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In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror

Stephen Holmes[†]

“It’s extremely hard to wage war with so many undefined rules and roles.”¹

Several years ago, my daughter (now fully recovered) lay in a coma after a serious fall. At a crucial moment, two nurses rushed into her hospital room to prepare for a transfusion. One clutched a plastic pouch of blood and the other held aloft my daughter’s medical chart. The first recited the words on the bag, “Type A blood,” and the other read aloud from the file, “Alexa Holmes, Type

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1. Tom Lasseter, *U.S. Abuse of Detainees Was Routine at Afghanistan Bases*, McCLATCHY, June 16, 2008 (quoting Army Captain Christopher Beiring, commander of the 377th Military Police Company from the summer of 2002 to the spring of 2003). Charges against Captain Beiring in connection with the deaths of two detainees in custody at Bagram Air Base in Afghanistan in 2002 were dropped in 2006. Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. TIMES, Jan. 8, 2006, at A13.

A blood.” They then proceeded, following a prepared and carefully rehearsed script to switch props and roles, the first nurse reading from the dossier, “Alexa Holmes, Type A blood,” and the second reading from the bag, “Type A blood.”

Emergency-room personnel are acutely aware of the serious risks posed by excessive delay. Though they understand the need for immediate and unhesitating action, they nevertheless routinely consume precious time to follow protocols drilled into them and practiced in advance. Why do they do this? They do it to minimize the risk of making fatal-but-avoidable mistakes under the psychologically flustering pressures of the moment.

My aim in this Lecture is to tease out some of the implications of this everyday emergency-room experience—implications, in particular, for designing a more effective response to what President George W. Bush, throughout his time in office, persisted in labeling “a national emergency.”²

I

TWO CONCEPTS OF EMERGENCY

Emergency-room doctors and nurses are not the only professionals who, when faced with a disorienting crisis, limit discretion and abjure gut reactions, embracing instead a strict adherence to rules and protocols that provide them with a kind of artificial “cool head.” Emergency evacuation procedures for coastal areas during severe weather events³ or urban centers during a terror attack⁴ provide obvious examples. Similarly, to successfully extract an unconscious firefighter from a third-story window requires not improvisation on the fly but coordinated adherence to pre-established procedures rendered quasi-instinctive by practice and repetition.⁵ And, as all travelers know, if the

2. Declaration of National Emergency by Reason Of Certain Terrorist Attacks, Proclamation No. 7463, 60 Fed. Reg. 48199 (Sept. 14, 2001) (“A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.”); Press Release, Office of the Press Secretary, President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), *available at* http://en.wikisource.org/wiki/Detention,_Treatment,_and_Trial_of_Certain_Non-Citizens_in_the_War_Against_Terrorism (“Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.”); Press Release, Office of the Press Secretary, National Security and Homeland Security Presidential Directive: National Security Presidential Directive/NSPD 51, Homeland Security Presidential Directive/HSPD-20 (May 9, 2007), *available at* <http://www.fas.org/irp/offdocs/nspd/nspd-51.htm>.

3. See UH PUB. SAFETY DEP’T, UH [UNIVERSITY OF HOUSTON] SEVERE WEATHER RESPONSE PLANNING KIT (2008), *available at* http://piersystem.com/posted/1093/UH_Severe_Weather_Response_Planning_Kit.205047.pdf.

4. Spencer S. Hsu, *Sept. 11 Chaos Prompts Exit Plan; Federal Workers Would Get Orders Within 15 Minutes*, WASH. POST, Aug. 17, 2002, at A1.

5. JOHN NORMAN, *THE FIRE OFFICER’S HANDBOOK OF TACTICS* 265-67 (PennWell 2005)

cabin pressure suddenly drops, we should secure our own oxygen masks before coming to the assistance of our children.⁶ Every single instruction manual devoted to emergency preparedness and contingency planning stresses a similar set of carefully pre-crafted rules.

Is regimented adherence to pre-existing rules in emergency situations relevant to the effective management of national-security emergencies? This question is raised by a rhetorical flourish frequently employed during the Bush presidency to silence critics of unconfined executive power in the war on terror: anyone who favors adhering to inherited legal rules, such as habeas corpus or the Geneva Conventions, must be frivolously underestimating the danger we face. In confronting the terrorist threat, effectiveness requires flexibility, and flexibility presupposes the shedding of rules—not of rules that the executive can selectively apply, revise, or flout at will, but of rules that effectively constrain the executive. The president’s constitutional responsibility to act within the law, we are sometimes told, is secondary to his constitutional duty to defend and protect the country. Allegedly, only those who downplay the threat of international Salafi jihadism would suggest that we should fight al Qaeda with our hands tied behind our backs.

What makes the emergency-room example seem jarring, at least to anyone immersed in the Bush-era debate about counterterrorism, is that it conveys the opposite lesson: emergency-response personnel follow pre-established protocols precisely *because* they understand the dangers they face. Only those who fail to appreciate the gravity of a looming threat would advocate a wholesale dispensing with rules that professionals have developed over time to reduce the error rate of rapid-fire choices made as crises unfold.

If slavishly followed, admittedly, some rules would impede apt responses to danger and disaster. But the patently dysfunctional nature of particular rules in certain situations does not justify a blanket repudiation of obligatory rule-following during emergencies.⁷ That rules *may* play an emphatically positive role during crises and calamities is plainly illustrated by emergency-room protocols. The reason why is easy to formulate. Rules do not function always and exclusively as disabling restraints, binding our hands; they can also serve

(1991).

6. For an example of the detailed drill followed by pilots during emergency depressurization of an aircraft, see STANLEY STEWART, *EMERGENCY: CRISIS ON THE FLIGHT DECK* 29-30 (2d ed. 2002).

7. A pertinent example is provided by a Boston surgeon who first cites a study showing that “the rate of bloodstream infections” in Michigan intensive care units “fell by two thirds” within three months after the introduction of “a simple five-step checklist,” including instructions about washing hands and wearing sterile gowns and gloves; and then goes on to complain that the Office for Research Protections has outlawed the checklist because it violates the rights of patients and health-care providers to informed consent. This is a useful example of how poorly conceived rules can degrade performance by interfering with well-designed rules that have a time-tested record of improving performance. Atul Gawande, *A Lifesaving Checklist*, N.Y. TIMES, Dec. 30, 2007, § 4, at 8.

as steadying guidelines, focusing our aim, and reminding us of long-term objectives and collateral dangers that might otherwise slip from view in the flurry of an unfolding crisis.

That this rather obvious truth might have some relevance to the war on terror is strongly suggested by the behavior of the constitutionally unrestrained executive between 2001 and 2008. Some of the most egregious policy mistakes that occurred during this period can be traced directly to the constitutionally unchecked presidency, a “monarchical” and therefore potentially arbitrary decision-making system that, arguably, no country can afford, especially when faced with grave, obscure, and rapidly evolving threats.

Unchastened by recent history, the theorists and policymakers with whom I take issue continue to claim that the most effective way to fight terrorism is to maximize executive-branch discretion and, by increasing governmental secrecy, to minimize legislative and judicial oversight of executive action.⁸ In fighting international terrorist organizations, they typically argue that “the benefits of relying upon executive speed and unity outweigh any benefits that might arise from congressional participation.”⁹ This empirically disputable claim was advanced alongside an equally dubious constitutional claim that “[t]he Constitution creates a presidency whose function is to act forcefully and *independently* to repel serious threats to the nation.”¹⁰ This reading of the Constitution was shared by prominent members of Bush’s national-security establishment. In the mind of Vice President Dick Cheney’s chief legal advisor, David Addington, the U.S. president has the constitutional power to ignore all statutes that, in the president’s opinion, interfere with his capacity to conduct the war on terror in any way that he sees fit. For whatever reason, Cheney and Addington felt that 9/11 vindicated their prior belief that “[t]here was too much international law, too many civil liberties, too many constraints on the President’s war powers, too many rights for defendants, and too many rules against lethal covert actions. There was also too much openness and too much meddling by Congress and the press.”¹¹ Restraints on the power of the president, according to the Cheney-Addington view, necessarily diminish the capacity of the country’s national-security agencies to respond effectively to an existential threat.¹² Defenders of unchecked (or only weakly checked)

8. For the in-house reasoning during a period when many controversial decisions were being made, see Dan Eggen & Josh White, *Memo: Laws Didn’t Apply to Interrogators: Justice Dept. Official in 2003 Said President’s Wartime Authority Trumped Many Statutes*, WASH. POST, Apr. 2, 2008, at A1.

9. Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2541 (2006).

10. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 127 (2006) (emphasis added).

11. JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 7 (2008).

12. For a sophisticated theoretical elaboration that does not endorse all of the broad and unconditional claims embraced by Cheney and Addington, see ERIC A. POSNER & ADRIAN

executive discretion in the war on terror typically ignore the liberal paradox that constraints can be empowering, and that legal and constitutional restraints can increase the government's capacity to manage risk and crisis.¹³ Adherence to preexisting rules, they imply or state, displays a doctrinaire or "deontological" mindset, oblivious to real-world consequences, while handing unregulated discretion to a single individual, of uncertain temperament and situational awareness, is perfectly pragmatic and tough-minded.¹⁴

Ancestral authority supporting executive unilateralism in times of crisis is frequently discovered in John Locke's conception of prerogative: the "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."¹⁵ When feeling even pithier, executive-discretion theorists remind us that necessity knows no law.

What would those who endorse a broad reading of the president's emergency powers after 9/11 say about the emergency room, where discretion is discouraged and urgency itself favors operating according to prescribed rules? At first, presumably, they would dismiss its relevance. There are two kinds of emergencies at issue here, they might say, and we cannot learn anything of value about how national-security professionals should respond to national-security emergencies by studying the way medical professionals respond to medical emergencies. In the emergency-room example, they might point out, there was only one right answer; such is unlikely to be the case when dire threats of national security suddenly arise. Moreover, trauma specialists encounter the same problems over and over again and therefore eventually develop serviceable rules of thumb (such as "unclog the windpipe of an accident victim before stanching the bleeding wound")¹⁶ that, followed implicitly, help save lives. When emergency situations are being addressed sequentially and display similarities that demand similar treatments, acting according to general rules makes sense. Even though they can be immensely stressful, emergency-room emergencies are of this variety. Because they are in no way unprecedented, they can be managed by the book. On the other hand,

VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS* (2007). Posner and Vermeule refer to acquiescence in executive discretion as "the deferential view," namely the belief in "strong judicial and legislative deference to government decision making in times of emergency." *Id.* at 15.

13. See generally STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995).

14. Another carefully argued work that defends unchecked executive power in the war on terror while rejecting the more extreme positions of David Addington and John Yoo is BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008). Wittes, too, dismisses criticisms of unchecked executive discretion as "high-minded moral rhetoric." *Id.* at 184.

15. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 81-82 (2007). For Locke's theory of the prerogative power, see JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 82, ch. XIV, §160 (J.W. Gough ed., 3d ed. 1966) (1690).

16. See J. Christian Fox, *Initial Approach to the Trauma Patient*, in *EMERGENCY MEDICINE MANUAL* 761, 761 (O. John Ma et al. eds., 6th ed. 2004).

national-security emergencies, especially the threat of a 9/11-style nuclear sneak attack, are completely different. That, at least, is what those who conflate the counterterrorism agenda with the executive-discretion agenda would have us believe.

But does the looseness of the analogy mean that we can learn nothing useful that could be applied—with suitable adjustment—to managing the national emergency posed by jihadist terrorism? In the case of counterterrorism, the most frequently invoked reason for casting off inherited rules is that the terrorist threat revealed by 9/11 shatters all preexisting paradigms. Of course, infiltration and sabotage are not new. But the possibility that a nuclear weapon might fall into the hands of an anti-American terrorist group has exploded the two inherited legal frameworks—those of criminal law and the law of war—within which modern political systems have learned to respond to domestic and international violence.

Modern al Qaeda-style terrorism is neither crime nor war in the conventional sense. It is not crime, as we ordinarily conceive it, because its perpetrators are foreigners conspiring and attacking from overseas who employ indiscriminate murder on an unprecedented scale to pursue overtly political goals. It is not war because it is conducted by itinerant, dispersed non-state actors who cannot be cornered into unconditional surrender, who cannot sign binding treaties, and who cannot be deterred by threats of retaliation. Because international Salafi terrorism does not fit comfortably into either of these two traditional categories, it is argued that due process and the laws of war—drawn up as they were in those traditional contexts—are unserviceable and basically irrelevant to the task of combating it. Put another way, those who originally crafted such venerable rules did not anticipate today's unnerving threats.

It is worth noting that the most uncompromising promulgators of blank-check constitutionalism oppose the eventual creation of a new legal framework to cover the currently unregulated no-man's-land between crime and war. They spurn all laws that threaten to bind the executive, dismissing them as dangerous obstacles to effective governmental action.¹⁷ Less radical advocates of executive discretion in the war on terror do not go so far; they simply point out that a new legal framework tailored to fit the new threat has yet to emerge. In the meantime, counterterrorism must be as nimble and improvisational as terrorism itself, responding in an ad hoc manner to unique circumstances that

17. For example, "conservative administration lawyers, led by Vice President Cheney's chief of staff, David Addington . . . worry that any attempt to involve Congress or international lawyers in writing new rules would produce an unworkable legal mess that would endanger U.S. security." David Ignatius, *A Way Out of Guantanamo Bay*, WASH. POST, July 7, 2006, at A17. Similarly, "[n]ew laws could bring political certainties and consensus, but they will come at the price of flexibility and adaptability." Yoo, *supra* note 10, at 241. Even if crafted with an eye to the threat of international Salafi terrorism, a new legal framework would still be binding on the President, and "[o]nly the executive branch has the ability to adapt quickly to new emergencies and unforeseen circumstances like 9/11." *Id.* at 234.

can neither be described nor be controlled by rules. We do not need generals fighting the last war or policemen trapped in the law-enforcement paradigm.

Keeping all this in mind, we can pose our leading question again: does the centrality of rules to ordinary emergency response have nothing of substance to teach us about the potential contribution of due process, constitutionalism, and international law to the prudent management of national emergencies? There are several reasons to believe that lessons drawn from ordinary emergency management can be usefully applied to counterterrorism, despite all the differences between them.

II

RULES FOR RESPONDERS

The most persuasive argument for executive discretion during emergencies is usually thought to be urgency. This is fascinating because, in the emergency room, urgency is the principal reason for avoiding discretion and relying on rules; nurses, for example, follow protocols elaborated in advance because, when a disaster strikes, they have little time to think. Besides reducing the risk of avoidable error, the rules governing emergency response considerably reduce decision and coordination costs. They also serve an emotionally reassuring function, something of immense practical value when the stakes are high and time is scarce.

As I mentioned earlier, managing diverse situations according to general rules is feasible only if the situations in question display observable uniformities. General rules for administering transfusions make sense because, for all practical purposes, the patients being transfused are the same. But that is only part of the story. Another reason why general rules are applicable in such cases is that emergency responders tend to react in predictable ways, freezing, fixating, or panicking under stress. All of us make costly and sometimes irreparable mistakes under immense time pressures. All of us, when spellbound by an onrushing threat, may fail to notice another lethal danger careening toward us from our blind side. To universal human fallibility and tunnel vision (exacerbated by urgency), we can add the equally universal human reluctance to admit mistakes and to make appropriate midstream adjustments in a timely fashion.

These considerations provide an initial reason for thinking that emergency-room practices may contain important lessons for managing national-security emergencies. Advocates of executive discretion in the war on terror frequently ask how precedents can guide our response to a wholly unprecedented threat. An initial answer is that America's situation after 9/11, however novel, is not totally unprecedented. At least one factor that has repeatedly undermined government effectiveness in the past, also during emergencies, remains essentially unchanged: our all-too-human cognitive and emotional imperfections.

When facing an unprecedented threat, responders should of course jettison rules that prevent them from responding in the most effective and appropriate way. On the other hand, they do not necessarily want to circumvent those “auxiliary precautions” (rules, protocols, practices, and institutions) that have survived through trial and error to remind them of the complexity of their threat environment, to prevent their over-concentration on a single salient danger, to alert them to unintended complications triggered by our own ad hoc remedial interventions, and to bring their potentially fatal mistakes to light before it becomes too late to correct them.

Rules to be followed “in case of emergency” reflect a realistic understanding that a crew of human responders, with no script to follow, often *fail* to adapt themselves with desirable rapidity and coordination to the demands of a dangerous and confusing situation. In a moment of crisis, in fact, the absence of clear instructions written in advance is more likely to produce dazed paralysis than effective action. Emergency protocols reveal, more profoundly still, that rules are not the only or even the principal source of immobilizing rigidity in human behavior. The grip of unthinking habit, clouding awareness of feasible options, is well known. The psychological roots of fixation, obsession, one-track thinking, self-certainty, dogmatism, and tunnel vision are equally deep. Over time, arguably, a variety of rules have evolved to increase the capacity of human beings, acting in concert, to adapt flexibly to complex threat environments with which individuals, prisoners of their own pride, limited capacity for processing information, intransigence, slow reflexes, or incomplete situational awareness would be unable to cope. Double-blind tests in science, to choose a different but related analogy, may be subjectively experienced as limiting the freedom of individual scientists, but they obviously help the system of science to adapt realistically to natural phenomena that are always only partly understood.

Like emergency-room crises, moreover, national-security crises have to be managed by a trained staff. To hone their capacity to respond effectively as a team to unexpected crises, such a staff must practice in advance how to apply detailed rules and perform scripted protocols. In emergency situations, that is to say, rules may be superior to discretion because rules, unlike discretion, can be practiced in advance by multi-person operational units. In addition, current staff can transmit their accumulated professional tradecraft to new recruits by inducting the latter into routine procedures, thereby eliminating the need for ad hoc instruction from above and freeing higher-ups to concentrate on strategic challenges. Thus, it would be unwise for a field commander to tell his troops that no rules apply to the treatment of enemy prisoners of war. If he conveyed this anything-goes message, he would soon lose control of his army. The importance of training, disciplining, and coordinating the behavior of front-line emergency responders reinforces the suspicion that rules may be just as crucial for managing national-security crises as for handling life-and-death situations

in the hospital.

Medical crises can also help us overcome the preconception that “absolute” rules, because they reduce tactical flexibility, are necessarily harmful during emergencies. To understand what is obscured by this half-truth, we need only consider the bright-line rule that our two nurses followed before they came rushing into the room: “always wash your hands.” This imperative is blinking red. It admits of no exceptions. When it comes to hand-washing, discretion is strictly forbidden: no excuses or rationalizations are allowed; ignoring the rule, not following it, would be “suicidal.” Based on observable uniformities in nature, obligatory hand-washing reduces error costs as well as decision costs. The rule is rigid but nevertheless pragmatic, neither dogmatic nor moralistic. It incorporates the empirical observation that even members of a professional staff, if left to their own devices, will *not* consistently behave as their situation demands. Thus, it also illustrates the truism, profoundly relevant to the war on terror, that limiting options available during emergencies can be good or bad, depending on what emergency responders, who may be tempted by sheer exhaustion to take hazardous shortcuts, will do with the latitudes they seize or receive.

Campaigners for executive discretion routinely invoke the imperative need for “flexibility” to explain why counterterrorism cannot be successfully conducted within the Constitution and the rule of law. But general rules and situation-specific improvisation, far from being mutually exclusive, are perfectly compatible.¹⁸ There is no reason why mechanically following protocols designed to prevent harried nurses from negligently administering the wrong blood type should preclude the same nurses from improvising unique solutions to the unique problems of a particular trauma patient. Drilled-in emergency protocols provide a psychologically stabilizing floor, shared by co-workers, on the basis of which untried solutions can then be improvised.¹⁹ In other words, there is no reason to assert, at least not as a matter of general validity, that the importance of flexibility excludes reliance on rules during emergencies, including national-security emergencies.

The emergency-room example can also deepen our understanding of national-security crises by bringing into focus an important but sometimes neglected distinction between threats that are *novel* and threats that are *urgent*. Dangers may be unprecedented without demanding a split-second response. Contrariwise, urgent threats that have appeared repeatedly in the past can be managed according to protocols that have become automatic and routine.

18. See generally Richard A. Epstein, *Intuition, Custom, and Protocol: How To Make Sound Decisions With Limited Knowledge*, 2 N.Y.U. J. L. & LIBERTY 1 (2006).

19. Improvisation is not only compatible with rules; it is deeply dependent on rules. This is only common sense, as a moment’s consideration of grammar reveals. Adherence to the rules of grammar, far from reducing, increases our capacity for communicating, and that includes communicating innovative, dissident, and unexpected ideas.

Emergency-room emergencies are urgent even when they are perfectly familiar. Terrorists with access to weapons of mass destruction (“WMD”), by contrast, present a novel threat that is destined to endure for decades, if not longer. Such a threat is not an “emergency” in the sense of a sudden event, such as a house on fire, requiring genuinely split-second decision making, with no opportunity for serious consultation or debate.²⁰ Managing the risks of nuclear terrorism requires sustained policies, not short-term measures. This is feasible precisely because, in such an enduring crisis, national-security personnel have ample time to think and rethink, to plan ahead and revise their plans. In depicting today’s terrorist threat as “an emergency,” executive-discretion advocates almost always blur together urgency and novelty. This is a consequential intellectual fallacy. But it also provides an opportunity for critics of executive discretion in times of crisis. If classical emergencies, in the house-on-fire or emergency-room sense, turn out to invite and require rule-governed responses, then the justification for dispensing with rules in the war on terror seems that much more tenuous and open to question.

In crises where “time is of the essence”²¹ and serious consultation is difficult or impossible, it is imperative for emergency responders to follow previously crafted *first-order rules* (or behavioral commands) to enable prompt remedial action and coordination. In crises that are not sudden and transient but, instead, endure over time and that therefore allow for extensive consultation with knowledgeable parties, it is essential to rely on previously crafted *second-order rules* (or decision-making procedures) designed to encourage decision makers to consider the costs and benefits of, and feasible alternatives to, proposed action plans. In medicine, a typical first-order rule is “always wash your hands before inserting a stent,” and a typical second-order rule is “always get a second opinion before undertaking major surgery.” Such a second-order rule, arguably, makes a good deal of sense in the context of counterterrorism as well. For example, even if we cannot specify in advance when the government is allowed to hold a person without pressing charges, we can specify in advance the procedures that the government must follow to increase the chances that such a decision will be reasonable and revisable.

In sum, a visit to intensive care helps upend some flawed assumptions that, unfortunately, continue to distort current debates about counterterrorism. First, the emergency-room experience brings into focus the paradox of urgency. The extreme urgency of a threat requires rather than excludes adherence to preexisting rules, if only to permit emergency workers, with no time to think, to

20. If a major American city were struck with a nuclear weapon, on the other hand, we would be faced with a house-on-fire emergency of massive proportions, where the importance of emergency-response protocols practiced in advance for mitigating the ghastly consequences presumably needs no emphasis.

21. Cf. POSNER & VERMEULE, *supra* note 12, at 273 (“In emergencies, however, where the stakes are high and time is of the essence, procedural excess can be disastrous.”) (emphasis added).

coordinate their responses swiftly and effectively. Second, when crafted over time by emergency responders who have learned from their mistakes, non-negotiable rules can sometimes prove more effective, pragmatic, and adaptive than unregulated and unmonitored discretion. And, third, rules to be applied in case of emergency can significantly increase the flexibility of operational personnel in a crisis situation by freeing them from their own psychological compulsions and behavioral rigidities.

Of course, not all emergencies are alike. Even if discretion is strictly an anathema in some sorts of emergency, other types of emergency are no doubt best managed by some combination of rules and discretion. So even if we accept the misleading but routine classification of the enduring threat of nuclear terrorism as an “emergency,” we still have to decide what kind of emergency it is. Is it the kind of emergency that requires the government to rewrite radically, or flatly disregard, previously binding rules? This should be an important question precisely for those who insist that the current threat is unprecedented. Because it is unprecedented, its contours are obscure. We are not yet sure which responses will be most effective against it. We are uncertain how urgently we need to respond. Should we manage the new threat by rules (and which rules?) or by some kind of combination of rules and discretion? And how should we organize decision making to improve the chances of finding an intelligent answer to these questions? Because of its notable capacities for secrecy and dispatch, the executive is usually described as the branch best suited for acting in an emergency. But the capacity for acting with secrecy and dispatch may *not* be the most useful asset for appraising the seriousness of a novel threat or analyzing its still-murky characteristics in a self-critical spirit. The security threats inherited by the Obama administration remain immensely complex and constantly evolving. *Acting successfully* in such a complex threat environment presupposes *thinking strategically* about priorities and alternatives. Even if the benefits of secrecy and dispatch outweigh their costs when national-security policies are being put into operation, the costs of secrecy and dispatch probably exceed their benefits when national-security policies are being made.

Advocates of unbounded executive discretion, it should also be noted, routinely rely on analogies and metaphors of their own. My emergency-room analogy should therefore be construed as an antidote of sorts; perhaps one analogy can help loosen the grip of another. To support their claim that the executive branch will be more effective at countering the terrorist threat if liberated from habeas corpus and the Geneva Conventions, for instance, advocates of maximum executive discretion commonly make the metaphorical claim that rules “tie hands.” Because rules tie hands, disablingly, in a crisis they must be loosened or cast off. Because they forbid practices that promise to defeat the terrorist enemy, previously binding statutes and treaties must be circumvented for the duration of the crisis. To prevent the president and his

subordinates from being “strangled by law,”²² especially in moments of grave danger, advocates argue that restrictive regulations must be replaced by broad grants of discretion or enabling acts that effectively turn Congress and the courts into passive and ill-informed observers of unilateral executive action. This arrangement makes sense, needless to say, only if its proponents are correct to argue that unrestrained power, by definition, is effective power.

Those who like to generalize in this flamboyant style may be conflating laws and procedures in general with those technicalities that, in their opinion, permit obvious lawbreakers to escape well-deserved punishment. Even more dramatically, advocates of unfettered executive discretion sometimes write as if laws restricting the executive were all part of some elaborate post-Watergate plot to cripple strong-on-defense American patriots.²³ When ratcheting up the debate philosophically, supporters of executive discretion tend to write about law the way Nietzsche wrote about Christianity, as if it were a trick that the weak have shrewdly played on the strong.²⁴ They sometime suggest, in this spirit, that following restrictive laws (such as rules prohibiting the government from relying on circumstantial or hearsay evidence) communicates submissiveness and weakness, and thereby emboldens the enemy. By contrast, an executive branch that conspicuously breaks the chains that previously restrained it will apparently instill a salutary fear into allies and enemies alike.

The emergency-room analogy provides a useful corrective to such apotheoses of extralegal executive discretion. Without denying the potential upsides of improvisation during emergencies, the analogy draws attention to the potential downsides of shedding rules in moments of crisis and reminds us that rules can magnify problem-solving capacity, even in such perilous circumstances, precisely when and because they are constraining.

III

DEMYSTIFYING THE LIBERTY-SECURITY TRADEOFF

Effective criticism of the unfettered executive in the war on terror requires

22. GOLDSMITH, *supra* note 15, at 69.

23. CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 158 (2007).

24. For example, “The ICC [International Criminal Court] is at bottom an attempt by militarily weak nations that dominated ICC negotiations to restrain militarily powerful nations.” *Id.* at 63. Although he distances himself from “executive power ideologues,” *id.* at 89, such as Addington and Yoo, who were “too committed to expanding the President’s constitutional powers,” *id.* at 102, Goldsmith also takes credit for the notorious DOD document in which “law” is described as “a strategy of the weak” alongside terrorism, arguing that “lawfare” is a weapon routinely wielded, with dismaying success, against effective executive action. *Id.* at 64; U.S. DEP’T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005).

a skeptical analysis of the metaphors through which promoters and defenders of executive discretion structure public debate. "Tying hands" is one example. Another (which sounds disconcerting in the context of hospital care) is "taking off the gloves." But the master metaphor dominating discussions of the war on terror is the idea of a necessary tradeoff between liberty and security. Richard Posner, whose fascinating writings on national security contain many valuable and original insights, nevertheless endorses "the metaphor of the balance." Filling in the make-believe details, he writes: "One pan contains individual rights, the other community safety, with the balance needing and receiving readjustment from time to time."²⁵

This metaphor is loaded. It implies, without evidence or argument, that *liberty can make no positive contribution to security*. So powerful is the imaginative grip of this metaphor, moreover, that even civil libertarians adamantly opposed to extralegal executive discretion during emergencies implicitly accept it.²⁶ Because liberty is often identified with the rules that restrict and discipline executive authority, the tradeoff metaphor also implicitly corroborates the misleading insinuation that, during national-security emergencies, the costs of following rules exceed the benefits of following rules.

The image of a liberty-security tradeoff appears at first to be eminently reasonable. This is probably because the very concept of a tradeoff calls up images of "balances" and "scales," and is naturally associated with anti-dogmatic, anti-hysterical ideas of compromise, negotiation, and splitting the difference between extremes. The tradeoff idea may also be so widely accepted because it is seductively easy to illustrate. Anyone who has passed through airport security knows what it means to sacrifice comfort and convenience as an individual in order to avoid being murdered in a group. The "wall" between intelligence and law enforcement has been repeatedly invoked to show how quaint legalisms, such as the Fourth Amendment, make it more difficult than it would otherwise be to coordinate efforts of separate government agencies trying to shut down terrorist cells. That freedom of expression may prevent the

25. RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 148, 152 (2006); *see also id.* at 31 ("The challenge to constitutional decision making in the era of modern terrorism is to re-strike the balance between the interest in liberty from government restraint or interference and the interest in public safety, in recognition of the grave threat that terrorism poses to the nation's security."). Apart from a few passages, not integrated into his main argument, Judge Posner assumes that constitutional rights and government self-restraint rarely if ever make a positive contribution to national security.

26. David Cole and Jules Lobel, whose instructive book is allegedly about law as an asset rather than a liability in the war on terror, easily slip into talk of liberty-security tradeoffs. For instance: "there are deep-rooted reasons why government officials are unlikely to balance security and the rule of law fairly or accurately in times of crisis" or "[o]utside the traditional battlefield detention context, however, the liberty of the individual must prevail over the government's interest in not disclosing classified evidence." DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 101, 251 (2007). The bulk of their analysis, in fact, concerns the possibility of fighting terrorism without violating the rule of law, rather than the positive contribution of the rule of law to fighting terrorism.

outlawing of anti-Western hate speech, even when the rhetoric of sermons given inside mosques borders on incitement to violence, is yet another frequently cited example of the way liberty can interfere with security.

And this is not all.

If the government respects data privacy laws, we are told, it will be unable to mine worldwide banking records to trace the whereabouts of otherwise-elusive terrorist masterminds. If we *Mirandize* a terrorist suspect, if we allow him to confer with an attorney (who will instruct him not to talk to investigators), and if we then bring him before an Article III judge, we will supposedly lose the chance to extract information from him that might enable us to disrupt an ongoing plot. And how can we provide an alleged terrorist a public trial if such a trial requires us to turn over exculpatory or impeaching evidence to his attorney, thereby revealing sensitive government sources and methods? Along the same lines, exclusionary rules are said to make no sense in the war on terror. We cannot let a nuclear terrorist go free in the short term for the sake of improving relations with the Muslim community in the long term.²⁷ After all, if a nuclear terrorist goes free, there will be—at least for the innocent victims—no long term.

As these colorful examples suggest, there is something to the idea of a liberty-security tradeoff. It makes some sense in some contexts. It is also easy to illustrate anecdotally and, as a consequence, has entered too deeply into our public lexicon to be refuted or uprooted by a theoretical analysis. But it remains a highly distorting lens with which to view the overall war on terror. It conceals more than it reveals.

To see why, we first need to seek some clarification: what sort of liberty must be curtailed in order for security to be enhanced? Advocates of unconstrained executive discretion, it turns out, routinely provide a lopsided answer. They selectively emphasize some forms of liberty while neglecting others, effectively advocating a sharp reduction of the liberties prized by their liberal opponents, while passing over in silence the liberties dear to conservatives. Those who venerate unregulated markets, for example, typically say next to nothing about the potential security benefits of restricting economic liberties, skipping lightly over the negative externalities of a laxly regulated international market to buy and sell, say, ground-to-air missiles or computer

27. By giving frontline operatives a strong incentive to adapt their tactical behavior to the strategic goals of political leaders, exclusionary rules are designed to improve police-community relations, discouraging weakly justified police intrusions into the private residences of (what often turn out to be) innocent individuals. Exclusionary rules, in other words, discourage myopic tactics that can fatally reduce a community's long-run willingness to share time-sensitive information with law enforcement authorities. Executive-discretion theories are frequently drawn to the hypothetical of a ticking nuclear bomb because it mocks the importance, in combating jihadist terrorism, of rules that allow long-term and system-wide concerns to override short-term and local concerns.

circuits for roadside bombs.²⁸ When explaining how due process for terrorist suspects may grievously harm national security, conservatives of a different stripe turn a blind eye to the potential security risks of the right to bear arms. Others ignore obvious downsides to the right of Christian missionaries to proselytize in Muslim lands. Such liberties, like the liberty to buy and sell, are routinely made absolute by their zealous advocates; taken together, they arguably pose as great a threat to American national security as extending habeas corpus to a few hundred randomly captured detainees. But few executive-discretion advocates will be heard loudly insisting that the scope of *these* rights should be curtailed for the sake of national security. Such a selective vision of the liberty to be sacrificed for security suggests that the executive-discretion approach to counterterrorism is tinged with partisan politics, rather than being pragmatic and professional as its advocates imply. The exploitation of national-security emergencies for covertly or overtly partisan purposes, of course, is nothing new in American history.²⁹ That the pattern was repeated after 9/11 is suggested by the irony of theorists who, exaggerating the security costs and minimizing the security benefits of due process and constitutional checks, nevertheless associate their approach with “balance.”

Rather than working with a capacious concept of liberty that might include some freedoms to which they, too, are attached, executive-discretion advocates artificially reduce liberty to those civil liberties associated with the presumption of innocence. This selective definition of liberty makes it suspiciously easy for them to condemn liberals, who are committed to civil liberties, as naïve pawns of an enemy whose saboteurs blend invisibly into innocent civilian populations. Stressing “the refusal of the civil liberties lobby to take threats to national security seriously,”³⁰ they introduce a key and, arguably, misleading storyline: the idea that liberalism itself is a kind of suicide pact into which left-leaning legal academics and activists, adhering dogmatically to non-negotiable values, wish to drag the country to its collective ruin.

28. Eric Lipton, *U.S. Alarmed as Some Exports Veer Off Course in the Mideast*, N.Y. TIMES, Apr. 2, 2008, at A1. On the security implications of the untrammelled liberty to buy and sell, one can usefully consult former Defense Secretary Donald Rumsfeld: “The post-Cold War liberalization of trade in advanced technology goods and services has made it possible for the poorest nations on earth to rapidly acquire the most destructive military technology ever devised including nuclear, chemical and biological weapons and their means of delivery. We cannot prevent them from doing so.” Memorandum from Donald Rumsfeld, former Secretary of Defense, on National Security Policy Issues – Post Cold War Threats to senior officials in the Bush Administration (2001), available at <http://thepriceofloyalty.ronsuskind.com/thebushfiles/archives/000047.html>.

29. This is a central theme of *SECURITY V. LIBERTY: CONFLICTS BETWEEN CIVIL LIBERTIES AND NATIONAL SECURITY IN AMERICAN HISTORY* (Daniel Farber ed., 2008).

30. RICHARD A. POSNER, *UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM* 136 (2006).

Civil libertarians seem insufficiently aware of how much, when they casually embrace the tradeoff metaphor, they are implicitly conceding to their conservative adversaries. Rational, intelligent debate about counterterrorism policy cannot be conducted if the public comes to believe—largely by power of suggestion—that the party defending liberty has abandoned concern for national security to its partisan rivals. But the tradeoff metaphor suggests exactly that. It also implies that, after 9/11, the American government faced a black-and-white choice between preserving the Bill of Rights and preventing the next attack. As a consequence, the prominence of the liberty-security polarity poisons democratic deliberation about how best to confront the terrorist threat. It does so by lending a spurious plausibility to the slanderous charge that expressing concern for personal liberty, in the context of the war on terror, comes close to lending aid and comfort to the enemy.

The “tradeoff thesis”³¹ functions as a mystification in another way as well: it makes winners and losers magically disappear. Instead of being told that the liberty and security of non-Americans (both inside the United States and overseas) have been sacrificed for the liberty and security of Americans—which is closer to the truth—we read about the sacrifice of a nebulous “liberty” for the equally free-floating abstraction of “security.” *Whose liberty? Whose security?* are questions not being asked. In other words, the tradeoff thesis obscures the way in which America’s response to 9/11 has involved a morally unjust distribution of liberty and security jointly. Needless to say, it is easy to understand the electoral logic of benefiting registered voters and burdening invisible “others” with no political clout.

By supplementing a volunteer army with contract forces, and borrowing heavily from abroad rather than raising taxes, the Bush administration made sure that a majority of American citizens of non-Muslim descent experienced the war on terror as a low-sacrifice conflict. In this context, the erroneous implication that most Americans were being called upon to sacrifice something valuable, implicit in the tradeoff illusion, may have helped U.S. citizens feel vaguely noble while simultaneously numbing them to the cruelty inflicted on foreigners in their name. The sacrifices of liberty for the sake of security made by Americans after 9/11, such as exposure to surreptitious domestic surveillance by the government, was negligible compared to the arbitrary deprivations of liberty and cruel treatment suffered by foreign captives—not to mention the massive sacrifices of both liberty and security which hundreds of thousands of Iraqi civilians, who never harmed a single American before 2003, have been forced to make for the sake of purely speculative and arguably non-existent increments in the liberty and the security of Americans.

A final example of partisan-political misuse of the tradeoff metaphor is even more revealing. As others have pointed out, the tradeoff thesis implies that

31. POSNER & VERMEULE, *supra* note 12, at 15.

whenever liberty is curtailed, security is automatically increased. This “hydraulic” understanding of the relation between liberty and security is a mental construction, not an empirical generalization. It is also unappealing for several reasons. When democratically elected leaders are looking for, but cannot find, credible metrics of success in the struggle against terrorism, they may be tempted to rely on the public’s inculcated presumption that every decrease in civil liberties spells an increase in national security. The sacrifice of civil liberties might help persuade the public that the government is succeeding simply because it elicits cries of outrage from the civil liberties community. For electoral purposes, such a negative metric may be preferable to no metric at all. Even worse, the metaphor of a necessary tradeoff may encourage underinvestment in programs, such as the hiring of linguists and analysts, which would increase security without in any way decreasing liberty because such programs—unlike, say, waterboarding—elicit no public cries of outrage from civil libertarians, and therefore remain largely invisible and unknown to the electorate.³²

Even if the promoters of unfettered executive power were justified in associating legal rules with ineffectiveness during emergencies, their single-minded obsession with circumventing America’s allegedly “super-legalistic culture”³³ would need explaining. Let us stipulate, for the sake of argument, that civil liberties, due process, treaty obligations, and constitutional checks and balances make national-security crises somewhat harder to manage. If so, they would still rank quite low among the many factors that render the terrorist threat a serious one. None of them rivals in importance the extraordinary vulnerabilities created by technological advances, especially the proliferation of compact weapons of extraordinary destructiveness, in the context of globalized communication, transportation, and banking. None of them compares to a shadowy, dispersed, and elusive enemy that cannot be effectively deterred. And none of them is as constraining as the scarcity of linguistically and culturally knowledgeable personnel and other vital national-security assets, including satellite coverage of battle zones, which the government must allocate in some rational way in response to an obscure, evolving, multidimensional, and basically immeasurable threat.

The curious belief that laws written for normal times are especially important obstacles to defeating the terrorist enemy is based less on evidence and argument than on a hydraulic reading of the liberty-security relationship. One particular implication of the hydraulic model probably explains the psychological appeal of a metaphor that is patently inadequate descriptively: if the main thing preventing us from defeating the enemy is “too much law,” then the pathway to national security is easy to find; all we need to do is to discard

32. RICHARD A. POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 95-96 (2007).

33. GOLDSMITH, *supra* note 15, at 79.

the quaint legalisms that needlessly tie the executive's hands. That this comforting inference is the fruit of wishful thinking is the least that might be said.

IV SECURITY-SECURITY TRADEOFFS

An important reason to retain at least some long-standing rules during both short-duration emergencies and enduring crises is that certain rules have been crafted, or have evolved over time, to help emergency responders balance the risks of delay with the risks of haste. In the emergency room, the patient's survival can be endangered in more ways than one; acting too quickly is just as risky as acting too slowly. Emergency-room protocols codify and transmit lessons distilled from a multigenerational learning experience with managing complex contingencies, helping today's frontline responders balance competing risks, even when time pressures give them little chance to consult or reflect.

Balancing risks versus risks is not confined to the hospital, of course, or to the choice between rushing and waiting. National security provides plentiful examples. A wide variety of security-security tradeoffs are central to the war on terror. Which potential targets will be hardened and which ones will be left relatively unprotected? Where will policemen be—and not be—stationed? What leads will the FBI follow and which will they ignore? To which theater of war will Arabic-speaking personnel be assigned?

And this is just the beginning.

Counterterrorism agents routinely have to weigh the risks of premature pouncing on a gang of suspects against the risks of delaying arrest so long that a deadly plot is actually carried out.³⁴ Hiring an informant with a shady past is risky, but so is refusing to employ such unsavory characters. Imprisoning angry young men may incapacitate them temporarily, but it also exposes them to prison-house radicalization, potentially transforming mere cranks into committed killers. Releasing Guantánamo detainees who have committed no crime but who may rejoin the fight in Afghanistan or Iraq is dangerous, but so is keeping innocent men locked up for years for no discernable reason.

On the foreign policy side, talking to enemies (such as Hamas or the Taliban) entails risks, but so does refusing to talk. Issuing student visas for young men from Saudi Arabia and Iran is risky (a single unbalanced individual may slip through the screening process and shoot up a mall), but so is refusing to build long-term human contacts with the talented youth of those countries. Associating U.S. foreign policy with unpopular dictators may diminish the willingness of ordinary people in, say, Pakistan to cooperate in the war on

34. These risks include, for example, the risk of divulging the identity of an infiltrated agent who might continue to gather vital intelligence if left unexposed. See POSNER, *supra* note 30, at 98-99.

terror, but breaking relations with the security services of such authoritarian regimes carries risks of its own.

Scarce resources and opportunity costs mean that *all* strategies for making us safer, including labor-intensive and time-consuming needle-in-the-haystack fishing expeditions, invariably expose us to danger in ways that we may later come to regret. If the FBI is required to cast a wide net and pursue the flimsiest of tips, for example, it will have to forego targeted follow-ups of more promising leads. That is one of the painful tradeoffs compelled by a scarcity of national-security assets. It is a tradeoff not of liberty for security, but of security along one dimension for security along another. There are no zero-risk options in the war on terror. Only a feverish imagination would believe that the country could be defended against every conceivable risk at once. The best we can do is to manage risk over time, and that usually means choosing to increase one risk in order to minimize another.³⁵

The inevitability of such security-security tradeoffs is politically embarrassing. It implies that policymakers are constantly endangering national security by the risky choices they make. So how might policymakers and their defenders avoid being held responsible for gambling with national security? One way would be to inflate the liberty-versus-security slogan into a theoretically respectable framework of analysis. The subtly misleading implication of this framework is that security lies on only one side of the equation. The underlying intellectual fallacy, however, may be secondary to the political sleight of hand: namely, the implicit suggestion that, when the government is making tough decisions, its curtailments of liberty never, by definition, imperil national security in ways for which political decision makers should be held responsible.

If you doubt that the liberty-security polarity serves to reduce political accountability for national-security gambles undertaken without thinking through the consequences, then I invite you to contemplate the way a handful of rhetorical formulas, closely associated with the liberty-security mystification, have been used to defend executive discretion in the war on terror. I am thinking of political slogans such as “better safe than sorry,” “we cannot afford not to act,” and “we must prevail whatever the cost.”³⁶ To transform these beguiling slogans into guiding maxims of national security implicitly denies the obvious, namely that precipitate action itself may impose unaffordable costs. When sufficiently thoughtless and uninformed, for

35. Although Richard Posner, too, sensibly advocates a risk-management approach to counterterrorism and has written as well as anyone about security-security tradeoffs in the war on terror, he never to my knowledge argues that curtailments of liberty can, and often do, put security at risk. See generally POSNER, *supra* note 25.

36. According to Goldsmith, “the President’s personal mission to check Islamist terrorism at any cost trickled down and pervaded the administration.” GOLDSMITH, *supra* note 15, at 75. The phrase “at any cost” here strongly suggests myopic indifference to opportunity costs as well as reckless inattention to inevitable security-security tradeoffs.

example, a snap decision can entangle a country in a bloody conflict from which low-cost extraction will prove impossible.

It is easy to understand, admittedly, why political leaders would prefer, undemocratically, to dim public awareness of excruciating security-security tradeoffs undertaken “on the dark side”—that is, in a tenebrous domain where national-security officials frequently stumble around and walk into walls.³⁷ The decision to accept one risk in order to escape another can easily prove to be an irreversible blunder or, to view it from an electioneering perspective, a massive political embarrassment. Ceaseless public chatter about hypothetical liberty-security tradeoffs arguably obscures onerous political responsibility for real and risky tradeoffs of security for security.

According to Jack Goldsmith, David Addington “believed presidential power was coextensive with presidential responsibility. Since the President would be blamed for the next homeland attack, he must have the power under the Constitution to do what he deemed necessary to stop it, regardless of what Congress said.”³⁸ Although it sounds plausible in the abstract, the claim the president’s actual powers must be adequate to his heavy responsibilities clashes with observable reality, namely with the unseemly efforts of high-level Bush administration officials to avoid responsibility for their actions.³⁹ David Addington was famous for refusing to put his own signature on policies he had initiated behind the scenes.⁴⁰

Concerted efforts to shirk and deflect responsibility, moreover, provide an illuminating context in which to reconsider Vice President Dick Cheney’s mantra, “The risks of inaction are far greater than the risk of action.”⁴¹ The risks of inaction, in Cheney’s worldview, are the risks of being “strangled by law,”⁴² in Jack Goldsmith’s phrase, of being hamstrung by due process of law and constitutional checks and balances. Cheney’s warnings about the hazards of failing to act, therefore, suggest that the metaphor of a tradeoff between liberty and security is not as anti-dogmatic and anti-hysterical as one might have initially thought. Behind the associated images of balances and scales, we find in fact that a spurious urgency is being invoked to justify a psychological or ideological unwillingness to submit proposed policies to a nonpartisan and professionally conducted cost-benefit analysis. This is the ultimate paradox of the anti-liberal approach to national security. The misleading hypothesis of a tradeoff between liberty and security has been used, surreptitiously, to *prevent* the application of cost-benefit thinking to alternative proposals for managing

37. See generally TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* (2008).

38. GOLDSMITH, *supra* note 15, at 79.

39. See, e.g., RICARDO S. SANCHEZ WITH DONALD T. PHILLIPS, *WISER IN BATTLE: A SOLDIER’S STORY* 394-404 (2008).

40. Barton Gellman, *ANGLER: THE CHENEY VICE-PRESIDENCY* 135-136 (2008).

41. Elisabeth Bumiller & James Dao, *Eyes on Iraq: Cheney Says Peril of a Nuclear Iraq Justifies Attack*, N.Y. TIMES, Aug. 27, 2002, at A1.

42. GOLDSMITH, *supra* note 15, at 69.

the risk of terrorism, including nuclear terrorism.

Cheney's maxim about the risks of inaction escapes being false only by being meaningless. Given the scarcity of resources, every action *is* an inaction; heightening security in one respect opens up security vulnerabilities along other dimensions. For example, assigning the majority of the CIA's Arabic speakers to Iraq means withdrawing them from other missions; if the attention of high-level officials is devoted to one problem, it will not be devoted to another.

And here is another familiar example. American intelligence agencies reportedly hesitate to hire native Farsi- or Pashto- or Arabic-speaking agents because the best-qualified candidates have relatives in Muslim countries, where reliable background checks are difficult to carry out.⁴³ This is a serious problem because only CIA and FBI agents fluent in these languages are capable of recruiting and handling informants.⁴⁴ This example, too, illustrates that the real tradeoffs in the war on terror do not involve a sacrifice of liberty for security, but rather a willingness to increase one risk in order to reduce another risk. In this case, American intelligence has to run the risk of hiring compromised personnel⁴⁵ in order to reduce the risk of failing to understand the enemy. The tradeoffs necessary in the war on terror, as I have been arguing, almost always involve this sort of gamble. The question is: who has the right to choose the set of security risks that we, as a country, would be better off running?

Policymakers misunderstand worst-case reasoning when they use it to hide from themselves and others the opportunity costs of their risky choices. The commission of this elementary fallacy by Vice President Cheney and other architects of the U.S. response to 9/11 has been extensively documented by Ron Suskind.⁴⁶ Allocating national-security resources without paying attention to opportunity costs is equivalent to spending binges under soft budget constraints, an arrangement notorious for its unwelcome consequences. One cannot reasonably multiply "the magnitude of possible harm from an attack" (for example, a nuclear sneak attack by al Qaeda using WMD supplied by Saddam Hussein) by the low "probability of such an attack"⁴⁷ and then conclude that one must act immediately to preempt that remote threat without

43. Lawrence Wright, *The Spymaster*, THE NEW YORKER, Jan. 21, 2008, http://www.newyorker.com/reporting/2008/01/21/080121fa_fact_wright ("The intelligence community is literally incapable of understanding the enemy, because substantial security barriers have been placed in the path of Americans who are native speakers of Arabic and other critical languages. In the six years since September 11th, very little progress has been made in hiring people who might penetrate and disrupt Al Qaeda and its affiliates.").

44. Craig Whitlock, *After a Decade at War with the West, Al-Qaeda Still Impervious to Spies*, WASH. POST, Mar. 20, 2008, at A1.

45. Needless to say, al Qaeda's capacity to plant double agents inside America's national security bureaucracy is surely negligible compared to that of the KGB during the Cold War.

46. See generally RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11* (2006).

47. John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 820 (2004).

first scanning the horizon and inquiring about other low-probability catastrophic events that are equally likely to occur. One cannot say that a one-percent possibility of a terrifying Saddam-Osama WMD handoff justifies placing seventy percent of our national-security assets in Iraq. But this seems to be how the Bush administration actually “reasoned,” perhaps because of its go-it-alone fantasies, as if scarce resources were not a problem. Or, perhaps those responsible for national security during the Bush years succumbed to commission bias, namely, the overpowering feeling, in the wake of a devastating attack, that inaction is intolerable. This uncontrollable urge to act is often experienced in emergencies, namely, in situations where decision makers need to do something but do not know what to do.

Among President Bush’s many unfortunate bequests to President Obama is the desperate “readiness” problem that afflicts the American military, overstretched in Iraq and Afghanistan and therefore unprepared to meet a third crisis elsewhere in the world. This problem was a direct result of the Bush administration’s failure to take scarcity of resources and opportunity costs into account. What secret and unaccountable executive action made possible, it turns out, was not flexible adaptation to the demands of the situation but rather profligacy, arbitrariness and a failure to set priorities in a semi-rational way. Defenders of the half-truth that the capacity to adapt is increased when rules are bent or broken seem to have a weak grasp of the elementary distinction between flexibility and arbitrariness.

The Founders, by contrast, understood quite well the difference between the flexible and the arbitrary. The ground rules for decision making that they built into the American constitutional structure were meant to maximize the first while minimizing the second. From their perspective, therefore, the question “Can there be too much power to fight terrorism?” is poorly formulated. The right question to ask is: can there be too much arbitrary executive action in the United States’ armed struggle with al Qaeda, potentially wasting scarce resources that could be more usefully deployed in another way? And the answer to this second question is obviously “yes.”

Another example will help clarify the point I am trying to make. It is obviously desirable to conceal information that, if disclosed, would endanger national security. The question is: who should decide which information to reveal or conceal? Or, formulating the question with an eye to institutional design: how should the decision-making process be organized to increase the chances that choices about concealment will be relatively reasonable, rather than whimsical and capricious? Secrecy is a serious problem during national emergencies because disclosure and concealment are *both* risky, for different reasons and—depending on context—to a different extent. It is also an empirical question, since we are talking about predicting the real-world effects, whether harmful or beneficial, of revealing closely held intelligence.

Without delving deeply into this issue, we can say one thing with

confidence: a well-designed national-security constitution would not assign the right and responsibility to make the conceal/reveal decision to parties with a reputational stake in the choice. Covert operatives themselves consistently over-value the secrets that inflate their personal feelings of self-importance.⁴⁸ They also exaggerate the damage to national security that the release of such secret information would cause. No system for deciding what to conceal and what to reveal, if crafted to supply the defects of human nature, would place unmonitored discretion in the hands of executive-branch officials whose self-image as custodians of precious secrets might interfere with an objective assessment of the actual consequences of classification and declassification in any particular case. This is another argument against blank-check constitutionalism, another piece of evidence supporting the view that a well-designed national-security constitution will not assign purely discretionary decision-making power to the executive branch alone.

V

THE CONSTITUTION OF PUBLIC LIBERTY

The simplest way to expose the inadequacy of the hydraulic conception of the liberty-security relation is to focus on *public liberty*. According to James Madison, “[The] right of freely examining public characters and measures, and of free communication among the people thereon . . . has ever been justly deemed the only effectual guardian of every other right.”⁴⁹ The public liberty to examine one’s government, expose its mistakes, and throw it out of office (as opposed to private liberty from government interference) draws attention to the most important clash between the tradeoff metaphor and America’s constitutional tradition. It makes superficial sense to allege that national security can be enhanced by reducing individual privacy via warrantless wiretaps and secret searches; it makes no sense to say that national security can be enhanced, on balance and over a period of years, by ensuring that no one outside of a closed circle of like-minded political appointees knows what the executive branch is doing. A distressing characteristic of ignorance is that it is unaware of that of which it is ignorant. Shielding policymakers from informed criticism, therefore, may palpably damage national security even in the relative short run. Public liberty—meaning the examination and criticism of government by alert citizens, political journalists, and elected representatives (unusually from the party out of power)—protects not individual autonomy but collective rationality. An intellectual framework that assumes, as a matter of definition, that liberty can make no positive contribution to security is seriously misleading for this reason alone. A wily enemy will surely reap greater

48. See generally DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* (1998).

49. James Madison, Virginia Resolution (Dec. 21, 1798).

advantage from the arbitrary and myopic misallocation of scarce national-security assets than from the unwavering enforcement of civil liberties.

Constitutions are sometimes described as instruments for dispersing power in order to prevent political authorities from violating private rights. But constitutions can be understood in other ways as well. For example, constitutional rules of succession help avoid paralyzing struggles for power when leaders unexpectedly die. Written in advance to make succession crises easier to manage, such in-case-of-emergency rules are enabling rather than disabling. The same can be said about constitutional rules that organize decision making in order to maximize the intelligence of decisions—for example, by centralizing accountability and by compelling decision makers to consider relevant counter-evidence and counterarguments. Public liberty is a constitutionally created and mandated system for responsibly weighing the expected costs and benefits of whatever security-security tradeoff is being proposed. That is public liberty's invaluable contribution to national security. And that is also why it makes no sense to ask democratic citizens to sacrifice their public liberty in order to enhance their national security.

Viewed from this perspective, the U.S. Constitution is based on three still-valid principles: all people, including politicians, are prone to error; all people, especially politicians, dislike admitting their blunders; and all people relish disclosing the miscalculations and missteps of their bureaucratic or political rivals. The Constitution attempts to put these principles into operation, roughly speaking, by assigning the power to make mistakes to one branch, and by delegating the power to correct these inevitable mistakes to the other two branches, to the public, and to the press. Its structural provisions, when combined with certain basic rights (such as freedom of political dissent), set forth a series of second-order rules, specifying the essentially collegial, not unilateral, process by which concrete decisions and first-order rules are to be made and revised. All historical changes taken into account, America's eighteenth-century Constitution remains helpful in dealing with twenty-first century threats,⁵⁰ because its second-order rules embody a still reasonable distrust of false certainty, as well as a commitment to procedures that facilitate the correction of mistakes and the improvement of performance over time.⁵¹

50. Rejecting originalism, Posner and Vermeule see things differently, arguing that "[o]ur original constitutional structure, with a relatively weak presidency, reflects the concerns of the eighteenth century and is not well adapted to current conditions." POSNER & VERMEULE, *supra* note 12, at 56.

51. This is not to deny that some features of America's eighteenth-century Constitution may seriously inhibit adaptation to an unprecedented threat. For example, "the government and people of the United States lack a satisfactory way to get rid of an incompetent President in time of crisis. There is no guarantee that a man at all equal to the times will be in the White House. The [British] cabinet system makes the substitution of a crisis executive a relatively simple matter. The presidential system makes such a substitution a virtual impossibility." CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 221 (2d ed. 2002).

False certainties may be more common and more damaging during emergencies than during periods of relative normality. Generally valid decision-making rules have proved feasible and advisable because human decision making displays regularities across individuals and situations. One of the most important of these regularities is the common tendency of political decision makers to interpret ambivalent evidence in a way that makes new information seem to confirm previously held beliefs. Another near-constant in human behavior is a deep-seated aversion to self-critical thinking. In a crisis as in normal times, policymakers do not enjoy listening to people who strongly disagree with them or consulting experts who think that they, the policymakers, are on the wrong track. Although subjectively annoying to the wielders of power, obligatory consultations with independent officials can nevertheless benefit the community for whom the executive is ostensibly working.

Shielding government incompetence from public view may damage national security by delaying the correction of potentially lethal mistakes. As mentioned, the enemy may benefit much more from false certainty and the misallocation of scarce resources than from the extraterritorial extension of some watered-down version of due process to foreign detainees. The point, after all, is to expand the executive's capacity for effective action. Whether the executive's capacity for effective action is increased by oversight and legal rules, or by unfettered and unmonitored discretion, is exactly what needs to be established. That the correct answer to *this* question can be dictated by executive fiat defies belief.

Rules that provide incentives for decision makers to consider counter-evidence and counterarguments are liberating rather than constricting. Promoters of extralegal executive discretion, in other words, have made things easy for themselves by associating rules with rigidity and discretion with flexibility, ignoring the equal plausibility of the opposite alignment. Adversarial process can increase the flexibility of collective decision making, compensating for the psychological and ideological rigidity that individuals regularly display when making decisions behind closed doors and with the blinds drawn, that is to say, in the kind of unnatural isolation fostered by a near-hysterical fear of spies and leaks. Contrariwise, assigning all power to an unchecked executive risks exposing the collectivity to one man's, or one clique's, peculiar cognitive rigidities, emotional hang-ups, and behavioral obstinacies.

Second-order rules, governing the way first-order rules as well as policies and ad hoc decisions are made, can facilitate self-correction. To return briefly to our medical example above, the second-order rule, "always get a second opinion," suggests that pragmatically designed decision-making procedures can be just as compulsory as first-order rules like "always wash your hands." Given observable regularities in human decision making, adversarial process can compel policymakers to focus on pitfalls and opportunities of which they had

been only vaguely aware. This is why choices governed by relatively-unchanging second-order rules can sometimes be more adaptive and sensitive to context than purely unregulated discretion.

Hostile to checks and balances and devoted to unmonitored executive discretion, the Bush administration came to be known less for its flexibility than for its intransigence and extreme reluctance to shift gears. Its abhorrence of legislative and judicial oversight seems to have produced not pragmatism but dogmatism. In retrospect, this is not surprising. By stonewalling external critics and stifling internal dissenters, the Bush administration was able to prolong the natural life span of false certainties that are now widely believed, with the benefit of hindsight, to have seriously damaged national security.⁵²

VI

THE ALLURE OF SECRECY AS A THREAT TO SECURITY

That some level of secrecy is vital in national-security affairs, including the war on terror, is beyond dispute. But can there ever be too much secrecy? Advocates of uninhibited executive discretion appear to deny the possibility, overselling secrecy's benefits for counterterrorism and downplaying its costs. Implementing this lopsided perspective, the Bush administration invested considerable resources in stonewalling, sealing records, unilaterally defying judicial discovery orders, withholding documents from Congress and the 9/11 Commission, over-classifying, lying to the FISA court, destroying CIA videotapes to conceal criminal violation of the anti-torture statute, attaching gag orders to National Security Letters, and routinely invoking the "state secrets doctrine."⁵³ Some of these practices are probably justified under certain conditions. But they can also have pathological consequences, including the sheltering of the official view of reality, tunnel vision, fixation, and obsession. Secrecy can be self-defeating when it provides cover for a failure to make contingency plans or to consider side effects and alternative options, not to mention obstructing investigations into bribery and sweetheart deals whereby long-term national-security interests are subordinated to short-term interests in corporate profits. The stupefying effect of excessive secrecy is strongly suggested by the experience of Bush's first term, when "the process of lying to deceive the enemy imperceptibly turned into lying to hide failures and disappointments."⁵⁴

52. Does unwillingness to admit mistakes correlate with unwillingness to make midstream readjustments? If so, proponents of executive-branch flexibility should have been more concerned about the Bush administration's adamant refusal to acknowledge its errors—even those that could not plausibly be denied, such as the notorious case of Maher Arar, the Canadian citizen kidnapped by U.S. officials at John F. Kennedy Airport and sent to Syria to be interrogated under torture. Ian Austen, *Canadians Fault U.S. for Its Role in Torture Case*, N.Y. TIMES, Sept. 19, 2006.

53. BRUCE FEIN, CONSTITUTIONAL PERIL: THE LIFE AND DEATH STRUGGLE FOR OUR CONSTITUTION AND DEMOCRACY 152-187 (2008).

54. GEORGE FRIEDMAN, AMERICA'S SECRET WAR: INSIDE THE HIDDEN WORLDWIDE

In evaluating the pluses and minuses of secrecy in government decision making, we need to ask ourselves: what kind of plants grow in the dark? The fact that neither President Bush⁵⁵ nor former Secretary of Defense Donald Rumsfeld⁵⁶ can remember why or how the decision was made to disband the Iraqi Army speaks volumes not only about the executive's appetite for deniability, but also about the pernicious effects of secrecy on the rationality of policy making. One motive behind the Bush administration's embrace of extreme executive unilateralism may have been an idiosyncratic belief that the antonym of secrecy is neither transparency nor corrigibility, but betrayal.

Alberto Gonzales's suggestion, when he was attorney general, that investigative journalists could be prosecuted under the 1917 Espionage Act for disclosing executive-branch illegality and incompetence to Congress perfectly illustrates the kind of thinking encouraged by the dim notion that security will necessarily be increased if liberty is contracted.⁵⁷ The hydraulic liberty-security metaphor distorts reality in this case, too, because press freedom may contribute most to national security when it occasionally discomfits the fallible and prideful human beings who temporarily wield power. More generally, democracy depends on maintaining a certain balance between the secrecy of government and the privacy of citizens. During the Bush administration, the secrecy/privacy boundary migrated considerably, with privacy shrinking and secrecy expanding. A government that surreptitiously monitored citizens protesting the Iraq war also prevented citizens from examining in-house decisions about launching and conducting the war. At a certain point, we must worry that an under-scrutinized government ruling an over-scrutinized society will lose its essentially democratic character.⁵⁸

From a national-security perspective, the government's opacity to its inquiring citizens poses a more direct threat than the transparency of citizens' actions to their spying government. Because there is no military draft in the United States today, and no well-positioned Fifth Column of American professors and filmmakers who could conceivably sympathize with Salafism, there has also been no need or opportunity to crack down on dissenters. Between 2001 and 2008, dissent was not criminalized but simply ignored. The former president may not have committed massive violations of civil liberties, using civil liberty to mean only the personal liberties constitutionally

STRUGGLE BETWEEN AMERICA AND ITS ENEMIES 293 (2004).

55. See, e.g., Edmund L. Andrews, *Envoy's Letter Counters Bush on Dismantling of Iraqi Army*, N.Y. TIMES, Sept. 4, 2007, at A1.

56. See, e.g., Fred Kaplan, *Who Disbanded the Iraqi Army?* SLATE, Sept. 7, 2007, <http://www.slate.com/id/2173554/>.

57. Walter Pincus, *Prosecution of Journalists Is Possible in NSA Leaks*, WASH. POST, May 22, 2006, at A4.

58. This is the implicit theme of ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* (2008), an account of the obsessive secrecy with which the administration violated laws designed to protect privacy.

guaranteed to U.S. citizens, not the human rights of all persons. What made his administration's behavior nevertheless seem "unconstitutional," in a philosophical rather than a more narrowly legal sense, was its self-insulation, its unreasonable belief in its own inerrancy, and an imprudent denial of the dangers of false certainty.

Constitutionalism is based on the premise that all men need to be ruled, including the rulers. The last thought is rejected by extollers of unregulated and unmonitored executive discretion, who are, consequently, anti-constitutionalists in the philosophical sense I have in mind. Defying the explicit will of Congress as expressed in unambiguous statutory language,⁵⁹ and shielding itself from informed criticisms and outside input, the Bush administration made one ill-considered choice after another. In short, it violated collective rationality under the false flag of collective security. This is not especially surprising, as decision makers who exclusively watch TV channels owned by political allies and read only newspapers edited by political supporters are unlikely to hear or respond quickly to bad news.

Those who would inflate the president's unilateral power in the war on terror often point out that Congress voiced its explicit approval of the Bush administration's decision to go to war in Iraq. But such sweeping statutory authorizations "are often epiphenomenal products of the emergency rather than moving parts in the government's response."⁶⁰ The fact that checks and balances can be gamed by shrewd executive officials during a national-security crisis is beside the point. When cornering Congress into approving the Authorization for Use of Military Force of 2002, the executive observed the letter but not the spirit of second-order rules for improving the quality of first-order decisions. To understand what is at stake here, we need to look beneath formal compliance with checks and balances to the arrangement's underlying rationale—namely the idea that the duty of the president to report to Congress will prevent at least some ill-conceived policies from being adopted. This is a hope or expectation shared by the Framers, and denied by both the key decision-makers in the Bush administration and their ardent or lukewarm academic sympathizers.

The most disastrous result of the Bush administration's hostility to adversarial decision making was the choice to invade Iraq. None of the many books and articles published about the run-up to the war has managed to discover any trace of a serious debate or discussion, even inside the executive branch, of the pros and cons of the war. Such a serious and informed debate did

59. See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 692 (2008).

60. POSNER & VERMEULE, *supra* note 12, at 273. The authors also describe the AUMF, implicitly, as a feeble congressional attempt to "pretty up the pig" of unilateral executive initiative in wartime. *Id.* at 274.

not occur in Congress either. Members of Congress were presumably reluctant to assume serious responsibility for such a momentous choice, and the voting public, having been led to believe that Saddam Hussein was somehow responsible for 9/11, would very likely have punished any elected representative who did not favor retaliation against the alleged perpetrators of the attacks. On the other hand, Congress may not have passed the AUMF of 2002 if certain of its key members had not been deliberately deceived by executive-branch prevarication.⁶¹

To refute the Founders' claim that the executive branch will, on balance, perform better if compelled to give plausible reasons for its actions, Eric Posner and Adrian Vermeule argue, first, that Congress and especially the courts are less well-informed about terrorism than experts in the executive branch and, second, that representatives and judges are subject to the same cognitive biases that plague the president and his agents. Because judges, in particular, lack national-security expertise, they assert, non-deferential review cannot, on balance, increase executive effectiveness in the area of counterterrorism.⁶² This argument is a non sequitur. That the executive branch acting alone is more effective than the judicial or legislative branches acting alone does not imply that the executive branch acting alone is more effective than the executive branch acting in coordination with the other branches. Indeed, the claim that an executive agency will, on balance, perform best when it is never observed or criticized would not be worth discussing were it not so vehemently advanced in defense of the executive-discretion agenda. The liberty which one-sided advocates of extralegal executive discretion find most odious is the right of citizens and their elected representatives to demand that the executive branch provide plausible reasons for its actions. If a government no longer has to provide plausible reasons for its actions, however, it is very likely, in the relative short term, to stop having plausible reasons for its actions.⁶³

Its capacity for secrecy and dispatch, as mentioned, qualifies the executive branch for acting effectively in a crisis. But such institutional advantages do not necessarily make the executive the most qualified branch for understanding the shape and scope of an unprecedented threat. It is not at all obvious that its hierarchical structure makes the executive capable, in bunkered isolation from the other branches, to analyze intelligently a changing and complex national-

61. On the calculated role of disinformation in securing Congressional support for the authorization to invade Iraq, see BARTON GELLMAN, *ANGLER: THE CHENEY VICE PRESIDENCY* 215-22 (2008).

62. See generally POSNER & VERMEULE, *supra* note 12.

63. JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 30-34 (1991) (arguing that the requirement for the executive to provide plausible reasons for its actions should be construed as an incentive to avoid arbitrary action, not as a disabling "limit" on executive power; and that obligatory adherence to due process and constitutionalism is therefore not only perfectly compatible with, but is actually essential to, effective crisis government.).

security environment, to rank various difficult-to-compare threats according to their gravity and urgency, and to make delicate security-security tradeoffs in a responsible fashion. It has often been insinuated—but never proved—that compelling national-security officials to testify before congressional committees and to explain their interpretation of the country’s national-security environment will have a detrimental chilling effect on zealous counterterrorism efforts. Reporting requirements can admittedly be onerous. But the assumption that legislative oversight will, on balance, reduce the thoughtfulness with which the executive branch approaches security-security tradeoffs is questionable.

It should also be said that the executive branch cannot hide from Congress, the courts, the public, and the press, without hiding from itself as well. Indeed, one of the main reasons why the Bush administration was reluctant to explain itself to the public was apparently that a small group of fallible individuals inside the Defense Department and the Office of the Vice President wanted to make sure that their bureaucratic rivals in other executive agencies, such as the State Department, did not learn of game-changing decisions until it was too late to reverse them. Secrecy was invoked not only to protect national security but, less justifiably, “to avoid dissent” from other executive-branch officials.⁶⁴ The personal hostility, turf warfare, and information hoarding that afflicts America’s national security bureaucracies is probably more paralyzing than the government’s general commitment to due process or checks and balances. Judge Richard Posner himself contends that intra-executive pathologies such as bureaucratic fragmentation and duplication, unclear chains of command, failure to standardize security clearances, and investment in the wrong set of employee skills pose greater obstacles to effective counterterrorism than congressional or judicial micromanagement.⁶⁵ The extent to which Bush’s counterterrorism policy led executive agencies to withhold important secrets from each other is startling, among other reasons, because the Bush administration originally singled out the wall between national-security agencies as an important source of governmental dysfunction in the run-up to 9/11.

To repeat, fear of transparency to Congress, the courts, the public, and the press can severely exacerbate problems of coordination and cooperation among the various agencies of the purportedly “unitary” executive. Excessive compartmentalization within the executive prevents knowledgeable experts ensconced in one executive agency from pointing out the flaws in the evidence being used by another executive agency to set national policy. This is especially dangerous in the face of a new and evolving threat, when useful knowledge about the threat’s contours is likely to be dispersed among various agencies and not yet pooled. To

64. See MAYER, *supra* note 11, at 235.

65. This is a basic theme of two of Judge Posner’s books. See *supra* notes 30, 32.

protect “the unity of the executive” from congressional and judicial meddling by clogging channels of communication and mutual self-correction *within* the executive makes little sense. In line with the Framers’ intent to encourage thoughtful cooperation and information sharing among the semi-independent branches, checks and balances can make a positive contribution to national security by compelling the executive to submit to congressional scrutiny. When arguing that “Congressional oversight helps keep federal bureaucracies on their toes,”⁶⁶ Lee Hamilton has in mind: “hearings, periodic reauthorization, personal visits by members or their staffs, review by the General Accounting Office (GAO), or inspectors general, subpoenas, and mandated reports or letters from the executive branch.”⁶⁷ Such procedures have the downside of consuming precious time. But they also have the upside of maximizing the chances for a wide range of experts to be heard.⁶⁸ They can be enabling as well as disabling. “The purpose of oversight should not be to rein in the intelligence community . . . [T]he basic purpose of oversight should be to ensure that the right people are getting the right information and analysis at the right time.”⁶⁹ Left to itself, the executive branch often fails miserably at its task of coordinating agency-specific counterterrorism programs, a defect that can be mitigated, at least to some extent, by congressional performance audits.⁷⁰ No one thinks that legislative monitoring of executive action is especially well organized. Oversight committees have overlapping jurisdictions and are too specialized on single executive agencies to keep track of broader government policies. Nevertheless, as David Golove has remarked, constitutional checks and balances, when functioning properly, have sometimes allowed experts dispersed throughout the executive to break out of their “stovepipes” and communicate with each other through the oversight function.⁷¹

66. LEE HAMILTON WITH JORDAN TAMA, *A CREATIVE TENSION: THE FOREIGN POLICY ROLES OF THE PRESIDENT AND CONGRESS* 56 (2002).

67. *Id.* at 56.

68. Goldsmith, for his part, freely acknowledges the positive contribution of checks and balances to executive-branch effectiveness. For instance: “Political debate is one of the strengths of a democracy in wartime, for it allows the country’s leadership to learn about and correct its errors. The Bush administration’s failure to engage Congress eliminated the short-term discomforts of public debate, but at the expense of many medium-term mistakes.” GOLDSMITH, *supra* note 15, at 206.

69. HAMILTON, *supra* note 66, at 59.

70. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, *COMBATING TERRORISM: THE UNITED STATES LACKS COMPREHENSIVE PLAN TO DESTROY THE TERRORIST THREAT AND CLOSE THE SAFE HAVEN IN PAKISTAN’S FEDERALLY ADMINISTERED TRIBAL AREAS* (2008).

71. Interview with David Golove, Professor of Law, New York University School of Law, in N.Y., N.Y. (Nov. 4, 2007).

VII

PRIVATE RIGHTS AS PUBLIC INCENTIVES

Now that we have discussed the potentially positive contribution of public liberty to national security, we can return to personal liberties or individual rights with fresh eyes. What we find is that civil liberties are part of the same culture of justification, adversarialism, and obligatory reason-giving associated with democracy at the level of public policy. Like public liberty, individual liberty involves time-tested rules that can potentially improve the government's performance even during a harrowing crisis.

In the face of an unprecedented national-security threat, individual rights, far from invariably interfering with the effectiveness of the executive branch, may sometimes serve a vitally pragmatic function. Those who deny this possibility, in principle, misunderstand due process as a rigid restraint. Laws that discipline executive decision making should not be understood as laying down sharp lines between the permitted and the forbidden. Besides being a personal liberty, a suspect's right to challenge the evidence against him is simultaneously a duty of the government to provide a plausible rationale for its requests to apply coercive force. A right that is enforceable against the government is best understood not as a rigid limit, therefore, but as a rebuttable presumption. In this framework, rights demarcate provisional no-go zones into which government entry is prohibited unless and until an adequate justification can be given for government action. If the executive branch violates a right that it is usually required to respect, it has to give a reason why.

This is how legal rights contribute to a democratic culture of justification. A private right is neither a non-negotiable value nor an insurmountable barrier, but rather a trip-wire and a demand for government explanation of its actions. The rights of the accused are therefore the obligations of the prosecution. Before criminally punishing an individual, the executive must give reasons why such punishment is deserved before a judicial tribunal that can refuse consent. Here lies the difference between a constitutional executive and an absolute monarch: the former must give reasons for his actions, while the latter can simply announce *tel est mon plaisir*.⁷²

For analogous reasons, it is one-sided and even obscurantist to describe habeas corpus, on balance, as a gratuitous hindrance to effectiveness in counterterrorism. It can occasionally involve risks, but habeas does not "tie the government's hands." Like the traditional charge-or-release rule, habeas simply forces the executive to give plausible reasons for its actions. Such a right is a spur, therefore, not a rein. It may sometimes appear to be a roadblock,

72. Many commentators have speculated that Bush was revealing forbidden monarchical fantasies when he commented unguardedly to Bob Woodward: "I'm the commander—see, I don't need to explain—I do not need to explain why I say things. That's the interesting thing about being the president. Maybe somebody needs to explain to me why they say something, but I don't feel like I owe anybody an explanation." BOB WOODWARD, *BUSH AT WAR* 145-46 (2002).

obstructing effective action, but it is also an incentive to take reasonable care, aimed at increasing the likelihood of intelligent decision making even under enormous pressure and time constraints. Abolishing such incentives will not guarantee intelligent, focused, and effective government action.

Advocates of executive discretion in the war on terror are perfectly right to point out that legal restrictions on the executive can occasionally impede effective action. But their analysis is one-sided and too narrowly focused; they need to add that the absence of legal restrictions on the executive, in turn, can encourage irresponsible, profligate, and self-defeating choices. The genuine challenge of counterterrorism is to balance the two symmetrical risks, not to pretend that following rules is risky while circumventing rules is not.

An administration that is legally exempted from providing reasons for its actions also has a weak incentive to develop and implement a coherent overall policy. One reason why the United States was able to treat various terrorist suspects in its custody (Salim Ahmed Hamdan, Yaser Hamdi, David Hicks, John Walker Lindh, Khaled al-Masri, Zacarias Moussaoui, José Padilla, and Mohammad al-Qahtani) in incomprehensibly erratic and inconsistent ways may have been that it was never forced to explain publicly, or perhaps even behind closed doors, exactly what it was doing. The Bush administration also allocated scarce resources behind a veil of national-security secrecy—that is, without having to explain the security-security tradeoffs it was making. The outcomes, as they have gradually come to light, do not look even vaguely pragmatic.

That violations of personal liberty can, under some conditions, severely damage national security is also relevant to the dispute about trying terrorist suspects before Article III courts (or before ordinary military courts-martial). That national security could be damaged by open trials has been frequently alleged. And the possibility cannot be ruled out. But advocates of executive discretion rarely mention the potential damage to national security of closed or partially closed trials and the potential strategic benefits of open and visibly fair trials. This is unfortunate because a fully public trial of mass murdering zealots, using visibly fair procedures, would provide an exceptional opportunity to rivet the attention of the world on the heinous acts and twisted mentality of the jihadists; this is something that no procedure that looks rigged, where Muslim defendants appear in any way railroaded, can possibly do.

Transparent judicial procedures, although they may be costly along some dimensions, can also help convince domestic and foreign onlookers that decisions of guilt and innocence are being made responsibly, not arbitrarily. They can vindicate tough counterterrorism policies and refute the allegation that authorities are exaggerating the threat to national security. Public willingness to cooperate with counterterrorism efforts depends on public confidence in the essential fairness of law-enforcement authorities.⁷³ Such

73. Even commentators who are otherwise committed to extralegal executive discretion, it

confidence is especially vital for managing a threat, such as Islamist terrorists with access to WMD, that is likely to endure for decades, if not longer.

Even more, the transcripts of past public trials of Islamic terrorists have provided a trove of open-source and relatively reliable information that independent scholars and analysts have used to help the country make sense of the motives and operational techniques of the enemy. Many dots will remain unconnected if such information is reserved for the exclusive perusal of a few individuals with high security clearances operating in isolation from outside criticism.

Yes, wholly public trials may possibly expose the sources and methods of U.S. counterterrorism agencies.⁷⁴ But the alternative, trials conducted on the basis of undisclosed information, will likely cause equivalent damage, due to the perverse incentives that they engender. Once again, the tacit tradeoff here involves security versus security. One predictable motive for reluctance to hold a trial in open court might be the embarrassing untrustworthiness of sources and shoddiness of investigative methods. Expecting a closed trial, in effect, investigators and prosecutors have a much weaker incentive to take reasonable care to ferret out reliable information and to use dependable techniques for ascertaining the facts. This is how executive discretion can erode executive professionalism. If terrorism investigators and prosecutors fail to take reasonable care, they will then need secrecy not for the respectable reason that secrecy protects security, but for the discreditable reason that secrecy conceals the illicit shortcuts of investigators who are subjectively convinced, on no compelling grounds, that their guesses and hunches are always totally right. Those who imagine the possible security benefits of such deviations from ordinary standards of due process are not completely mistaken. They have simply over-generalized a partial perspective, unjustifiably ignoring the equally likely possibility of security losses.

Subjectively, without any doubt, a president and his entourage can experience congressional and judicial oversight as an annoying hindrance to free and “flexible” action, just as a prosecutor can experience independent trial judges, discovery rules, defense attorneys, and public trials as obstacles to putting away “obviously guilty” suspects. But rules can be subjectively experienced as disabling restraints when, on balance, they actually serve to facilitate adaptation to reality. That is how shield laws and whistleblower laws ideally function, for example.⁷⁵ Double-blind tests, as mentioned earlier, work

should be said, find this particular argument persuasive. *See, e.g.,* WITTES, *supra* note 14, at 75 (“[O]pen application of agreed-upon rules serves to justify criminal convictions over the years and to lessen doubt about the legitimacy of long-term imprisonments.”).

74. It is worth mentioning, however, that the 1980 Classified Information Protection Act (CIPA) spells out workable and by now time-tested rules for protecting sensitive intelligence without resorting to secret trials, and that means, without encouraging arbitrariness and irresponsibility in the executive.

75. The president may view a law that protects whistleblowers within the executive as an

in a similar way, allowing the system of scientific research to make progress and adapt to reality, even if individual researchers feel to some extent hemmed in by the system's constraints.

The executive branch's obligation to give reasons for its actions is built into the American legal system, both at the micro-level of criminal trials and at the macro-level of checks and balances. To hinder the fatal slide from flexibility to arbitrariness, from expediency to recklessness, the U.S. legal and constitutional system requires the executive branch to test the factual premises of the use of force in some sort of adversarial process. This is the most important way in which due process can enhance governmental performance.

To illustrate how some form of adversarial process might have been useful in the war on terror, we need only consider the possibility that either a serious congressional inquiry before going to war in Iraq or a semi-public trial of Khalid Sheikh Mohammed would have discredited the myth of an Osama-Saddam connection, one of the principal delusions that pumped up public support for a misbegotten war.

And what were the consequences of brushing aside the presumption of innocence and worries about mistaken identity at Guantánamo Bay, where hundreds of detainees have now spent seven years in administrative detention without the detaining authority having to explain why? By failing to provide even perfunctory individualized hearings, that is, by failing to select with minimal care among individuals delivered for a fee to the American authorities in Afghanistan and elsewhere, the U.S. government (I exaggerate to make my point) sent the first 700 "stunt doubles" who came into its custody to the detention-and-interrogation center in Cuba, thereby mispending our scarce interrogation capacities on individuals of minimal or no intelligence value.⁷⁶ And Guantánamo is not the only situation in which jettisoning traditional rules for presumed tactical gains has proved strategically self-defeating.

As Shakespeare's Iago and Othello memorably illustrate, pre-constitutional and therefore legally unconstrained power wielders are notoriously vulnerable to being manipulated by disinformation. Today's advocates of a "monarchical" swelling of presidential discretion tend to underestimate this particular cost of acting with excessive secrecy and

unwarranted congressional infringement of his capacity to run "his" branch of government as he sees fit. But whistle-blower laws, while subjectively annoying at the moment, may increase the president's capacity, over time, to keep an eye on the shenanigans of his thousands of subordinates. Similarly, rules protecting the attorney-client privilege can seem frustrating to a zealous prosecutor or an investigator in pursuit of actionable intelligence; but a trusted lawyer can occasionally convince the accused to turn states' evidence in exchange for leniency in the sentencing phase.

76. See MARK DENBEAUX ET AL., A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (2006), available at law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

dispatch.⁷⁷ Besides contracting individual rights, a loosening of evidentiary standards can simultaneously harm national security by encouraging liars to clog the system with disinformation and false leads and discouraging honest people from reporting what they observe. If authorities begin shipping suspects to prison camps, where they are held incommunicado, without double-checking the alleged evidence, they unwittingly create incentives for malicious or self-serving witnesses to swarm out of the woodwork. (Call this “the elasticity of supply” of informants with hidden agendas.) Contrariwise, well-intentioned people will hesitate to communicate their observations of suspicious activity next door, lest an innocent neighbor be incarcerated for years on the basis of misperceptions that could easily have been dispelled in court.

The generous bounty awarded to Northern Alliance forces and Pakistani border guards for captured “terrorists” obviously created a perverse incentive.⁷⁸ The likelihood that such payments would encourage bounty hunters to gull the inexperienced Americans by pretending that hand-delivered captives were members of al Qaeda or the Taliban was presumably overlooked by decision makers tasked at the time with taking off the gloves. This unfortunate episode draws our attention naturally to rules and practices, such as the right of confrontation, adopted in criminal and civil trials to winnow out testimony or evidence shaped by hidden agendas. Far from “shackling” the government, such procedures have survived over time because they help ascertain the facts of the case. Rules to defend the judicial process from witness malice also reveal the possibility that laws governing the behavior of public officials, far from crippling the government, can strengthen the government. Enabling rather than disabling, such rules free the government from manipulations by spiteful and devious private parties (irate neighbors, jilted lovers, resentful employees, or government informants with a criminal record angling for a better deal) who hope to lure state power into serving illicit ends. Thus, Judge Posner’s suggestion that standards of proof be lowered when threats to security increase⁷⁹ underestimates the security risks associated with government gullibility in the face of strategically planted or accidentally introduced disinformation. Yes, terrorists may occasionally reap some benefit from American law, but that is only part of the story. Terrorists can also take advantage of the credulity of national-security officials, their incapacity to distinguish reliable from unreliable information after they have shredded rules of evidence that have developed by trial and error to help them draw that very distinction. In this way, lifting traditional “constraints” on the executive makes

77. For a similar argument, see Paul F. Diehl & Tom Ginsburg, *Irrational War and Institutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT’L L. 1239, 1246 (2006).

78. Greg Miller, *Many Held at Guantanamo Not Likely Terrorists*, L.A. TIMES, Dec. 22, 2002, at A1.

79. POSNER, *supra* note 25, at 64-65.

it easier for nefarious outsiders to manipulate the executive for purposes extraneous to—if not entirely at odds with—American national security. Evidence suggesting that gullible executive-branch officials were fed deliberate disinformation by Chinese intelligence led a three-judge panel of the Court of Appeals for the District of Columbia Circuit to overturn the Pentagon's determination that a member of the Uighur minority from western China was properly held as an enemy combatant.⁸⁰ That unmonitored presidential discretion under conditions of extreme secrecy opens the door to illicit factional influence *inside* the executive branch is also worth mentioning in this context.

Although some degree of secrecy is vital in conducting the war on terror, resorting to secrecy is never risk-free since it inevitably increases the chances that decision makers will be thrown off track by undetected falsehoods and half-truths. The problem of secret intelligence provided by informants with hidden agendas, and swallowed gullibly because of a failure to appreciate the limited probative value of hearsay evidence, is a serious one. This subtle form of state capture could be called “the Chalabi effect.”⁸¹

The government's duty to disclose, whatever the risks, protects executive officials not only from their own false certainty but also from deceptions perpetrated by internal factions and foreign intelligence services (if not by terrorist operatives themselves) with interests that do not coincide with America's national-security concerns. That is why the duty to disclose should not be one-sidedly disparaged as being always and only an obstacle to pragmatic counterterrorism.

VIII

TEARING UP THE RULE-BOOK ON INTERROGATION

Between 2001 and 2008, American interrogation policy, both for military and CIA detainees, was set by a small group of individuals around Vice President Cheney and Secretary of Defense Rumsfeld who acted without

80. See *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

81. It is curious that “sovereignists” seem more concerned about protecting American sovereignty from the International Criminal Court than from being manipulated by self-serving agents of disinformation such as Ahmed Chalabi. One should also notice in this context not only the failure to learn from the disinformation about Castro's unpopularity provided by Cuban exiles in the run-up to the Bay of Pigs disaster, but also Machiavelli's prescient warning about exiles:

It should therefore be considered how vain are both the faith and promises of those who find themselves deprived of their fatherland. . . . [A]s to their vain promises and hopes, their wish to return home is so extreme that they naturally believe many things that are false and from art add many more to them. So that between what they believe and what they say they believe, they fill you with such hope that by founding yourself on it, either you make an expense in vain or you undertake an enterprise in which you are ruined. . . . A prince should thus go slowly in taking up enterprises on the report of someone banished, since most often he is left either with shame or with very grave harm. NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* 202-203 (Harvey C. Mansfield & Nathan Tarcov trans., 1996) (1531).

consulting or even informing State Department lawyers knowledgeable about the laws of war or FBI experts on effective techniques of interrogation.⁸² Having avoided the normal sanity checks built into the interagency process, they declared Common Article III of the Geneva Conventions inapplicable to both the al Qaeda and Taliban captives and decided to ignore *Army Field Manual 34-52*, the rule-book for interrogating military detainees. Looking for “more flexibility in interrogations,”⁸³ they directed those conducting the interrogations at Guantánamo to use more aggressive methods and to do whatever it took to extract information that might conceivably help stop the next attack.⁸⁴ Mohammed al-Qahtani, the alleged twentieth hijacker, began to be abused at Guantánamo after a full year in captivity when his knowledge of al Qaeda operations was no longer fresh.⁸⁵ The intelligence extracted from military detainees, including al-Qahtani, by resorting to such harsh methods seems to have been meager.⁸⁶ By contrast, America’s strategically-valuable reputation for treating Muslims fairly was perhaps irreparably damaged.

Waterboarding is now officially prohibited by the U.S. military.⁸⁷ Rules governing the CIA’s resort to waterboarding, by contrast, remained murky to the very end of the Bush administration,⁸⁸ although CIA Director Michael Hayden stated for the record that the Agency had ceased water boarding detainees in 2006 as a matter of policy.⁸⁹

For most of the Bush presidency, in any case, national security was routinely invoked to justify the president’s refusal to inform Congress fully about the interrogation methods being used on terrorist suspects. The administration’s politically expedient reluctance to account for its own actions raises the question of how—if they had not been dismantled or ignored—checks and balances and legal rules (domestic and international) might have helped improve the effectiveness of U.S. government interrogations conducted as part of America’s armed struggle with al Qaeda. What is striking about the

82. Eric Lichtblau, *F.B.I. Gets Mixed Review in Interrogation Report*, N.Y. TIMES, May 17, 2008, at A10.

83. MAYER, *supra* note 11, at 220.

84. See generally PHILIPPE SANDS, *TORTURE TEAM* (2008).

85. See, Tim Golden & Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. TIMES, June 21, 2004, at A1.

86. As the footnotes to the 9/11 Commission Report show, the confessions extracted in ghost prisons from the relatively high-level CIA detainees (as opposed to relatively low-level military detainees) using extreme interrogation techniques swarm with maddening inconsistencies. Also, to the extent that they were accurate, the confessions may have simply corroborated what was already known from electronic surveillance, paid informants, and uncoerced testimony. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 523 n.182 (2004).

87. DEP’T OF THE ARMY, *HUMAN INTELLIGENCE COLLECTOR OPERATIONS* 5-21 (2006).

88. See Dan Eggen, *Bush Poised to Veto Waterboarding Ban*, WASH. POST, Mar. 8, 2008, at A02.

89. Scott Shane, *C.I.A. Chief Doubts Tactic to Interrogate Is Still Legal*, N.Y. TIMES, Feb. 7, 2008, at A9.

Bush administration's permissive view about how it should have been allowed to treat detainees is the assumption that a man who is naked and chained to the floor in a freezing prison cell is not, as one might have assumed, *hors de combat*. Applied to interrogation, in fact, "the necessity defense" implies bizarrely that it is the interrogator, not the interrogated, who has his back up against the wall.⁹⁰ The interrogation chamber is purportedly an extension of the battlefield, and custodial interrogation resembles a live firefight with a free-ranging and lethally armed hostile force.⁹¹ Because all his metaphorical exits are supposedly cut off, the interrogator can be excused for ignoring previous legal prohibitions (for example, laws criminalizing torture) in order to secure his country's survival. Necessity knows no law.

Somewhat less eccentrically, proponents of extralegal executive discretion justify ditching traditional rules of interrogation by invoking the inherent powers of the commander-in-chief to conduct an ongoing war any way he sees fit, without meddling by Congress or the courts, much less with any concern for international treaties. But this pseudo-originalist argument for eliminating congressional and judicial oversight of interrogation practices in the war on terror would presumably have little purchase were it not combined, inconsistently, with the practical and prudential, not constitutional, claim that harsh interrogation is necessary to meet a threat that would have been inconceivable to the Framers. All the more astonishing, therefore, is the weakness of the necessity defense that is routinely wheeled out to defend harsh interrogation.

Let us admit, for the sake of argument, that torture sometimes produces actionable intelligence. From this hypothetical premise, significantly, we *cannot* infer that torture is sometimes (that is, ever) justified. To justify the torture that produced the actionable intelligence, we would have to prove that the very same actionable intelligence could not have been unearthed from any other source or in any less coercive manner. Proving a negative, however, is notoriously difficult. An individual who claims to have killed in self-defense must bear a weighty burden of proof, especially if no impartial witnesses observed the allegedly justifiable homicide. This extra burden of proof reflects an old, but still valid, insight into an important regularity of human behavior, namely the tendency of malefactors to *feign necessity* in order to escape

90. See Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, to Alberto R. Gonzales, Counsel to the President 39-41 (Aug. 1, 2002) (signed by Jay Bybee but written in large part by John Yoo); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 207-213 (Karen J. Greenburg & Joshua L. Dratel eds., 2005).

91. See WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 21 (2003) ("Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.").

culpability for criminal acts.⁹² An individual who claims that he killed an assailant in Central Park at three a.m. because he had no other option (such as retreat) may or may not be telling the truth. What about the agents of an immensely wealthy and powerful government who claim that they had no choice but to torture a physically restrained detainee in an interrogation chamber?

It would not be legally or morally convincing for an interrogator to say that he “had to torture” because he was too lazy to walk across the room and ask a CIA agent who already knew the extracted nugget of information. It would make no sense for an interrogator to claim “necessity” simply because he could not read Arabic well enough to find the actionable intelligence he extracted by torture on an easily accessible jihadist website. What is “necessary” for me to do, moreover, frequently hinges on the set of skills I currently master. But am I not responsible for my options and skills, at least to the extent that they result from my prior decisions about how to allocate my scarce resources? Can I claim that I “must” use harsh methods because I have not bothered to learn how to speak a certain Arabic dialect or how to create a rapport with the detainee whom I am questioning?

The necessity defense is the last-ditch justification for unfettered executive power after 9/11.⁹³ Its surprising shoddiness, and not only when applied to harsh interrogation, makes one wonder: how do policymakers inside the constitutionally unrestrained executive, who are walled-off from outside criticism and informed advice, decide what is necessary and what is not? When we hear the word “necessity,” are all our critical faculties supposed to fall asleep? How can the executive’s claim of necessity be tested? How can it be refuted? How can we prevent the executive from claiming necessity to justify an action that is not actually necessary but merely, in the eccentric opinion of a few isolated individuals, desirable?

As the *Boumediene* majority recognized,⁹⁴ the challenge of proving military necessity for the suspension of individual rights is especially acute in the war on terror, where metrics of success are admittedly obscure. We cannot help worrying that executive officials do not actually *know* what is necessary, but rather simply feel compelled, for political reasons, to conceal their uncertainty. By invoking a necessity that can never be tested in any formal setting, the Bush lawyers who favored enhanced interrogation may have simply been asserting that the executive branch does not need to give any reasons for

92. It is paradoxical that executive discretion theorists, such as Posner and Vermeule, while drawing extensively on economic theory, display scant interest in the *incentives* created by their proposal for everyone outside the executive to defer to the executive in the war on terror. See generally POSNER & VERMEULE, *supra* note 12.

93. See YOO, *supra* note 10, at 181.

94. *Boumediene v. Bush*, 128 S. Ct. 2229, 2260 (2008) (“The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”).

its interrogation policies—*tel est mon plaisir*. Policymakers may even believe that being forced to give reasons for their actions, like being forced to conform to rules, involves a display of weakness that might embolden the enemy. The Bush administration's legal defenders more or less said as much: the president's constitutional powers in national-security affairs will be gravely impaired if he has to explain himself before any independent tribunal. This monarchical fantasy has its charms, but it does not take into account the human proclivity to feign necessity. It therefore allows the executive to evade responsibility for actions that may be fatally damaging to national security.

The past administration's defenders assume that harsh interrogation is practical ("it works") and that flat prohibitions on harsh interrogations, by contrast, are ideological, dogmatic, and irresponsible.⁹⁵ According to conservative commentator Benjamin Wittes, proponents of harsh interrogation are pragmatic realists, nimble and adaptive, while opponents of such techniques cleave squeamishly and dogmatically to "modern anticoercion absolutism."⁹⁶ Domestic legislation and international treaties forbidding torture are said to be short-sighted disabling restraints on the ability of the country to defend itself against its enemies. Such rules allegedly make unavailable techniques that are necessary for gathering lifesaving intelligence.⁹⁷ Executive-discretion advocates repeatedly circle back to this theme. In the new situation created by 9/11, liberal qualms about physically and psychologically abusing defenseless prisoners are just as impractical as liberal worries about mistaken identity.

So how much truth is there in this way of framing the debate?

Not much. For one thing, there are many wholly practical arguments against assaulting the human dignity of defenseless detainees. For another, there are good reasons to suspect that the American practice of harsh interrogation employed since 9/11 has been driven less by pragmatic considerations than by a mixture of sub-rational emotion and political opportunism.

In stressing the creation of a rapport with the subjects being interrogated, the FBI's approach to interrogation is designed to increase the reliability of the intelligence obtained. Because rules designed to produce evidence in a criminal trial cannot be applied to the search for intelligence to prevent a future attack, proponents of coercive interrogation argue that the FBI's no-torture policy has

95. POSNER & VERMEULE, *supra* note 12, at 183-215. According to the authors, the claim that "coercive interrogation works" simply means that it "produces information that prevents harms, in a nontrivial range of cases," *id.* at 195, thereby dismissing the need for independent review of executive-branch assertions that all feasible non-coercive methods of obtaining the same information have been exhausted.

96. See WITTES, *supra* note 14, at 191.

97. In a radio address in 2008, Bush reiterated his belief that cruelly coercive interrogation methods are "practices that have a proven track record of keeping America safe." President George W. Bush, President's Radio Address (Mar. 8, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080308.html>.

been rendered quaint and obsolete by the war on terror. But this is an odd argument. It seems highly unlikely that the reliability of intelligence, gathered piecemeal and retained on file to be spliced together with slivers of information discovered later, has absolutely *no value* for preventing future acts of terror.

The only half-plausible argument for interrogators to abandon rapport-building methods in favor of harsh techniques involves urgency: that is, the need for extreme speed to extract information in order to foil an impending attack. When time-sensitive and perishable information is being desperately sought, torture is no guarantee against disinformation, needless to say. Send the torturers on one wild goose chase, and the impending attack will become a *fait accompli*. But, the argument for violating the ban on torture is even more perverse than this suggests. It inexplicably assumes the government already possesses a lode of knowledge (that an attack is impending, when it will occur, and how to find a person who knows the plans in detail, and so forth). The perversity is that many of the rules that the Bush administration improvidently sought to circumvent were explicitly designed to maximize the accumulation of exactly such essential background intelligence—information that needs to be meticulously gathered and thoroughly analyzed, not magically conjured out of the air.

Contrary to the allegations of the executive-discretion school, laws against torture have developed over time not only because of moral and emotional revulsion at physical cruelty, but also because of empirical observations about the unreliability of intelligence extracted by abusive treatment. Further, harsh treatment has deleterious effects on national security, considering the well-documented tendency of torture to produce terrorism,⁹⁸ not to mention the equally well-documented refusal of informants to turn themselves in voluntarily to investigating authorities with a reputation for torture. Next-of-kin, a more promising source of time-sensitive intelligence than physically brutalized detainees, will be less likely to report the suspicious activity of a young family member if they believe that the authorities routinely engage in coercive interrogation. This is one of those cases, not so rare as modern-day Thrasymachuses imagine, where morality and strategy overlap. The practical arguments against torture have been succinctly summarized by, among others, Lieutenant General John Kimmons who asserted, when introducing the Army's new interrogation manual, that "any piece of intelligence which is obtained under duress, through the use of abusive techniques, would be of questionable credibility."⁹⁹ An ex-FBI agent, Daniel Coleman, argues that "[d]ue process

98. Ayman al-Zawahiri repeatedly describes terrorism as "retaliation" for death by torture of his companions. LAURA MANSFIELD, *HIS OWN WORDS: A TRANSLATION OF THE WRITINGS OF DR. AYMAN AL ZAWAHIRI* 30, 33 (2006). Suicide terrorism, in particular, seems to have evolved as a strategy to prevent captured terrorists from revealing the whereabouts of their accomplices under torture.

99. Defense Department News Briefing on Detainee Policies (Sept. 6, 2006), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090601442.html>.

made detainees more compliant, not less.”¹⁰⁰ And Michael Rolince, former special agent in charge of counterterrorism in the FBI’s Washington office, says, “[T]orture and coercion gets you, in the vast majority of cases, wrong information that takes you off on wild goose chases.”¹⁰¹ To this hesitation to endanger national security by acting on disinformation and thereby wasting scarce national-security resources, we need to add long-term considerations, such as: the weakening of incentives to develop more reliable intelligence-gathering skills; the impact of U.S. torture policy on “the battle for the soul of Islam,” on uninhibited cooperation from European allies, on future global competition between the United States and China (a country known for its mistreatment of prisoners); and so forth.

Did anyone in the Bush administration take such long-term consequences into consideration when setting America’s interrogation policy? Or, did long-term planning with an eye to the entire range of national-security threats yield blindly to the needs of the moment, as interpreted by a few individuals caught up in a stressful and bewildering situation? Is the executive-discretion agenda merely a sophisticated expression of myopia, the bunker mentality, worst-case fantasies, and radically truncated time horizons? Is counterterrorism all short-run tactics and no long-term strategy?¹⁰² Does the frightening possibility of nuclear terrorism mean that all attempts to think systemically and dynamically about how to manage the terrorist risk must be abandoned?

Rules banning cruelly coercive interrogation should be retained, not swept aside, for strategic if not humanitarian reasons, because the practice’s palpable costs outweigh its alleged benefits.¹⁰³ After eight years of fierce controversy, its defenders have failed to prove that harsh interrogation’s positive contribution to national security compensate for its negative impact on voluntary informing. It is also worth recalling that the Bush administration typically justified its resort to harsh interrogation techniques by alleging secret evidence of its utility that no one outside a small circle of policymakers can double-check.

Among the many other advantages offered by rules against harsh interrogation, one advantage in particular deserves more attention than it has received. A strict ban on harsh interrogation can help diminish—if not eliminate—anti-democratic incentives for the executive (especially when it is

100. MAYER, *supra* note 11, at 119.

101. Peter Bergen, *War of Error: How Osama Bin Laden Beat George W. Bush*, THE NEW REPUBLIC, Oct. 22, 2007.

102. The thesis that rule-based counterterrorism, on balance, favors strategy over tactics while largely unregulated executive discretion frequently allows tactics to crowd out strategies is also defended by Deborah Pearlstein, Visiting Scholar at the Woodrow Wilson School, Princeton University, Lecture at the Colloquium on Law & Security at New York University School of Law (Oct. 27, 2008).

103. Executive-discretion theorists, needless to say, doubt this claim, stressing the many important benefits of harsh interrogation, including the way it helps the United States “project an image of strength.” POSNER & VERMEULE, *supra* note 12, at 206.

radically uncertain about what to do) to invoke allegedly overpowering but conveniently unobservable necessities and urgencies of its own contrivance.

If a detainee were first savagely tortured and afterwards discovered to possess no information useful for safeguarding national security, the interrogating authority would have a very powerful incentive to hush up the entire episode. Executive-discretion theorists routinely ignore the Framers' warning about the inherent discrepancy between the interests of a country and the interests of its constitutionally unrestricted executive in matters of war and peace.¹⁰⁴ Underestimating private incentives to hide egregious errors, defenders of harsh interrogation are also ready to accept without questioning the executive's assertion that harsh interrogation has saved many innocent lives. All we can say with certainty is that a self-protecting and self-promoting executive is likely to make such assertions whether they are true or false.

The appeal of torture, it might also be argued, derives from a peculiar act of wishful thinking, namely, the misinterpretation—to adapt the terms of Malcolm Gladwell—of a mystery as a puzzle.¹⁰⁵ A puzzle is a problem that can be solved by discovering a single piece of information that can be slotted into place, revealing the hitherto hidden pattern of the whole. When faced with a mystery, by contrast, we have all the information, but we still cannot make sense of the situation, because of a failure to understand the context. The crude idea that America's national security can be enhanced by extracting scraps of information with pliers from randomly-detained individuals sounds too much like the wishful thinking of embarrassingly ignorant interrogators to be attributed to any carefully thought-out policy.

The Bush administration's indulgence in coercive interrogation may have been motivated less by a cool appraisal of its likely beneficial consequences than by other, less rational considerations. After all, violence is notoriously mimetic. It is therefore unsurprising that those responsible for answering the 9/11 attacks resorted to a savage practice that is as universally condemned as terrorism itself. This is the context in which to reconsider the instruction to be "more aggressive" with the detainees. No one would claim that aggressive outbursts are always appropriate, in a strategic sense, to the situations in which they occur. Why, therefore, would anyone believe that being aggressive is invariably more effective than, say, making a brilliant chess-like move?¹⁰⁶ Adapting one's behavior flexibly to the demands of a crisis, in fact, may require circumventing one's aggressive reflexes or managing one's craving for

104. See THE FEDERALIST NO. 4 (John Jay).

105. See Malcolm Gladwell, *Open Secrets: Enron, Intelligence, and the Perils of Too Much Information*, THE NEW YORKER, Jan. 8, 2007.

106. Acknowledging the serious "long-term costs to safety from being too aggressive," Jack Goldsmith argues, revealingly, that the incentives facing national-security officials make them overvalue "the short-term benefits to safety from acting aggressively." See GOLDSMITH, *supra* note 15, at 191.

revenge by cleaving to pre-set rules. The self-defeating consequences of blind rage suggest once again how rules can produce greater flexibility than discretion.

When decision makers feel compelled to respond immediately but have no idea what to do, they may be tempted to choose among alternative courses of action by acting according to simple-minded slogans, seemingly applicable in all contexts. One such slogan is “never show weakness.” But this may be terrible advice, precisely during moments of crisis. Such situations, among their other effects, make decision makers acutely vulnerable to misleading cues and clues that may turn their biologically rooted aggressive reflexes against them.

Does the embrace of harsh interrogation practices reflect an irrational belief that if some force is good, then more force is better? Did the maxim “never show weakness” dispose policymakers to support harsh interrogation without carefully weighing evidence that it may not be effective? Could it be that harsh interrogation is embraced less as a method for extracting actionable intelligence than as an opportunity for achieving, whatever the downstream consequences, symbolic payback for 9/11 and for the subsequent deaths of U.S. soldiers in Afghanistan and Iraq?¹⁰⁷ Could the motives behind the decision to tear up the rulebook on interrogation have been more visceral than rational? Is not the dominance of expressive and punitive over strategic and rational impulses in Bush administration interrogation policy strongly suggested by the techniques actually employed—for instance, forcing humiliatingly naked and sleep-deprived detainees, whose identities and backgrounds were barely known, to wear bras and to bark like dogs while being dragged around on leashes?

When faced with a serious threat to national security, the most aggressive response will *not* always be the most effective response. In a bullfight, the bull loses the contest not because it is insufficiently aggressive, but rather because the matador, through provocative gestures, uses the wounded beast’s aggressive impulses and impaired vision against it, repeatedly luring it into futilely and exhaustingly charging a phantom target.¹⁰⁸ Any system that defends unmonitored executive discretion exposes itself to the danger that the executive officials who happen to be in power at the time will feel that inaction is psychologically intolerable or, by sheer bad luck, will have a bias toward aggressive action that, while psychologically satisfying (not to mention electorally advantageous), in no way corresponds to the requirements of the situation.¹⁰⁹

107. For anecdotal evidence of “an emotional current underlying the rush toward torture,” see MAYER, *supra* note 11, at 142.

108. See generally STEPHEN HOLMES, *THE MATADOR’S CAPE: AMERICA’S RECKLESS RESPONSE TO TERROR* (2007).

109. A analogous problem no doubt arises during genuine battlefield experiences, usually invoked as the trump card by those who believe that *inter arma silent leges*, that there are no

Because those who attacked the United States violated an absolute international ban on terrorism, American authorities may have been tempted to avenge the injury—an eye for an eye—by violating an equally absolute international ban on torture. After suffering a severe blow inflicted by an avowed enemy, the surviving victims of an attack are often obsessed with reestablishing an image of themselves as active rather than passive. They have to “do something” without giving too much thought to the specific consequences of the actions they undertake. This suggests, once again, that cruelly coercive interrogation may have been embraced less for the tactical information it promised to disgorge than for its independent psychological appeal. All of its practical consequences were not necessarily coolly considered.

Such speculations are admittedly impossible to prove or disprove. But they are plausible enough to justify skepticism about the claim that harsh interrogation was embraced solely for the pragmatic reason alleged, namely to extract intelligence to prevent a follow-up nuclear sneak attack against the United States.

Electoral, as opposed to national-security, considerations may also have contributed to the embrace of interrogation techniques that departed sharply from preexisting rules. The lack of genuine metrics of success in the war on terror makes it inherently difficult to prove to voters that their government has undertaken the most effective course of action. Such politically unsustainable uncertainty may, as mentioned, pressure policymakers into seeking or fabricating pseudo-metrics. This is especially true when American policymakers could not demonstrate that their actions are eliminating more terrorists than they are producing. But the Bush administration and its supporters could always point out that Amnesty International, Human Rights First, the ACLU, and other liberal-humanitarian organizations were screaming about torture. These organizations’ vehement expressions of outrage strongly

rules in the “game” of fighting and defeating an intransigent foe. *Cf.* JAMES DOOLITTLE ET AL., REPORT ON THE COVERT ACTIVITIES OF THE CENTRAL INTELLIGENCE AGENCY 2 (1954) (“It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are no rules in such a game.”). A ruthless enemy will rely on guile and deception as well as force. A commander who truly appreciates the immensity of the danger will expect his enemy to use disinformation as a strategic tool. He knows that his enemy will try to lure him into fighting on disadvantageous terrain or to trick him into exposing his flank. What makes the situation so dangerous, in fact, is the ubiquitous nature of the enemy’s decoys and feints, all designed to provoke a self-defeating “gut reaction” on the commander’s part. To cope with such a situation, no commander will rely entirely on spontaneity and off-the-cuff improvisation. Above all, he will need an artificial cool head, rules of prudence developed over time by predecessors who, having lived through earlier battles, learned ways to resist being played for a fool. If he truly appreciates the gravity of the danger, above all, he will cleave to rules designed to protect him against disinformation. He will refuse to make snap decisions based on undisclosed intelligence that no one outside a small circle of saluting subordinates has had a chance to double-check. Only if he underestimates the enemy will he dispense with such rules.

suggested that the Bush administration was going to extreme lengths—pulling out all the stops—to protect the country. The pernicious idea of a liberty-security tradeoff, once again, lent a spurious plausibility to the mind-game being played.

IX

A RULE-BASED APPROACH TO COUNTERTERRORISM

Osama bin Laden's murderous attack on America was less an act of war than a globalized reenactment of archaic vengeance, the collective punishment of randomly assembled Americans for the alleged crimes of the American government. Refusing to be sucked into al Qaeda's primitive logic of an eye-for-an-eye would have been a shrewd way to respond to a self-styled retaliatory attack. If it had really been necessary, in the immediate aftermath of the attacks, to round up undocumented aliens of Muslim heritage on a random basis, without any rationale other than a generalized fear of a second wave of attacks, then it would have been good public diplomacy to treat these undocumented aliens decently and to release them as soon as possible. A decision not to torture Khalid Sheikh Mohammed and the others genuinely responsible for 9/11 would have also made good strategic sense. Treating the high-valued detainees by the book might not have been costless, admittedly. But it would have made it possible, within a year or so of their capture, to give them public trials employing visibly fair procedures.¹¹⁰ Even those who oppose "judicial micromanagement of fast-moving intelligence operations overseas"¹¹¹ might perhaps admit the wisdom of an enhanced judicial role in counterterrorism operations that have been as painfully slow-moving as this one. By dramatically and credibly individualizing the culpability of the 9/11 suspects, public trials would have lessened political support for ill-advised foreign wars by helping the American public escape the visceral and archaic lure of poorly focused group-on-group revenge.

According to John Yoo and Julian Ku,¹¹² the *Hamdan* Court had no business questioning the executive's invocation of military necessity to justify deviations from usual evidentiary principles at trial.¹¹³ Yoo and Ku claim that

110. That the Military Commissions process at Guantánamo, far from being visibly fair, is patently rigged, is suggested by the alarming fact that, thus far, seven military prosecutors there have resigned. For the most recent resignation, see William Glaberson, *Guantánamo Prosecutor Is Quitting in Dispute Over a Case*, N.Y. TIMES, Sept. 24, 2008, at A20.

111. WITTES, *supra* note 14, at 215.

112. See generally Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006).

113. Cf. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) ("Nothing in the record demonstrates that it would be impracticable to apply court-martial rules here. There is no suggestion, e.g., of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. It is not evident why the danger posed by international terrorism, considerable though it is, should require, in the case of *Hamdan's* trial, any variance from the courts-martial rules.").

decisions about how to try enemy combatants should rest within the discretion of the commander-in-chief not only because of the comparative institutional incompetence of the courts in national-security affairs, but for the deeper reason that due process serves only the liberty interests of the prosecuted individual and not the security interests of the prosecuting community. This, as I have been arguing, is the most basic fallacy of executive-discretion theory. Restricting criminal liability to actual perpetrators, carefully excluding clansmen and kin, is in fact a fragile historical achievement aimed precisely at quelling mimetic violence, at interrupting spirals of bloody inter-communal vendetta. In other words, the rules of criminal procedure have evolved and survived over time as instruments for managing violence and restricting its inherently contagious effects. Relatively insulated from political pressures to make someone (anyone) pay for a grievous injury, courts are the institutional custodians of time-tested rules such as the presumption of innocence, notice, and the right to confront adverse witnesses. Those who advocate judicial deference to extralegal executive discretion in the war on terror disagree: "Applying criminal justice rules to al Qaeda terrorists [i.e., terrorist suspects] would gravely impede the killing or capture of the enemy" ¹¹⁴ The historical role of courts in managing violence suggests that criminal justice rules can play an important role in coping with the terrorist threat. Formulated differently, the crime model will retain an enduring relevance to the ongoing struggle with modern terrorism. Those who downplay these considerations typically argue that Americans "are overinvested in criminal law as a weapon against terrorism." ¹¹⁵ But the history of American national-security policy between 2001 and 2008 strongly suggests the opposite, namely that under-investing in criminal law as an instrument of counterterrorism is both a more common and a more serious mistake.

By placing most of its counterterrorism efforts not into tracking down bin Laden and Ayman al-Zawahiri but into making "war" in Iraq, the Bush administration deliberately deviated from venerable legal precedent, inadvertently confirming the jihadists' most damning propaganda by communicating that Muslims worldwide can, for no apparent reason, become targets of America's lethal but poorly focused fury. The surest way to rouse violent resistance is to let people know that there is nothing they can personally do, no prohibitions they can honor, to avoid being attacked. A reckless abandon of due process for individual terror suspects conveys to the world exactly that. This is what it means to say that the Bush administration, after 9/11, lost its compass while taking off its gloves.

Anti-American terrorism on the 9/11 model is best understood as a globalized campaign of revenge attacks against the superpower that has,

114. YOO, *supra* note 10, at 16.

115. POSNER, *supra* note 32, at 231.

according to the prevailing narrative, directly and indirectly oppressed Muslims worldwide. An even better, though still imperfect, analogy to al Qaeda-style terrorism is revolutionary insurgency. Al Qaeda is a deracinated or globalized resistance movement that recruits from a multinational universe of crippled local insurgencies and directs its ire at enemies shared by all violent Islamic fundamentalist movements, particularly the United States, corrupt rulers of Muslim states, and Israel. But if al Qaeda resembles a globally dispersed and networked insurgency, then why should we not look to counterinsurgency theory for some direction in designing an effective counterterrorism strategy?¹¹⁶ This is an instructive suggestion because a central rule of counterinsurgency is to split off the irreconcilable killers from their potential communities of support. The campaign to separate al Qaeda forces from the tribal groupings in Anbar is perhaps the best-known example.¹¹⁷ Indiscriminate violence is self-defeating in a counterinsurgency because collateral damage is counterproductive, driving the civilian population into the insurgent camp, stimulating recruitment and encouraging non-insurgents to provide shelter to insurgents. To be effective, counterinsurgencies therefore require focused and even pinpoint attacks that minimize collateral damage and spare the civilian population.

Although the contours of international jihadist terrorism remain obscure and constantly changing, we know enough about the current terrorist threat to realize the overall benefits of conducting counterterrorism along counterinsurgency lines. Counterinsurgency tactics, in turn, are broadly in accord with the core liberal principle that only the guilty should be punished, a principle that originally developed inside political communities to blunt the universal tendency of violence to breed violence. The individualization of culpability remains a strategic imperative even if the ordinary criminal law alone cannot cope successfully with the terrorist threat. Not only morality but military expediency, too, dictates a strenuous effort to sort the innocent from the guilty.¹¹⁸

For all the obvious differences separating crime, terrorism and insurgency,

116. Democratization is frequently recommended as a long-term strategy to defeat revolutionary insurgencies because elections by universal suffrage can demonstrate the falsity of the militants' claim that they represent the true will of the community. Unfortunately, this strategy is unavailable in the case of al Qaeda, whose militants claim to represent the global Islamic *umma*. OLIVIER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* 200 (2004). Democratization cannot be used to undermine a de-territorialized al Qaeda, contrary to the fantasies of the neoconservatives, because of the logistical impossibility of showing, through a universal-suffrage election, that the true preferences of a majority of the *umma* are not in accord with the views of the militants who claim to act in their name.

117. That such strategies are susceptible to set-backs needs no emphasis. Joshua Partlow & John Ward Anderson, *Tribal Coalition in Anbar Said to Be Crumbling; U.S.-Backed Group Has Fought Al-Qaeda in Iraq*, WASH. POST, June 11, 2007, at A11.

118. LOUISE RICHARDSON, *WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT* 215-224 (2006).

all three can be fought most effectively by adhering to one and the same principle, namely, the imperative to keep the plotters and perpetrators distinct from their innocent associates and neighbors. This demanding rule of prudence and justice, above all, should not be countermanded by talk of “war” where civilian bystanders are expected to die in large numbers. In counterterrorism, too, the individualization of culpability will increase security overall by diminishing the probability that American violence against foreigners will spark violent acts of retaliation by foreigners against Americans. This is another reason why liberalism, contrary to the advocates of legally unleashed executive discretion in the war on terror, will continue to provide a perfectly pragmatic general framework for defending national security.

Rather than advertising its high tolerance for collateral damage by attacking a country that had not attacked the United States, the Bush administration should have made violence against guiltless Muslim civilians look wholly abnormal and unacceptable. Of unproven effectiveness, indiscriminating sweeps and dragnet arrests, too, should have been strenuously avoided. The FBI and federal prosecutors, for their part, should make greater efforts to dispel all appearances of entrapment in terrorism cases.

Convicting and imprisoning Muslim youth not because of hard evidence of conspiracy to commit terrorist acts but on the basis of vaguely worded material-support statutes and relaxed standards of proof is likely to backfire. This is the conclusion not of civil libertarians alone but also of thoughtful specialists on the evolving relationship between terrorism and counterterrorism after 9/11. According to Marc Sageman, for example, “Once arrested, alleged terrorists are entitled to due process and the impartial application of the law in order to win over the worldwide Muslim community and refute claims that Muslims are treated unfairly.”¹¹⁹ For the sake of national security, broadly understood, a strict individualization of culpability should be applied to terrorism just as it is applied to war crimes and felonies.

Those who believe that, in a national-security crisis, “[c]onstitutional rights should be relaxed so that the executive can move forcefully against the threat,”¹²⁰ obviously disagree. They deny the relevance to counterterrorism of the core principles of due process, arguing, on the contrary, that individualized punishment, targeting the guilty without injuring the people around them, is *not aggressive enough* to defeat the terrorists. The “preventive” mission of American counterterrorism makes a refusal to draw a sharp line between the innocent and the guilty seem perfectly pragmatic, in their eyes, because outward signs do not reveal who will become guilty and who will instead remain innocent.

This forward-leaning and therefore indiscriminating approach to

119. MARC SAGEMAN, *LEADERLESS JIHAD* 177 (2008).

120. POSNER & VERMEULE, *supra* note 12, at 16.

counterterrorism is not merely theoretical. It has encouraged federal prosecutors to employ paid informants to encourage Muslim-American youth to talk wildly about committing acts of violence in the name of Islam.¹²¹ By prosecuting acts that are merely preparatory, and not yet dangerously proximate, to crime, a preemptive approach to terrorism risks turning the distinction between guilt and innocence into a matter of opinion. The sentencing of the Lackawanna Six to long prison sentences for what was basically a thought crime should also be mentioned in this context, reflecting as it does a myopic indifference to the way Muslim Americans will perceive a legal system that railroads a few mixed-up kids.¹²²

A similarly indiscriminate bundling of the innocent and the guilty is also observable abroad, in American military prisons in Iraq, for instance, where degrading interrogation methods were applied not on grounds of individualized suspicion but instead on a random or group basis to find out if the anonymous detainees in question, by chance, had any information worth extracting. And it was also observable in Afghanistan, in early 2002, when the Bush administration canceled the traditional Article 5 hearings that the military had originally planned to use for screening those to be sent to Guantánamo.¹²³ Such individualized or case-by-case hearings were apparently incompatible with the Bush administration's initial decision that no process at all was due to the randomly assembled foreign captives. Enemy combatants, paradoxically, did not deserve a hearing to determine if they were enemy combatants. Once the president had made "a group-status identification," David Addington allegedly argued, there was no longer any "question of individual guilt or innocence."¹²⁴ The professional military's desire to get the right people was apparently viewed, by the civilian leadership, as unduly restrictive of the president's power to defend the country as he saw fit.

This re-tribalization of culpability, as it might be called, has also appeared in antiliberal endorsements of extrajudicial executions.¹²⁵ Before he became attorney general during Bush's second term, Michael Mukasey warned civil libertarians who have advocated judicial review of executive decision making

121. Guy Lawson, *The Fear Factory*, ROLLING STONE, Feb. 7, 2008.

122. See generally DINA TEMPLE-RASTON, *THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN THE AGE OF TERROR* (2007).

123. See MAYER, *supra* note 11, at 123. Article 5 of the Third Geneva Convention reads: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364.

124. MAYER, *supra* note 11, at 186.

125. In November 2002, the CIA killed an American citizen, Ahmed Hijazi, along with five other suspected al Qaeda operatives, by a hellfire missile attack inside Yemen. See James Risen, *Threats and Responses: Drone Attack; An American Was Among 6 Killed by U.S., Yemenis Say*, N.Y. TIMES, Nov. 8, 2002, at A13.

in the war on terror that they were going to have blood on their hands: “[I]t bears mention that one unintended outcome of a Supreme Court ruling exercising jurisdiction over Guantánamo detainees may be that, in the future, capture of terrorism suspects will be forgone in favor of killing them.”¹²⁶ Executing suspects, without the public disciplining of executive power typical of criminal justice, involves suspending the presumption of innocence and dismissing liberal worries about mistaken identity. Only someone unconscious of the threat, supposedly, would fret about mistaken identity after 9/11.

Those who swashbuckle in this manner underestimate the downsides of discarding the presumption of innocence, however. Their blind spot is a serious one because the individualization of culpability, enforced by habeas and other forms of judicial oversight of the executive, is one of the most effective tools in the American arsenal for preventing violence from breeding violence, in an endless cycle. They fail to appreciate this point, overconfidently assuming, on the contrary, that grave security losses by non-Americans will have no repercussions for the security of Americans. By arguing that one false negative (a foreign terrorist who gets away) is of much greater significance than thousands of false positives (innocent foreigners who are killed, mutilated, or deprived of liberty by accident or mistake), they are implicitly subordinating the cognitively demanding guilty/innocent distinction to a bright line that they have less trouble locating, namely the difference between them and us.¹²⁷ Defending collateral damage among foreign nationals as unlucky for them but beneficial to us may be tacitly relying on another analogy, namely, the idea that counterterrorism, to be effective, must be just as “aggressive” as chemotherapy. To eliminate one diseased cell it is necessary to destroy thousands of healthy cells. The fact that, in the counterterrorism context, these healthy cells happen to be innocent human beings seems to be of no special significance to the advocates of a gloves-off approach to national security.

But what if the casual acceptance of overkill in the war on terror proves fatally damaging to national security? What if it harms us as well as them? How many recruits to al Qaeda do we create every time a Predator drone kills dozens of Pakistani villagers on the off-chance that a member of al Qaeda is present in the village? Rules that compel us to treat with skepticism sketchy

126. Michael B. Mukasey, *Jose Padilla Makes Bad Law: Terror trials hurt the nation even when they lead to convictions*, WALL ST. J., Aug. 22, 2007, at A15.

127. Soldiers accused of war crimes in Iraq are routinely acquitted or given negligible sentences on the grounds that establishing guilt beyond a reasonable doubt is almost impossible in a war zone, where witnesses are prone to disappear and the chain of custody cannot be maintained. Paul von Zielbauer, *The Erosion of a Murder Case Against Marines in the Killing of 24 Iraqi Civilians*, N.Y. TIMES, Oct. 6, 2007, at A8. The application of such procedural rules to Americans, but not to similarly situated non-American terrorist suspects, corroborates the suggestion that, in the war on terror, the just-unjust distinction has been replaced by the them-us distinction. This distinction may have outlived its usefulness in an age of globalized communication and transportation, however, when voluntarily cooperating foreign tipsters living abroad are essential for reducing the terrorist threat against the United States.

intelligence on the whereabouts of high-value targets are not simply expressions of liberal squeamishness. Instead, they reflect lessons learned through past experience about how best to defend national security by avoiding gratuitous fatalities among people whose cooperation the national-security agencies need. That collateral damage by high-altitude U.S. bombing in the Federally Administered Tribal Areas abetted the sidelining of Pervez Musharraf and the installing of a potentially less cooperative civilian leadership in Pakistan suggests the vital importance, for U.S. security, of acting with more humane regard for those non-Americans who have been paying the price for America's aggressive counterterrorism campaigns.

The right of a nation to defend itself from its enemies does not imply that it is strategically advisable to treat foreign civilians the same way an oncologist treats healthy cells, subjecting the innocent and the guilty alike to an aggressive treatment. The legal prohibition on killing noncombatants may expose those who respect it to some degree of risk. But throwing out such a rule, refined over time to diminish the threat of mimetic violence, carries grave risks of its own. So which poses the greater obstacle to effective counterterrorism: laws limiting the indiscriminate use of force or popular resentment by groups whose cooperation the authorities need, fueled by the indiscriminate use of force? The first principle of counterinsurgency suggests that indiscriminate violence may be the greater obstacle. To weaken an insurgency, it is imperative to drive a wedge between the violent actors and the non-violent civilian population. Refusal to follow this time-tested rule in the name of an illusory flexibility is a recipe for failure if not disaster.

It should be said, by way of conclusion, that Bush-era officials do not deserve all of the blame for the policy disasters that they initiated and oversaw. The American public, especially at the beginning, went along with a counterterrorism policy that treated non-Americans—for they have been the principal victims—with evident unfairness and even cruelty. Why? To make sense of this amoral indifference, we should reflect on the surprisingly common claim that al Qaeda killed “3,000 Americans” on 9/11.¹²⁸ That several hundred of those killed on 9/11 were non-American is well known. So why does this pertinent fact usually go unmentioned? Are Americans somehow unwilling to mix their blood with the blood of foreigners? And why did no prominent American politician explain that deranged terrorists had not only killed innocent people but had simultaneously attacked an American tradition of hospitality, of protecting guests when they come to the United States to visit or work? After all, this would have been a politically effective way to appeal to the Muslim world where traditions of hospitality are strong. So why was nothing of the kind ever said?

128. Before he was elected, for example, President Barack Obama stated that “[t]here are terrorists holed up in those mountains who murdered 3,000 Americans.” Barack Obama, Remarks at *The Wilson Center in Washington, D.C.: The War We Need to Win* (Aug. 1, 2007).

One answer lies in the 9/11 trauma itself, as most Americans experienced it. On 9/11, America was attacked by enemies disguised as guests. The suicide hijackers took advantage less of America's civil liberties, in truth, than of the country's welcoming attitude even toward foreigners who steal into the country to make lives for themselves. That may be why the attacks shook the American psyche so profoundly. The most disturbing consequence has been a public willingness to treat all foreigners, indiscriminately, as if they were potentially enemies. This is probably as good an explanation as any for why many Americans acquiesced in their government's decision to abandon, as far as non-Americans are concerned, the deeply ingrained presumption-of-innocence rule for a cognitively unfocused, erratically applied, and institutionally unmanageable presumption of guilt.

CONCLUSION

Far from being a carefully calibrated response to the terrorist threat, the executive-discretion agenda exaggerates the upsides and discounts the downsides of unregulated executive discretion. The "game" of counterterrorism cannot be successfully conducted by ad hoc decisions made in defiance of all rules and outside of all institutionalized decision-making procedures, practices, and institutions. Rule-governed counterterrorism is both feasible and desirable for several reasons. First, public officials perform best, even during emergencies, when forced to give reasons for their actions. Second, the temptation to react viscerally and mimetically rather than strategically to the mass murder of innocent civilians is almost impossible to resist without strong guidelines laid down in advance. Third, like-minded individuals, if allowed to make vital national-security decisions in virtual isolation, tend to fixate on one salient feature of a complex threat environment, neglecting equally lethal dangers and failing to consider the unintended consequences of their own remedial actions. And fourth, it is essential in a democracy to minimize, if not altogether eliminate, incentives for public officials to feign urgency and necessity in the face of a threat that cannot easily be observed by anyone outside the security apparatus of the state.

Because the spectrum of threats which national-security agencies must monitor and manage remains extremely complex, and because national-security assets are invariably scarce, counterterrorism decisions can increase security in one dimension only by opening up security vulnerabilities along other dimensions. Risk-risk tradeoffs are often close calls and should therefore be undertaken with *deliberate* speed, not hastily after dissenters are intimidated with fictional accounts of the need to make consequential decisions instantaneously and without considering known facts, consulting knowledgeable experts, and hearing different points of view. The difficulty and gravity of security-security tradeoffs, obscured by the misleading focus on liberty-security tradeoffs, is perhaps the most important argument against

leaving decision making in the area of counterterrorism to the unchecked discretion of a few individuals, operating inside a bunker insulated from outside criticism and dissent.

For this and other reasons, the indispensability of rules and protocols in ordinary emergencies can provide an important clue and point of reference for counterterrorism theorists and strategists. Rules such as the individualization of culpability and procedures such as obligatory reason-giving, far from “tying hands,” can help liberate counterterrorism policy from the rigidities that inevitably plague partisan-political reactions to national-security emergencies. They do not guarantee success, of course. But adversarial procedures and the presumption of innocence are more likely than unfettered executive discretion to promote a pragmatic approach to the management of risk, including flexible and fact-minded adaptation to an obscure, amorphous, evolving, and still deadly serious threat.