

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

10-1-2004

Law in a Time of Emergency

Kim Lane Scheppelle

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#), [Law and Politics Commons](#), and the [National Security Law Commons](#)

Repository Citation

Scheppelle, Kim Lane, "Law in a Time of Emergency" (2004). *Faculty Scholarship at Penn Law*. 53.
https://scholarship.law.upenn.edu/faculty_scholarship/53

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

LAW IN A TIME OF EMERGENCY: STATES OF EXCEPTION AND THE TEMPTATIONS OF 9/11

*Kim Lane Scheppelle**

INTRODUCTION

When the two large passenger airplanes crashed into the World Trade Center on that September morning—as two other planes homed in on their Washington targets—the U.S. government hesitated for three days, and then declared that America was more or less at war. The President declared a state of emergency,¹ while Congress issued a joint declaration authorizing the President to use all “necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”² These pronouncements were later followed by a series of policy decisions³ and legal changes⁴ that would enable the United States to con-

* John J. O'Brien Professor of Comparative Law and Professor of Sociology, University of Pennsylvania. Earlier versions of this paper were presented at the Sparer Symposium at the University of Pennsylvania Law School on *Terrorism and the Constitution: Civil Liberties in a New America* on March 6, 2003, in a panel called “Outside the Law: Alternatives and Challenges to Legal Systems,” of the Sociology of Law Section of the American Sociological Association, August 2003, Atlanta, Georgia, and at a University of Pennsylvania faculty retreat in October 2003. Participants in all of these sessions were very helpful in the later reformulations of this argument. I would like to thank the students in my courses on Terrorism and Democracy (spring and fall 2002 and spring 2004) for being willing to follow through the twists and turns of this story with me as it was evolving. I would also like to thank helpful audiences at the American Association of Law Schools panel on military tribunals in Washington D.C. in January 2003, and at the Penn Law European Society meeting in Strasbourg, France in June 2003 for their good questions and useful challenges to the general framework presented here. Seth Kreimer has discussed many of these issues with me, and I have always benefited from his wise counsel. Serguei Oushakine, as always, both reminds me of why anyone should care about these things and prevents me from thinking about these things *only* in legal terms. Since things change quickly in this field, I should mention that this article was finally put to bed in mid-May 2004. What happened after that time is not reflected here.

¹ Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

² S.J. Res. 23, 107th Cong., 147 CONG. REC. S9413-01 (2003) (enacted). The resolution also authorized the President to take similar action against all those who “harbored” such persons. *Id.*

³ By “policy decision,” I mean reinterpreting laws already on the books to do new things. For example, the material witness statute, 18 U.S.C. § 3144 (2000), was not altered after 9/11, but was used for newly aggressive purposes—to provide a legal basis to simply hold suspicious people against whom no criminal charges could yet be filed. The legal cover story was that those detained were material witnesses who were being held to testify before the grand jury that was convened to look into the 9/11 attacks. Before 9/11, the primary use of the material witness statute was to hold key witnesses to testify in criminal trials, and even then the power was used sparingly. See the different judgments about the acceptability of the new interpretation before the Second Circuit resolved the conflict by ruling in favor

duct both a domestic and a foreign operation to combat international terrorism.

Surprising as 9/11 was in its particulars to nearly all of those who watched it around the world, it was not at all surprising in general from the standpoint of political theory, which has wrestled for centuries with the question of what to do with a shock to a political system that is so great that normal rules seem no longer to apply. Throughout the history of political thought, the idea of a state of exception has fascinated and repelled political theorists who have seen in the idea both the only way to defend a state in peril and the clear road to dictatorship.

In this Article, I explore how the state of exception has been used in practice in American domestic and foreign policy after 9/11, against a backdrop of both political theory and comparative responses. In Part I, I will explore the idea of the state of exception as it has been elaborated in modern constitutionalism, focusing on the work of Carl Schmitt and the collapse of the Weimar Constitution and working through the way the American constitutional order absorbed the idea of the state of emergency during the Cold War. Schmitt, as we will see, saw the ability of a ruler to suspend the rule of law as the ultimate act of sovereignty. Something like this idea was carried on into American policy through the idea of “national security,” providing both the rationale for the Cold War and the justification for the suspension of what had been normal practice. Though the Cold War ended decisively more than a decade before 9/11, the United States never reformulated its guiding ideas about how to manage serious threats. As a result, confronted with a new enemy after 9/11, the Bush administration fell back into Cold War habits, even though the present threat and the present world situation are very different.

Against this background of the exception and its rationales, I next explore the specific responses of the United States to 9/11 in both domestic

of the government. *Compare* *United States v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (holding that a person cannot be detained to secure grand jury testimony under the material witness statute), *rev'd*, 349 F.3d 42 (2d Cir. 2003), *with In re Application of the United States for a Material Witness Warrant*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (holding that the material witness statute does permit witnesses to be detained in conjunction with grand jury proceedings).

⁴ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT”) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered titles of U.S.C.), was the major statutory change that followed immediately after 9/11, but, as the Congressional Research Service analysis itself noted, much of what the USA PATRIOT Act did was to codify decisions that federal courts had already made; specifically, decisions adverse to criminal defendants and to those seeking to challenge state authority. *See* CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE REPORT RL31200: TERRORISM: SECTION BY SECTION ANALYSIS OF THE USA PATRIOT ACT (2001) [hereinafter DOYLE, TERRORISM], *available at* <http://www.cdt.org/security/usapatriot/011210crs.pdf>; *see also* CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE REPORT RL31377: THE USA PATRIOT ACT: A LEGAL ANALYSIS (2002) (organizing the analysis thematically), *available at* <http://www.fas.org/irp/crs/RL31377.pdf>; CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE REPORT RS21203: THE USA PATRIOT ACT: A SKETCH (2002) (providing a summary of his legal analysis), *available at* <http://www.fas.org/irp/crs/RS21203.pdf>.

and foreign policy in Part II of this Article. Since 9/11, the Bush administration has repeatedly invoked its ability to make exceptions to normal legality to cope with the terrorist threat in domestic policy through increasing invocation of military rationales for its actions. The commander-in-chief powers that have been invoked by the President have had the effect of undermining both separation of powers and individual rights at home. In foreign policy, the Bush administration acted as though 9/11 created the basis not only for a national state of emergency, but also an *international* state of emergency that requires other countries to make exceptions to both international law and their constitutional orders. The United States, as a result, has urged its allies to compromise their constitutional and international commitments to meet the new threat.

As I will show, the Bush administration's response to 9/11 in both domestic and foreign policy is not what one would typically expect of a true emergency; namely, quick responses that violate the constitutional order followed by a progressive normalization. Instead, the American government (including all three branches working together) responded with much constitutional care right after 9/11, fully aware that the temptation would be to overreact. The greater abuses have come as 9/11 recedes and executive policy has turned toward larger and larger constitutional exceptions, with the active acquiescence so far of both Congress and the courts. The reaction to 9/11 was not the declaration of a sudden emergency that has gradually abated, but instead has involved a measured immediate response followed by ever-expanding justifications for the assertion of executive and unilateral power.

Following a quick tour of American governmental responses to 9/11, I return in Part III to the general idea of the state of exception and ask why it is that America's democratic allies, also shaken by 9/11, have generally responded so differently. I argue that the Schmittian conception of the state of exception is no longer considered an acceptable frame of response for many of our allies, particularly those in Europe. It was precisely the catastrophe of Weimar, the rise of fascism, the experience of communism, and the history of total wars in the twentieth century that has caused a revision of the theoretical conception of the state of exception among many of our European allies and among many new democratic governments elsewhere. The idea of the state of exception from which the Bush administration has proceeded has met sharp international criticism, precisely because the international community has moved on from the Schmittian framework to which the Bush administration's response bears strong resemblance. Carl Schmitt's justification for the state of exception—and by extension the Bush administration's justification for the response to the terrorist attacks of 2001—presupposes a world that no longer exists, even after 9/11. As I argue, many of America's allies have seen 9/11 not as a moment when the rule of law should be suspended, but precisely a moment when the rule of law needs to be strengthened.

I. THE EXCEPTION

What is (or more precisely, what has been) the state of exception? Though it has gone by different names over time, the state of exception—or reason of state, or state of emergency, or *état de siège*⁵—has referred to the situation in which a state is confronted by a mortal threat and responds by doing things that would never be justifiable in normal times, given the working principles of that state. The state of exception uses justifications that only work *in extremis*, when the state is facing a challenge so severe that it must violate its own principles to save itself. But of course, the state of exception is dangerous precisely because it is so subject to abuse. Who decides whether the situation is one that deserves to be called exceptional? If *some* principles of the state are suspended in a crisis, what prevents *all of them* from being suspended? And how can the normal situation be restored when the state of exception is over?

As both Clinton Rossiter⁶ and Carl Friedrich⁷ noted in their grand surveys of the historical roots of the idea of the state of exception during the Cold War, such mortal threats to the political community have been around since the origin of complex political communities, and so both politicians and political theorists have always had to confront the justifiable limits of the normal state of governance. Aristotle's *Politics* details how an elected dictator was charged with restoring domestic order and fighting off aggressive neighbors in ancient Greece.⁸ The dictatorship in Rome provided a way to handle severe threats to the institutions of the Republic by elaborating and following established procedures for doing so.⁹ For Machiavelli's Prince, the self-interest that grounded his actions was never regularized in what a modern reader would think of as constitutional institutions.¹⁰ But in giving advice to the Prince who would surely face periodic crises, Machiavelli issued prudential warnings:

[Now in a well-ordered republic it should never be necessary to resort to extra-constitutional measures; for although they may for the time be beneficial, yet the precedent is pernicious, for if the practice is once established of disregarding the laws for good objects, they will in a little while be disregarded under that pretext for evil purposes. Thus no republic will ever be perfect if she has

⁵ For the terminological fine-tuning, see JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 1 n.1 (1994).

⁶ CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

⁷ C.J. FRIEDRICH, CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER (1957).

⁸ ARISTOTLE, POLITICS: BOOKS III AND IV (Richard Robinson trans., Clarendon Press 1995) (335-323 B.C.).

⁹ As Rossiter notes, when a situation of emergency was imminent, consent of both the senate and the consuls was necessary for a dictator to be appointed to fend off the crisis. Dictators were never permitted to appoint other dictators. ROSSITER, *supra* note 6, at 19–20. The terms of the dictators were strictly limited to six months. *Id.* at 23.

¹⁰ FRIEDRICH, *supra* note 7, at 32.

not by law provided for everything, having a remedy for every emergency, and fixed rules for applying it.¹¹

Later, Jean Bodin thought that the Prince should be accountable only to God and not to his fellow mortals for what was done as a matter of necessity,¹² which effectively reduced the normative influence of anything like representative government or its institutions.

In short, while political theorists wrestled for centuries with the question of whether emergency government was justifiable, it might be easy for those of us living in constitutional democracies to dismiss their analyses because the political and historical contexts about which they wrote were so different from those of the present day. In particular, the rise of secular, democratic, and constitutional government seems to have created a different dilemma of justification, precisely because executives in constitutional democracies are supposed to be accountable to and removable by electorates, and also because modern constitutions embrace both separation of powers and justiciable systems of rights. For an executive to seize power and suspend rights under a democratic constitutional government is an entirely different matter, normatively speaking, than for a monarch (even a constitutional monarch) to do so. In a modern constitutional democracy, the suspension of separation of powers and of substantial bodies of rights to cope with an emergency requires justification in terms of both the viability of accountable government and the long-term respect for rights in the constitutional order. Thus, while monarchies generally possess some residual elements of unaccountability and of extraordinary executive powers, republican government attempts to purge both. States of emergency, then, pose more difficult problems of justification in republics than in monarchies.

Written constitutions before the twentieth century did not typically attempt to regulate a state of exception in detail. The U.S. Constitution forbids suspension of the “[p]rivilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹³ This is an indirect admission that there may be times when the normal rules do not apply and in such times, the courts may be prohibited from reviewing the legality of detentions. But the location of this power of suspension as a power of the Congress, given to it along with the power “[t]o declare War,”¹⁴ indicates that emergency government was never meant to be reserved for executive action alone. That Congress’s role in a state of emergency was meant to be primary may be further supported by the Third Amendment, which says that quartering of troops in private homes in a time of war shall only be done if there is a law allowing it.¹⁵ Given that

¹¹ THE DISCOURSES OF NICCOLO MACHIAVELLI bk. I, discourse 34, at 203 (Luigi Ricci and E.R.P. Vincent trans., Modern Library, 1950) (1513).

¹² For an elaboration, see FRIEDRICH, *supra* note 7, at 72–73.

¹³ U.S. CONST. art. I, § 9, cl. 2.

¹⁴ *Id.* art. I, § 8, cl. 11.

¹⁵ *Id.* amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

laws must be passed by Congress, the Third Amendment in effect says that no unilateral commander-in-chief power may intrude upon the inviolability of the home. In time of war, rebellion, and other emergencies, then, Congress was given a strong role, almost certainly the lead role, in the process of emergency governance envisioned in the U.S. Constitution. While emergencies may result in a temporary suspension of judicial power through limitation of the writ of habeas corpus, the emergency provisions of the U.S. Constitution do not allow suspension of congressional power. Instead, they seem to require that the president's own power be subordinate to that of the Congress at such a time.

European constitutions of the eighteenth and nineteenth centuries tentatively began to elaborate the idea of a constitutional state of emergency, but typically left all important details to statutes. One could argue that the French Constitutions of 1795 and 1800 were constitutions written only for a time of emergency. The Constitution of the Directorate in 1795 established a committee of rulers with nearly unlimited powers, and the Napoleonic Constitution of 1800 consolidated Napoleon's power grab by proclaiming him, by proper name, to be the primary head of state.¹⁶ Neither of these were constitutions in the modern and liberal sense, ensuring separation of powers and respect for rights. The French Constitution of 1848, however, included as Article 106 a general provision that said that a law should determine when a state of siege could be declared, but left details to that law.¹⁷ General framework statutes passed in France in 1849 and again in 1878 specified how a state of siege could be determined, what new and exceptional powers could be taken by the government in such a time, and how the state of siege would be ended.¹⁸ In much of the nineteenth century in Europe, however, even when constitutions did try to establish separation of powers and respect for the rights of citizens, they typically broke down under stress, and had to be rewritten when the crises were over. The invocation of emergency provisions typically spelled the end of the constitutional order itself. The periods between breakdown and reconstruction were simply non-constitutional moments.

Against this background, the Weimar Constitution, written in Germany in the shadow of the First World War, tried harder than most constitutions to ensure that constitutional failure in a time of emergency did not occur. To that end, the constitutional drafters inserted into the text Article 48, a provision that defined rather precisely a constitutional state of emergency.¹⁹

¹⁶ R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW 186-93 (1995).

¹⁷ LA CONSTITUTION DE LA SECONDE REPUBLIQUE of 1848 [Constitution], art. 106 (Fr.).

¹⁸ ROSSITER, *supra* note 6, at 81.

¹⁹ Article 48 states:

If any state fails to perform the duties imposed upon it by the federal constitution or by federal laws, the president may hold it to the performance thereof with the aid of the armed forces.

If the public safety and order in the German Reich is materially disturbed or endangered, the president may take the necessary measures to restore public safety and order, intervening if

Article 48 gave the president extraordinary powers to cope with extraordinary threats to the system, up to and including both the suspension of a particular and limited set of rights as well as the use of armed forces to quell domestic disturbances. The inclusion of Article 48 in the Weimar Constitution did not signal a flight of constitutional abstraction; the need to have a constitutional state of emergency provision was obvious to all who worked on the text. With Germany in chaos after its defeat in the First World War,²⁰ and with the German political scene marked by the blossoming of radical political parties advocating extreme remedies for extreme times,²¹ some method for the defense of the new constitutional government had to be inserted into the new constitution. Article 48 was adopted by a “decisive majority”²² of the constitutional assembly.

In the thirteen years that the Weimar Constitution limped along before being simply suspended, Article 48 was invoked more than 250 times,²³ 130 times in the first few years of the constitutional order alone.²⁴ As Rossiter has noted, “[l]acking the emergency competence provided in Article 48, the rulers of republican Germany could hardly have launched their infant democracy into the stormy seas of postwar Europe.”²⁵ At the start, Article 48 seemed to work as planned; it repeatedly saved the new democratic order from being undermined by domestic extremists.

Many of the deepest constitutional issues surrounding the use of the state of emergency were never solved legally or politically, however, and the uncertainties surrounding the legitimate use of Article 48 only magnified with time. For one thing, no German parliament in Weimar ever passed the general framework law that Article 48 required to regulate the uses of a state of emergency in more detail. As a result, the specific *types* of crises that could trigger Article 48 were never specified, and Article 48 was used for ever-widening types of state maladies, from civil violence at

necessary with the aid of the armed forces. To this end he may temporarily suspend, in whole or in part, the fundamental rights established by Articles 114 [personal liberty], 115 [inviolability of dwelling places], 117 [secrecy of postal, telegraphic and telephonic communications], 118 [freedom in the expression of opinion], 123 [freedom of assembly], 124 [freedom of association] and 153 [private property].

The president must immediately inform the Reichstag of all measures adopted by authority of the first or second paragraphs of this Article. These measures are to be revoked upon demand of the Reichstag.

In cases where delay would be dangerous[,] the cabinet of a state government may for its own territory take provisional measures as specified in paragraph 2. These measures are to be revoked on demand of the president or of the Reichstag.

Further details will be regulated by federal law.

WEIMAR CONST. of 1919, art. 48 (F.R.G.), translated in FREDERICK MUNDELL WATKINS, *THE FAILURE OF CONSTITUTIONAL EMERGENCY POWERS UNDER THE GERMAN REPUBLIC 15* (1939).

²⁰ For a dire description, see WATKINS, *supra* note 19, at 6–7.

²¹ *Id.* at 25–35.

²² ROSSITER, *supra* note 6, at 35. For more on the history of Article 48, see *id.* at 33–37; WATKINS, *supra* note 19, at 13–14.

²³ ROSSITER, *supra* note 6, at 33.

²⁴ *Id.* at 38.

²⁵ *Id.*

the start, to economic crises by the middle, to merely sharp political disagreement by the end. Furthermore, while at the beginning of the Republic, in the early 1920s, emergency decrees were often backed up by legislation that normalized these decrees quickly thereafter, this legislative validation soon went missing into the 1930s as the popular support for parties that opposed the constitutional order translated into more and more extremist representatives in the parliament, who failed wherever possible to do what was required to maintain the constitutional system. By the time the parliament was finally dissolved,²⁶ making the executive decrees authorized under Article 48 the only effective source of law, the institutions of the Weimar Constitution that might have prevented such a consolidation of power (federalism, independent courts, parliament) had all been neutralized by the prior creeping use of an ever-expanding Article 48.²⁷

The well-known story of the collapse of the Weimar Constitution is recounted here because it is both a cautionary tale for modern constitutionalists and also because the prolonged period of crisis that Weimar experienced produced theoretical justifications for the state of emergency that are in many ways more resonant to the modern ear. As a result, the place to start in thinking about theoretical justifications for states of emergency in a system of democratically accountable, representative, and rights-respecting government is with Carl Schmitt, who not only attempted to justify the state of exception in a constitutional democracy but who, in the end, played a role in the demise of the Weimar Constitution itself.

Carl Schmitt famously begins his work *Political Theology* with the sentence: “Sovereign is he who decides on the exception.”²⁸ By equating the sovereign with the capacity to define when a situation can be handled within normal rules and when it must be treated as an exception to normal governance, Schmitt takes as a defining feature of a political sovereign the ability to operate outside juridical “normality.” In fact, it is precisely the

²⁶ Article 25 of the Weimar Constitution allowed the president to dissolve the parliament once for any reason. WATKINS, *supra* note 19, at 22–23. But Article 48’s check on emergency powers indicated that the parliament could, by a majority vote, require the state of emergency to be lifted. *Id.* at 15. Obviously, if the parliament were constitutionally dissolved under Article 25, it would not be around to exercise the separation-of-powers check built into Article 48.

²⁷ In light of the argument to follow, it is interesting to note that one of the first commentators on the Weimar Constitution to notice the possibility that Article 48 could be used in this unchecked way was Carl Schmitt, who wrote in 1922:

According to article 48 of the German constitution of 1919, the exception is declared by the president of the Reich but is under the control of parliament, the Reichstag, which can at any time demand its suspension. This provision corresponds to the development and practice of the liberal constitutional state, which attempts to repress the question of sovereignty by a division and mutual control of competences. . . . If applied without check, it would grant exceptional powers in the same way as article 14 of the [French] Charter of 1815, which made the monarch sovereign.

CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 11 (George Schwab trans., MIT Press 1985) (1922).

²⁸ *Id.* at 5.

unanticipated nature of the emergency that calls for such powers. According to Schmitt:

The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.²⁹

For Schmitt, liberal constitutions fool their citizens if it appears that these constitutions could have accounted for everything. There will always be moments outside the constitutional range of legitimate expectation, and legitimate constitutional action under unanticipated and extreme threats can never be fully elucidated within a constitution's terms. This is a clear challenge to the idea that the rule of law must constrain rulers and ruled alike, for if the rule of law constrains the sovereign entirely, then the sovereign should not be able to claim exception to the rules. But an emergency makes visible the incompleteness of the constitutional design because by its very nature, it cannot be predicted in its particulars in advance. In practice, Schmitt seems to say, a liberal constitution can therefore never be complete. The ability of the sovereign to act outside the rules in the case of emergency, however, is precisely the signature element that constitutes sovereignty and it is something with which liberal constitutions cannot dispense unless they are to be destroyed by the exceptional challenge.

If the sovereign can claim exception, then the sovereign must have all of the lesser-included powers—for example, the power to decide when the situation has ceased to be “normal,” thereby justifying the declaration of emergency, the power to determine when the emergency is over so that the rule of law may be safely restored, and the power to specify which political actors normally protected by the rule of law lose their protection in the interim. Rather than seeing the rule of law as something that must be followed for its own sake as a way of ensuring the integrity of the state, Schmitt argues that the rule of law may *prevent* a polity from defending itself in the event of a serious political crisis, and that the capacity of a ruler to maintain the very existence of the state may depend on that ruler *not* being bound by the rules.³⁰ In fact, it is the most distinctive power of a sovereign—not simply an incidental and unusual capacity—that he has the power to suspend the law.

Schmitt justified his view that a sovereign must possess the ability to determine the state of exception in a sociological³¹ manner:

²⁹ *Id.* at 6–7.

³⁰ *Id.* at 12 (“The state suspends the law in the exception on the basis of its right of self-preservation, as one would say.”).

³¹ Schmitt, however, said explicitly that the exception is a juristic and not a sociological category: “It would be a distortion of the schematic disjunction between sociology and jurisprudence if one were to say that the exception has no juristic significance and is therefore ‘sociology.’” *Id.* at 13. By this, he

Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium. This effective normal situation is not a mere “superficial presupposition” that a jurist can ignore; that situation belongs precisely to [the norm’s] immanent validity. There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.

All law is “situational law.”³²

According to this analysis, the juridical order itself requires for its maintenance a regular field of life, a *habitus* or a certain taken-for-granted predictability, in order for the small deviations that the juridical order controls to be noticeable. If half the population becomes murderers, then the law against murder is no longer a purely juridical matter. Instead, when the field of life becomes so disordered that the jurist can no longer distinguish between the normal and the abnormal, then the sovereign must act—in Schmitt’s view—to restore the condition of normality necessary for any rule-of-law system to make sense. The state of exception is, as a result, the means for restoring the order necessary for legality to exist. The political moment that justifies invoking the state of exception is the moment when the possibility of restoring a field of order requires that the rules themselves do not apply to the means of restoration.

Moreover, according to Schmitt, it is the exception that gives meaning to the rule in the first place, since one cannot understand a rule except by noting the edges of its applicability.³³ The rule gains meaning from publicizing what is *not* covered in its ambit.³⁴ It is therefore the exception that defines the extent and core meaning of the rule. Through exceptions—and nonexceptions—the juridical order comes to have its distinctive shape and character.

A more comprehensive “state of exception” of the sort that arises in political crises implicates not just an individual rule, but the limits of the juridical field itself. Invoking a state of exception to the juridical field as a whole indicates, as in the case of the individual exception, the defining limits of the taken-for-granted condition. The possibility of a state of exception existing outside the juridical field but still within the political field creates the condition for the separation of law and politics. It opens up the practical reality that the rule of law may cover only part of what politics

seems to mean that the exception is a category within jurisprudence even if recognition of its distinctive markers requires sociological judgment to recognize.

³² *Id.*

³³ In many ways, this parallels the Durkheimian tradition of argument about the role of deviance in maintaining the boundaries of a social community. See KAI T. ERIKSON, *WAYWARD PURITANS* (1966) (arguing that the punishment of deviant conduct publicizes the boundaries of a community and therefore enables the community to better understand its moral architecture).

³⁴ This point is particularly well-elaborated in the analysis of Schmitt in GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 15–29 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1995).

may do. Consequently, some of what counts as politics must exist outside the field of law. If, in Schmitt's formulation, the distinctive capacity of the sovereign is to define the exception, then the sovereign can never be fully bound by law. The broader significance of the state of exception, then, is to define the basic qualities of the sovereign's responsibility, only some of which are legally defined.

Schmitt's analysis echoes some of the logical puzzles of nineteenth and early twentieth century legal positivism—which is not surprising since legal positivists were among his main interlocutors in the theoretical debates he entered in the 1920s and 1930s in his native Germany.³⁵ For legal positivists, all law is the command of the sovereign; it exists as a factual matter distinguishable from its normative advisability. But if law is in fact just that which the sovereign commands, then what can (normatively) bind the sovereign? Schmitt's answer is broadly consistent with that of the legal positivists of his day: in the end, the sovereign can only be bound by voluntary acceptance of his own commands.³⁶ That meant, for Schmitt, that the sovereign could also exempt himself from his own commands when the circumstances dictated.³⁷ What separated Schmitt from his positivist colleagues was his concern with the practical realities of governance over the abstract properties of concepts. In the context of Weimar Germany, where the constitutional order lurched from one unstable government to the next and where the economy lurched along with it, determining the legitimate response to immediate crisis was more than a purely theoretical issue. Schmitt's view—offered against defenders of parliamentarianism—was that liberal parliamentary systems would simply collapse without the decisive judgments of a single sovereign who was vested with the power to suspend the rules in order to save them.³⁸ In fact, before his eyes in Weimar, liberal parliamentary government seemed always on the brink of failure.

Moreover, Schmitt added that it may be the sovereign's *obligation* to violate the normal rules of governance because the integrity and viability of the state itself was the sovereign's responsibility.³⁹ If the state were under mortal threat, Schmitt believed, then the sovereign had to act.⁴⁰ Preservation of the possibility of an ordered life, so crucial in his analysis of the ordinary juridical field, had to take priority over the normal operation of that ordinary juridical field in times that were not ordinary. Exceptional means, then, were warranted in exceptional times. And it was the job of the sovereign to decide which times were exceptional.

³⁵ For more on these debates, see ELLEN KENNEDY, *CONSTITUTIONAL FAILURE: SCHMITT IN WEIMAR* (forthcoming 2004) and PETER C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM* (1997).

³⁶ SCHMITT, *supra* note 27, at 12.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

As it happened, the Weimar Constitution concretely lacked any guidance for determining when a situation had gotten to the point of being constitutionally ungovernable, and its only effective check on the power of the president to declare a state of emergency turned out to be relatively easy to undermine. As a consequence, whenever the president believed that an emergency was imminent, the president could suspend many ordinary constitutional rules of operation.⁴¹ While Article 48 required that the presidentially declared state of emergency had to end when the lower chamber of the parliament so demanded, this provision interacted badly with Article 25 of the Constitution, which allowed the president to dissolve the parliament. Once the president declared a state of emergency under Article 48 and dissolved the parliament for the same reasons under Article 25, Article 48's "checks and balances provision" (that the lower house of the parliament could force the president to end the state of emergency) was no longer effective. Through these absolutely constitutional mechanisms, the unconstitutional state of Nazi Germany was born.

The world viewed (and experienced) with horror what happened next. Nazi Germany, with Schmitt providing justificatory support for the use of emergency powers, attacked its neighbors, conquered much of Europe (with massive devastation of people and property), launched its purge of European Jews and Roma, created the camps, and committed genocide. The concrete events are rather a lot to attribute to Schmitt, but his justification of emergency government assisted in rationalizing the early phases of the Nazi seizure of power precisely because he sketched a compelling portrait of the need and justification for the state of exception. As Europe struggled to recover from the dislocation and destruction of the Second World War, it was not surprising that many of those who had suffered from the consequences of the war had second thoughts about emergency powers and their legitimate use. I will return to the European story in Part III of this Article, but suffice it to say for now that much of the effort to avoid repeating these mistakes involved placing constitutional faith in strengthened courts, which were the least tainted political institution to emerge from under the rubble of conquered and conquering states. The solution to the state-of-emergency problem, as it was elaborated after the war in much of Europe, was to specify the legal stages of the exception in such a way that an unconstitutional state could never emerge through emergency provisions. For example, when the post-war German Basic Law was amended in 1968 to include the emergency powers that had been deliberately omitted when the constitution was first written, the amendment clearly specified that the Constitutional Court had to remain open and able to hear chal-

⁴¹ See *supra* note 19 for a listing of the concrete constitutional provisions whose suspension Article 48 authorized. These included inviolability of both the person and private homes; secrecy of mail and postal communications; freedom of speech, assembly and association; and the right to private property.

lenges throughout any state of emergency and that the executive could not make a declaration of emergency alone.⁴²

The lessons Americans learned from the horrors of World War II were quite different from those taken away from the war by the Europeans. The difference can be seen in how American occupying forces in Germany intervened in the constitutional drafting process in 1948. Americans took the most substantial interest in ensuring a strengthened and unamendable federalism,⁴³ rather than in insisting upon a different way of thinking about emergency powers. The ability to subvert federalism was, in the American view, the primary structural weakness of the Weimar Constitution, not the use of emergency powers to radically increase executive powers.

From the position of their own newly dominant role in the world after the war, American leaders diagnosed that they had failed in the 1930s to see the signs of an oncoming menace early enough. In the immediate post-war period in the United States, foreign policy was guided by the firm conviction that one should not give any benefit of the doubt to a potential enemy, lest one be guilty of appeasement:

The word *appeaser*, easily thrown about, became the most pungent of foreign policy expletives, the quickest way to silence a dissenter, forestall diplomacy. And, of course, appeasement connoted weakness, and so suggested blindness and stupidity or, worse, something approaching treason. Again and again, the lesson of Munich was explicitly summoned for interpreting events and shaping policies in the postwar years.

So it was that “Hitler’s salami tactics” over the years became the “domino theory.”⁴⁴

Rather than being preoccupied with how to prevent a “regime of horror,”⁴⁵ which was the German constitutional challenge after the war, Americans were more concerned with *empowering* government to meet new threats. Rather than finding new ways to strengthen the resilience of the constitutional order and to place limits on executive power, which were the pressing German constitutional issues, Americans were more concerned with expanding executive power to cope with dangers that faced the United States because of its newly dominant role as the only advanced industrial country left relatively unscathed after the war. In this new world, as American policymakers quickly saw, the threats were quick to materialize and, sooner rather than later, the Cold War was the result.

⁴² GRUNDGESETZ [GG] [Constitution] arts. 80a, 115g (F.R.G.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 67, 87 (Gisbert H. Flanz ed., 2003).

⁴³ For evidence of the American role in the drafting of the German Basic Law, see generally PETER MERKL, THE ORIGIN OF THE WEST GERMAN REPUBLIC (1963).

⁴⁴ DANIEL YERGIN, SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE 198 (1977).

⁴⁵ Kim Lane Scheppelle, *Constitutional Interpretation After Regimes of Horror*, in STUDIES IN LAW, POLITICS AND SOCIETY (Patricia Ewick & Austin Sarat eds., forthcoming 2005).

The origins of the Cold War have been disputed often enough;⁴⁶ for the purposes of this Article, one need only observe that the onset of the Cold War had substantial constitutional consequences for the United States. The Cold War was not the first time that the United States had endured something like a crisis government. But the previous crises—the Civil War, World War I, the Great Depression, and World War II—had been imagined to be of limited duration. While they were accompanied by a serious catalogue of constitutional violations, such violations were eventually condemned as being excesses of a particular time, not affecting America's normal constitutional operation or its constitutional aspirations.⁴⁷ The Cold War was different: it promised an indefinite future of crises and a perpetual alteration of both separation of powers and individual rights. In short, the Cold War ushered in an era of “permanent emergency” in which the constitutional sacrifices that were to be made were not clearly temporary or reversible.

The constitutional effects of the Cold War have been well-documented. One was the rise of what Harold Koh has called the “national security constitution,” which concentrated foreign affairs power almost exclusively in the presidency.⁴⁸ In the mid-1930s the Supreme Court decision in *United States v. Curtiss-Wright Export Corp.* had, at least in dicta, indicated that the power to conduct foreign affairs lay exclusively with the president.⁴⁹ But the institutional entrenchment of that extreme understanding of presidential powers in foreign policy came in the post-World War II period with the National Security Act of 1947.⁵⁰ The National Security Act emerged originally as a proposal from the armed services to ward off a serious effort

⁴⁶ The dispute roughly centers on who was more at fault for the start of the Cold War—the Soviet Union or the United States. Immediate post-war American political analysts emphasized the expansionist and aggressive aims of the Soviet Union as a reason for launching the United States' new state of permanent war. Later, American historians, writing in the age of Vietnam, tended to view the historical evidence differently, emphasizing that many domestic considerations led the United States to interpret signals from the Soviet Union in the most negative possible light when they might have been understood as less threatening to American interests. For more on the historiographic debate over the origins of the Cold War, see PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 447–57 (1988).

⁴⁷ Some of the major exceptions—Lincoln's suspension of habeas corpus upon delegation of this power by Congress, the Palmer Raids, the various attempts by President Roosevelt to circumvent judicial disapproval of the economic emergency measures during the Depression, the initiation of martial law in Hawaii during the Second World War, and the detention of Japanese-Americans during that war—are generally portrayed as being unusual and temporary moments in American history, at least in constitutional retrospect. But not all have been legally repudiated. See, e.g., Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (examining the claim that the U.S. government has often viewed its abrogation of individual rights during security crises as unnecessary in retrospect).

⁴⁸ HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 67–69 (1990).

⁴⁹ 299 U.S. 304, 329 (1936).

⁵⁰ Pub. L. No. 80-253, 61 Stat. 495 (codified as amended in scattered sections of 50 U.S.C. ch. 15 (2000)).

to merge the services at the end of the war.⁵¹ Instead, what resulted from a combination of bureaucratic wrangling (the services fought back against the merger) and the perception of an external threat (the Soviet Union tightened its hold over Eastern Europe) was a new unification of the command structure of the military in the Joint Chiefs of Staff and the creation of a new body, the National Security Council, that would give foreign policy advice directly to the president. Perhaps most importantly, a Central Intelligence Agency (“CIA”) was formed that was not under the command of the individual forces, as had been the case before, but that was instead directly accountable to the president. The National Security Act reorganized the foreign policy apparatus of the United States and placed it more firmly in the hands of the president, out of the reach of Congress. Though Congress had passed this law, Congress seemed to envision no role for itself in the ongoing operation of the new national security bureaucracy.

The National Security Act was accompanied by a new view of the world, one that had the term “national security” at its heart. The expression “national security” had not been in common use before World War II.⁵² But its preeminence during and after the war signaled a new understanding of what the foreign policy of the United States was designed to protect. In particular, it allowed a wide range of actions far afield in the world to count as direct threats to the United States. As Daniel Yergin put it:

[W]hat characterizes the concept of national security? It postulates the interrelatedness of so many different political, economic, and military factors that developments halfway around the globe are seen to have automatic and direct impact on America’s core interests. Virtually every development in the world is perceived to be potentially crucial. An adverse turn of events anywhere endangers the United States. Problems in foreign relations are viewed as urgent and immediate threats. Thus, desirable foreign policy goals are translated into issues of national survival, and the range of threats becomes limitless. The doctrine is characterized by expansiveness, a tendency to push the subjective boundaries of security outward to more and more areas, to encompass more and more geography and more and more problems. It demands that the country assume a posture of military preparedness; the nation must be on permanent alert. . . . All of this leads to a paradox: the growth of American power did not lead to a greater sense of assuredness, but rather to an enlargement of the range of perceived threats that must urgently be confronted.⁵³

The idea of national security, permanently emblazoned on the signature legislation of the Cold War, required that the United States maintain a permanent army in a state of perpetual readiness because small events anywhere in the world could be signs of a mortal danger to the nation. “National security” was eventually filled with the realization that the primary enemy of the United States had weapons that could destroy the entire country—and ultimately, the whole world—on short notice. Little wonder that

⁵¹ YERGIN, *supra* note 44, at 336–38.

⁵² *Id.* at 194.

⁵³ *Id.* at 196.

the Supreme Court's apparent grant of executive power in *Curtiss-Wright* was taken up with special urgency as the Cold War settled in. A president could not possibly debate policy with Congress while there was an incoming Intercontinental Ballistic Missile. Nuclear missiles left no time for democratic debate.

The edginess that produced the Cold War also produced a very large number of emergencies. The newly established National Security Council got to work and produced Paper 68 in April 1950, an analysis that provided "the first comprehensive statement of a national strategy after World War II."⁵⁴ It predicted "an indefinite period of tension and danger."⁵⁵ The perpetual legal state of emergency began shortly thereafter. President Truman first declared a state of emergency in response to the deteriorating situation in Korea in December 1950,⁵⁶ a state of emergency that lasted nearly a quarter of a century.⁵⁷ Under the policy of "containment," the United States saw every attempt—or possible attempt—by the Soviet Union to expand its influence as a direct threat to the United States. As a result, the emergency declaration of 1950 was used to justify a number of other foreign actions in the fight against communism.

Domestically, as part of the same effort, Truman announced the power to classify government information bearing on national security.⁵⁸ This latter move made it very difficult for anyone, including Congress, to check on what was being done in the name of national security. Under the cloak of national security secrecy, the U.S. government engaged for decades in abuses of rights to gather information relevant in the struggle against the Soviet Union and to do whatever was necessary to prepare for imminent war. As the "Church Committee"—named for its chair, Senator Frank Church—found in the mid-1970s in its investigations into domestic surveillance since World War II:

—Nearly a quarter of a million first class letters were opened and photographed in the United States by the CIA between 1953–1973, producing a CIA computerized index of nearly one and one-half million names.

—At least 130,000 first class letters were opened and photographed by the FBI between 1940–1966 in eight U.S. cities.

—Some 300,000 individuals were indexed in a CIA computer system and separate files were created on approximately 7,200 Americans and over 100 domestic groups during the course of [the] CIA's Operation CHAOS (1967–1973).

—Millions of private telegrams sent from, to, or through the United States were obtained by the National Security Agency from 1947 to 1975 under a secret arrangement with three United States telegraph companies.

⁵⁴ Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1401 (1989) (quoting Senator Henry Jackson's characterization of National Security Council Paper 68).

⁵⁵ *Id.*

⁵⁶ Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950).

⁵⁷ Lobel, *supra* note 54, at 1401.

⁵⁸ Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951).

—An estimated 100,000 Americans were the subjects of United States Army intelligence files created between the mid-1960s and 1971.

—Intelligence files on more than 11,000 individuals and groups were created by the Internal Revenue Service between 1969 and 1973 and tax investigations were started on the basis of political rather than tax criteria.

—At least 26,000 individuals were at one point catalogued on an FBI list of persons to be rounded up in the event of a “national emergency.”⁵⁹

In addition, the U.S. government irradiated, without their consent, more than 250,000 American citizens (most, but not all, in the military) in experiments to test the effects of nuclear weapons.⁶⁰ In 1952, Congress appropriated \$775,000 to establish six detention camps under the emergency detention provision of the Internal Security Act of 1950, though the camps were not used in the end.⁶¹ McCarthyism was the extreme edge of the active attacks on suspected communists,⁶² but the domestic fight against communists led to a systematic reinterpretation of the rights of both citizens and aliens.⁶³ The persecution of suspected communists through blacklisting, criminal prosecution, and even execution⁶⁴ was accompanied by an alarming expansion of the surveillance powers of the U.S. government, surveillance that also included actions taken to disrupt groups and the per-

⁵⁹ S. REP. NO. 94-755, bk. 2, at pp. 6-7 (1976) (citations omitted), *microformed on* CIS No. 76-S963-2 (Cong. Info. Serv.).

⁶⁰ Jill Elaine Hasday, *Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, KAN. J.L. & PUB. POL'Y, Winter 1996, at 129, 138.

⁶¹ The details can be found in ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976*, at 322–66 (2001).

⁶² For the history of the McCarthy period in original documents, see generally MCCARTHYISM: THE GREAT AMERICAN RED SCARE: A DOCUMENTARY HISTORY (Albert Fried ed. 1997).

⁶³ I have elaborated elsewhere how this strong influence of the Soviet Union in American constitutional law generated, upon closer inspection, a mixed legacy. Kim Lane Scheppelle, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influences Through Negative Models*, 1 INT'L J. CONST. L. 296 (2003). The restrictions on civil liberties evident during the domestic search for communists occurred at the same time as the expansion of civil liberties for African Americans, and the two were connected. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000). The Truman and Eisenhower administrations, seeing the importance of the outcome of the Cold War in winning the hearts and minds of the about-to-be-liberated colonies in Africa, repeatedly urged in briefs to the Supreme Court that African Americans be assisted in their struggle for equality. The Soviet Union had used the lack of equal rights of blacks in the United States as an effective propaganda tool in its Cold War effort to win over the newly establishing states. Successive American administrations saw an important foreign policy interest in providing equal rights for African Americans in order to counter the Soviet threat. *Id.*

⁶⁴ The case of Julius and Ethel Rosenberg has recently been revisited with the opening of the Soviet archive, which seems to show that Julius was in fact a spy but not responsible for the disclosure of atomic secrets, the specific allegation that resulted in his conviction and execution. There is no evidence to suggest that Ethel was ever a spy. Her brother, David Greenglass, who has been the key witness against her in the trial, admitted several years ago in an interview on *60 Minutes II* that he lied in his testimony in order to protect himself and his wife. *60 Minutes II: The Traitor* (CBS television broadcast, Dec. 5, 2001). Some suggest that FBI Director J. Edgar Hoover knew of Ethel's innocence, but insisted that charges be pressed as a way of leveraging information from Julius, who could have secured her release by cooperating with the government.

sonal lives of their members well into the 1970s.⁶⁵ Between the 1950s and the 1970s, Congress passed about 470 statutes that empowered the executive branch to act under emergency powers. These statutes delegated “power to the executive over virtually every facet of American life.”⁶⁶

Following the intense political battles over Vietnam and Watergate in the 1970s, when the presidency itself came into disrepute, Congress reclaimed some of its powers in the perpetual state of emergency. In one statute, Congress terminated all existing states of emergency and provided more stringent rules for how such emergencies should be declared in the future.⁶⁷ But in another statute, Congress extended the reach of states of emergency to international economic affairs.⁶⁸ The War Powers Resolution represented another attempt by Congress in this period to restore a role for the legislative branch in committing American troops abroad,⁶⁹ and the Foreign Intelligence Surveillance Act (“FISA”) was designed to provide some judicial check on the ability of the executive to engage in domestic spying on those who were thought to be part of foreign-originated plots without having to meet the high hurdles of the Fourth Amendment warrant requirement.⁷⁰

As most observers have noted, however, all of these attempts by Congress to reclaim some of its lost foreign policy powers were, and continue to be, quite ineffectual.⁷¹ Not only has the president asked permission of the Congress before committing the country to military engagements or foreign policy obligations only as a matter of courtesy rather than as a matter of law (and then only sometimes), but Congress has typically not attempted to enforce any of its powers under the 1970s-era legislation.⁷² The

⁶⁵ This campaign of domestic surveillance, often starting to root out communist influence, was documented by the “Church Committee,” chaired by Senator Frank Church. The official name of the committee was the Senate Select Committee on Intelligence. See generally S. REP. NO. 94-755 (1976), *microformed on* CIS No. 76-S963 (Cong. Info. Serv.).

⁶⁶ Lobel, *supra* note 54, at 1408.

⁶⁷ National Emergencies Act, Pub. L. No. 94-412, § 101, 90 Stat. 1255, 1255 (1976) (codified at 50 U.S.C. § 1601 (2000)).

⁶⁸ International Emergency Economic Powers Act, Pub. L. No. 95-223, § 202, 91 Stat. 1625, 1626 (1977) (codified as amended at 50 U.S.C. § 1701 (2000)).

⁶⁹ Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-46, 1547-48 (2000)).

⁷⁰ Pub. L. No. 95-511, §§ 101-11, 92 Stat. 1783, 1783-96 (1978) (codified as amended at 50 U.S.C. §§ 1801-11 (2000)).

⁷¹ See KOH, *supra* note 48, at 116 (“Congress’s ambitious attempts during the post-Vietnam era to reassert its constitutional role in foreign policy making have met with limited success.”); Hasday, *supra* note 60, at 139 (“Congress’s dominant foreign relations strategy during the Cold War, one that ultimately did more than its emergency legislation to support crisis government, was consistent acquiescence to presidential assertions of power.”); Lobel, *supra* note 54, at 1414 (describing the success of congressional efforts to limit executive emergency powers as “dismal”); see also Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998) (showing how the president has evaded the constitutional requirement of gaining Senate consent to treaties by using the parallel device of executive agreements).

⁷² It is hard to tell how much of this was congressional lethargy and how much was caused by the decision in *INS v. Chadha*, 462 U.S. 919 (1983), which struck down the legislative veto, the primary

Cold War state of affairs, in which the executive operated under nearly constant emergency powers with a quiescent Congress refusing to intervene, continued. While one might have thought that the midcourse correction of the 1970s would have ended the period of executive government, the Iran-Contra affair in the 1980s suggested otherwise.⁷³

Does the experience of Weimar have anything to contribute to thinking about the U.S. government's uses of emergency powers in the Cold War? Of course, the uses of emergency powers in Weimar Germany were very different from those in post-World War II United States. While in Weimar, the dissolution of the parliament marked an end to separation of powers and a suspension of the constitutional framework altogether, the American government maintained its constitutional institutions through the Cold War. American presidents generally acted with congressional delegations of power, however broad and vague they might have been. Courts reviewed and sometimes corrected the worst offenses;⁷⁴ Congress occasionally attempted to curb the executive as well.⁷⁵ The overall shape of the American government, however, took on some of the same distinctive features of crisis government that could be discerned in Weimar as many powers were swept into the vortex of a constantly expanding executive branch.

In both Weimar Germany and the United States, executives gained great powers through declarations of states of emergency, powers that were used to justify both the use of force abroad and restrictions on rights at home. While the emergencies in Weimar started as domestic ones, they did not remain domestic in their application and they had even more devastating consequences when their effects spread beyond the border. Conversely, while American emergencies might have been triggered by events abroad during the Cold War, eventually they came home as the U.S. government began to realize that foreign and foreign-influenced enemies could not be kept outside national borders. In short, in neither case was the state of emergency confined to the area which had originally triggered its application. In both Weimar and in the Cold War, states of emergency generally spread from the reasonably perceived threat to a wider and wider sphere of potential dangers with a smaller and smaller evidentiary base for each expansion of the threat. Each new threat, however slight, justified changing

provision that Congress had inserted into the 1970s reform legislation as a device for controlling the president.

⁷³ KOH, *supra* note 48, at 101–16.

⁷⁴ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (striking down an executive order directing the secretary of commerce to seize and operate many of the nation's steel mills to avert a strike during wartime).

⁷⁵ See, e.g., War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–46, 1547–48 (2000)) (requiring a declaration of war, specific statutory authorization, or a national emergency created by an attack against the United States before the president may engage the military in hostilities); S. REP. NO. 94-755 (1976), *microformed on* CIS No. 76-S963 (Cong. Info. Serv.) (exposure of the extensive violations of civil liberties during the Cold War concluded in a number of recommendations for new laws curbing executive power). While many of the Church Committee's recommendations went nowhere, some became law. See *supra* at notes 67-70.

what had been the normal rules of procedure to cope with the new form of danger.

Schmitt had emphasized, for Weimar, the need for the executive to act unilaterally because parliamentary democracy could not sustain the decisiveness necessary to cope with a mortal threat to the state. In fact, according to Schmitt, the nature of the regime could itself be defined in terms of the ability of the sovereign to put the rule of law aside in order to cope with a serious danger. Successful democratic governments required an illiberal core that could be exposed when the state was endangered. The sovereign, in Schmitt's view, had ultimate responsibility for the continuing existence of the state, and this was ultimately what gave the sovereign permission to set aside constitutional rules to act directly to cope with the threat. As with Schmitt's sovereign, American presidents could, acting in their official capacities, slip out from under constitutional constraint at nearly every turn.⁷⁶ While Schmitt imagined that this would occur because the law would simply fail to cover these actions and the sovereign would then have to step outside the law, the American constitutional experience was slightly different. The U.S. Constitution has capaciously expanded to adjust to all expansions of executive power without appearing to fail. The Constitution's meaning has changed as it has been aggressively interpreted by Cold War executives and as both Congress and the courts ratified this new meaning through acquiescence. The Weimar Constitution may have broken under emergency government, but the American Constitution bent.

After the end of the Cold War, when the Soviet Union surprisingly released its satellites and then disbanded itself, one might have expected the American government to go back to the way it had been before the Cold War began. At the very least, one might have expected the United States to rethink the extraordinarily lopsided executive government that had developed to respond to the Soviet threat. But such was not the case. Though there were calls to "reestablish[] the rule of law at the end of the Cold War,"⁷⁷ Cold War habits had ossified into permanent traits of constitutional character. The American presidency is as strong, if not stronger, than ever. The practical deference of courts to the political branches is nearly universal on all matters of foreign and military policy, including outsized claims of national security. Congress has largely ceded its powers in the realm of foreign policy, providing only lax and fitful oversight. The balance of powers struck during the Cold War, with a bulked-up executive, a wizened

⁷⁶ What has gotten American presidents into serious trouble is either the authorization of private crimes (Richard Nixon) or the conduct of private affairs (Bill Clinton). While presidents have been defeated for failing to perform adequately, it is usually weakness (Lyndon Johnson in Vietnam, Jimmy Carter with the Iranian hostage crisis, George H.W. Bush with the economy) rather than strength that has defeated them. Excesses in the use of emergency powers or emergency-like powers (Ronald Reagan with Iran-Contra; John F. Kennedy in the Cuban Missile Crisis) have rarely been the source of general presidential disrepute.

⁷⁷ Hasday, *supra* note 60, at 129.

Congress, their disputes only partly subject to refereeing by courts, remains largely intact.

II. AMERICA AFTER 9/11

A. *The State of Exception in Domestic Policy*

“Everything has changed,” political commentators muttered darkly, without specifying what “everything” was or in what direction it had “changed.” “The world after 9/11” has become a specific historical moment, referred to as if it has a logic of its own.⁷⁸ Those who can clearly recall the United States before 9/11 may compare it with the present moment and be shocked by the new *mentalité*: the self-confident and blithely liberal United States has become haunted by fear, more inward-looking, and less open to debate. As I will argue, after 9/11, the Bush administration has declared an ever-expanding state of exception in which more and more of the taken-for-granted operating rules of American law have been suspended in the name of the war against terrorism. This new state of exception bears many of the features of Cold War exceptionalism at its height.

Terrorism was obviously not new with 9/11, nor were attacks by al Qaeda against Americans new on that day. What changed was the framework through which they were seen. As pre-9/11 books on terrorism customarily noted, nations have a choice between thinking of terrorist attacks as large crimes (on the model of organized crime or other criminal conspiracies) or as small wars (on the model of insurgent attacks).⁷⁹ Under the Clinton administration, terrorist attacks were seen primarily as big crimes with a small war component.⁸⁰ They were handled as a first matter by the

⁷⁸ Historians are already considering what this moment means in the light of their profession:

[H]ow transformative was September 11? Would it become an iconic historical event, marking a transition in the history of the United States and of the world? Or was it instead best understood as an aspect of pre-existing historical trajectories? Did it change law, politics, religion, and culture, or did it instead simply provide a new site for political and cultural conflicts that were already in play?

... We do not have the luxury to wait for this moment to settle more firmly into historical memory. Understanding September 11 and its impact is a need, and a responsibility, of our own.

Mary L. Dudziak, *Introduction* to *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* 1, 2, 8 (Mary L. Dudziak ed., 2003).

⁷⁹ For perhaps the best such account, see PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY* (1998). It is significant that Professor Heymann’s post-9/11 book, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* (2003), gives up on the crime strategy for confronting terrorism and instead attempts to argue that in the “war” on terrorism, multilateral strategies and international law should guide American conduct.

⁸⁰ As this article was in the editing stage, new information about the Clinton-era anti-terrorism tactics emerged, showing that the Clinton White House had in fact been pursuing more military options than were apparent at the time or in the several years after 9/11. See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, STAFF STATEMENT NO. 6: *THE MILITARY* (2004), <http://www.9-11.com/statement6.htm>

Department of Justice (“DOJ”) and ordinary criminal courts, even when they pertained to attacks on U.S. interests overseas. Under the Bush administration, terrorist attacks have been seen within the framework of not just a small war, but of a world war. Along with that framework has come a reluctance to actively use or even to acquiesce in the jurisdiction of the courts,⁸¹ and a sense that the Department of Defense (“DOD”), the military, and the intelligence agencies patrol the front lines, even within the United States.

Under the Clinton administration, the attacks on two American embassies in Africa on the same day in 1998—one in Kenya and the other in Tanzania—were treated as both war and crime. Several cruise missiles were launched on locations in Afghanistan and Sudan to get rid of what had been flagged as al Qaeda sites. But the most sustained treatment of the embassy bombings framed them as a large criminal conspiracy. Eventually, four defendants—including one American citizen—were tried in the federal District Court for the Southern District of New York in the spring of 2001 for plotting and participating in the attacks. Several months of evidence—including reports from FBI field officers, results of electronic monitoring, physical evidence obtained through searches in multiple countries, and confessions gathered in extensive interrogations abroad—resulted in convictions of all four defendants on all counts.⁸² Other trials were conducted and resulted in guilty verdicts in the case of the first World Trade Center bombing, the plot to blow up major sites in New York City, and the plot to bomb the Los Angeles International Airport on the eve of the millennium. All were found to be al Qaeda-related conspiracies.⁸³

11commission.gov/hearings/hearing8/staff_statement_6.pdf; NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, STAFF STATEMENT NO. 7: INTELLIGENCE POLICY (2004), http://www.9-11commission.gov/hearings/hearing8/staff_statement_7.pdf; RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* (2004).

⁸¹ George W. Bush’s State of the Union Address in January 2004 stated the case strongly:

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

President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

⁸² *See* United States v. Bin Laden, 132 F. Supp. 2d 168 (S.D.N.Y. 2001). The transcript of the trial in which the specific uses of evidence can be seen is available at Transcript available at <http://news.findlaw.com/legalnews/us/terrorism/cases/background.html>.

⁸³ The evidence presented at the trial of the so-called Millennium Bomber is laid out in *Frontline: Trail of a Terrorist* (PBS television documentary, Oct. 25, 2001) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/trail/etc/script.html>). The first World Trade Center bombing and the subsequent foiled plots by Ramzi Yousef, who is believed to have masterminded that bombing, are detailed in SIMON REEVE, *THE NEW JACKALS: RAMZI YOUSEF, OSAMA BIN LADEN AND THE FUTURE OF TERRORISM* (1999).

It appeared from the Clinton administration's antiterrorism efforts that it believed the ordinary criminal justice system was an effective tool for ensuring that those who plotted against the United States and attempted to kill its citizens could be brought to justice on the basis of public evidence in normal criminal proceedings. And the results—guilty verdicts in all cases—seemed to bear that belief out. From the standpoint of Schmitt's political theory, the 1990s terrorist attacks were deemed by the administration then in power to require no state of exception. Instead, the United States showed itself to be aggressively unexceptional in these circumstances, treating these attacks on the country through normal procedures as a way of making a point that the terrorists could not destroy American constitutional values.⁸⁴ Of course, the situation was being monitored to determine if the threat rose to the level of a military response, but by and large, plots within the United States were thwarted using ordinary policing methods,⁸⁵ and their perpetrators were put on trial throughout the 1990s.

⁸⁴ That said, there were some elements of these al Qaeda trials that should give human rights lawyers pause. The confessions that were the centerpiece of the African embassy bombing trials were obtained through interrogations lasting weeks in some cases, and in every case without a lawyer present. All of the defendants signed statements saying that they waived their right to counsel, but the only evidence offered that the confessions made by two of them were voluntary or that the defendants understood what they were signing came from the interrogators themselves. Thereafter, the confessions were introduced into evidence through the testimony of the interrogators, who often spent days on the witness stand apparently quoting the exact words of the defendants, even though everyone admitted that no tape recorder was used and that the investigators only took notes detailing their conversations after the interrogations were over—sometimes days and weeks later. The issue of whether the U.S. Constitution's right to counsel applied to noncitizens interrogated abroad by U.S. officials seems to have been an issue of first impression in this case. See *Bin Laden*, 132 F. Supp. 2d at 181, 187–89. In his decision, Judge Sand elaborated a modified version of the doctrine of *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that prosecutors may not use statements made during custodial interrogation unless the defendant was first advised of his privilege against self-incrimination and his right to counsel), for interrogations of noncitizens conducted by U.S. officers abroad. *Id.* at 188 n.16. In addition, some of the searches conducted abroad that netted evidence for this trial were conducted without even superficial compliance with Fourth Amendment guarantees. Whether the constitutional procedures for gathering evidence apply to evidence gathered abroad more generally is a controversial proposition. See M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319 (2003) (discussing the changing situation of *Miranda* warnings after 9/11); Mark A. Godsey, *Miranda's Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1703 (2002) (analyzing and mapping out proposals for how to apply *Miranda* rights internationally); Roberto Iraola, *Self-Incrimination and the Non-Resident Alien*, 22 PACE L. REV. 1 (2001) (discussing applications of the self-incrimination doctrine to non-resident aliens); Irvin B. Nathan & Christopher D. Man, *Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for American Constitutional Rights*, 42 VA. J. INT'L L. 821 (2002) (discussing the interplay between the United States and foreign governments on American constitutional rights); Jay Shapiro, *Terrorism, the Constitution, and the Courts*, 18 N.Y.L. SCH. J. HUM. RTS. 189 (2002) (discussing the application of the Fourth and Fifth Amendments to terrorists); Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307 (2002) (discussing the use of American constitutional values in dealing with foreign governments).

⁸⁵ This may not be completely true, as ordinary criminal investigations were giving way at a rapid pace to national security investigations. The number of warrants issued by the Foreign Intelligence Surveillance Court ("FISC") went up sharply in the 1990s, perhaps because of an increased focus on terrorism investigations. When Clinton came to power, about 500 warrants were granted annually for

The 9/11 attacks changed that calculation, but not immediately. At first, the Bush administration's DOJ and the Federal Bureau of Investigation ("FBI") acted as if the normal legal model were still in play.⁸⁶ Two of the first concrete suspects in U.S. custody in the new war on terrorism—Zacarias Moussaoui and John Walker Lindh—were charged with crimes in normal criminal proceedings even though their alleged criminal activity involved participation in terrorist plots.⁸⁷

Moussaoui was publicly announced to have been the "twentieth hijacker" on the presumption of symmetry—three of the four hijacked planes on 9/11 had five hijackers, but one only had four. Moussaoui, who was arrested prior to 9/11, had been originally thought by the DOJ to have been slotted for that fifth seat on the fourth plane. Since the case began, it has become less clear that Moussaoui was a hijacker. Instead, it seems that Moussaoui was probably an al Qaeda member in the United States awaiting instructions that never came for some further attack.⁸⁸ Moreover, the *Moussaoui* case has become difficult for the DOJ because Moussaoui has claimed the right to interrogate other high-level al Qaeda operatives who are in U.S. custody, particularly Ramzi bin al-Shibh.⁸⁹ Bin al-Shibh has publicly claimed credit for organizing the 9/11 attacks and may have said that Moussaoui had nothing to do with them.⁹⁰ Judge Brinkema, the trial

FISA searches. Electronic Privacy Information Center, Foreign Intelligence Surveillance Act Orders 1979–2002 [hereinafter FISA Statistics], at http://www.epic.org/privacy/wiretap/stats/fisa_stats.html (last modified May 6, 2003). By 2000, that number had doubled to 1012. *Id.* Since no FISA warrant documents are public, it is impossible to say for sure what caused the increase, but given the evident concern in the Clinton White House with antiterrorism issues, it would not be far-fetched to suppose that the FISA warrant increase tracked the increased hunt for foreign terrorists inside the United States.

⁸⁶ The FBI's investigation procedures did not seem to change immediately after 9/11. Later, on May 30, 2002, Attorney General John Ashcroft issued new guidelines for the FBI to follow in its terrorism investigations, which substantially lowered the showing necessary to use intrusive means of surveillance in terrorism investigations. OFFICE OF THE ATT'Y GEN., DOJ, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (2002) [hereinafter ASHCROFT GUIDELINES], <http://www.usdoj.gov/olp/generalcrimes2.pdf>.

⁸⁷ The level of security and publicity that these cases received was, of course, far from normal. Likewise, the Attorney General's statements about the heinous activities of both went beyond the normal commentary practices of the office. Ashcroft said that Lindh's "allegiance to those fanatics and terrorists never faltered, not even with the knowledge that they had murdered thousands of his countrymen." Jane Mayer, *Lost in the Jihad: Why Did the Government's Case Against John Walker Lindh Collapse?*, NEW YORKER, Mar. 10, 2003, at 50. Ashcroft labeled Moussaoui's indictment a "chronicle of evil." Naftali Bendavid, *PR War Rages in Terror Cases: U.S., Defense Lawyers Battle Relentlessly for Public Sympathy*, CHI. TRIB., Apr. 7, 2002, § 1, at 12. In general, though, both cases started off as normal serious crimes. In the end, both cases fell victim to post-9/11 particularities.

⁸⁸ In fact, at one stage in the proceedings, Moussaoui appeared to attempt to confess to just this set of facts. Transcript of Arraignment and Motions Hearing, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. Crim. 01-455-A), available at http://www.washingtonpost.com/wp-srv/nation/transcripts/text_moussaoui.htm.

⁸⁹ See, e.g., Philip Shenon, *Future of Terror Case Is in Judge's Hands as Government Continues To Block Testimony*, N.Y. TIMES, July 16, 2003, at A11 (describing Moussaoui's attempts to interview bin al-Shibh).

⁹⁰ *Id.* ("Mr. Moussaoui has insisted that he had nothing to do with the [September 11th] attacks and that Mr. bin al-Shibh could help prove his innocence.")

judge assigned to the case, has insisted that Moussaoui have access to potentially exculpatory evidence as the normal rules of criminal procedure require, but the government has insisted that national security would be compromised by Moussaoui's access to bin al-Shibh's testimony even under the restricted terms that Judge Brinkema approved.⁹¹ When the government openly refused to provide Moussaoui access to exculpatory witnesses, Judge Brinkema dropped those charges against Moussaoui that would have implicated him in the 9/11 attacks and that therefore would have carried the death penalty. She left in place charges that Moussaoui was a member of al Qaeda but ordered that no evidence of Moussaoui's connection with 9/11 could be presented at trial.⁹² This ruling was, for the most part, upheld on appeal.⁹³ However, the final legal resolution is far from clear. One possibility, hinted at in the press, is that the government will use the dropped charges as a reason for classifying Moussaoui with the Guantánamo Bay detainees, eligible only for a military tribunal where such rules about access to exculpatory evidence do not apply.⁹⁴

John Walker Lindh was an American citizen captured while fighting with the Taliban in Afghanistan. At first he was charged with multiple counts that included charges of al Qaeda membership and participation in a knowing attack on an American CIA officer. The plea bargain that was eventually negotiated saw Lindh plead only to having fought with the Taliban while carrying a gun. Because Lindh was an American citizen, he was initially handled through ordinary criminal procedure and his father, a lawyer clever about both the legal and political options available at the time, organized a vigorous legal defense that called the government's bluff about the concrete evidence they had against Lindh. Virtually all of the evidence

⁹¹ Judge Brinkema never required that bin al-Shibh be present in court, but instead ruled that Moussaoui's right to compel witnesses on his behalf was satisfied if U.S. officials asked bin al-Shibh the relevant questions in whatever location they deemed appropriate. *United States v. Moussaoui*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003), *aff'd in part and vacated in part*, No. 03-4792, 2004 WL 868261 (4th Cir. Apr. 22, 2004). Since the government refused to do even this, the judge dropped all 9/11-related charges against Moussaoui. Order, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. Crim. 01-455-A), available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss82903ord.pdf>.

⁹² *Moussaoui*, 282 F. Supp. 2d at 487.

⁹³ *United States v. Moussaoui*, No. 03-4792, 2004 WL 868261 (4th Cir. Apr. 22, 2004). The Court of Appeals for the Fourth Circuit affirmed Judge Brinkema's conclusion that Moussaoui should be granted access to exculpatory witnesses, but remanded the case to the district court to "craft substitutions under certain guidelines." *Id.* at *21. Specifically, the court instructed defense counsel to identify the portions of summarized deposition testimony that Moussaoui wants to admit into evidence and permitted the government to argue for the inclusion of additional portions "in the interest of completeness." *Id.* The court was clear, however, that the government is not to "attempt to use the substitutions to bolster its own case by offering what it considers to be inculpatory statements" and that the substitutions "may be admitted only by Moussaoui." *Id.*

⁹⁴ The rules of evidence that will be in use at the military tribunals indicate at section 8: "The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer." This access may be limited in order to safeguard "protected information" and to protect state secrets. DOD, MILITARY COMMISSION ORDER NO. 1 (2002), available at <http://news.findlaw.com/hdocs/docs/dod/dod032102milcomord1.pdf>.

consisted of Lindh's own statements, gathered in conditions that were arguably coercive. The battle in an ordinary criminal courtroom might have found (not certainly, but perhaps) that Lindh's self-incriminating statements were excludable because of the government's own misconduct in acquiring them. The government refused, for example, to provide Lindh with needed medical assistance until he told investigators what he knew and also refused to notify him that his father had hired a lawyer on his behalf.⁹⁵ Had these failures been judged to constitute coercion in producing the incriminating statements, the government's case would have been substantially weakened. Even if the statements were ruled admissible in the end, the government's handling of Lindh looked bad, and there was television footage plus an internal leak from the DOJ as proof.⁹⁶ Seeing the weakness of their position, the DOJ bargained, a sure sign of business as usual in the criminal justice system.

So far, the handling of Moussaoui and Lindh through criminal indictment and conviction generally has shown the government's commitment to using ordinary criminal process where it can, just as the Clinton administration had done. But there were two early signs even in these cases that the previous status quo for handling terrorists was changing. One came in matters of jurisdiction. While almost all of the Clinton-era terrorism cases were handled in the Southern District of New York, which by then had developed both the security apparatus and the expertise in investigating and prosecuting al Qaeda-related crimes, the new cases were brought in a far more conservative federal jurisdiction, the Eastern District of Virginia. The Southern District of New York could have been used as a venue since it included the World Trade Center and was the location of the primary grand jury that was convened after 9/11 to investigate the attacks. But the DOJ decided instead to hold the trials in the district of the Pentagon attacks, where it could be expected that any random jury would have in it a number of military families and other federal civil servants who were no doubt thought to be more sympathetic to the government's position than New York liberals. Moreover, appeals from the Eastern District of Virginia go to the Fourth Circuit Court of Appeals, widely thought to be the most conservative federal circuit court.⁹⁷ The jurisdictional changes did not signal a breakdown of the normal rules; complex federal cases often

⁹⁵ A DOJ lawyer, Jennifer Radack, went public with the information that she and others in the DOJ had given the advice to the FBI agents interrogating Lindh in Afghanistan that Lindh had to be told of counsel hired on his behalf and had to be given the right to have counsel present if he so desired. Mayer, *supra* note 87, at 58–59.

⁹⁶ Radack, the whistle-blowing DOJ lawyer, has since been dismissed and alleges that her future employment has been blocked by government officials trying to retaliate against her. *All Things Considered: Lindh Whistle-Blower Sees Smear Campaign* (NPR radio broadcast, Jan. 20, 2004).

⁹⁷ Given the split within American legal conservatism between social conservatives who tend to be deferential to authority and libertarian conservatives who are not, a conservative federal court did not necessarily guarantee that the Bush administration would prevail in its "state of exception" arguments. But it was a surer bet than the more ideologically diverse Second Circuit that the Southern District of New York appeals would have reached.

present a legitimate choice of venue. But they did signal that the previous standard operating procedures were under challenge from within the DOJ and that there had been a conscious decision *not* to follow Clinton-era practice by locating the trials in New York.

The other early warning signal that the handling of terrorism suspects was changing came in the controversy over whether John Walker Lindh should have been able to consult with the lawyer his father had hired for him when Lindh was interrogated in Afghanistan. In Clinton-era practice, the DOJ's position had apparently been that suspects interrogated abroad did have the right to counsel and had to be given *Miranda* warnings (though in practice counsel turned out not to be available).⁹⁸ The African embassy bombings trial prominently featured confessions on the part of two of the four defendants, confessions made without a lawyer present. But in those cases, there was no evidence that counsel had been alerted to the suspects' detention and were trying to reach them. Moreover, the African embassy bombing defendants questioned abroad were not U.S. citizens and had never before set foot in the United States, making their only connection with the United States the fact that they would be tried there. Even that was sufficient for Judge Sand to rule that *Miranda* warnings had to be given and that counsel had to be offered, consistent with local availability. Though the judge ruled that the part of the confession that one of the defendants made before the *Miranda* warning was given was inadmissible, the bulk of the confession, which was made after the defendant had signed away his claims to see counsel, was admissible.⁹⁹ One might imagine that since John Walker Lindh was a U.S. citizen with counsel ready to provide legal advice, the full *Miranda* protocol would have been required without adjustment in his case. Both alternative explanations for the counsel-less interrogation that Lindh endured—that either the agents in the field did not get the information that Lindh had counsel or that the DOJ knew but explicitly blocked this information from getting to Lindh¹⁰⁰—foreshadowed some of the hardball tactics that were to come in denying counsel to those suspected of involvement with terrorism post-9/11.¹⁰¹ Arguably, the non-

⁹⁸ The Clinton-era practice can be seen most clearly in the testimony of the FBI agents John Anticev and Stephen Gaudin in the embassy bombings trial, *United States v. Bin Laden*, 132 F. Supp. 2d 168 (S.D.N.Y. 2001). See also Transcript, *supra* note 82. According to these agents, each of the foreign defendants had been informed of their right to counsel, told that there was no counsel that was practically available to them when interrogated abroad, and then given the option of either going forward with the interrogation or refusing to talk. The potentially coercive part of these interrogations could be seen when suspects were told that if they refused to talk to American officials, they would be questioned instead by local officials, whose sense of proper interrogation protocol might be, to say the least, less polite. Not surprisingly, the suspects agreed to talk to the FBI agents. See *Bin Laden*, 132 F. Supp. 2d at 173-81.

⁹⁹ *Id.* at 194.

¹⁰⁰ For evidence of the latter position, see Mayer, *supra* note 87, at 50.

¹⁰¹ Counsel has been routinely denied to those suspected of being enemy combatants, both at Guantánamo and within the United States. Moreover, those rounded up after 9/11 in a preventive detention sweep were routinely denied access to counsel in practical terms, according to the report of the

American suspects in the embassy bombings case were given more constitutional protection than John Walker Lindh was given, even though, as later reports seem to indicate, Lindh had less clear involvement with the terrorists than had the embassy bombing suspects.

The normal rules of operating procedure for treating terrorists as criminals broke down altogether after 9/11 in a general round-up of terrorism suspects, most of whom were Muslim men from countries where al Qaeda was active. Overtly pretextual reasons were used for detaining suspects for whom there was very little (and often no) concrete evidence of their involvement with terrorism but whose suspiciousness to federal officials made them targets of investigation anyway.¹⁰² As then-Assistant Attorney General Michael Chertoff was quoted as saying, the policy of the DOJ in the immediate aftermath of 9/11 was that “we have to hold these people until we find out what is going on.”¹⁰³ Within weeks after the terrorist attacks, it appears that at least 1200 men¹⁰⁴ were rounded up and detained, in many cases for many months.¹⁰⁵ No serious terrorism charge was brought against any of them—all were eventually absolved of direct involvement in 9/11-related activities (at least as far as has been made public).¹⁰⁶ But many of the detainees were deported on the basis of immigration violations, some being quite minor (though it is hard to tell for sure since most

Office of the Inspector General. OFFICE OF THE INSPECTOR GEN. (“OIG”), DOJ, 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 130-142 (2003) [hereinafter OIG REPORT], available at <http://www.usdoj.gov/oig/special/0306/full.pdf>.

¹⁰² For the most thorough evidence to date on the detention of non-Americans after 9/11, see the OIG REPORT, *id.*, required by Congress under the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered titles of U.S.C.), which painted a damning portrait of the pretextual reasons for extended detentions of terrorism suspects who were later cleared.

¹⁰³ See OIG REPORT, *supra* note 101, at 39 (quoting Alice Fisher, head of immigration issues for the Criminal Division of the DOJ). Michael Chertoff has since been confirmed to a seat on the Court of Appeals for the Third Circuit.

¹⁰⁴ The exact figures are not known because the government stopped counting at 1200, after the ever-increasing number had caused much interest from the press. According to the OIG Report, “the Public Affairs Office stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.” *Id.* at 1 n.2. The actual totals will probably never be known.

¹⁰⁵ The OIG Report indicates that, of the 762 detainees who entered the OIG’s purview in this report because they were involved with the immigration system, 89 were held for at least three months, 53 were held for at least four months, 33 were held for at least five months, and another 18 were held for more than six months. But 130 of the 762 cases were coded as having “missing values” because the Inspector General’s office was not able to determine how long the men in question had been confined. *Id.* at 52 tbl.3.

¹⁰⁶ The fact that so many were deported is probably a sign that they were not considered dangerous. It is hard to imagine that the U.S. government would be convinced that someone was involved with terrorism and then would send them off to plot from afar. But the case of Maher Arar, a Canadian citizen deported by the United States to Syria where he claims he was tortured for information, presents another possibility of what may have happened with the deportees. Complaint and Demand for Jury Trial, *Arar v. Ashcroft*, No. 1:04-CV-00249-DGT (E.D.N.Y. 2004), available at http://www.ccrny.org/v2/legal/september_11th/docs/ArarComplaint.pdf.

of the deportation hearings were closed upon the insistence of the DOJ).¹⁰⁷ Other 9/11 detainees were charged with crimes unrelated to terrorism, though the maximum sentences in some of the minor crimes were less than the length of time that the suspect was held in custody awaiting resolution of these cases.¹⁰⁸ Still others were held as “material witnesses” to testify before the grand jury convened after 9/11 to hear terrorism-related evidence, though not all of them actually testified in the end.¹⁰⁹

In the meantime, the DOJ’s own Office of the Inspector General found credible evidence that some of the 9/11 domestic detainees had been beaten while in custody, and that normal rules about access to counsel, bond hearings, and notification of family members were honored primarily in the breach.¹¹⁰ In the post-9/11 roundup of Muslim men, the average length of detention was eighty days, and more than 25% of the detainees were held for more than three months.¹¹¹ Even after deportation orders were given, many of the detainees were still held in U.S. custody to allow investiga-

¹⁰⁷ The DOJ took the view that all hearings of the 9/11 detainees were to be summarily closed to the public and to the press since national security information might be released. This claim met different fates in different circuits. The Sixth Circuit Court of Appeals rejected the DOJ argument, insisting that each hearing had to be presumptively open until such time as the government could demonstrate that the release of a specific piece of national-security sensitive information warranted the closure of the hearing. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). But the Third Circuit came out the other way, upholding the government’s claim to close all hearings without having to make an individualized showing. See *N.J. Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

¹⁰⁸ E.g., *United States v. Oulai*, No. 02-00046-CR-J-20-TE (M.D. Fla. 2002) (unreported decision), *aff’d*, 88 Fed. Appx. 384 (11th Cir. 2003) (unpublished table decision). Tony Oulai was a Roman Catholic from West Africa who had been detained trying to board a flight in the United States with flight manuals, “Arabic language materials,” and a stun gun in his checked luggage. He admitted the flight materials and stun gun, but claimed that the foreign language material in question was a French Bible. He was held first as a material witness in the terrorism investigation, then detained on immigration charges which turned out to be unfounded, and finally was jailed because he had allegedly lied to immigration officials who questioned him during his detention. By the time motions were being filed prior to trial on this offense, he had already been held for eight months even though the maximum sentence for the crime with which he was charged was six months. Also, the crime for which he was eventually convicted—lying to immigration officials—would arguably not have occurred if he had not been detained in harsh conditions in the first place. For the details of this case, see Amy Goldstein, ‘I Want to Go Home’: *Detainee Tony Oulai Awaits End of 4-Month Legal Limbo*, WASH. POST, Jan. 26, 2002, at A1; Amy Goldstein, *No Longer a Suspect, But Still a Detainee: U.S. Won’t Release or Deport Prisoner*, WASH. POST, May 27, 2002, at A1; Amy Goldstein, *No Longer Material Witness, West African Still Detained*, WASH. POST, Feb. 15, 2002, at A17; and Jim Schoettler, *September Detainee Cleared of Terrorist Activity: Visitor Still Faces Charge*, FLA. TIMES-UNION, Apr. 2, 2002.

¹⁰⁹ The use of material witness warrants for grand jury proceedings was sharply contested and produced within a few months of each other conflicting district court opinions in the same district on the question of whether material witnesses could be detained indefinitely in conjunction with a grand jury proceeding. The Second Circuit resolved the conflict by ruling in favor of the government’s position that the material witness statute could be used in this way. Compare *United States v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (holding that an innocent person cannot be detained to secure grand jury testimony under the material witness statute), *rev’d*, 349 F.3d 42 (2d Cir. 2003), with *In Re Application of the United States for a Material Witness Warrant*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (holding that the material witness statutes does apply to grand jury witnesses).

¹¹⁰ OIG REPORT, *supra* note 101, at 111-85.

¹¹¹ *Id.* at 51.

tions to continue.¹¹² The result was, in practice, a regime of preventive detention—the holding of suspects in terrorism investigations without terrorism charges and without a sufficient showing of evidence to legally justify the detentions on that basis.¹¹³ Knowing that such a system of pure preventive detention would not be constitutionally permissible for long in the United States, the DOJ adopted a policy of “preventive prosecution”¹¹⁴ in which those suspected of involvement in terrorism would be charged with whatever violation was ready at hand, such as credit card fraud or “spitting on the sidewalk.”¹¹⁵ The fig leaf of legality in the post-9/11 context grew primarily from the insincere assertion that terrorism suspects were really being held for other criminal or administrative investigations, most commonly for immigration violations. In the war on terrorism, the real reason for holding the suspects was often not explicitly charged; instead, the reasons presented to judges for detention were invented to simply hold the suspects in prison until such time as the government deemed them safe to release.¹¹⁶

The next departure from previously normal standards came with the development of new guidelines for surveillance and investigation of terrorism-related activities. While the USA PATRIOT Act has gotten much of the attention in the public criticism of the Bush administration’s approach

¹¹² According to the OIG Report, the Office of Legal Counsel (“OLC”) had produced a memorandum opinion in which it determined that the ninety-day period within which removal of a deportable alien should be accomplished was not mandatory if the alien’s continued detention was “supported by purposes related to the proper implementation of immigration laws.” *Id.* at 106. The memorandum concluded that the detainees were held properly because they were still not yet cleared for terrorist connections, a proper purpose under the immigration laws. As a result, the ninety-day period for removal could be indefinitely extended, according to the OLC. *Id.*

¹¹³ *Id.* at 91–110.

¹¹⁴ The term and the policy were explained by Viet Dinh in his presentation at the annual meeting of the Association of American Law Schools in Atlanta, Ga. on January 3, 2004. Confirmed in email message to author 24 May 2004. In his Leventhal Lecture before the DC Bar, Dinh further detailed the importance of prevention strategies after 9/11. Viet Dinh, “Ordered Liberty in an Age of International Terrorism.” Harold Leventhal Lecture, 7 June 2002. Available at http://www.dcbbar.org/for_lawyers/sections/administrative_law_and_agency_practice/dinh.cfm.

¹¹⁵ Shortly after 9/11, Attorney General Ashcroft announced that aggressive prosecution of minor offenses would in fact be his policy:

Robert Kennedy's Justice Department, it is said, would arrest mobsters for spitting on the sidewalk if it would help in the battle against organized crime. It will be the policy of this Department of Justice to use same aggressive arrest and detention tactics in the war against terror. Let the terrorists among us be warned: If you overstay your visas, even by one day, we will arrest you. If you violate a local law, we will hope that you will and work to make sure that you are put in jail and be kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.

Morning Edition: President Bush, Tom Ridge and John Ashcroft on Ways to Right Terrorism (NPR radio broadcast, Oct 25, 2001).

¹¹⁶ What I have not been able to figure out, however, is whether judges presiding over criminal proceedings on charges of credit card fraud or perjury, for example, were told about the suspicions of terrorist activities before or during the trial, or at sentencing time.

to the 9/11 investigations, much of what the USA PATRIOT Act contained was nothing particularly new, even though it might be justifiably described as disturbing.¹¹⁷ Moreover, the new powers were generally attached to sunset provisions that expire at the end of 2005. As the Federalist Society White Paper on the criminal procedure provisions of the USA PATRIOT Act put it, “[t]he criminal procedure and related sections of the USA PATRIOT Act of 2001 generally do not ‘push the envelope’ of constitutional limits.”¹¹⁸ The Act did, however, codify practices that had previously been fixed only in court decisions, which makes these practices harder to change after the crisis has passed. Further, some of the provisions were both new and alarming.

The USA PATRIOT Act codified the cramped understanding of the Fourth Amendment search and seizure provision as it had been developed in successive judicial retreats from Warren Court precedents—that only nonconsensual,¹¹⁹ particularly intrusive¹²⁰ searches required full-scale “probable cause” warrants under the Fourth Amendment.¹²¹ Other searches

¹¹⁷ See USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered titles of U.S.C.). By pointing out that many of the USA PATRIOT Act’s provisions constituted nothing new, I do not mean to imply that they are not serious. But after the high point of the Warren Court’s criminal procedure jurisprudence, the tendency of American courts had been to restrict rights granted to criminal defendants, particularly with respect to defendants’ rights in the course of criminal investigations. As a result, many of the “rights” that the USA PATRIOT Act appeared to limit had already been scaled back by courts. Just as the National Security Act represented “nothing new” in placing control of foreign affairs directly into the hands of the president after a particularly hardball interpretation of *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936), so the USA PATRIOT Act did little new, legally speaking, in consolidating the growing set of already defendant-hostile federal court decisions.

¹¹⁸ KENT SCHEIDEGGER ET AL., FEDERALIST SOCIETY WHITE PAPER ON THE USA PATRIOT ACT OF 2001: CRIMINAL PROCEDURE SECTIONS, 2001 FEDERALIST SOC’Y FOR L. & PUB. POL’Y STUD. 17, <http://www.fed-soc.org/Publications/Terrorism/TerrorCrimPro.pdf>.

¹¹⁹ “Nonconsensual” is defined in this area of constitutional criminal procedure as surveillance without the consent of *any* of the parties to the interactions. So, if one person agrees to wear a microphone in order to record the conversation of another person, the recording is considered “consensual” even if the bugged party didn’t agree to it. Such surveillance did not require a probable cause warrant in normal criminal investigatory practice before 9/11.

¹²⁰ “Particularly intrusive” searches are those that involve physically entering a private dwelling or recording conversations in a nonconsensual manner, or otherwise (for example, virtually) monitoring a person’s activities in private places. Observing someone in public, gaining access to information about a person through means available to the general public, or gathering information with the consent of someone who does have legitimate access to the information did not require a warrant before 9/11.

¹²¹ The USA PATRIOT Act authorized the approval of “roving searches” in which a court in Jurisdiction X is now empowered to authorize a wiretap on all of the phones of a particular target, even the phones that were not in Jurisdiction X. This provision was urged to streamline the prior process in which separate warrants were required in each jurisdiction where there was a target phone. See USA PATRIOT Act § 216 (regarding trap and trace orders). The principle of roving searches was extended to physical searches in Section 219 and to email content in Section 220.

For a particularly helpful review of the circumstances under which warrants were not required for search, detention and arrest under federal criminal procedure before the USA PATRIOT Act, see Theodore P. Metzler et al., *Thirtieth Annual Review of Criminal Procedure: Warrantless Searches and Seizures*, 89 GEO. L.J. 1084 (2001).

(including examining private databases,¹²² monitoring public places, and interviewing friends and acquaintances) did not require probable cause warrants even before the USA PATRIOT Act went into effect, and the USA PATRIOT Act could be seen as simply consolidating these judicial understandings. Some, though significantly not all, courts had previously agreed that “sneak and peek” searches (in which the target of the search would not be notified immediately that such a search had occurred) were not violations of Fourth Amendment search standards before such a provision was included in the USA PATRIOT Act.¹²³

¹²² For example, prior to the passage of the USA PATRIOT Act, it had not been clear whether telephone and electronic communications (cable and Internet) providers had to notify their customers when law enforcement officers asked for personally identifiable information. Now it is clear that law enforcement may require communications providers to keep such information secret from the targets of the investigation. This provision does not sunset. The USA PATRIOT Act still allows cable operators to keep private video subscription records. *DOYLE, TERRORISM*, *supra* note 4, at 11. Service providers were already under obligation to assist law enforcement when asked. *Id.* at 19.

¹²³ The circuits were divided on this issue before Congress wrote the USA PATRIOT Act. The Fourth Circuit had already ruled that delayed notification of searches and seizures of intangible evidence were not violations of the Fourth Amendment. *See United States v. Simons*, 206 F.3d 392 (4th Cir. 2000). But the Ninth Circuit had said that they were unconstitutional. *See United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986). The Second Circuit took a position somewhere in between, declining to address the constitutional question by locating the disclosure requirement in Rule 41 of the Federal Rules of Criminal Procedure. *See United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993). In a related context, the Supreme Court has held in the “knock and announce” situation that police do not have to announce their entry into a dwelling beforehand if “it would inhibit the effective investigation of the crime.” *See Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). More recently, the Court held that a fifteen- to twenty-second pause between the knock and announcement and a forcible entry passes constitutional muster if the police believe that evidence may be destroyed with a longer delay. *See United States v. Banks*, 124 S. Ct. 521, 526 (2003). If the Court would countenance police knocking down the door without announcing themselves first or waiting only the briefest time after doing so, it seems hard to imagine that the Court would require the police to announce surreptitious searches in the absence of the target contemporaneously with the search. The “sneak and peek” provision of the USA PATRIOT Act does not sunset.

FISA¹²⁴ had already allowed senior FBI officials to gain access to the

¹²⁴ FISA was passed in 1978 as a way of regularizing American spying on foreign spies. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, §§ 101-11, 92 Stat. 1783, 1783-96 (codified as amended at 50 U.S.C. §§ 1801-11 (2000)). But the reach of FISA includes all those who are “agents of foreign powers.” A “foreign power” is, significantly, not limited to governments. As defined in FISA, a “foreign power” is:

- (1) a foreign government or any component thereof, whether or not recognized by the United States;
 - (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
 - (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
 - (4) a group engaged in international terrorism or activities in preparation therefor;
 - (5) a foreign-based political organization, not substantially composed of United States persons;
- or
- (6) an entity that is directed and controlled by a foreign government or governments.

50 U.S.C. § 1801(a) (2000).

Part 5 is of particular concern since any foreign-based political organization—Amnesty International, the Human Rights Committee of the International Bar Association, or the Catholic Church, for example—could easily count as a foreign power under this definition.

An “agent of a foreign power” is defined in FISA as:

- (1) any person other than a United States person, who—
 - (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) [see above—this is a reference to terrorist groups];
 - (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or
- (2) any person who—
 - (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;
 - (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;
 - (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;
 - (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or
 - (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

Id. § 1801(b).

For the purposes of FISA, a “United States person” includes citizens, permanent resident aliens, organizations consisting primarily of U.S. natural persons, and U.S.-registered corporations. § 1801(i). As a result, there are laxer standards for spying on those who are not U.S. persons; only their connection to a “foreign power” has to be established. For U.S. persons, evidence of some criminal activity seems to be required, though § 1801(b)(2)(E) seems to allow the nexus between the individual and criminal activity to consist only of “aiding or abetting” a crime. All parts of the statute pertaining to U.S. persons require specific knowledge. For more on FISA, see the Federation of American Scientists’ Intelligence Resource Project’s listing of primary documents. Fed’n of American Scientists, Intelligence Resource Project: Foreign Intelligence Surveillance Act, at

records of common carriers, public accommodation providers, physical storage facility operators, and vehicle rental agencies in their surveillance of foreign agents before the USA PATRIOT Act.¹²⁵ The USA PATRIOT Act extended the range of objects that could be sought to include “any tangible things (including books, records, papers, documents and other items).”¹²⁶ It also extends the number of officials who may ask for such records.¹²⁷ The more radical extension of the FISA search provision is that items that are sought need not directly relate to an identified “foreign agent,” but may be sought in conjunction with any investigation into international terrorism more generally.¹²⁸ All that the government must demonstrate in these cases, then, is that the information might be relevant to a terrorism investigation in general, not that it implicates a particular person who is the target of the FISA warrant. And the government may then insist that the person or organization on whom the warrant is served not reveal that the information was ever sought.¹²⁹ In another change, FISA warrants previously had to specify the precise locations where the surveillance would be carried out; under the USA PATRIOT Act, so-called “roving warrants” are permitted, broadening all FISA warrants to include any location (including locations not named in advance) where the target is likely to be.¹³⁰ Such warrants were also extended from having a 90-day limit to having a 120-day limit.¹³¹ Nonetheless, all of these provisions broadening the timing and locations of valid FISA warrants and the set of objects to which they may apply are set to sunset at the end of 2005 unless they are renewed.¹³²

To my mind, the most worrisome novel aspect of the USA PATRIOT Act involves the changes the Act made to the threshold standard for getting a FISA warrant in the first place. Before the USA PATRIOT Act, a FISA warrant could only be issued upon a government showing that national security surveillance was “the purpose” of the search. This limited FISA warrants to instances where the government could assert to the Foreign Intelligence Surveillance Court (“FISC”) that the surveillance was undertaken exclusively for national security purposes.¹³³

<http://www.fas.org/irp/agency/doj/fisa/> (last modified May 6, 2004). See also *infra* notes 164–175 and accompanying text.

¹²⁵ 50 U.S.C. §§ 1801–1810 (2000).

¹²⁶ USA PATRIOT Act § 215. This provision sunsets through Section 224.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* Unlike in the “sneak and peek” provisions, where the target of the search has to be notified eventually, even if with a delay, the FISA provisions require perpetual secrecy.

¹³⁰ *Id.* § 206. This provision sunsets through Section 224.

¹³¹ *Id.* § 207. This provision sunsets through Section 224.

¹³² The sunset provision of the USA PATRIOT Act is contained in Section 224.

¹³³ As Peter Swire notes in a forthcoming article, one way that this assertion was to be accomplished was through the range of signatures that had to appear on the warrant. FISA warrants in their original form under the 1978 legislation had to contain the signatures not only of the lawyer who drafted the warrant, but also those of the head of the intelligence agency and the Attorney General personally. These signatures would reassure the FISA judge that the purpose of the surveillance was what it

The USA PATRIOT Act, significantly, changed this standard so that the government need only assert that “a significant purpose” of the requested surveillance is national security.¹³⁴ This implies that there may be other purposes for surveillance, such as gathering information for criminal investigations. While a number of courts had previously admitted in criminal trials evidence collected under the lower probable cause standards attached to FISA surveillance even before the USA PATRIOT Act was passed,¹³⁵ there was still a meaningful distinction within the DOJ’s investigatory structure between criminal investigations and national security investigations. Peter Swire explains that this distinction (also known as “the wall”) originated with FISA and was policed by the head of the Office of Intelligence Policy and Review (“OIPR”) within the DOJ. Under OIPR’s strict review, intelligence information was occasionally passed on to the criminal investigation side for use in trials, and courts had allowed such evidence to be admitted upon a showing that the information had been originally collected for bona fide national security purposes in the first place. As Swire puts it, “there has always been a gate in the wall.”¹³⁶ Still, there was a wall. Once the standard for issuing FISA warrants was changed by the USA PATRIOT Act, it was only a matter of time before the wall collapsed.

Another clear novelty of the USA PATRIOT Act came in allowing information gathered in the course of a grand jury proceeding to be shared with intelligence services if it relates to the possibility of foreign attack or concerns foreign agents that may be spying or planning assaults on U.S. interests.¹³⁷ Before the Act, grand jury information could only be shared outside the grand jury room for law enforcement purposes.¹³⁸

Changes were also made by the USA PATRIOT Act in the area of immigration law. The attorney general was given broader powers to detain aliens without charges--specifically, upon a showing that he has “reasonable grounds to believe” that those detained are engaged in activity that

claimed to be, and not an attempt to obtain evidence for criminal investigations through this less rigorous channel. Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, GEO. WASH. L. REV. (forthcoming 2004) (manuscript on file with author).

¹³⁴ USA PATRIOT Act § 218.

¹³⁵ In virtually all published opinions in this area, courts seemed always to admit evidence gathered under FISA warrants, though they were divided on what the relevant test was to admit this evidence. Some courts indicated that the original FISA warrant had to indicate that seeking foreign intelligence information was *the* purpose of the search (where “the” purpose implied the “only” purpose). *United States v. Duggan*, 743 F.2d 59, 77–78 (2d Cir. 1984). Other courts indicated that evidence collected under a FISA warrant was admissible in a criminal trial when foreign intelligence gathering was the “primary purpose” for the warrant. *United States v. Pelton*, 835 F.2d 1067, 1074–76 (4th Cir. 1987). The “primary purpose” test was first articulated in a pre-FISA case, *United States v. Truong Dinh Hung*, 629 F.2d 908, 915–16 (4th Cir. 1980). The USA PATRIOT Act significantly changed the relevant test to “significant purpose.” USA PATRIOT Act § 218.

¹³⁶ Swire, *supra* note 133 (manuscript at 20).

¹³⁷ USA PATRIOT Act § 203.

¹³⁸ DOYLE, *TERRORISM*, *supra* note 4, at 7.

threatens national security.¹³⁹ The USA PATRIOT Act limits such detentions to seven days. But Attorney General John Ashcroft adopted an emergency interim rule for detaining aliens on less than probable cause for “an additional reasonable period of time.”¹⁴⁰ Given the lengths of time that the 9/11 detainees were held without being charged,¹⁴¹ one might guess that the government has been operating on the Attorney General’s rule rather than under the USA PATRIOT Act’s more restrictive provisions.

Probably the biggest changes in preexisting law (at least so far as the non-security-cleared can tell) came in the area of investigatory methods authorized not by the USA PATRIOT Act, but instead by the curious legal device known as the “Attorney General Guidelines.”¹⁴² It may come as a surprise to those who have never tracked the technical legal basis of the Federal Bureau of Investigation that it has never had a charter statute—one that sets up the institution in law, explains its mission and generally regulates the contours of its mandate. Instead, the FBI, located within the DOJ, is regulated piecemeal through statutes that provide legal requirements for particular methods of investigation (e.g., procedures to follow before wiretaps can be authorized are given by statute).¹⁴³ But no statute governs the overall shape of investigations and when investigatory tools short of warrant-triggering searches can be used. Instead, these matters are governed by guidelines of the attorney general.¹⁴⁴ These guidelines do not have to pass a notice-and-comment procedure, and do not exist as formal federal regulations at all. Any attorney general can modify them at will without using even the procedure required for the modification of ordinary federal rules.¹⁴⁵

¹³⁹ USA PATRIOT Act § 412.

¹⁴⁰ Custody Procedures, 66 Fed. Reg. 48,334 (Sept. 20, 2001) (codified at 8 C.F.R. pt. 287).

¹⁴¹ The OIG Report indicates that about 16% of the detainees in the Fall 2001 roundup were held for more than ten days without being served with an NTA (notice to appear), which signals the start of the charging process. (For 15% of those detained, there is missing data.) See OIG REPORT, *supra* note 101, at 30 tbl.1.

¹⁴² On the Attorney General’s Guidelines generally, see John T. Elliff, *The Attorney General’s Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785 (1984), and the set of primary documents posted on the Electronic Privacy Information Center website at <http://www.epic.org/privacy/fbi/>.

¹⁴³ For example, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 212 (codified as amended at 18 U.S.C. §§ 2510–20 (2000)), regulates electronic searches.

¹⁴⁴ The practice began with Attorney General Edward Levi after the Church Committee had exposed the excesses of the FBI’s surveillance programs. See Elliff, *supra* note 142.

¹⁴⁵ They are not, for example, in the Federal Register, and getting copies of the guidelines in effect before the emergence of the Internet was exceedingly difficult. In the comparisons that follow, I compare Ashcroft’s guidelines with the most recent version that had been used by the DOJ before 9/11, which were guidelines last amended by Attorney General Dick Thornburgh in 1989. OFFICE OF THE ATT’Y GEN., U.S. DOJ, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY/TERRORISM INVESTIGATIONS (1989) [hereinafter THORNBURGH GUIDELINES], <http://www.usdoj.gov/ag/readingroom/generalcrimea.htm>. As one might imagine, Reagan-era guidelines were already substantially more law-and-order oriented than the first regulations written under the tenure of Edward J. Levi in the aftermath of the Church Commission Report. But that comparison is beyond the scope of this article.

In May 2002, Attorney General Ashcroft issued a new version of these little-noticed guidelines and in so doing made, in my view, even more substantial changes in the normal operating procedure of the FBI in domestic surveillance and investigation than the USA PATRIOT Act did. Ashcroft's guidelines lowered the threshold of suspicion at which agents were allowed to use informants and undercover activities to find out more, indicating that only mail openings and nonconsensual electronic surveillance were categorically prohibited at the "preliminary inquiry" stage. Now such intrusive techniques can be used whenever there is "information or an allegation which indicates the possibility of criminal activity."¹⁴⁶ Whereas earlier guidelines required that an FBI agent go through a series of stages, from checking leads, to initiating a preliminary inquiry, to launching a full investigation, the current guidelines allow agents to move to the full investigation level without going through the earlier stages.¹⁴⁷ The guidelines make explicit the point that "[p]reventing future criminal activity, as well as solving and prosecuting crimes that have already occurred, is an explicitly authorized objective of general crimes investigations"¹⁴⁸ and that the standard for launching a full investigation is a "reasonable indication" that a crime "has been, is being, or will be committed."¹⁴⁹ To drive the point home, the Ashcroft guidelines note, as had earlier guidelines, that "[t]he 'reasonable indication' threshold for undertaking such an investigation is substantially lower than probable cause."¹⁵⁰ The previous guidelines then went on to say: "However, the standard does require specific facts or circumstances indicating a past, current, or impending violation. There must be an objective, factual basis for initiating the investigation; a mere hunch is insufficient."¹⁵¹ The Ashcroft guidelines have dropped that cautionary language. In fact, more aggressive investigations seem to be actively encouraged in the post-9/11 version:

The conduct of preliminary inquiries and investigations may present choices between the use of investigative methods which are more or less intrusive, considering such factors as the effect on the privacy of individuals and potential damage to reputation. Inquiries and investigations shall be conducted with as little intrusion as the needs of the situation permit. It is recognized, however, that the choice of techniques is a matter of judgment. The FBI shall not hesitate to use any lawful techniques consistent with these Guidelines, even

¹⁴⁶ ASHCROFT GUIDELINES, *supra* note 86, at 1. The previous guidelines indicated that these allegations had to be in writing, a requirement that has apparently been dropped. See THORNBURGH GUIDELINES, *supra* note 145, at pt. II(B)(2).

¹⁴⁷ ASHCROFT GUIDELINES, *supra* note 86, at 2.

¹⁴⁸ *Id.* The previous guidelines added at this point: "With respect to criminal activity that may occur in the future but does not yet involve current criminal conspiracy or attempt, particular care is necessary to assure that there exist facts and circumstances amounting to a reasonable indication that a crime will occur." THORNBURGH GUIDELINES, *supra* note 145, at pt. II(C)(2). This sentence has been dropped from the current guidelines.

¹⁴⁹ ASHCROFT GUIDELINES, *supra* note 86, at 2.

¹⁵⁰ *Id.*

¹⁵¹ THORNBURGH GUIDELINES, *supra* note 145, at pt. II(C)(1).

if intrusive, where the intrusiveness is warranted in light of the seriousness of a crime or the strength of the information indicating its commission or potential future commission. This point is to be particularly observed in the investigation of terrorist crimes and in the investigation of enterprises that engage in terrorism.¹⁵²

In addition to changing the level of aggressiveness with which terrorism-related investigations may be initiated, the new guidelines greatly increased the amount of information that may be retained from these investigations by establishing a “database that identifies all preliminary inquiries and investigations conducted pursuant to these Guidelines and that permits the prompt retrieval of information concerning the status (open or closed) and subjects of all such inquiries and investigations.”¹⁵³ Such a database appears to be new. Moreover, in addition to this database of FBI-generated information, another even more sweeping database is authorized by the guidelines, a database that tracks all information that can be discovered about suspected terrorists:

[The database is authorized to contain] pertinent information from any source permitted by law, including information derived from past or ongoing investigative activities; other information collected or provided by governmental entities, such as foreign intelligence information and lookout list information; publicly available information, whether obtained directly or through services or resources (whether nonprofit or commercial) that compile or analyze such information; and information voluntarily provided by private entities.¹⁵⁴

¹⁵² ASHCROFT GUIDELINES, *supra* note 86, at 7.

¹⁵³ *Id.* at 21.

¹⁵⁴ *Id.* at 21–22. “Private entities” may sound innocuous enough, but there are private groups which collect information on their own that the government either would be restricted by federal law in collecting or would have to clear a great many hurdles to gather. The private groups can get this information without such bureaucratic delays and now can provide it on their own initiative to the government, which can then add it to the governmental databases.

The scope of such “private investigations” can be quite breathtaking, causing them to raise serious questions about whether the legal frameworks put in place to regulate the FBI, flexible as they are, are being evaded. As Steven Emerson, head of the Investigative Project, a group specializing in private investigations of Islamist terrorism, has revealed:

People in law enforcement would regularly come to me with new data, records, and documents. The most disturbing were the calls I would get from federal law-enforcement agents who had information and wanted to follow up, but were being prevented by their superiors who weren’t interested in these things. More and more, these disgruntled agents turned to us with information that they weren’t allowed to pursue themselves.

Our operations became more sophisticated and far-reaching. One of the unexplored mountains of evidence we inherited, for example, was the trial exhibits from the first World Trade Center bombing. Included were the records of thousands of phone calls made by the suspects to the Middle East and other parts of the world. We knew the individuals who were placing the calls, but we couldn’t tell who had received them. Yet it was obvious that this was the key to investigating how far the network of international terrorism had extended.

We divided the list of calls up country by country. Then, we engaged a number of Arabic speakers and started making cold calls. Every night at midnight—when the tolls were low and it was daylight on the other side of the world—we would begin dialing numbers in the Middle East. When someone picked up we would engage him in random, nondescript conversation. “How are you? How are things going? I’m calling from the U.S. Do you want to know what’s happening here?” One way or another we tried to get them to talk to us.

In addition to creating new databases for storing information about terrorist suspects and terrorism investigations, the guidelines also indicate that the FBI will be authorized (in a change of policy) to “visit any place and attend any event that is open to the public,” as well as “to conduct online search activity and to access online sites and forums on the same terms and conditions as members of the public generally.”¹⁵⁵ These practices had been explicitly disallowed under the previous guidelines because undercover infiltration of political groups had previously led to shocking abuses.

What is disturbing about the Ashcroft guidelines in the context of a discussion about emergency powers is how unaccountable they are to anything resembling a democratic process. The attorney general can change policy quite radically on just his own say-so without either congressional approval or even a rule-making process that requires public input. And

More than 49 out of 50 calls would be a dead end. The person answering would hang up or wouldn't have any idea of what we were talking about. But that one in fifty proved to be a treasure trove of information. At one point we ended up talking to the son of blind Sheikh Omar Abdel Rahman, the infamous Jersey City imam who plotted a day of terror for Manhattan. Another time we reached the spiritual leader of the Palestinian Islamic Jihad. Little by little it became obvious that all these groups were coordinating their effort in a worldwide network.

Then one day the phone rang, and we hit an absolute gold mine. The caller was a brave Sudanese who was a member of the Republican Brotherhood, a group opposed to Dr. Hassan al-Turabi's fundamentalist regime in Sudan. He was now working as a plumber in Brooklyn. He was in the basement of a building and had just come across scores of boxes of old records that appeared to be the property of Alkhifa Refugee Center, also known as the Office of Services for the Mujahideen, the predecessor to Osama bin Laden's al Qaeda international network. The records had apparently been moved there after the World Trade Center bombing from Alkhifa headquarters at the Al-Farooq Mosque on Atlantic Avenue. He wondered if we would be interested.

We immediately contacted the FBI in New York and Washington. To our utter amazement, they said they couldn't do anything about it. The field agents were very interested but when they ran it up to their superiors, they were told it wouldn't fly. We even smuggled out a few pages to pique their interest but the superiors would not budge. Then we got word that the documents were about to be moved or perhaps even destroyed in about five days.

So we decided to pull off our own covert operation. Our Sudanese contact went into the building at midnight to do his job carrying several large toolboxes. He then immediately emptied the toolboxes and filled them with documents. We met him at the rear of the building in a rented van. We grabbed the toolboxes, each containing about 4,000–5,000 documents, and raced off to a Kinko's in Manhattan where we spent all night feverishly photocopying the material. Then we would race back to the building by 6:00 A.M. and return them to the plumber so he could put them back before the building owners showed up for work. We did this for three straight nights.

The papers contained financial records, address books, information about the fabrication of passports, and countless other materials showing the Alkhifa Refugee Center's involvement in the worldwide jihad movement. When we returned to the building the fourth night, however, our contact didn't show up. We waited and waited but by 7:00 A.M. we were very fearful that something had happened to him. We left and found out later that something had triggered the building owners' suspicion and they had caught him. While we were waiting outside he was being questioned and threatened in the basement. He is a tough guy, however, and somehow got out of it. We ended up keeping the original records instead of copies. Altogether, we only retrieved about one-quarter of the information that was there, but it was great material. We got thousands of leads. Nonetheless, I still think it would have been much better had the FBI gone in.

STEVEN EMERSON, *AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US 19–22* (2002).

¹⁵⁵ ASHCROFT GUIDELINES, *supra* note 86, at 22.

given the secrecy surrounding the authorized investigations, it will be difficult for anyone illegally surveilled to challenge the practices until visible damage has been done. Since the guidelines were issued, Attorney General Ashcroft shows every sign of expanding his powers as far as he can.

Under these new guidelines, Ashcroft pushed the envelope of prior practice by seeking FISA¹⁵⁶ warrants in cases where the clear intent of the FBI was to engage simultaneously in foreign intelligence collection and criminal investigation. The USA PATRIOT Act had officially changed the standard for obtaining FISA warrants from a showing that foreign intelligence was “the purpose” of the surveillance or search to a showing that foreign intelligence was “a significant purpose” of the investigation.¹⁵⁷ The tricky part, legally speaking, came when FISA warrants were requested in order to spy not just on non-resident aliens, who have little protection under FISA, but also on American citizens and green-card holders, who have more. When FISA was first passed, Congress had inserted a special protection that required the government to “minimize”¹⁵⁸ the amount of personal information gathered and retained on “United States person[s]”¹⁵⁹ who were the targets of FISA warrants. This provision was not amended by the USA PATRIOT Act. But Attorney General Ashcroft wanted to increase the amount of information gathered and retained under FISA on U.S. persons for use in criminal investigations related to terrorism. In fact, his memo on the subject indicated that he took the view that the “significant purpose” standard newly introduced to FISA through the USA PATRIOT Act “allows FISA to be used *primarily* for a law enforcement purpose, as long as a significant foreign intelligence purpose remains.”¹⁶⁰ He indicated that requests for FISA warrants could originate with the criminal investigation side of the DOJ rather than the intelligence investigation side.¹⁶¹

While the question of who gets to request a FISA warrant may sound like an arcane organizational matter within the DOJ, it is a distinction of constitutional importance. The Fourth Amendment applies in full to warrants sought for ordinary criminal searches and surveillance, and the spe-

¹⁵⁶ For the details of FISA warrants, see *supra* note 124.

¹⁵⁷ USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291.

¹⁵⁸ 50 U.S.C. §§ 1801(h), 1821(4) (2000).

¹⁵⁹ § 1801(i). This is the term of art used in FISA to refer primarily to American citizens and green-card holders.

¹⁶⁰ Memorandum from John Ashcroft, U.S. Attorney General, to Director, FBI, et al., at pt. I (Mar. 6, 2002), available at <http://fas.org/irp/agency/doj/fisa/ag030602.html>. The memo indicates that “[t]he Criminal Division and OIPR [Office of Intelligence Policy and Review] shall have access to all information developed in full field FI [foreign intelligence] and FCI [foreign counterintelligence] investigations,” *id.* at pt. II.A., which meant that there were, in essence, no minimization procedures that would consistently redact information about American citizens or green-card holders who came under foreign intelligence surveillance. While the previous rule was that information would stay within foreign intelligence investigations unless there were special permission to share it with the criminal side, the new rule implies that all information will be shared unless there are special reasons not to.

¹⁶¹ “Correspondingly, the Attorney General can most effectively direct and control such FI and FCI investigations only if all relevant DOJ components are free to offer advice and make recommendations, both strategic and tactical, about the conduct and goals of the investigations.” *Id.* at pt. I.

cific grounds for getting those warrants is given in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.¹⁶² For Title III surveillance warrants, the standard is that probable cause be shown that a crime has been, is being, or is about to be committed before such a warrant shall be given.¹⁶³ FISA warrants also have a probable cause standard, but the only probable cause that must be shown in the case of “non-U.S. persons” is that the target of the warrant is an agent of a foreign power,¹⁶⁴ both an easier and a different thing to prove. But even though Title III and FISA warrants both authorize intrusive surveillance, FISA warrants are easier to get in the first place and more powerful when gotten. FISA warrants are authorized for longer periods of time, require no notice to the surveilled party, and allow all records of the surveillance to be kept secret, even if the information is later introduced at trial.¹⁶⁵ If all criminal investigations in the terrorism field can proceed with FISA warrants instead of Title III warrants, then the Fourth Amendment has been effectively bypassed. By indicating that the DOJ would share all information between the criminal side and the intelligence investigation side of the department, Ashcroft was proposing to eliminate altogether the Fourth Amendment requirements that might otherwise apply to terrorism-related searches and surveillance.

And the changes do not just affect aliens. The FISA statute requires that the information collected and stored on U.S. persons be “minimized,” which is to say that when citizens and green-card holders are under surveillance, a narrower range of information can be collected in the first place and this narrower range of information is subject to stricter rules about retention and distribution than would be the case if non-U.S. persons were under surveillance. As part of his newly aggressive posture post-9/11, Ashcroft proposed new “minimization procedures” to apply to U.S. persons in the context of specific applications for FISA warrants before the FISC.¹⁶⁶ But the court balked at approving these minimization procedures, even though the court approved the warrants themselves. This was significant, because in its nearly twenty-five years of operation, there is no evidence that the FISC had ever refused to approve the full request of the DOJ.¹⁶⁷

¹⁶² Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510–20 (2000)).

¹⁶³ § 802, 82 Stat. at 218 (codified as amended at 18 U.S.C. § 2518(3) (2000)).

¹⁶⁴ For a more detailed contrast between Fourth Amendment and FISA warrants, see Swire, *supra* note 133. For U.S. persons, an additional showing that the target knowingly engage in potentially criminal activity is also required. 50 U.S.C. § 1801(b).

¹⁶⁵ *Id.*

¹⁶⁶ The FISC, which was set up by Congress in FISA, is an Article III court staffed with district court judges who are empowered to approve FISA warrant requests. 50 U.S.C. § 1803(a) (2000).

¹⁶⁷ Though the warrants themselves and everything they produce is secret, under the terms of FISA, the FISC must report on the number of warrant requests and the number of warrants granted each year. 50 U.S.C. § 1807. These reports are publicly available, and it is from these reports that we can see that the FISC has never rejected a warrant request. For FISC statistics, see FISA Statistics, *supra* note 85. The secrecy surrounding FISA warrants is otherwise so complete that any details of the warrant requests to this court are secret not just at the moment when they are made, but perpetually. Even when parts of a FISA wiretap are used against a defendant in a criminal case, the defendant may not be al-

Convening an unprecedented en banc panel of all the FISC judges, the court ruled that the Ashcroft request went too far and that the proposed unlimited information sharing between those who were authorized to conduct intelligence investigations and those who were authorized to conduct criminal investigations within the DOJ violated FISA with respect to U.S. persons.¹⁶⁸ Though the court might have gone further to say that the Ashcroft practices violated the U.S. Constitution by circumventing the Fourth Amendment altogether, the court refrained from dealing with the constitutional issues.¹⁶⁹

Though the specific warrants requested were in fact issued (with some modifications pertaining to proposed minimization standards),¹⁷⁰ the DOJ fought the FISC's judgment on the new minimization procedures by appealing to the never-before-convened Foreign Intelligence Surveillance Court of Review ("FISCOR")¹⁷¹ for a further ruling. FISCOR, in a decision far more sweeping than the decision below, ruled that the USA PATRIOT Act had changed the ground rules for sharing information between intelligence and criminal investigations and that the DOJ could therefore get FISA warrants to investigate even U.S. persons regardless of whether the search or surveillance was used for intelligence purposes or criminal investigation purposes.¹⁷² As long as the search or surveillance gathered information that could be used for intelligence purposes, criminal investigation could even be the primary motive for the information.¹⁷³

With this substantial victory, there is no reason for the DOJ to go the more onerous Fourth Amendment route to gather information in international terrorism investigations. As a result, the Fourth Amendment "probable cause" standard has been replaced by the FISA "probable cause" standard, which requires only probable cause that the non-U.S. person to be investigated is an agent of a foreign power, not necessarily that they have committed or are about to commit a crime. And even though a FISA warrant still requires demonstration of some connection to a criminal activity in the case of U.S. persons, Ashcroft's statement that he intends to throw the book at potential terrorism suspects for "spitting on the sidewalk," indi-

lowed to see the raw material from which quotations were selected or even to see the original in a foreign language when all that is introduced in court is the translation. For a more detailed explanation, see Swire, *supra* note 133 (manuscript at 31).

¹⁶⁸ *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 625 (Foreign Intel. Surv. Ct. 2002).

¹⁶⁹ *Id.* at 615 (noting that the constitutional issues are not addressed).

¹⁷⁰ Under the terms of FISA, an appeal can only be made from denial of a warrant request. 50 U.S.C. § 1803(b). Because the warrant requests in this case were modified before being granted, the DOJ appealed the modification even though the warrant was granted. This might have raised questions about whether the decision below could in fact be appealed, but the Foreign Intelligence Surveillance Court of Review was not deterred from ruling because of this minor point.

¹⁷¹ The FISCOR is another special court created by FISA. See § 1803(b).

¹⁷² *In re Sealed Case*, 310 F.3d 717, 734 (Foreign Int. Surv. Ct. Rev. 2002).

¹⁷³ *Id.* at 731 (noting that the prosecutor's ability to advise the FBI in intelligence investigations should not be limited).

cates that the criminal nexus can be quite minimal. As a result, FISA can be used quite widely to substitute for the traditional Title III, Fourth-Amendment-based warrant, even for U.S. citizens and green-card holders.

The impact of this extraordinary change on the application of the Fourth Amendment to terrorism investigations was itself deliberately minimized by the FISCOR in the rather stunning statement:

Our case may well involve the most serious threat our country faces. Even without taking into account the President's inherent constitutional authority to conduct warrantless foreign intelligence surveillance, we think the procedures and government showings required under FISA, *if they do not meet the minimum Fourth Amendment warrant standards, certainly come close*. We, therefore, believe firmly . . . that FISA as amended is constitutional because the surveillances it authorizes are reasonable.¹⁷⁴

As the court slipped from requiring that a statute actually meet the tests that the Constitution sets to being satisfied if the statute "comes close," the statutory requirement that there be minimization procedures to redact information gathered about American citizens and green-card holders also seemed to disappear. The FISCOR decision breathtakingly permitted both the protections for U.S. persons Congress had put into the Act (and had not amended with the USA PATRIOT Act) and the more general requirements of the Fourth Amendment to vanish amid the claims that the country is under serious threat. When this decision was issued in November 2002, more than a year after the terrorist attacks, the state of emergency became firmly entrenched.¹⁷⁵

The changed trigger mechanisms for when investigations may be performed, who has to approve them, how much judicial oversight they require, and what can be done with the evidence collected are all, in my view, bigger changes in existing law than those made directly under the USA PATRIOT Act. They have also moved the United States further and further away from what had been established as the normal operating rules for domestic criminal and intelligence investigations. Though the Constitution does not seem to contemplate any situation in which the Fourth Amendment might be suspended in a time of crisis, the Fourth Amendment has effectively been suspended for the purposes of terrorism-related investigations.

Finally, there has been the very serious move away from anything resembling normal procedure in the case of the two U.S. citizens who have been detained indefinitely without charges, without counsel, and with almost no constitutional review. According to the government, Yaser Hamdi was captured on the battlefield in Afghanistan, taken to the special detainees' camp at Guantánamo Bay, and then discovered to be a U.S. citizen.¹⁷⁶

¹⁷⁴ *Id.* at 746 (emphasis added).

¹⁷⁵ Proceedings before the FISA courts are *ex parte* proceedings, so there is no knowledgeable losing party who could appeal this decision. See 50 U.S.C. § 1805(a) (2000).

¹⁷⁶ *Hamdi v. Rumsfeld*, 316 F.3d 450, 460 (4th Cir. 2003)

He was removed from Guantánamo, taken to the U.S. mainland, and put in a military jail as an “enemy combatant” without access to counsel and, as far as the courts have been concerned thus far, without the ability to require the government to put forward more than a small amount of evidence to justify his indefinite detention.¹⁷⁷ The government has presented as evidence only a second-hand declaration by a political appointee in the DOD to the effect that Hamdi was indeed captured on the battlefield and has been classified by the President as an enemy combatant.¹⁷⁸ While at a trial this evidence would be considered multiple hearsay and would not be admissible, this declaration was enough to satisfy the Fourth Circuit, which approved Hamdi’s indefinite detention without counsel, formal charges, or trial.¹⁷⁹ The Supreme Court recently granted certiorari and heard arguments on this case.¹⁸⁰

The other case of a domestic “enemy combatant” involves José Padilla, an American citizen of Puerto Rican descent who was born in New York and convicted of murder in Chicago.¹⁸¹ While in prison, Padilla apparently converted to Islam, and upon his release, sought to join al Qaeda, according to the government’s statement. Padilla flew to Pakistan and crossed over into Afghanistan where he allegedly volunteered his services to al Qaeda, although it is not clear from the government’s statements in the matter

¹⁷⁷ The Fourth Circuit upheld the government’s detention of Hamdi but limited its holding almost entirely to its asserted facts:

Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the U.S. Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the [habeas] petition.

Id. at 459.

As critics of the decision have noted, one reason why the evidence against Hamdi is “undisputed” is that he was never allowed to meet with a lawyer or to put forward evidence on his own behalf.

¹⁷⁸ The “Mobbs Declaration,” named after Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, listed only bare bones facts against Hamdi without indicating sources and without providing vital context. A summary of what the Mobbs Declaration said in *Hamdi* can be found in the petition for certiorari to the U.S. Supreme Court filed by Hamdi’s lawyer, Frank Dunham, who has never met his client. Petition for Writ of Certiorari, *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004) (No. 03-6696), available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums100103pet.pdf>.

¹⁷⁹ On this, even the normally deferential Fourth Circuit almost balked. As the court said:

We did not order the petition [for habeas review] dismissed outright, however, noting our reluctance to “embrac[e] [the] sweeping proposition . . . that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.” Rather, we sanctioned a limited and deferential inquiry into Hamdi’s status, noting “that if Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan, the government’s present detention of him is a lawful one.”

Hamdi, 316 F.3d at 461 (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002)) (alterations in original).

¹⁸⁰ *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004) (mem.). The Court heard oral arguments on Wednesday, April 28, 2004, but as of the time I write, no decision has been issued.

¹⁸¹ For the only facts we know about Padilla’s case, see Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy 2 (Aug. 27, 2002), <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf>.

whether, or for what purposes, his offer was taken up.¹⁸² Upon his return to the United States, Padilla was arrested at O'Hare Airport in Chicago, and flown to New York City to appear as a material witness before the grand jury convened there.¹⁸³ But before he could testify, he was taken into military custody and removed from New York. His lawyer first learned about Padilla's disappearance when she went to meet with him and found that he was no longer held in New York.

Donna Newman, Padilla's court-appointed lawyer under the material witness warrant, started a long fight in which she attempted to figure out where her client had been taken. Once she determined that Padilla had been sent to a military brig and declared an enemy combatant by President Bush, she began a legal battle to have his case reviewed by the federal courts on a habeas petition. The DOJ, however, took the position that Padilla was not entitled to see his lawyer, that he could be held indefinitely as an enemy combatant in a military jail without charges or without any means of communication with the outside world, and that he was in general beyond the reach of the ordinary legal system. The DOJ argued that habeas review was simply not available to those whom the President had deemed enemy combatants.¹⁸⁴

Since Padilla was not captured on the battlefield, his case has received different treatment in the courts from that of Hamdi. Padilla's case was heard in the federal District Court for the Southern District of New York because his original detention was in New York, so the direct conflict with the rulings from the Eastern District of Virginia were also muted. Judge Michael Mukasey held that Padilla was entitled to challenge his detention on a habeas petition but, unlike Hamdi, Padilla was also entitled to meet with his lawyer and prepare a defense.¹⁸⁵ Unfortunately for Padilla, however, the judge also ruled that the government could hold him upon the showing of only "some evidence" that he was an enemy combatant.¹⁸⁶ "Some evidence" is a far cry from the level of proof that would normally be required for long-term detention if this case were treated within the normal criminal justice system. Furthermore, it has been unclear how Padilla could successfully show that the government had failed to meet this low standard. Even with this government-friendly ruling, the DOJ challenged Mukasey's decision, refusing to allow Padilla's lawyer access to

¹⁸² Here, too, the only evidence presented by the government to justify indefinite detention without the right to counsel is yet another hearsay upon hearsay declaration by Michael Mobbs. *See id.*

¹⁸³ *Id.* at 4.

¹⁸⁴ For the government's argument, see the Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, *Padilla v. Bush* (S.D.N.Y.) (No. 02 Civ. 4445 (MBM)), <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf>, as well as the government's brief on the merits in the case before the Supreme Court, Brief for Petitioner, *Rumsfeld v. Padilla*, (2004) (No. 03-1027), http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/192/Padilla_BriefForThePetitioner.pdf.

¹⁸⁵ *Padilla v. Bush*, 233 F. Supp. 2d 564, 605 (S.D.N.Y. 2002).

¹⁸⁶ *Id.* at 608.

him,¹⁸⁷ and, having obtained certification from Judge Mukasey, the government launched an interlocutory appeal of Judge Mukasey's decision to the Second Circuit Court of Appeals.

The Second Circuit made an even more forceful decision on Padilla's behalf.¹⁸⁸ Ruling that Padilla had the right to consult with counsel (all three judges on the panel agreed on this), the two-judge majority held that the President had no authority to detain a U.S. citizen as an enemy combatant on American soil, absent explicit authorization of Congress.¹⁸⁹ Aware of the seriousness of the situation, the court reframed the legal question as one about separation and sharing of powers,¹⁹⁰ rather than about presidential power, taken alone. The court took particular note of the Non-Detention Act, which specifies that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,"¹⁹¹ and indicated that the President had no power, even under the Commander-in-Chief Clause of the Constitution, to detain an American citizen on American soil without the express authorization of Congress.¹⁹² The Joint Resolution passed by Congress in the immediate aftermath of 9/11 failed to provide such explicit authorization, the court held, ordering Padilla released from military custody within thirty days.¹⁹³ But Padilla has not yet been released, pending a determination by the Supreme Court, which granted certiorari in his case.¹⁹⁴

The domestic enemy combatant cases have generated a great deal of criticism, from human rights organizations¹⁹⁵ to the American Bar Associa-

¹⁸⁷ *Padilla v. Bush* was adhered to, on reconsideration, by *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *application granted*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003), which found that because the petitioner was not apprehended on the battlefield, counsel for petitioner had to be able to meet with him to develop the facts of the case; otherwise the court could not assess whether the petitioner had been detained arbitrarily.

¹⁸⁸ See *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

¹⁸⁹ *Id.* at 720.

¹⁹⁰ The opinion states:

As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the President is obligated, in the circumstances presented here, to share them with Congress.

Id. at 699.

¹⁹¹ 18 U.S.C. § 4001(a) (2000).

¹⁹² *Padilla*, 352 F.3d at 720.

¹⁹³ The government filed a motion to stay the decision until the case could be heard by the Supreme Court. See *Affirmation in Support of Respondent's Motion to Stay the Mandate, Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (Nos. 03-2235(L.) and 03-2438(Con.)), <http://news.findlaw.com/hdocs/docs/padilla/padrums11604staymot.pdf>. Oral argument was held on Wednesday, April 28, 2004, but as of the time I write, no decision has been issued.

¹⁹⁴ *Rumsfeld v. Padilla*, 124 S. Ct. 1353 (2004) (mem.) (granting certiorari).

¹⁹⁵ See, e.g., Press Release, Amnesty International, USA: One Year in Detention Without Charge (June 9, 2003), at <http://web.amnesty.org/library/index/ENGAMR510852003>; HUMAN RIGHTS WATCH, WORLD REPORT 2002: UNITED STATES, at <http://www.hrw.org/wr2k2/us.html> (last visited May 3, 2004).

tion.¹⁹⁶ The cases have generated an unusual number of amicus briefs in the Supreme Court.¹⁹⁷ Even those who have otherwise taken the view that the war on terrorism requires exceptional means have found that the enemy combatant cases go too far. Instead of altering the usual rules of criminal procedure, the enemy combatant cases infringe on more fundamental structural principles of American constitutional government, like the separation of powers which requires independent judicial review of executive action, especially as it pertains to the treatment of individual citizens and the basic right of personal liberty.

Since 9/11 there has been a steady erosion of normality in the government's response to terrorism. While one may have expected the sharpest violations of the state of normality to come right after the attacks in a kind of emotional reaction to the shock of the event, the trajectory has actually been quite different. Instead of declining over time, the number of efforts to claim exception—to argue that unusual times call for unusual measures—has in fact *increased* over time as the shock of 9/11 fades.

Perhaps most pronounced is the Bush administration's increasing effort to avoid regular judicial procedures at all by trying to bring the war on terrorism entirely within the executive branch and minimizing the influence of both Congress and the courts. While the earliest 9/11-related cases were in fact brought in the federal courts under regular criminal procedure (*United States v. Moussaoui*¹⁹⁸ and *United States v. Lindh*¹⁹⁹), the post-9/11 roundup cases have been handled on a different model. They were processed primarily through administrative law courts,²⁰⁰ rather than through regular Article III courts, because they were assimilated, often pretextually, into the system of immigration control rather than the system of crime control. As 2002 progressed, the Attorney General guidelines were promulgated, changing the ground rules for terrorism investigations quite radically.²⁰¹ From all an outsider can see, the DOJ's methods for handling

¹⁹⁶ See AM. BAR ASSOC., TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, REVISED REPORT TO THE HOUSE OF DELEGATES (2003), <http://news.findlaw.com/hdocs/docs/aba/abarpt21003cmbtnts.pdf>.

¹⁹⁷ An archive of the amicus briefs in the *Hamdi* and *Padilla* cases can be found in collections maintained by the law firm Jenner & Block. See *U.S. Supreme Court Brief Resource Center: Hamdi v. Rumsfeld*, at <http://www.jenner.com/hamdi> (last visited May 3, 2004); *U.S. Supreme Court Brief Resource Center: Rumsfeld v. Padilla*, at <http://www.jenner.com/padilla> (last visited May 3, 2004).

¹⁹⁸ 282 F. Supp. 2d 480 (E.D. Va. 2003).

¹⁹⁹ 227 F. Supp. 2d 565 (E.D. Va. 2002).

²⁰⁰ Administrative law judges do not have the same formal guarantees of independence as their Article III counterparts. In general, also, administrative proceedings, like deportation hearings, have been deemed by regular court decisions prior to 9/11 not to require the full constitutional criminal procedure protections that would be mandated in a criminal trial. To take one particularly relevant example, since the mid-1990s (as a result of the anti-terrorism laws passed after the Oklahoma City bombing), immigration hearings can use "secret evidence" that the defendant and his/her lawyer cannot see, but that is only shown to the judge. This serious abridgment of the Confrontation Clause would clearly not be tolerated in an ordinary criminal case.

²⁰¹ See *supra* notes 144–155 and accompanying text.

terrorism investigations have gotten more extreme and more “exceptional” the further we get from 9/11.

There is also a sign that terrorism investigations have been increasingly using methods that no longer require regular Fourth Amendment judicial warrants. Instead, the DOJ has indicated that it prefers to go to the FISC,²⁰² which proceeds on the basis of evidence that never has to be revealed and which has never in its twenty-five-year history refused to grant a warrant when asked.²⁰³ In addition, despite being required to do so by the USA PATRIOT Act,²⁰⁴ the DOJ has reported only grudgingly on its use of USA PATRIOT Act provisions to the Congress.²⁰⁵ And the minimal information given so far has not enabled the Congress to engage in reasonable oversight of the terrorism investigations, as both Republican and Democratic members of Congress have noted.²⁰⁶

The avoidance of separation of powers constraints in the domestic war on terrorism has reached its height with the claimed presidential power to label suspect individuals as enemy combatants who are immune from legal process altogether. The “enemy combatant” label has dispensed with the need to provide substantial evidence to hold a suspect in custody, according to the Bush administration—and this pertains not only to aliens, but also to American citizens. But the ability of the president to designate “enemy combatants” is given neither directly by the Constitution nor by statute. It has been asserted on the basis of the constitutional commander-in-chief power to conduct wars as the president sees fit. The arguments in these cases have so far revealed that the President is willing to provide little more than general assertions about the alleged enemy’s activities. And the executive branch has denied that the courts even have jurisdiction to hear

²⁰² By now, Title III warrants account for only 25% of the total warrants obtained at the federal level. FISA warrants constitute 75% of electronic surveillance orders. Compare FISA Statistics, *supra* note 85, with ADMIN. OFFICE OF THE U.S. COURTS, 2001 WIRETAP REPORT 15-17 tbl. 2 (2002), <http://www.uscourts.gov/wiretap01/table201.pdf>.

²⁰³ For the FISC review statistics, see FISA Statistics, *supra* note 85.

²⁰⁴ USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (instructing the Inspector General to prepare reports on civil liberties abuses).

²⁰⁵ The fourth such report was issued by the Inspector General (“IG”) of the DOJ on January 27, 2004. But the report provides few specifics compared with the more in-depth report done on the 9/11 detainees. In particular, the IG seems to have ruled almost all complaints out of his jurisdiction because they do not involve actions by DOJ employees. See OFFICE OF THE INSPECTOR GEN., U.S. DOJ, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT, <http://www.usdoj.gov/oig/special/0401a/final.pdf>. But in a world where at least some of the most important information in the war on terrorism is collected privately, see, e.g., *supra* note 167, it may well be that information that would come into government hands in violation of the civil liberties of citizens and residents of the United States would not involve DOJ employees.

²⁰⁶ As one contemporary news story noted:

Many lawmakers said Ashcroft continues to be guarded or unresponsive when presented with questions from Congress about the department’s use of the broad new surveillance and investigative powers given to them by the post-Sept. 11, 2001, USA Patriot Act, despite recent reports that have raised questions about the treatment of immigrant detainees, the increased use of wiretap surveillance, and the use of Patriot Act provisions for non-terrorist crimes.

Emily Pierce, *Ashcroft Rapped Over Oversight*, ROLL CALL, June 9, 2003, at 1.

these cases.²⁰⁷ The government has neither to bring charges, nor to present evidence in a public forum, nor to establish beyond a reasonable doubt that the detained person has done what the government believes the detainee has done. The “enemy combatant” label is the logical endpoint of a process in which the rule of law has been progressively undermined by assertions of executive power to determine when the rules no longer apply. Though the courts have so far shown some substantial nervousness about the breadth of the President’s claims in the enemy combatant cases and the Second Circuit has held that the President flatly does not have this power, the Bush administration has persisted in insisting that it alone can safeguard the nation by determining unilaterally how to fight the “war” on terrorism.

B. The State of Exception in Foreign Policy

Having sketched the contours of the U.S. government’s post-9/11 domestic policy on terrorism, it should not be surprising to find roughly the same general outlines in U.S. foreign policy.²⁰⁸ At first, the deviations from rule-of-law-based practice were minor, but the invocations of the state of exception, justifying a release from the rules, have increased as 9/11 recedes into the distance.

The most visible foreign policy response of the U.S. government right after 9/11 was to look for a military target against which to retaliate. But al Qaeda was not a country, and military doctrine typically operates with countries as targets. The language that had been inserted into the congressional joint resolution authorizing the President to take all “necessary and appropriate force” against those who attacked the United States also included language that extended the authorized use of force to those who “harbored” the attackers.²⁰⁹ The “harboring” language gave the Bush administration domestic permission to launch its military attack against Afghanistan, where the Taliban government had given explicit protection to the al Qaeda forces still there. Furthermore, Afghanistan had clearly served as the physical headquarters of al Qaeda until just before the attacks.

Much of world opinion was on the side of the United States as it prosecuted a war against the battered and impoverished country of Afghanistan.²¹⁰ Many allies offered to fight alongside the United States.²¹¹ The in-

²⁰⁷ Calling the President’s judgment in the matter of enemy combatants a “quintessentially military judgment,” the government argued that the military was better able to handle these cases than Article III courts. Brief for the Respondents in Opposition at 16, *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004) (No. 03-6696), available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums120303gopp.pdf>.

²⁰⁸ I should note that I will only discuss those aspects of foreign policy that are visible to someone who does not have a security clearance. There were no doubt other major changes—such as alterations in the CIA’s rules of engagement or in clandestine collaboration among security services or even an increase in extraordinary renditions, much of which would be outside the public eye.

²⁰⁹ S.J. Res. 23, 107th Cong., 147 CONG. REC. S9413-01 (2001) (enacted).

²¹⁰ See Robin Wright, *Coalition of Exceptional Depth is Forming*, L.A. TIMES, Sept. 30, 2001, at A3 (describing the wide support among nations for the war in Afghanistan). *But see* Ewen MacAskill et

ternational press offered relatively little criticism, while occasionally wondering whether it was either humane or worthwhile to bomb a country where little was left from previous wars.²¹² Understood as a reaction of self-defense in response to a prior military attack, however, the U.S. war against the Taliban government and their al Qaeda friends was widely thought to be justified,²¹³ even if the U.N. Security Council's blessing had not been explicitly sought as international law required.²¹⁴ While the U.S. military was nervous about invading a country that had never been successfully conquered, they were convinced in the end by the support from various allies who made the task easier. For example, the Russians gave permission to the United States to base its troops in former Soviet military bases in the former Soviet Republics of Central Asia. President Musharraf of Pakistan (a country that had been subject to U.S. sanctions since May 1998 for having tested a nuclear weapon) was brought back into the pro-United States fold when he pledged his substantial support for the war against Afghanistan.²¹⁵ Since their own government had supported the Taliban and had in fact been crucial in helping it come to power, the Paki-

al., *Cracks Appear in Coalition*, GUARDIAN (U.K.), Sept. 15, 2001, available at <http://www.guardian.co.uk/wtccrash/story/0,1300,552410,00.html>.

²¹¹ On September 11, the North Atlantic Treaty Organisation ("NATO") indicated that its eighteen (at that time) members would provide "assistance and support" to the United States. Press Release, NATO, Statement by the North Atlantic Council (Sept. 11, 2001), <http://www.nato.int/docu/pr/2001/p01-122e.htm>. On September 12, NATO invoked Article 5 of its charter for the first time in its history, declaring that a member state had been attacked from abroad and that the mutual defense pact would therefore be activated. Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm>. This was confirmed in detail with a further finding on October 12 that the attacks had been carried out by al Qaeda, harbored by the Taliban government in Afghanistan. Update, NATO, Invocation of Article 5 Confirmed (Oct. 2, 2001), <http://www.nato.int/docu/update/2001/1001/e1002a.htm>.

²¹² *Soviet Invasion*, TIMES (London), Oct. 5, 2001 ("If ever there was a place that could do without another war, it is Afghanistan; on the other hand, Afghanistan is already so soaked in blood and bullets that perhaps a just war, fought cleverly, for honest aims, might yet rescue it from its own history."), available at 2001 WL 4935167.

²¹³ See, for example, the open letter signed by a number of prominent American intellectuals that supported the attack. Statement, David Blankenhorn et al., Pre-emption, Iraq, and Just War: A Statement of Principles (Nov. 14, 2002), http://www.americanvalues.org/html/1b__pre-emption.html. Richard Falk defended the limited use of force in Afghanistan in RICHARD FALK, *THE GREAT TERROR WAR* (2003), but seems to have recanted. See Richard Falk, *Letter to the Editor*, NATION, Nov. 26, 2001, at 60.

²¹⁴ The United States probably could have gotten Security Council backing for its attack on Afghanistan but it failed to do so and thus acted, strictly speaking, in violation of the U.N. Charter. See Jonathan I. Charney, Editorial Comments, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835, 836 (2001).

²¹⁵ The United States had slapped sanctions on both India and Pakistan for their nuclear tests, and sanctions against both came off together. See Stephen Collinson, *Bush Administration Moves Towards Lifting India-Pakistan Sanctions*, AGENCE FRANCE-PRESSE, Sept. 22, 2001, 2001 WL 25018917. The fact that President Musharraf seized power in a military coup had resulted in additional sanctions against Pakistan. For the long history of military coups and the attempts of the Pakistani Supreme Court to develop an informed and detailed jurisprudence of emergency, see Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 UTAH L. REV. 1225.

stanis were thought crucial to bringing the Taliban down. In any event, the war in Afghanistan went far more quickly than pundits had predicted as the Taliban government rather rapidly collapsed. Al Qaeda's top leadership, however, went underground and was not captured during the war.

No sooner had the main fighting in Afghanistan stopped, however, when the United States started to claim a new state of exception against well-understood rules of international law. This turned out to be more controversial than taking military action against Afghanistan without a Security Council resolution had been. Confronted with many detainees captured on the battlefield by the various local militias that the United States had pressed into assistance, the U.S. government made a decision to take direct control of some of the captives for interrogation. The government, however, did this without giving the detainees the protection that international law accorded them under the Geneva Conventions by providing access to a "competent tribunal" to establish their status.²¹⁶ Many of the detainees

²¹⁶ The treatment of prisoners of war is generally covered in the Third Geneva Convention, and the "competent tribunal" requirement is contained in Article 5. See Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135 (entered into force Feb 2, 1956) [hereinafter Third Geneva Convention]. The legal advisor to the International Committee of the Red Cross, writing in a personal and not an institutional capacity, urged that the treatment of at least some "unlawful combatants" is covered in the Fourth Geneva Convention. Knut Dörmann, *The Legal Situation of 'Unlawful/Unprivileged Combatants*, INT'L REV. RED CROSS, at 45 (March 2003), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/\\$File/irrc_849_Dorman.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/$File/irrc_849_Dorman.pdf). But the view that there are no gaps in international humanitarian law and that all persons caught in a conflict situation are protected in one way or another under the Geneva Conventions is commonplace. The Bush administration, asserting that the Geneva Conventions did not apply to "enemy combatants" (not a term in use in international law) never attempted to fully justify its exceptions to the Geneva Conventions in legal terms. In one press conference, (former) White House Press Secretary Ari Fleischer said that neither al Qaeda nor the Taliban captives would automatically get Geneva Convention protections, noting that such things depended on whether those captured fought by carrying weapons openly and whether they wore uniforms. But then, under more persistent questioning, Fleischer seemed to admit that the detentions were made subject to no law in particular. A reporter, exasperated at not getting a straight answer about whether the detainees were covered by the Geneva Convention or not, asked, "There's no international convention or there's no law on which we're detaining them, it's basically, they're dangerous, they want to kill Americans, and we're going to keep them in detention." And Fleischer seemed to grant the point in his answer: "Keith, put it this way: There's a war in Afghanistan. These people did not stop fighting; it was either be killed or be captured. These people were captured." See Press Briefing by Press Secretary, The White House (Jan. 9, 2002). This was, obviously, far from the sort of compelling legal analysis that one generally expects a government to undertake when it is going to make exception to a widely agreed upon international convention. The White House eventually issued a fact sheet summarizing the status of Guantánamo detainees under the Geneva Convention on February 7, 2002, indicating that the Taliban detainees would in fact be accorded POW status. See Press Release, The White House, Fact Sheet: Status of Detainees at Guantánamo, (Feb. 7, 2002), <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>; see also Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1 (reporting that the shift in position had been strongly urged by European allies and had been advocated by Secretary of State Colin Powell). The international objections to U.S. conduct in the matter of the detainees are not to the possibility that a particular detainee would eventually be found guilty of war crimes (though as we will see, the specific form of the military tribunals has caused an international outcry). The objections are instead that the United States never held individualized review of particular cases to determine whether those detained were combatants (and if so, for which party) or civilians.

were taken to a hastily constructed camp located in the American military base at Guantánamo Bay, Cuba, halfway around the world.

Why Guantánamo Bay? It appears that this location was chosen because Guantánamo had been previously determined by a number of American courts to be an area that was explicitly not U.S. sovereign territory even though the United States had effective and sole control there.²¹⁷ The absence of U.S. sovereignty meant that American federal courts were quite likely to claim they were largely powerless for jurisdictional reasons to review what occurred there.

*Bird v. United States*²¹⁸ was a pre-9/11 case outside the terrorism context, but it gives the most complete historical account of the special situation at Guantánamo and its juridical implications. The base had been leased from Cuba in 1903 in order “to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense.”²¹⁹ The treaty was renewed in 1934 and while “the current government in Cuba may not recognize these treaties, the 1903 agreement does remain in effect.”²²⁰ The treaty was still valid because it explicitly specifies that it can be terminated only by mutual agreement or by unilateral abandonment by the United States, neither of which had happened.²²¹ In response to the argument that the United States had *effective sovereignty* over the territory even though the *legal sovereign* may have officially been another state, Judge Arterton noted that the 1903 treaty explicitly specified that Cuba has ultimate sovereignty over Guantánamo and this was what was crucial.²²² Guantánamo, then, was deemed foreign territory and as a result federal courts had no jurisdiction over what the U.S. government did there.²²³ Successive executive branch opinions had held the same.²²⁴

²¹⁷ *E.g.*, Cuban Am. Bar Ass’n v. Christopher, 43 F.3d 1412 (11th Cir. 1995). In that case, Cuban refugees sought admission to the United States once they got to Guantánamo and were denied access to U.S. courts with the statement, “we . . . reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are ‘functional[ly] equivalent’ to being land borders or ports of entry of the United States or otherwise within the United States.” *Id.* at 1425 (alteration in original) (citations omitted).

²¹⁸ 923 F. Supp. 338 (D. Conn. 1996).

²¹⁹ *Id.* at 340 (quoting Lease of Lands for Coaling and Naval Stations, Feb. 16–23, 1903, U.S.-Cuba, T.S. 418).

²²⁰ *Id.* at 341 (footnote omitted).

²²¹ The U.S. government sends annual rent checks of \$4,085 to the Cuban government which has not cashed these checks since the year after Fidel Castro came to power. *Id.* at 341 n.6 (referencing Jim Wolf, *U.S. Pays Cuba \$4,085 Yearly for Leased Guantánamo Base*, ROCKY MTN. NEWS, Aug. 25, 1994, 1994 WL 6673251).

²²² *Id.* at 342 (“[T]he leased land is subject to the ultimate sovereignty of Cuba.”).

²²³ See *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342 (2d Cir. 1992) (“Interestingly, both United States citizens and aliens alike, charged with the commission of crimes on Guantánamo Bay, are prosecuted under United States laws.”), *cert. granted and vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993) (mem.). This case found that certain Haitian detainees could be “screened in” to the United States from Guantánamo to pursue their claims for refugee status, but the reasoning relied on their refugee status, not on a general claim about the sovereign status of Guantánamo.

Given this strong authority, then, the Bush administration located Taliban and al Qaeda detainees at Guantánamo, a place that they could reasonably have expected would not trigger the jurisdiction of U.S. courts. In an early challenge that arose within American domestic courts to the detentions, *Rasul v. Bush*, Judge Kollar-Kotelly found that Guantánamo was, indeed, not part of the sovereign territory of the United States.²²⁵ In fact, the proposition had been so well established that plaintiffs did not even seek to question Guantánamo's ultimate status.²²⁶ Instead, plaintiffs claimed that the United States exercised *de facto* sovereignty at Guantánamo, and that this was sufficient for the application both of the Foreign Tort Claims Act (on which a group of Kuwaiti detainees were basing their claim) as well as for grounds to request a habeas writ (which two British detainees were seeking).²²⁷ Judge Kollar-Kotelly dismissed both claims, rejecting the *de facto* sovereignty test urged by the plaintiffs, citing the *Bird* case.²²⁸

On appeal, the D.C. Circuit Court of Appeals agreed.²²⁹ Family members who had been permitted to proceed as the next friends of the detainees²³⁰ challenged Guantánamo's status more directly, but the court held that

²²⁴ See 35 Op. Att'y Gen. 536, 537 (1929) (analyzing Guantánamo's status in the context of a review of other military bases); 6 Op. Off. Legal Counsel 236, 238 (1982) (finding that the station at Guantánamo is not a "possession" of the United States). See the more detailed discussion of the status of Guantánamo in Gerald L. Neuman, *Surveying Law and Borders: Anomalous Zones*, 48 *Stan. L. Rev.* 1197, 1228-1234 (1996).

²²⁵ 215 F. Supp. 2d 55, 72 (D.D.C. 2002).

²²⁶ See *id.* at 69 ("It is undisputed, even by the parties, that Guantánamo Bay is not part of the sovereign territory of the United States.").

²²⁷ *Id.*

²²⁸ *Id.* at 71 (arguing that Guantánamo was outside the sovereign territory of the United States and those detained were aliens). That meant, according to Judge Kollar-Kotelly, that the relevant precedent on the habeas claim was *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, the Supreme Court denied habeas to German nationals first captured and convicted of war crimes by an American military tribunal convened in China and then imprisoned in Germany under U.S. military occupation, at the end of World War II. *Id.* at 790. Even though the United States had functional military control in Germany, such functional control did not give U.S. courts jurisdiction in the *Eisentrager* case. Judge Kollar-Kotelly argued that it was the same at Guantánamo. *Rasul*, 215 F. Supp. 2d at 68 ("*Eisentrager* is applicable to the aliens . . . at Guantánamo Bay."). There were, as a result, no grounds on which to extend a writ of habeas corpus. Aliens detained abroad and held abroad could not access American courts simply because their captors were the U.S. military. The Foreign Tort Claims Act claim was rejected as being a habeas petition in disguise. *Id.* at 62.

²²⁹ *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted in part*, 124 S. Ct. 534 (2003) (mem.). *Al Odah* affirmed the district court judgment in *Rasul*, 215 F. Supp. 2d 55 (D.D.C. 2002). The Supreme Court consolidated *Al Odah* and *Rasul* and granted certiorari limited to the question: "Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba." *Rasul v. Bush*, 124 S. Ct. 534 (2003) (mem.); *Al Odah v. United States*, 124 S. Ct. 534 (2003) (mem.).

²³⁰ The Guantánamo detainees have been held without being able to consult with counsel or meet with family members. Some of the detainees are allowed to exchange letters with family members, but such letters (and the ones back from family members) pass through military screening. In the U.S.-court cases consolidated in the *Al Odah* ruling, family members were bringing the habeas petitions as next friends because the detainees were not able to approach the court themselves. The court permitted the family members to be designated as next friends. *Id.* at 1138.

determinations of sovereignty were “for the legislative and executive departments” to make and no such determination had been made here.²³¹ As a result, Guantánamo was not U.S. sovereign territory because no law made it so.²³² Instead, the court emphasized the similarity between the Guantánamo detainees and the petitioning prisoners in *Johnson v. Eisen-trager*.²³³ In *Eisen-trager*, petitioners were Germans captured in China after the German surrender at the end of the Second World War and accused of continuing to spy on Americans despite the end of hostilities. The Germans were detained, tried by military commission, sentenced to prison, and taken to Germany to serve their sentences in that occupied country, from which they brought a habeas action in U.S. court. The Supreme Court held, according to the *Al Odah* court, that no habeas writ could issue because the prisoners were beyond the territorial jurisdiction of the United States, even though the prison where they were held was entirely within the functional control of American authorities at the time.²³⁴ *Eisen-trager* so closed the door on habeas petitions from Guantánamo in the court’s view that it noted, “[w]e cannot see why, or how, the writ [of habeas corpus] may be made available to aliens abroad when basic constitutional protections are not. This much is at the heart of *Eisen-trager*.”²³⁵

The detainees petitioned the Supreme Court to hear their case, a petition which the Court agreed to hear.²³⁶ The petitioners and the government include in their briefs sharply different readings of *Eisen-trager*. Petitioners assert that *Eisen-trager* is a wholly different case from the present one, involving prisoners of war from an enemy state who had in fact been convicted of violating the laws in a military tribunal authorized by Congress. By contrast, petitioners claim, the Guantánamo detainees are from friendly states (Britain and Kuwait) and they have been neither charged nor convicted in any legal process. While the *Eisen-trager* petitioners asked to be released, the Guantánamo detainees want only to have their status determined by an independent tribunal.²³⁷ The government asserts that *Eisen-trager* is on all fours with the present case: aliens captured abroad and held abroad with no substantial connection to the United States do not have the writ available to them.²³⁸ As I write, no opinion has yet been forthcoming.

²³¹ *Id.* at 1143 (quoting *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948)).

²³² *Id.* at 1143–44.

²³³ 339 U.S. 763 (1950).

²³⁴ *Al Odah*, 321 F.3d at 1139.

²³⁵ *Id.* at 1141.

²³⁶ See *supra* note 229 (explaining the Supreme Court’s consolidation of both detainees’ petitions). Oral argument was held on April 20, 2004, but as I write, the opinion had not yet been issued.

²³⁷ See Petitioner’s Brief on the Merits, *Rasul v. Bush* (2003) (No. 03-334), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/77/petitioners_brief_on_merits2.pdf; Brief for Petitioners, *Al Odah v. United States* (2003) (Nos. 03-334, 03-343), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/78/Brief_For_Petitioners.pdf.

²³⁸ Brief for the Respondents, *Al Odah v. United States* (2003) (Nos. 03-334, 03-343), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/170/respondent_brief.pdf.

Thus far, there has been no possibility for *anyone* to assert on behalf of these prisoners that they were wrongly detained because the Geneva Conventions have no enforcement mechanism, save for the reciprocal self-interest of those engaged in hostilities and the power that the armies and the domestic courts of the hostile parties choose to give the treaties. While the U.S. military generally accords the Geneva Conventions substantial weight in its own internal regulations,²³⁹ the Supreme Court in *Eisentrager* explicitly held that the Geneva Conventions gave rise to no private rights of action in U.S. courts. The effectiveness of the Geneva Conventions generally relies on the calculation that if one side treats the other side's POWs well, then their POWs will be treated well in return. The Geneva Conventions, according to the *Eisentrager* court, place "responsibility for observance and enforcement of these rights . . . upon political and military authorities."²⁴⁰

As it turned out, it was impossible to challenge the U.S. detentions in foreign courts as well. In *The Queen on the Application of Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*,²⁴¹ family members of some British nationals being held at Guantánamo attempted to get the British courts to order the foreign secretary to intervene on their behalf to have the detainees' status clarified, consistent with the Third Geneva Convention. The solicitors for Feroz Ali Abbasi, one of the detainees, and his mother had attempted to approach the U.S. government directly through the American Embassy in London but had received word that Abbasi and others detained at Guantánamo were "enemy combatants" and would be held for the duration of the war without legal process. They sued to get the British government to intervene.

The Court of Appeal ultimately ruled against Abbasi on the grounds that the court had no authority to order the foreign secretary to act in any particular way with respect to a matter within the scope of the British government's foreign policy. But the judgment is particularly interesting for the harsh terms in which it treats American claims that the detainees have no legal status cognizable by any court. Calling the Guantánamo detention a "legal black hole," the court made much of the fact that the United States had failed to comply with the Geneva Convention on prisoners of war because it had not allowed those who were detained to have a hearing on their status. Instead, the United States had asserted that the detainees were, by the definition of the conflict in which they had been captured, necessarily "enemy combatants" not subject to prisoner-of-war protections.

²³⁹ The amicus brief filed by the National Institute for Military Justice in the Guantánamo cases before the Supreme Court discusses the regulations of the American military and the way in which those regulations incorporate the Geneva Convention requirements for treatment of prisoners of war. Brief of Amicus Curiae National Institute of Military Justice, *Rasul v. Bush* (2003) (Nos. 03-334 and 03-343), http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/92/amicuscuriae_national_institute_of_military_justice.pdf.

²⁴⁰ *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950).

²⁴¹ [2002] All E.R. (D) 70 (Nov.) (Eng. C.A.), 2002 WL 31452052.

With its tone fairly dripping with disdain for the American position, the Court of Appeal noted that the status of “enemy combatant,” on which the Bush administration relied, was not a conception recognizable in international law. Instead, the term appeared only in *Ex Parte Quirin*,²⁴² an American case approving the trial before a military commission of foreign nationals who had entered U.S. territory to commit sabotage. As the Court of Appeal pointed out, however, even on the *Quirin* standard, it was impossible to determine whether the status of enemy combatant in fact applied to Abbasi because the circumstances of his capture had never been reviewed by any court. While expressing hope that American courts might find jurisdiction to review the Guantánamo cases, the Court of Appeal nonetheless found that British courts could do nothing within their own jurisdiction to compel the British government to intervene in the matter.

The *Abbasi* case is notable because it reflects a view expressed by a number of the United States’ allies abroad: not only that the Geneva Conventions should be followed in the war on terrorism, but also that all detainees should be able to have the bases for their detention reviewed by an independent court to assess whether in fact the detention is warranted. The protection that habeas review is supposed to offer those in U.S. detention has been generalized as a principle of international law, both in the Geneva Conventions and generally in other human rights bodies, such as the Inter-American Commission, which condemned the U.S. position on Guantánamo,²⁴³ and the European Court of Human Rights which, while having no jurisdiction over Guantánamo, has a substantial jurisprudence under Article 6 of the European Convention on Human Rights, ensuring access to court review of all detentions.²⁴⁴ Thus, when the Bush administration put the Guantánamo detainees into a position where their detentions could not be reviewed, they created an exceptional state that has been roundly condemned.²⁴⁵

The condemnation has only increased as the Bush administration has made public its plans to constitute specialized tribunals exclusively to try the post-9/11 captives who have been held in Guantánamo. These military tribunals were announced in a military order by President Bush shortly af-

²⁴² 317 U.S. 1 (1942)

²⁴³ The Inter-American Commission on Human Rights took “precautionary measures” against the United States in its session of March 12, 2002. Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), 41 I.L.M. 532 (Inter-Am. C.H.R. 2002); see also Response of the United States to Request for Precautionary Measures—Detainees in Guantánamo Bay, Cuba, 41 I.L.M. 1015 (Inter-Am. C.H.R. 2002).

²⁴⁴ The European Court of Human Rights has a lot of experience in this area, largely in reviewing British legal strategy in Northern Ireland during the “troubles,” specifying rule-of-law guarantees even for those suspected of terrorism. See *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) at 14 (1988) (holding that even terrorism suspects could not be held without review and without charges for as long as four days).

²⁴⁵ For example, two British law lords have explicitly condemned the detentions. Robert Verkaik, *Another Law Lord Criticises Detentions at Guantánamo Bay*, INDEP. (London), Jan. 28, 2004, at 2, 2004 WL 67162485.

ter the 9/11 attacks.²⁴⁶ At the start, the order indicated that such proceedings were to be limited to non-citizens and that they were to be run by the U.S. military with procedural rules that were not the equal of those in normal American courts or in ordinary courts martial, for that matter. As the rules have been elaborated,²⁴⁷ they have been simultaneously better and worse than the critics feared. They are better because they require a judgment of guilt only upon proof beyond a reasonable doubt. Also, they start with the presumption of innocence and require unanimous verdicts before a death penalty can be imposed.²⁴⁸

Nonetheless, the tribunals have been at least as bad as critics feared because all aspects of the procedure are controlled by the secretary of defense or the secretary's designee, the appointing authority ("AA").²⁴⁹ The AA approves all charges to be brought and supervises the procedure (including security clearances) for qualifying any private defense counsel that the defendant may hire at his own cost. All judges on the tribunal and all staff members—including the prosecutor—are appointed by the AA. The defendant is assigned (by the AA) to a military counsel, who is the only one on the defense team allowed to see all of the evidence against the defendant. Evidence does not have to be offered orally²⁵⁰ and the defendant has no right to confront witnesses against him.²⁵¹ Instead, indirect (hearsay) evidence may be admitted²⁵² and the defendant himself may not be allowed to learn all the evidence against him if it is national-security sensitive.²⁵³ While the defendant has some right to call witnesses, such rights are lim-

²⁴⁶ See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

²⁴⁷ The more specific framework was provided by DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (2002), <http://www.dtic.mil/whs/directives/cores/mco/mco1.pdf> [hereinafter DOD ORDER]. Later, in a series of eight Military Commission Instructions dated April 30, 2003, the DOD published detailed rules of procedure. All of these documents can be found at <http://www.defenselink.mil/news/commissions.html>, along with a ninth Military Commission Instruction dated December 26, 2003.

²⁴⁸ The general international acceptance that the death penalty is an inhumane punishment also hurts the tribunals in international public opinion. For example, the European Convention on Human Rights requires the forty-six signatory states to forswear use of the death penalty. For more on the European attitude toward punishment generally, see JAMES Q. WHITMAN, *HARSH JUSTICE* 200–03 (2003).

²⁴⁹ The AA's powers are given in the DOD Order. DOD ORDER, *supra* note 247.

²⁵⁰ The procedures specify that witnesses may appear in person, "by telephone, by audiovisual means, or other means," *id.* § 6(D)(2)(a), a list which does not exclude evidence given in writing. In fact, the rules explicitly note that evidence given by unsworn or sworn written statements is admissible. *Id.* § 6(D)(3).

²⁵¹ *Id.* § 6(D)(2)(c). The rules indicate that witnesses who appear before the commission would be subject to direct and cross-examination but are silent about what opportunities for challenging testimony would be given to those witnesses who are permitted by the earlier passage to testify through means other than in-person appearance before the commission. *Id.*

²⁵² *Id.* § 6(D)(1). The rules state that evidence is admissible if it "would have probative value to a reasonable person," a standard that does not exclude the introduction of hearsay. *Id.*

²⁵³ *Id.* § 6(D)(5) (providing for the protection of information that discloses sources or methods or affects national security). Secret information may be deleted from documents available to both the defense and the defense's personal lawyer. *Id.* § 6(D)(5)(b)(i). The AA-appointed defense lawyer may still see this information. *Id.*

ited to those witnesses whose presence will not disclose national-security sensitive secrets and all witnesses called by the defense must be approved by the presiding judge.²⁵⁴ At the end of the proceedings, the AA reviews the transcript and signs off on the verdict before it is final, unless the president of the United States chooses to review the record for ultimate approval.²⁵⁵ There is no appeal to anyone outside the DOD, except the president of the United States, who was the one to designate which individuals could be tried before the military tribunals in the first place.

Such procedures have not only elicited a great deal of domestic criticism,²⁵⁶ but they have generated perhaps even more protests from outside the United States.²⁵⁷ Under the Third Geneva Convention, prisoners of war may only be tried by a tribunal exhibiting “the essential guarantees of independence and impartiality,”²⁵⁸ which the proposed military tribunals fail to do because they are under the direct control of the president and defense secretary.²⁵⁹ When President Bush finally designated a few of the Guantánamo detainees for possible trial before the military commissions, the British Prime Minister Tony Blair immediately asked that the two British detainees in that first set not be subjected to this procedure.²⁶⁰ The Australian Prime Minister, John Howard, learning that there was an Australian citizen in that first military tribunals list, asked also for his national to be exempted.²⁶¹ The Bush administration promised to negotiate the procedures to be used in the case of nationals of U.S. allies, but it is unclear just what such promises mean. In spring 2004, charges were brought against

²⁵⁴ *Id.* § 5(H) (“The Accused may obtain witnesses and documents for the Accused’s defense, to the extent necessary and reasonably available as determined by the Presiding Officer.”).

²⁵⁵ *Id.* § 6(H) (providing for post-commission review of the proceedings by the AA and the secretary of defense or, in some cases, the president). There is no other appeal allowed. *Id.*

²⁵⁶ See, e.g., TASK FORCE ON TERRORISM AND THE LAW, American Bar Ass’n, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS (2002) (condemning the Bush administration’s use of military tribunals), <http://www.abanet.org/leadership/military.pdf>.

²⁵⁷ See, e.g., Sandro Contenta, *Detained Britons Won’t Face Death Penalty For Now*, TORONTO STAR, July 20, 2003, at F3 (discussing the critical reaction in the United Kingdom to the tribunal procedures), 2003 WL 59323921.

²⁵⁸ Third Geneva Convention, art. 84, *supra* note 216, 6 U.S.T. at 3364–65.

²⁵⁹ For critical analyses of the military tribunal rules, see HUMAN RIGHTS FIRST (formerly LAWYERS COMM. FOR HUMAN RIGHTS), TRIALS UNDER MILITARY ORDER: A GUIDE TO THE FINAL RULES FOR MILITARY COMMISSIONS (2003), http://www.humanrightsfirst.org/us_law/a_guide_to_the_final_rules.pdf, and HUMAN RIGHTS WATCH, BRIEFING PAPER ON MILITARY COMMISSIONS (2003), <http://hrw.org/backgrounders/usa/military-commissions.pdf>.

²⁶⁰ Hamish MacDonell & Fraser Nelson, *Blair the Showman’s Ultimate Performance*, SCOTSMAN, July 19, 2003, at 3, 2003 WL 63935338.

²⁶¹ Australian national David Hicks has since been assigned a military defense lawyer though he has not yet been charged. His lawyer has criticized the Guantánamo tribunals and has joined a brief to the U.S. Supreme Court in the *Al Odah* case. Marian Wilkinson & Jonathan Pearlman, *Military Trial Only Option for Hicks, Says Ruddock*, SYDNEY MORNING HERALD, Jan. 23, 2004, at 6, 2004 WL 55403140. For the brief, see Brief of Amicus Curiae Military Attorneys Assigned to the Defense in the Office of Military Commissions, *Al Odah v. United States* (2003) (No. 03-343), http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/91/AmicusCuriae_Military_Attorneys.pdf.

two Guantánamo detainees, one of whom is alleged to be a bodyguard and driver for Osama bin Laden²⁶² and the other an associate of bin Laden who made a video glorifying the attack on the USS Cole.²⁶³

But however much international protest U.S. actions have caused to date, nothing equals the international opposition mounted against the war in Iraq—opposition which, as I write a year later, is still a fresh wound. Here again, the United States essentially declared a state of exception from the normal rules in play for the declaration of war, in which only the justification of imminent self-defense works to exempt a state from first going through the U.N. Security Council procedures.²⁶⁴ While the United States and its staunch ally Britain had started to go down the Security Council road toward seeking a U.N. authorization of a military intervention with a resolution on point, in the end the impossibility of getting such a resolution meant that the United States and Britain had to go it nearly alone, without such authorization. France, Germany, and Russia—two with Security Council vetoes and the third on the council at the time—opposed the war; mass populations all over Europe and in the Middle East opposed it too, along with substantial numbers in the United States.²⁶⁵ Nonetheless, the United States and the United Kingdom went forward, claiming that Saddam Hussein had weapons of mass destruction that might fall into the hands of terrorists, even though the proof they presented did not convince even the countries that had recently authorized the weapons inspections.²⁶⁶

Much of the international community felt that either the U.N. procedures should be followed or that the war should not be launched. For the U.N. to fail to support the war in a second resolution and for the war to be launched anyway signaled to many that the United States had become lawless in international affairs.²⁶⁷ (Never mind that getting Security Council resolutions before going to war had not been common practice since the middle of the twentieth century, despite their endorsement by the U.N.

²⁶² See Charge: Conspiracy, United States v. Al Qosi, <http://www.defenselink.mil/news/Feb2004/d20040224AlQosi.pdf>.

²⁶³ See Charge: Conspiracy, United States v. Al Bahlul, <http://www.defenselink.mil/news/Feb2004/d20040224AlBahlul.pdf>.

²⁶⁴ The U.N. Charter requires a state to bring its grievances to the Security Council instead of launching a war on its own. A war is legitimate only if the U.N. agrees with the grievances and agrees to sponsor an international military operation against the offender. U.N. CHARTER ch. VII. The only exception to this is for immediate self-defense. *Id.* at ch. VII, art. 51.

²⁶⁵ On February 16, 2003, about five million people around the world demonstrated against the start of the Iraq war. See Peter Conradi, *Demos Follow Sun Around the Globe*, SUNDAY TIMES (London), Feb. 16, 2003, at 2 (describing anti-war protests in Iraq, New York City, and throughout Europe).

²⁶⁶ Judy Dempsey, *Anti-War Axis: Three Capitals Stand Firm on Opposing Strike*, FIN. TIMES (London), Mar. 15, 2003, at 2.

²⁶⁷ The Legal Advisor to the U.S. Department of State failed to produce a formal justification for the war. For a review of the variety of opinions expressed on this subject by experts in the American Journal of International Law symposium on the legality of the Iraq war, see Lori Fisler Damrosch & Bernard H. Oxman, *Editors' Introduction: Agora: Future Implications of The Iraq Conflict*, 97 AM. J. INT'L L. 553 (2003).

Charter.)²⁶⁸ The arguments for the need to follow international law rang out even in places that have not had a history of supporting international law themselves.²⁶⁹

Moreover, the pressure that the United States put on its allies amounted to trying to force them into a state of exception under their own laws. The United States pressed hard on Turkey, which had a fragile new moderate Islamist government, a history of military intervention in civilian government, and a historical stake in fighting Kurdish nationalism. When the civilian government refused to permit the United States to base its troops in Turkey for an attack on Northern Iraq, the Turkish military made noise as if it wanted to undermine the civilian government with a decision to the contrary.²⁷⁰ Furthermore, the United States did not discourage this, but pressed as hard as possible for it (to the point of cutting off aid) right up until the war started.²⁷¹ With other allies—the Philippines and Germany, for example—whose constitutions forbid foreign military commitments, the United States pressed hard to get them to support a military engagement that their own governments would be constitutionally forbidden from entering into on their own.²⁷² Russia, which started out as a strong supporter of the U.S.

²⁶⁸ There is an interesting story to be told here about how the U.N. Security Council procedures came to be normalized, despite having not been actually used very many times before this conflict. The Security Council had been paralyzed during the Cold War because any military venture the United States was likely to support would have been vetoed by the Soviet Union and vice versa. But even after the end of the Cold War, the United States had bypassed the Security Council in the 1990s. For example, the United States considered support from NATO to be sufficient international cover for the operation in Kosovo, and there had been much more muted criticism on that occasion. Even though the Security Council procedure has been used very rarely in the way it seems to have been envisioned, by the time of the Iraq war in spring 2003, nearly all the parties who spoke about the legitimacy of the war did so *as if* it required such a resolution from the Security Council. As a result, the failure of the United States and Britain to win support from the Security Council for a second resolution on Iraq was then met with strong protests that military action without such a resolution was clearly illegitimate. Giving some acknowledgment to this argument, the United States and Britain used the fact that there had been a prior resolution, ordering Saddam Hussein to let in weapons inspectors and to cooperate with them or face “consequences,” as a basis for justifying their eventual initiation of war. The resort to the first resolution for legitimacy was an indirect affirmation of the position that the Security Council did need to authorize a war that was not conducted for immediate self-defense. As a result, the Iraq war may have established for the first time the widespread recognition that Security Council resolutions are in fact needed for a state to legitimately go to war.

²⁶⁹ During the lead-up to the Iraq War, I was living in Moscow, where television reports and the daily print media were full of arguments about the need to follow international law. Russia, like the United States, had shown mostly disdain for international law during the Cold War.

²⁷⁰ Karl Vick, *After Calls on Turkey, U.S. Put on Hold: Heeding Public Opposition, Ankara Delays Decision on Use of Bases Against Iraq*, WASH. POST, Jan. 8, 2003, at A14 (discussing concerns about Turkish opinion regarding the war in Iraq).

²⁷¹ See Andrew Buncombe, *Iraq Crisis: U.S. Flexes Economic Muscle To Ensure Diplomatic Success*, INDEP. (London), Feb. 25, 2003, at 2, 2003 WL 14682283. When Turkey backed out later, the United States cut off all aid.

²⁷² See, for example, Articles 25 and 26 of the German Constitution:

Article 25 (International law and Federal law)

The general rules of international law are an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

Article 26 (Prohibition of preparations for a war of aggression)

war on terrorism, looked at the United States' Iraqi strategy in conjunction with the other military efforts in the war on terrorism and thought that it too might be an eventual target of U.S. aggression.²⁷³ This turned the Russian population firmly, and the Russian government tepidly (at the very least), against the war and against new American military campaigns, even though they were done in the name of the war on terrorism.

Suffice it to say that many of the United States' allies, no less than its enemies, were pushed hard to violate both international agreements and their own domestic constitutional provisions in order to be "with us" instead of "with the terrorists." The price that allies paid for not supporting the U.S. war on terrorism came either in financial terms (aid was cut to Turkey and Russia and trade restrictions were threatened with France and Germany) or in military terms (Russia believed itself to be surrounded and Germany was threatened with a pull-out of American bases there). Those who supported the United States, even at the cost of their own constitutional compliance, were generally rewarded for the use of the state of exception in their own countries. For example, in Pakistan, Pervez Musharraf rammed through a package of constitutional amendments making himself president, extending his term of office, and increasing the formal role of the military in government without protest from the United States.²⁷⁴

(1) Acts tending to and undertaken with the intent of disturbing the peaceful relations between nations, especially to prepare for a war of aggression, are unconstitutional. They shall be made a punishable offense.

GRUNDGESETZ [GG] [Constitution] arts. 25-26 (F.R.G.), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY (Gisbert H. Flanz ed., 2003). The Federal Constitutional Court ruled in a decision on July 12, 1994 that German troops could serve with peacekeeping forces authorized by the United Nations without violating this constitutional provision. Judgment of July 12, 1994, 90 BVerfGE 286 (F.R.G.).

The Constitution of the Republic of the Philippines also references international law:

The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

PHIL. CONST. art. II, § 2, *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: PHILIPPINES (Albert P. Blaustein & Gisbert H. Flanz eds., Supp. 1986).

²⁷³ This view was never stated directly by the Kremlin but it appeared with surprising frequency in the Russian media. There is some evidence of the view, however: when Russia gave permission to the United States to base its military in the Central Asian states and to use former Soviet military bases to do so, the permission was conditioned on the promise that the troops' presence would be temporary. But now the United States is building permanent bases in these states. In addition, the United States has dispatched special forces trainers to Georgia, on Russia's border with Chechnya, and has been using military air surveillance (some allegedly have broken into Russian airspace) to keep track of what is going on in Chechnya. The United States is now talking about moving its European bases farther "forward" to get closer to the troublesome Middle East, but putting military bases in Romania, Bulgaria, and Poland also brings the U.S. military closer to Russia. As a result, many Russians have gotten prickly over what they see as an attempt by the United States to use the war on terrorism as an excuse to surround its former adversary with military bases. See Seth Mydans, *Free of Marx, But Now in the Grip of a Dynasty*, N.Y. TIMES, Oct. 15, 2003, at A4 (describing political transitions in Russia and the "potentially explosive" issue of U.S. military presence).

²⁷⁴ See David Rohde, *Musharraf Redraws Constitution, Blocking Promise of Democracy*, N.Y. TIMES, Aug. 22, 2002, at A1 (discussing Musharraf's political maneuvers after pledging support to the United States); Karl Vick, *Pakistani Leader Accused of Trying to Grab Power; Restructuring Plan Is*

In the foreign policy sphere, then, we can see the same sort of progression from the small exceptions to legality right after 9/11 to increasingly large violations conducted with impunity that have become more blatant and more common as 9/11 has receded. While the Bush administration seems to have entered the war on terrorism after 9/11 with relative caution, this quickly broke down as first the Geneva Conventions and then the U.N. Convention itself were breached against strong opposition. The United States has also been urging other countries to break their treaty obligations as well as their own constitutions to enter the war on terrorism on the terms set by the United States. Sometimes it even appears as though the Bush administration would not mind bringing down the international system as a by-product of its war on terrorism, since the international system acts as a limitation to an endless state of exception.

III. POST-SCHMITT, POST-9/11

With this rather breathless tour of post-9/11 legal developments in mind, what is to be said about the idea of the state of exception? As I noted before, the state of exception according to Carl Schmitt is not just about governance in unusual times; it is one of the defining characteristics of sovereignty at all times and, as a result, it is the power whose exercise defines the very character of the sovereign.²⁷⁵ At a superficial level, the quality of President Bush's presidency does seem to have been radically affected by the events of 9/11 and the need to respond to them. Political commentary in the wake of 9/11 has frequently noted how the attacks gave George W. Bush a rationale for his presidency, a missionary project that has defined his entire term of office.²⁷⁶ Bush's invocation of national security rationales has meant that he has not needed to otherwise justify or explain his course of action, except to say that, based on information that cannot be widely shared, he understands that he must do what he proposes. At this most obvious level, the use of exceptional powers to meet exceptional situations has in fact defined the specific quality of this administration.

But the state of exception in Schmitt's terms goes deeper than this. Schmitt is interested not only in the effects of using emergency powers on a current head of state's reputation or the mission a leader has when there is a sudden need to meet a sudden threat. Schmitt is also interested in the character of regimes, of the possible limits to the rule of law (or the very idea of normality) that must be acknowledged if a threat is to be met. For Schmitt, it is the exception, not the state of normality, that defines what normal

Broadly Condemned, WASH. POST, June 28, 2002, at A18 (discussing Musharraf's plan to replace Pakistan's parliamentary system).

²⁷⁵ SCHMITT, *supra* note 27, at 12.

²⁷⁶ Patrick E. Tyler, *A Reminder of a Mission*, N.Y. TIMES, Mar. 7, 2003, at A1 (discussing the attacks as a defining moment of Bush's presidency).

means.²⁷⁷ The exception, then, has transformative powers over the very nature of the state. In this sense, I think, the Bush administration's use of exceptional logics has failed because the world in which the Bush administration acts is not the early twentieth century world that Schmitt took as his backdrop, a world of national and fragmented power. Even though the Bush administration has been able to do virtually everything it has wanted to in the war on terrorism, it has not succeeded in justifying what it has done to an international public or, increasingly, to substantial segments of the American public either.

Americans, beaten down in their constitutional expectations by the permanent changes brought about during the Cold War, have become used to the logic of the exception. The American presidency is supposed to take the lead in responding to threats, and virtually all other constitutional checks on his power are temporarily suspended—or work with a substantial bias in favor of approving emergency-justified presidential action while it is still deemed necessary. As I argued earlier, the American response to World War II and its aftermath was immediately tied up with defending the state against foreign threats that the Soviet Union posed and thus, the United States has rarely gone through a substantial questioning of the limits of emergency powers.²⁷⁸ Instead, the American constitutional order has learned to live with them.

Nonetheless, a number of America's European allies have taken a different trajectory since the defeat of Nazi Germany. Both in new constitutions that have been written and in the elaboration of international law, states of emergency have been filled up with more legal content, rather than with overt exceptions to legality.²⁷⁹ States of emergency, as a result, are

²⁷⁷ SCHMITT, *supra* note 27, at 13.

²⁷⁸ The 1970s debates around the findings of the Church Committee and the subsequent enactment of a statute ending existing states of emergency and putting eventual expiration dates on new ones were rare exceptions. See National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. § 1601 (2000)).

²⁷⁹ The legal content is defined in a variety of different ways. While Germany's new post-war constitution deliberately did not contain a provision for a state of emergency at all out of fear it would be used, Article 16 of the French Constitution of 1958 gave emergency powers almost exclusively to the president, in contrast with the shared-powers approach that had characterized the previous regime of legally regulated *états de siège*. Even so, there are official roles for the National Assembly and the Constitutional Council to play in the state of emergency:

When the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfillment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional governmental authorities is interrupted, the President of the Republic shall take the measures commanded by these circumstances, after official consultation with the Premier, the Presidents of the assemblies and the Constitutional Council.

He shall inform the nation of these measures in a message.

These measures must be prompted by the desire to ensure to the constitutional governmental authorities, in the shortest possible time, the means of fulfilling their assigned functions. The Constitutional Council shall be consulted with regard to such measures.

Parliament shall meet by right.

The National Assembly may not be dissolved during the exercise of emergency powers by the President.

moments that call for an even stricter application of law than might usually be the case, even as particular legal restrictions are loosened.²⁸⁰

FR. CONST. art. 16, *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: FRANCE (Gisbert H. Flanz ed., Supp. 1999).

²⁸⁰ The German constitution stands as a model for how a state of emergency may be legally regulated. When Germany eventually amended its constitution in 1968 to give definite legal shape to its understanding of the “state of defense,” it added an extraordinary amount of detail to the precise procedures that had to be followed in this exceptional state. As a result, the German state of defense is at least as much under the rule of law as normal governance is:

Article 80a (State of tension)

- (1) Where this Basic Law or a federal law on defence, including the protection of the civilian population, stipulates that legal provisions may only be applied in accordance with this Article, their application shall, except when a state of defence exists, be admissible only after the Bundestag has determined that a state of tension (*Spannungsfall*) exists or if it has specifically approved such application. In respect of the cases mentioned in the first sentence of paragraph (5) and the second sentence of paragraph (6) of Article 12a, such determination of a state of tension and such specific approval shall require a two-thirds majority of the votes cast.
- (2) Any measures taken by virtue of legal provisions enacted under paragraph (1) of this Article shall be revoked whenever the Bundestag so requests.
- (3) In derogation of paragraph (1) of this Article, the application of such legal provisions shall also be admissible by virtue of, and in accordance with, a decision taken with the consent of the Federal Government by an international organ within the framework of a treaty of alliance. Any measures taken pursuant to this paragraph shall be revoked whenever the Bundestag so requests with the majority of its members.

....

Article 115a (Determination of a state of defence)

- (1) The determination that the federal territory is being attacked by armed force or that such an attack is directly imminent (state of defence) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made at the request of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least the majority of the members of the Bundestag.
- (2) If the situation imperatively calls for immediate action and if insurmountable obstacles prevent the timely meeting of the Bundestag, or if there is no quorum in the Bundestag, the Joint Committee shall make this determination with a two-thirds majority of the votes cast, which shall include at least the majority of its members.
- (3) The determination shall be promulgated in the Federal Law Gazette by the Federal President pursuant to Article 82. If this cannot be done in time, the promulgation shall be effected in another manner; it shall subsequently be printed in the Federal Law Gazette as soon as circumstances permit.
- (4) If the Federal territory is being attacked by armed force and if the competent organs of the Federation are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, such determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce such time as soon as circumstances permit.
- (5) When the determination of the existence of a state of defence has been promulgated and if the federal territory is being attacked by armed force, the Federal President may, with the consent of the Bundestag, issue internationally valid declarations regarding the existence of such state of defence subject to the conditions mentioned in paragraph (2) of this Article, the Joint Committee shall thereupon deputize for the Bundestag.

Article 115b (Power of command during state of defence)

Upon the promulgation of a state of defence, the power of command over the Armed Forces shall pass to the Federal Chancellor.

Article 115c (Legislative compliance of the Federation during state of defence)

- (1) The Federation shall have the right to exercise concurrent legislation even in matters belonging to the legislative competence of the Laender by enacting laws to be applicable upon the occurrence of a state of defence. Such laws shall require the consent of the Bundesrat.
- (2) Federal legislation to be applicable upon the occurrence of a state of defence to the extent required by conditions obtaining while such state of defence exists, may make provision for:
 1. preliminary compensation to be made in the event of expropriations, thus diverging from the second sentence of paragraph (3) of Article 14;
 2. deprivations of liberty for a period not exceeding four days, if no judge has been able to act within the period applying in normal times, thus diverging from the third sentence of paragraph (2) and the first sentence of paragraph (3) of Article 104.
- (3) Federal legislation to be applicable upon the occurrence of a state of defence to the extent required for averting an existing or directly imminent attack, may, subject to the consent of the Bundesrat, regulate the administration and the fiscal system of the Federation and the Laender in divergence from Sections VIII, VIIIa and X, provided that the viability of the Laender, communes and associations of communes is safeguarded, particularly in fiscal matters.
- (4) Federal laws enacted pursuant to paragraph (1) or subparagraph (1) of paragraph (2) of this Article may, for the purpose of preparing for their execution, be applied even prior to the occurrence of a state of defence.

Article 115d (Shortened procedure in the case of urgent bills during state of defence)

- (1) While a state of defence exists, the provisions of paragraphs (2) and (3) of this Article shall apply in respect of federal legislation, notwithstanding the provisions of paragraph (2) of Article 76, the second sentence of paragraph (1) and paragraphs (2) to (4) of Article 77, Article 78, and paragraph (1) of Article 82.
- (2) Bills submitted as urgent by the Federal Government shall be forwarded to the Bundesrat at the same time as they are submitted to the Bundestag. The Bundestag and the Bundesrat shall debate such bills in common without delay. In so far as the consent of the Bundesrat is necessary, the majority of its votes shall be required for any such bill to become a law. Details shall be regulated by rules of procedure adopted by the Bundestag and requiring the consent of the Bundesrat.
- (3) The second sentence of paragraph (3) of Article 115a shall apply *mutatis mutandis* in respect of the promulgation of such laws.

Article 115e (Status and functions of the Joint Committee)

- (1) If, while a state of defence exists, the Joint Committee determines with a two-thirds majority of the votes cast, which shall include at least the majority of its members, that insurmountable obstacles prevent the timely meeting of the Bundestag, or that there is no quorum in the Bundestag, the Joint Committee shall have the status of both the Bundestag and the Bundesrat and shall exercise their rights as one body.
- (2) The Joint Committee may not enact any law to amend this Basic Law or to deprive it of effect or application either in whole or in part. The Joint Committee shall not be authorized to enact laws pursuant to paragraph (1) of Article 24 or to Article 29.

Article 115f (Extraordinary powers of the Federation during state of defence)

- (1) While a state of defence exists, the Federal Government may to the extent necessitated by circumstances:
 1. commit the Federal Border Guard throughout the federal territory;
 2. issue instructions not only to federal administrative authorities but also to Land governments and, if it deems the matter urgent, to Land authorities, and may delegate this power to members of Land governments to be designated by it.
- (2) The Bundestag, the Bundesrat and the Joint Committee, shall be informed without delay of the measures taken in accordance with paragraph (1) of this Article.

Article 115g (States and functions of the Federal Constitutional Court during state of defence)

The constitutional status and the exercise of the constitutional functions of the Federal Constitutional Court and its judges must not be impaired. The Law on the Federal Constitutional Court may not be amended by a law enacted by the Joint Committee except insofar as such amendment is required, also in the opinion of the Federal Constitutional Court, to maintain

the capability of the Court to function. Pending the enactment of such a law, the Federal Constitutional Court may take such measures as are necessary to maintain the capability of the Court to carry out its work. Any decisions by the Federal Constitutional Court in pursuance of the second and third sentence of this Article shall require a two-thirds majority of the judges present.

Article 115h (Legislative terms and terms of office during state of defence)

- (1) Any legislative terms of the Bundestag or of Land diets due to expire while a state of defence exists shall end six months after the termination of such state of defence. A term of office of the Federal President due to expire while a state of defence exists, and the exercise of his functions by the President of the Bundesrat in case of the premature vacancy of the Federal President's office, shall end nine months after the termination of such state of defence. The term of office of a member of the Federal Constitutional Court due to expire while a state of defence exists shall end six months after the termination of such state of defence.
- (2) Should the necessity arise for the Joint Committee to elect a new Federal Chancellor, the Committee shall do so with the majority of its members; the Federal President shall propose a candidate to the Joint Committee. The Joint Committee can express its lack of confidence in the Chancellor only by electing a successor with a two-thirds majority of its members.
- (3) The Bundestag shall not be dissolved while a state of defence exists.

Article 115i (Extraordinary power of the Land governments)

- (1) If the competent federal organs are incapable of taking the measures necessary to avert the danger, and if the situation imperatively calls for immediate independent action in individual parts of the federal territory, the Land governments or the authorities or commissioners designated by them shall be authorized to take, within their respective spheres of competence, the measures provided for in paragraph (1) of Article 115f.
- (2) Any measures taken in accordance with paragraph (1) of the present Article may be revoked at any time by the Federal Government, or in the case of Land authorities and subordinate federal authorities, by Land Prime Ministers.

Article 115k (Grade and duration of validity of extraordinary laws and ordinances having the force of law)

- (1) Laws enacted in accordance with Articles 115c, 115e, and 115g, as well as ordinances having the force of law issued by virtue of such laws, shall, for the duration of their applicability, suspend legislation contrary to such laws or ordinances. This shall not apply to earlier legislation enacted by virtue of Articles 115c, 115e or 115g.
- (2) Laws adopted by the Joint Committee, and ordinances having the force of law issued by virtue of such laws, shall cease to have effect not later than six months after the termination of a state of defence.
- (3) Laws containing provisions that diverge from Articles 91a, 91b, 104a, 106 and 107, shall apply no longer than the end of the second fiscal year following upon the termination of the state of defence. After such termination they may, with the consent of the Bundesrat, be amended by federal legislation so as to lead up to the settlement provided for in Sections VIIIa and X.

Article 115l (Repealing of extraordinary laws, Termination of state of defence, Conclusion of peace)

- (1) The Bundestag, with the consent of the Bundesrat, may at any time repeal laws enacted by the Joint Committee. The Bundesrat may request the Bundestag to make a decision in any such matter. Any measures taken by the Joint Committee or the Federal Government to avert a danger shall be revoked if the Bundestag and the Bundesrat so decide.
- (2) The Bundestag, with the consent of the Bundesrat, may at any time declare the state of defence terminated by a decision to be promulgated by the Federal President. The Bundesrat may request the Bundestag to make a decision in any such matter. The state of defence must be declared terminated without delay when the prerequisites for the determination thereof no longer exist.
- (3) The conclusion of peace shall be the subject of a federal law.

GRUNDGESETZ [GG] arts. 80a, 115a–115l (F.R.G.) (provisions cited were inserted by federal law in 1968), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: FEDERAL REPUBLIC OF

To see why the Schmittian logic of exception has much less attraction for American allies in much of Europe, it is necessary to briefly revisit the historical period in which Schmitt claimed that a state of exception could and should have this transformative effect on ordinary politics. When Schmitt wrote, parliamentary government was teetering on the brink of breakdown not only in Germany but in much of continental Europe, and the democratic republic established by the Weimar Constitution was fraught with internal inconsistencies, irreconcilable differences, and a growing sense of crisis. The Weimar Constitution's Article 48 seemed to *Realpolitik* theorists like Schmitt to be the constitutional way out of the mess. Schmitt had advocated the strengthening of executive power against the weakness of parliamentarism as the only strategy that would ensure the maintenance of the republic. History knows what happened later: the rise of fascism, the destruction of democratic government, war, the camps. Schmitt was himself a convert to and justifier of the fascist cause; many have seen in Schmitt's idea of the exception the seeds—even the seedlings and whole forests—of fascism.

But however powerful we believe ideas can be in the world, they only can be played out on the world stage if there are other historical and material circumstances that allow them to be realized. And there were many features of both Weimar Germany and inter-war Europe that allowed Schmitt's exceptional justifications to take hold at that time. I will not rehearse them all here—there has been plenty of scholarship on the point.²⁸¹ But I will mention just a few of the elements. While constitutional monarchies were more stable in Europe at that time, republican governments established in inter-war Europe were generally fragile. The conception of executive power in the new republics had generally not made a complete practical or intellectual transition from the model of the monarchy to the model of a democratically accountable head of state. The settlements at the end of the First World War had left resentment in their wake among the losers and leaders could whip up popular sentiment by promising a return

GERMANY (Albert P. Blaustein & Gisbert H. Flanz eds., 1974). For a discussion of these provisions, see C. C. Schweitzer, *Emergency Powers in the Federal Republic of Germany*, 22 W. POL. Q. 112 (1969).

²⁸¹ By now, the literature on Schmitt, his historical moment, and the political and theoretical debates surrounding him is enormous. Some of the most recent book-length contributions in English include JOSEPH W. BENDERSKY, *CARL SCHMITT: THEORIST FOR THE REICH* (1983); RENATO CRISTI, *CARL SCHMITT AND AUTHORITARIAN LIBERALISM: STRONG STATE, FREE ECONOMY* (1998); DAVID DYZENHAUS, *LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM* (1998); DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS Kelsen AND HERMANN HELLER IN WEIMAR* (1997); HEINRICH MEIER, *FOUR CHAPTERS ON THE DISTINCTION BETWEEN SCHMITT, POLITICAL THEOLOGY AND POLITICAL PHILOSOPHY* (Marcus Brainard trans., 1998); CHANTAL MOUFFE, *THE CHALLENGE OF CARL SCHMITT* (1999); WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW 181–251* (1999); GEORGE SCHWAB, *THE CHALLENGE OF THE EXCEPTION: AN INTRODUCTION TO THE POLITICAL IDEAS OF CARL SCHMITT BETWEEN 1921 AND 1936* (2d ed. 1989). Special issues of journals have been devoted to assessing Schmitt's legacy—see, for example, 10 CANADIAN J.L. & JURISPRUDENCE (1997), and, the exposition dedicated to Schmitt that started the modern debate in English, *Special Issue on Carl Schmitt*, 72 TELOS 3 (1987).

to the pre-War status quo.²⁸² The Russian Revolution created enormous sympathies both toward communism and toward revolutionary change in the rest of Europe, while also inspiring strong reaction against such revolutionary movements.²⁸³ Anxiety about national belonging was easily channeled into nationalism, and nationalism was at that time in Europe premised on the idea of a “people” whose boundaries of membership were inflexible because they were tied to birth and ethnicity. Law, in consequence, was national law, and the devices and justifications for sovereignty were national justifications.

Against this background, Schmitt’s idea of the state of exception can be seen as a distinctly *national and nationalist* idea. He imagines a sovereign of a nation, one who (as we learn in some of Schmitt’s other work)²⁸⁴ has as a primary job defining who is inside the sphere of protection (the friend) and who is outside (the enemy), locked in perpetual and mortal combat. The idea of the exception is related to this fundamentally agonistic conception of politics; the exception is what allows the sovereign to strike out against the enemy with the rationale that he is protecting the friend. But this conception of politics presupposes that all that is relevant about sovereignty can be captured in a single person who is sovereign of a nation that provides a first approximation of the universe of friends. The nation-state is the only sort of entity from whose perspective such clear dividing lines can be drawn. As democratic constitutional governments have replaced monarchies, and as immigration has become common in states once defined primarily by ethnic affiliation, Schmitt’s idea of sovereignty no longer reflects facts on the ground. Nationalism is no longer an ideology that attracts sympathies outside the sphere of the nationalists themselves.²⁸⁵

The negative lessons of fascism, and also the negative lessons of Stalinism, were taken on board in the construction of new national governments and new transnational institutions after World War II. The horror of the camps, the unspeakable destruction of total wars, even the later shadow of nuclear catastrophe—these living nightmares constituted the new forms of destruction that appeared simultaneously with the abolition of empires and monarchies, with the rise of both democratic and republican governments, with the ever-widening victory of constitutionalism and with the increasing appeals to the idea of universal human rights. Much of the first two-thirds

²⁸² See generally SALLY MARKS, *THE ILLUSION OF PEACE: INTERNATIONAL RELATIONS IN EUROPE 1918–1933* (2d. ed. 2003) (tracing the effects of the post-war agreements on European politics from the signing of the peace treaties to the collapse of the Weimar Republic).

²⁸³ See generally DONALD F. BUSKY, *COMMUNISM IN HISTORY AND THEORY: THE EUROPEAN EXPERIENCE* (2002) (documenting how the Russian Revolution made communism attractive as a theory and present as a live political option in European politics for much of the 20th century).

²⁸⁴ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (J. Harvey Lomax trans., Univ. of Chi. Press 1996) (1928).

²⁸⁵ See generally ERNEST GELLNER, *NATIONALISM* (1997) (providing a theoretical account of what nationalism believes itself to be); ANTHONY SMITH, *NATIONALISM: THEORY, IDEOLOGY AND HISTORY* (2001) (describing the rise of nationalism, its consolidation and its critics).

of the twentieth century²⁸⁶ was dominated by the simultaneous development of two contradictory trends—the headlong rush to new forms of international destruction alongside the development of new forms of the protection of the individual as a political subject. The new human-rights promoting democracies that emerged in Europe in the shadow of the world wars are far from perfect, but they improved on the records of the governments that had been destroyed by World War II.

During the Cold War, *Realpolitik* foreign policy dominated international developments led by the United States and the Soviet Union. Serious conflict in this period was typically recast as a proxy war among superpowers whose self-interest served as their primary motivations. But while international relations were dominated by prospects of superpower conflict, international law was growing in the shadows among powers that were less “super.” Institutions that were to the superpowers merely symbolic debating clubs developed both institutional stability and defining sets of principles that struck out in directions different from the guiding ideas of the superpowers. The development of the U.N. system outside of the Security Council, of international conventions and their non-coercive monitoring frameworks, of regional human rights bodies and the increasing human rights orientation of the successive waves of new constitutions that emerged following the Second World War were all largely ignored by the realist-driven superpowers. But develop they did. By the time the Cold War ended rather surprisingly at the end of the 1980s, the Schmittian framework of friend and enemy that had oriented world politics among the superpowers for decades after the last total war simultaneously collapsed.

The result was the rise to real prominence of what had been thought by the superpowers to be merely symbolic institutions. The U.N. and its system of international human rights protections assumed new powers and new status precisely because the old order had vanished. The regional human rights bodies (backed up in the case of Europe with an ever-increasing union) provided order that substituted for the old Cold War orientations. Out from under the constant threat of nuclear catastrophe and the sense that only sovereigns with “realist” views could manage the bipolar world, the international institutions that had developed with the luxury of having the sources of real power ignore them suddenly became sources of real power themselves. International law, disparaged by realists throughout the Cold War,²⁸⁷ suddenly became more law-like, at least in the sense that more countries were willing to take its principles as binding on domestic decisions.

²⁸⁶ My argument here applies primarily to those countries that defined themselves as world powers; obviously, in much of the less-powerful world, the concerns and trajectories were somewhat different.

²⁸⁷ The ultimate realist, Henry Kissinger, famously taught a course on international politics at Harvard. One class each term was devoted to international law. As legend would have it, each year Kissinger sent one of his research assistants to that class to announce that Professor Kissinger did not believe that there was such a thing as international law and that therefore the class was cancelled.

But even in the absence of transnational bodies that could enforce principles of international law, new constitutions (particularly those written as soviet communism and other repressive regimes collapsed) often include a prominent place for international law in domestic constitutional law.²⁸⁸ International law is, then, increasingly viewed as a species of domestic law—as binding legal norms that are integral parts of the domestic legal system and that give fundamental provisions of the domestic legal system their meaning. Part of this international law is the law of war, including the U.N. Charter, the Geneva Conventions and, most recently, the jurisdiction of the International Criminal Court. While the United States may have been oblivious (or opposed) to these developments since international law is still not considered part of a basic legal education in the United States and not widely respected either by U.S. courts²⁸⁹ or U.S. politicians,²⁹⁰ many other countries have been eagerly learning, adopting, and elaborating this system.

As a result, regimes of law and regimes of war are no longer opposed conceptions for many of the United States' constitutional-democratic allies. Instead, the increasing density of international norms in the period since

²⁸⁸ The Constitution of Hungary, for example, is typical in this regard:

Article 6

- (1) The Republic of Hungary repudiates war as a means of dealing with conflicts between nations and refrains from the use of force against the independence or territorial integrity of other states. It also refrains from making threats implying recourse to force.
- (2) The Republic of Hungary is working for co-operation with all peoples and countries of the world.

....

Article 7

- (1) The legal system of the Republic of Hungary accepts the universally recognised of international law, and shall harmonises the internal laws and statutes of the country with the obligations assumed under international law.

A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] arts. 6–7 (Hung.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: HUNGARY (Gisbert H. Flanz ed., 1995).

²⁸⁹ This may be changing with the rather sudden appearance in the case law of the U.S. Supreme Court at the end of the 2002–2003 term of nontrivial references to international law in two of the judgments. The most visible is the reference to decisions of the European Court of Human Rights in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), where the majority opinion uses those decisions to show that Western civilization has not had a uniform or unchanging view of homosexuality. *Id.* at 2481–83. The other was the reference in the concurring opinion of Justice Ginsburg in *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003), where she indicates that the affirmative action principles upheld by the majority in that case also are supported by two international agreements, the International Convention on the Elimination of All Forms of Racial Discrimination (which the United States has signed and ratified) and the Convention on the Elimination of All Forms Discrimination against Women (which the United States has signed but not ratified). For more along these lines by another distinguished commentator, see Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 40 (1994) (noting that certain constitutional touchstones like the “evolving standard of decency” standard require reference to the practices of other countries).

²⁹⁰ Recently, several resolutions have been introduced in the U.S. House of Representatives cautioning federal courts not to use foreign law. See, e.g., Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003) (“Expressing the sense of the House of Representatives that the Supreme Court should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States.”).

Schmitt wrote has produced a conception of war that is almost entirely filled with legal content. Precisely in response to the horrors that Schmitt saw coming (and perhaps assisted in producing), much of the international community has pulled back from the brink of catastrophe and realized that the very idea of war had to be governed by law.

Of course, creating a law of war no more ensures that wars follow the law than creating a criminal code ensures that there is no crime in a society. But the legal framework, if agreed upon widely, provides the basis for condemnation of individual country practices in the same way that a domestic criminal code provides the basis for the condemnation of individual acts. The United States has not been in the forefront of the development—or for that matter the adherence to—these international norms. In fact, even before 9/11, the United States was already one of the primary outlaws in this field.²⁹¹ But virtually no other country, with the exception of truly brutal dictatorships, denies the binding applicability of international law in the way that the United States does.²⁹²

This is why the United States has received so much criticism for the way that it has conducted its foreign policy after 9/11 when its small public vestiges of support for international norms collapsed entirely. The Iraq War and the Guantánamo camps, to take the two most egregious cases, violate the now-well-established principles of international law so thoroughly that the US position in taking exception them succeeds not in deeply reconstituting international politics, but instead in branding the United States as the attempted wrecker of the international system. With few exceptions, other countries have failed to recognize the legitimacy of the positions that the United States has taken.²⁹³

Even in its domestic policy, the Bush administration has drawn both international and domestic criticism. As we have seen, American domestic

²⁹¹ The United States' adherence to the death penalty is one of the leading causes of consternation among its constitutional allies. In 2003, the United States placed third in the world in the number of people it executed, behind China and Iran, and with Vietnam and Saudi Arabia in close pursuit. *Slight Fall in Capital Punishment*, GUARDIAN (U.K.), Apr. 7, 2004, <http://www.guardian.co.uk/international/story/0,3604,1187137,00.html>.

²⁹² By saying this, I am of course not implying that the United States operates like a brutal dictatorship. Instead, I want to make the point that many constitutional democracies now embed principles of international law in their own constitutional orders not just in symbolic ways, but as real backstops for domestic abuses of power. Because the United States by and large ignores international human rights law as a source of legal authority, more pressure is placed on the U.S. Constitution to be the one and only line of defense against serious assaults on rights. If the Constitution fails, the United States as a legal matter goes into free fall apart from the potential protections available through state constitutions. When countries whose constitutions and international commitments bind them to international law fail their own internal obligations, the international law system provides a second line of defense.

²⁹³ In another article, I attempt to show that most of the other constitutional democracies in the world have responded to 9/11 by using their domestic court systems to prosecute terrorists, much as the United States did before 9/11. As a result, there have been trials of al Qaeda members in Germany, Italy, France, Spain, and the U.K. Even Russia, which faces a terrorist threat (or civil war) from Chechen rebels, has reaffirmed its commitment to the maintenance of constitutional criminal procedure even as it has prosecuted a war against the province. See Kim Lane Scheppele, *Other People's PATRIOT Acts*, LOY. L. REV. (forthcoming 2004).

courts, while initially more constitutionally alert, have since become quite deferential to the Bush administration's rationales for the declarations of exception to states of normal legality. At times of crisis, the system of separation of powers and the system for protection of human rights seem to collapse into the one constitutional clause that gives the commander in chief his powers. This, as constitutional historians are quick to note, generally does happen during wartime in the United States.²⁹⁴

But this sort of general collapse of constitutionalism does not generally happen during wartime anymore in many of the world's most respected constitutional regimes. New constitutions often explicitly draw from the failure of the Weimar Constitution in hedging their own states of exception with legal guarantees. As we have seen, Germany's constitution builds in substantial and detailed protections against abuse of emergency powers.²⁹⁵ Later constitutions in other countries recovering from "regimes of horror"²⁹⁶ in the 1990s were even stronger on this point. It has now become a matter of standard constitutional drafting practice to constitutionally regulate states of emergency *within* the constitution, so that the state of emergency—like the idea of war itself—has become an idea filled with legality. One of the strongest protections among recently drafted constitutions can be found in the South African Constitution, which allows a state of emergency to exist, but protects basic human rights and requires constant parliamentary review of related executive decisions.²⁹⁷

²⁹⁴ Perhaps the most alarming of the defenders of the practice that the law is silent in war is Chief Justice William Rehnquist. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998) (tracing the history of civil liberties during times of national emergency).

²⁹⁵ See *supra* note 280.

²⁹⁶ Scheppelle, *supra* note 45.

²⁹⁷ The legal regulation of the state of emergency is so exemplary that it is worth quoting the South African Constitution at length:

- (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—
 - (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
 - (b) the declaration is necessary to restore peace and order.
- (2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—
 - (a) prospectively; and
 - (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.
- (3) Any competent court may decide on the validity of—
 - (a) a declaration of a state of emergency;
 - (b) any extension of a declaration of a state of emergency; or
 - (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

-
- (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—
- (a) the derogation is strictly required by the emergency; and
 - (b) the legislation—
 - (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
 - (ii) conforms to subsection (5); and
 - (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.
- (5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—
- (a) indemnifying the state, or any person, in respect of any unlawful act;
 - (b) any derogation from this section; or
 - (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table. [This is followed by a detailed list of which rights must be protected even in a state of emergency.]
- ...
- (6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:
- (a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.
 - (b) A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.
 - (c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.
 - (d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.
 - (e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
 - (f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.
 - (g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
 - (h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.
- (7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.
- (8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

Another more typical example is the 1993 Russian Constitution,²⁹⁸ which also requires both that a state of emergency be legally declared, and also that a long list of rights be protected during the ongoing emergency. These provisions have become typical of the new constitutions so that the very idea of a state of emergency has become a constitutional idea and not an extra-constitutional one. Rather than defining the edges of the sovereign regime, as Schmitt argued, states of exception are now in practical terms defined as states inside, not outside the constitutional framework. States of emergency, like states of war, have been filled with legal content.

This is not to say that a Schmittian world view is impossible post-9/11. The Bush administration has seemed to proceed from the presumption that exceptional times demand exceptional means and that it is either naïve or suicidal for a state to follow the rules in the current state of affairs. Perhaps because other countries have experienced the horror of the collapse of the rule of law firsthand in more extreme ways than has the United States in the last century, much of the international community (and particularly those democratic rule-of-law countries that count themselves among the United States' traditional allies) definitely rejected the *Realpolitik* presumptions underlying the Schmittian analysis of the state of exception.

The outrage and repulsion with which Schmitt's views have been received in recent years²⁹⁹ provide some measure of the extent to which the Schmitt's critique of liberalism and his proposed solutions to liberalism's weaknesses have been rejected. Schmitt's anti-liberalism has either been attributed to his fascist conversion, which is then taken as answer enough to the intellectual challenges he may have posed, or it has been met with the rule-of-law defenses of liberalism that, to Schmitt's defenders, only serve

²⁹⁸ Article 56 of the Russian Constitution reads:

1. Under conditions of a state of emergency in order to ensure the safety of citizens and protection of the constitutional system, individual restriction of rights and freedoms with the identification of the extent and term of their duration may be instituted in conformity with the federal constitutional law.
2. A state of emergency throughout the territory of the Russian Federation and in specific areas thereof may be introduced in circumstances and in conformity with the procedures defined by the federal constitutional law.
3. The rights and freedoms specified in Articles 20, 21, 23 (part 1), 24, 28, 34 (part 1), 40 (part 1), 46–54 of the Constitution of the Russian Federation are not subject to restriction.

KONST. RF art. 56 (1993), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE RUSSIAN FEDERATION (Gisbert H. Flanz ed., 2002).

²⁹⁹ For an early example of the controversy, see the intense debate that erupted in the journal *Telos* when Ellen Kennedy first attempted a discussion of Schmitt's intellectual legacy in modern German political theory. Ellen Kennedy, Carl Schmitt and the Frankfurt School, 71 *TELOS* 37 (1987) (arguing that Schmitt is one of the intellectual sources of the Frankfurt School but showing that many of the members of that school attempted to hide his influence after Schmitt's association with fascism became clear). The responses published in the same issue include: Martin Jay, Reconciling the Irreconcilable? Rejoinder to Kennedy 71 *TELOS* 67 (1987); Alfons Söllner, Beyond Carl Schmitt: Political Theory in the Frankfurt School, 71 *TELOS* 81 (1987); Ulrich K. Preubeta, The Critique of German Liberalism: Reply to Kennedy, 71 *Telos* 97 (1987). Kennedy responded, Ellen Kennedy, Carl Schmitt and the Frankfurt School: A Rejoinder, 73 *TELOS* 101 (1987). .

to reinforce the point that liberals are bad at dealing with political crises. But over the last several decades, there is a growing condemnation of the legitimacy of suspending the rule of law in order to defend a country—at least not in “advanced” constitutional democracies.³⁰⁰ In fact, there has been an expansion of the rule of law to cover more and more situations previously judged to be practically and perhaps even morally extra-legal. Instead of following the logic of the exception, the rule of law has become coterminous in both the intellectual debate and in the public mind in most constitutional democracies with the democratic political order itself. The rule of law has become an article of faith and not a controversial or internally fraught idea that needs public philosophical attention.³⁰¹

CONCLUSION

In this Article, I have tried to explain why the logic of Schmitt’s analyses no longer work as a practical matter to justify states of exception, even when it is clear to the international community that something fundamental has changed in the world system since 9/11. The institutional elaboration of a new international system that has occurred since Schmitt’s time make his ideas seem all the more dangerous, and yet all the more dated. There are simply fewer states in the world willing to tolerate either Schmitt’s conception of politics or his conception of the defining qualities of sovereignty. Schmitt’s philosophy has, in short, been met with a different sociology. For his ideas to be either persuasive or effective, they must be more than internally coherent or even plausible; they must be loosed in a context in which they can win against other competing ideas. Precisely because of the horrors of the twentieth century, much of the international community that has entrenched both democracy and the rule of law has turned away from these extra-legal justifications for states of exception. Instead, such states have attempted to embed exceptionality as an instance of the normal, and not as a repudiation of the possibility of normality. Only the United States, with its eighteenth-century constitution and Cold War legacy of exceptionalism, seems to be soldiering on in this new legal space of conflict unaware that the defining aspect of the new sovereignty is that even the new sovereign is bound by rules.

³⁰⁰ For a discussion of the developing comparative constitutional jurisprudence on the rule of law, see Kim Lane Scheppele, *When the Law Doesn’t Count: The 2000 Elections and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1370–85 (2001).

³⁰¹ This obviously does not apply quite as fully to political theorists and legal philosophers for whom such debates are their main stock in trade. Such debates have probably had a more and more “academic” quality because it has been hard to imagine them breaking into the public discourse without serious misunderstanding.