military trials, censorship laws, and reduction of process protections in trials of terrorists.

Although our argument proceeds at an abstract level, we will anchor the argument by discussing a range of security policies adopted after the terrorist attacks of September 11, 2001, including the following:

Military action. The president has sent troops to Afghanistan, Iraq, the Philippines, and other countries with orders to capture or kill members of al Qaeda and to provide military and civil assistance to friendly governments. The president has claimed this power to authorize counterterrorism operations under the commander-in-chief power of the U.S. Constitution; he has also received congressional approval. The Authorization for Use of Military Force issued shortly after 9/11 provides authority to capture and detain members of al Qaeda.

Detention of enemy combatants outside the theater of hostilities. Armies customarily detain enemy soldiers until the end of hostilities. Citing this authority, the president has claimed the power to detain indefinitely members of al Qaeda wherever captured, including those captured on American soil. Although these actions are not unprecedented, they have been controversial. In other Western countries, detention without charges has been used as well, but as a part of regular law enforcement and subject to limits of a few days or weeks. After an adverse ruling by the Supreme Court, the United States now gives detainees the opportunity to challenge the determination that they are enemy combatants before a military tribunal.

Heightened search and surveillance powers, including intelligence sharing. The PATRIOT Act, which was passed shortly after the 9/11 attacks, permits law enforcement agencies and intelligence agencies to share information and expands the search and surveillance powers of law enforcement agencies. For example, the law makes it easier for law enforcement agencies to seize records related to a terrorist suspect from third-party custodians, such as libraries, and to obtain nationwide eavesdropping warrants. The Bush administration also authorized the National Security Agency to perform warrantless wiretaps of overseas communications, including those originating or termi-

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nating in the United States, when it believes that one party is associated with Islamic terrorist organizations. This action arguably conflicted with statutes and customary practices that required warrants, although the administration argues that it is authorized by the president's executive powers and by the Authorization for Use of Military Force (a joint resolution, which has the legal force of a statute).²

Ethnicity-based search and surveillance. The U.S. government denies that it engages in ethnic profiling, but it is hard to believe that law enforcement agencies, acting on their own discretion, stop and search identifiable Arabs and Muslims at the same rate that they stop and search the rest of the population. The immigration sweeps (see below) were explicitly based on country of origin, and after 9/11, the FBI targeted Arab and Muslim residents and Arab Americans for voluntary interviews.

Coercive interrogation. Press reports suggest that the U.S. government has used aggressive interrogation measures, including water-boarding, which is a technique that induces the sensation of drowning, against members of al Qaeda. The U.S. government denies that it engages in torture; at the same time, the Bush administration has opposed a congressional proposal to forbid American officials to engage in torture, suggesting that it wishes to retain flexibility. In addition, American authorities turn over captured members of al Qaeda to friendly countries that are likely to interrogate them using torture.

Immigration sweeps and surveillance. After the 9/11 attacks, American authorities detained large numbers of aliens from Arab and Muslim countries. Although these aliens had problems with their documentation, it is clear that they were targeted because of their race or religion, since undocumented aliens from other countries were not targeted in these sweeps. Many were deemed to be terrorist threats and deported.

Terrorism and material support statutes. American law prohibits terrorism, including all of the crimes that individually make up terrorism, such as murder, conspiracy, and material support of terrorism. The last two provide prosecutors with a great deal of authority to prosecute people who are only peripherally involved in terrorist activity, such as people who contribute money to Islamic charities with a connection to a terrorist organization.

Military trials. The Bush administration has begun trying members of al Qaeda before military commissions. These commissions are

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staffed by soldiers, and the defendants have limited process rights. The commissions are used to try enemy combatants who have been accused of committing crimes, including war crimes, but have not been used against Americans, who so far have been detained and released or turned over to the criminal justice system. Although there is precedent for such commissions, they remain controversial, and the Supreme Court recently limited their use in certain respects.

Censorship. The United States has not passed censorship laws, but other countries have. Notably, British law currently prohibits people from advocating terrorism.³ Under current constitutional understandings, such a law would be unconstitutional if passed in the United States—although those understandings are liable to change rapidly during emergencies.

These measures, taken together, are less aggressive than those taken during prior emergencies. Martial law, which was used during the Civil War and World War II, dispenses with civil liberties altogether, leaving the decisions on how to investigate crimes, try suspects, and punish criminals almost entirely within the discretion of the military. The internment of Japanese Americans during World War II was the result of a military order. Many people think these earlier actions were mistaken; others might think that even if they were justified in the past, they are not justified today. Unfortunately, it is extremely difficult to evaluate whether these measures were justified or not; with the benefit of hindsight, we lose the ability to see events through the eyes of those who made the decisions. It is also difficult to evaluate the post-9/11 measures. Whether the government justifiably detains al Qaeda suspects without charging and trying them depends to a large extent on the magnitude of the threat, the importance of secrecy, and other factors that few people outside of government are in a position to evaluate.

For this reason, we have no opinion about the merits of particular security measures adopted after 9/11, as noted above. We hold no brief to defend the Bush administration's choices, in general or in any particular case. Many or most of its policies may or may not be wrong. Our point is that we are not well positioned to judge the merits of those policies, nor are the civil libertarian critics of those policies.

Rather, our focus is on the institutional allocation of authority to evaluate such policies. For example, suppose that ethnic or racial profiling during emergencies does not increase security, or even reduces it; if it does not

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increase security, then it is all cost and no benefit, and thus a bad policy. We call this a *first-order* question and bracket such questions to the extent possible. We focus instead on the *second-order* institutional and legal challenges—such as the arguments that ethnic profiling is inevitably a pretext for the scapegoating of minorities or that it irreversibly expands government power. Our basic concern is to rebut a common set of second-order arguments that courts should be skeptical of executive action during emergencies. Arguing on this plane is attractive to civil libertarians; it allows them to avoid evaluating the merits of policies about which lawyers know little, policies that fall within the expertise of security professionals. But, as we show, these arguments are flimsy.