

Constitutional Principles for a State of Emergency
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Bruce Ackerman
Sterling Professor of Law and Political Science
Yale University

What principles should guide us in drafting a constitution for a state of emergency?

European nations have had a long and unhappy historical experience with explicit emergency regimes. Speaking broadly, these tend to give the executive far too much unfettered power -- both to declare an emergency and to continue it for lengthy periods.¹ A similar tendency is also manifest in recent efforts by the Bush Administration to encourage the states to adopt new emergency legislation. These recommendations also reflect a regrettable, if predictable, propensity for executive aggrandizement.²

This is a fatal mistake. The Executive should be given the power to act unilaterally only for the briefest period -- long enough for the legislature to convene and consider the matter, but no longer. If the legislature is already in session, one week is the longest tolerable period; if not, two weeks at most.³

The state of emergency then expires unless it gains majority approval. But this is only the beginning. Majority support serves to sustain the emergency for a short time -- two or three months. Continuation requires an escalating cascade of supermajorities -- sixty percent for the next two months; seventy, for the next; eighty, thereafter.

There are matters of principle here, but also important issues involving institutional incentives. Principles first. The need for repeated renewal at short intervals serves as a first line of defense against a dangerous normalization of the state of emergency. The need for a new vote every two months publicly marks the regime as

¹ The next draft will contain a thorough treatment of contemporary efforts to design adequate constitutional structures. The German Notstandverfassung, introduced into the Basic Law in the 1960s, is especially interesting. Further research into French and British law also necessary.

² Describing same.

³ Special arrangements if the attack makes it impossible to convene a legislative quorum.

provisional, requiring self-conscious approval for limited continuation. Before each vote, there will be a debate in which politicians, the press, and the rest of us are obliged to ask once more: Is this state of emergency really necessary?

The supermajority escalator requires further principled commitments. Even if a bare legislative majority repeatedly votes to sustain an extension, this should not be enough to legitimate the normalization of emergency powers: we can never forget that hundreds or thousands have been placed in preventive detention without the standard proof of probable cause. Some may believe that this breach, once it has occurred, doesn't get worse with the passage of time. I disagree. Preventive detention for six months or a year disrupts ordinary life far more than incarceration lasting a week or even a month.

There is more at stake than the devastation of individual lives. Despite repeated debates in Congress or parliament, repeated votes of approval threatens to erode the general sense that emergency powers should be reserved for truly extraordinary crises. By subjecting these decisions to increasing supermajorities, the constitutional order places the extraordinary regime on the path to extinction. As the escalator moves to the eighty percent level, everybody will recognize that it is unrealistic to expect this degree of legislative support for the indefinite future. Modern pluralist societies are simply too fractionated to sustain this kind of politics -- unless, of course, the terrorists succeed in striking repeatedly with devastating effect.

The supermajoritarian case becomes even stronger once the dangers of its political abuse are taken into account. A "state of emergency" provides a wonderful electioneering tool for the majority party: "All true patriots must rally around the existing government in this time of need. We can't give into terrorism by showing them that they can force us to change our leaders when the going gets tough." This may be blather, but it may work to get the extra votes needed to win. Supermajority escalators, however, give smaller and smaller minority parties veto power over such manipulations. And even if the minority allows the emergency to continue during elections, the majority can no

longer so easily present itself as the country's savior -- since the support of the minority is fundamental to the extraordinary regime.

The escalator will also have a salutary effect on the executive. Even though extraordinary powers have been authorized initially, the president knows that he will have a tough time sustaining supermajorities in the future, and this will lead him to use his powers cautiously. The public will bridle if his underlings run amuck, acting in arbitrary ways that go well beyond the needs of the situation. So the political check of supermajorities will not only serve to make the emergency temporary, but to make it milder while it lasts.

It will also force the executive to recognize the distributional injustices imposed by its emergency regime. Each terrorist wave will generate a distinctive demonology. Right now the demons come largely from the Arab world, but twenty years onward, they may emerge from Latin America or China. Or they may have signed on to some universalistic creed, secular or religious, as in the case of the Cold War or the still-avoidable (?) struggle against something called "Islamic fundamentalism."

Each demonology will mark out segments of the population as peculiarly appropriate targets for emergency measures, and the supermajoritarian escalator may play a greater or smaller role in checking the abuses such discriminations invite. This may not operate too forcefully in America during the present wave, but it will serve as a more potent check in Europe, given the larger size of its domestic Arab and Islamic minorities. But the next terrorist wave may well shift the balance of political interests in very surprising directions.

Even when the prevailing demonology casts a relatively small shadow in domestic politics, the supermajority escalator will provide political cover for civil libertarians who are looking for an excuse to call an end to the emergency regime. Immediately after the terrorist strike, they can polish their antiterrorist credentials by voting for the state of emergency when only a simple majority is required. This is a

moment for maximum reassurance, and it is overwhelmingly likely that 51 percent of the legislators will support the measure regardless of protests by their libertarian colleagues. So there is no real harm done if the vote is 99 to one rather than 75 to 25.

As time marches on, contrarian legislators will be accumulating political capital that will make it easier for them to defect as the need for reassurance declines: “ I have now voted twice to continue the emergency, but enough is enough. I want to commend the president for keeping the situation under control, but now that the situation is stabilizing, we should return to the protection of our normal liberties. If we allow the continued erosion of our freedoms, the terrorists will have really triumphed. ”

And so the vote this time is 79 to 21, and the emergency comes to an end, at least for now.⁴

The supermajoritarian escalator will shorten the state of emergency, and soften its administration, but it won't work miracles. By hypothesis, the emergency begins with a terrorist attack that deeply embarrasses the nation's military, police, and intelligence services. *Res ipsa loquitur* -- whatever they did wasn't enough; and in retrospect, it will be easy to find clues that might have alerted super-alert guardians of order. The bureaucratic reaction will be swift and predictable. On the one hand, displace responsibility for past mistakes; on the other, strike out aggressively against the forces of evil.

But especially in the beginning, the security services will be striking out blindly. After all, if they had been on top of the conspiracy, they would have intervened beforehand. So they are almost certain to be in the dark during the early days. Nevertheless, early dragnets may well be functional -- and not only because they discharge the reassurance function. While many perfectly innocent people will be swept

⁴ Once an emergency expires, the vote needed for a new state of emergency deescalates on the same time schedule with which it escalated previously. If eighty percent support is required, the percentage drops to seventy percent after two months, then to sixty, then to fifty, as time marches on.

into the net, the list of the "usual suspects" compiled by the counterintelligence agencies may well contain a few of the genuine conspirators. And if we are lucky, the detention of a few key operators can disrupt the existing terrorist networks, reducing the probability of a quick second strike, and its spiral of fear.⁵

Nevertheless, given the virtual certainty of massive error, the executive will be tempted to keep secret all the potentially embarrassing details surrounding its emergency dragnets. And the supermajoritarian escalator will only heighten this perverse incentive. Perhaps the president or prime minister can convince his party loyalists to remain faithful when the opposition press generates a public uproar by headlining the worst abuses of the most attractive victims. But if the emergency regime requires the increasing support of the legislative minority, it will be hopeless for the chief executive to appeal to party loyalty. Perhaps the only hope of satisfying the supermajority requirement is to treat as top secret all potentially embarrassing facts surrounding the dragnets.

Despite the grave risk of partisan abuse, a simple rule requiring total openness is simple-minded. Terrorists are newspaper-readers and internet-surfers like the rest of us, and they can learn a lot about the government's surveillance activities that might allow them to escape detection. Much of this information quickly decays over time. News of particular dragnets may pinpoint geographical areas that terrorists should avoid, but investigators change focus quickly, and the old news no longer has much value a week later. But other information will have more enduring significance. How, then, to separate the wheat from the chaff?

A political system of checks and balances provides distinctive tools for a constructive response. While the executive is in charge of day-to-day affairs, the emergency regime returns to Congress every two months. And the legislature can't act effectively if it is at the mercy of the executive for information. What is more, the state of

⁵ See Varese's work on the Russian mafia in Italy.

emergency can survive only with the support of increasingly legislative coalition, representing a broad range of social groups and political opinions.

It follows that the majority party can't be allowed to use its normal control over legislative organization to deny informational access to representatives from minority parties. Instead, our constitution for a state of emergency should explicitly structure legislative oversight committees to reflect the crucial role that the supermajoritarian escalator assigns to informed minority consent in sustaining the emergency regime. Reversing the ordinary rule, it will be members of opposition political parties who will have the majority of seats on the oversight committee. The chairman of the committee should also come from an opposition party -- though the opposition shouldn't be allowed to select any candidate it likes. Instead, the minority should be required to offer a slate of three nominees to the majority and allow it to pick the chairman it finds least offensive.

This means that the oversight committee won't be a lapdog for the government, but a real watchdog for society. It will have a real political interest to engage in aggressive and on-going investigations into the administration of the emergency regime. The constitution will require the executive to provide the committee with complete and immediate access to all documents. This puts the government on notice that it can't keep secrets from key members of the opposition, and will serve as an important check on the abuse of power.

No less importantly, it is up to the committee majority -- the legislative minority - - to decide how much information should be shared more broadly. In contrast to the ordinary committee, the oversight group won't have a strong incentive to suppress information merely because the government finds it embarrassing. But it also won't make everything public -- since this will open it up to the charge of giving aid and comfort to terrorism. Instead, it is structured to make the trade-off between secrecy and publicity in a politically responsible fashion -- what more could one ask?

The oversight committee should also be explicitly required to give a report to their colleagues, in secret session if necessary, as part of the debate on each two-month extension. Even here, the committee can hold back particularly sensitive details to reduce the risks of damaging leaks. Nevertheless, it has every incentive to apprise the majority and minority of the main pluses and minuses afflicting the emergency effort. Legislators, in turn, will pass on the main points to the public as they debate and defend their votes.

We have designed a rather permeable sieve, not an iron-clad wall of secrecy. But that is just the point. In the immediate aftermath of a massive attack, the need for emergency measures may seem self-evident; but as time marches on, this is not a matter to be left to blind faith. Such an extraordinary regime can't be allowed to continue for four or six months, or longer, without the *informed* consent of the broader public. Leading members of the opposition are in the best position to appreciate this value. We should leave it to them to play a central gate-keeping role.

Finally, when the emergency comes to an end, the constitution should require a legislative inquest, chaired once again by an opposition member with an opposition majority, on the administration of the entire emergency. A public report, with formal recommendations, is due within a year.

I have been speaking broadly of a "terrorist attack," but more clarity is required concerning the sort of event that should be allowed to trigger a state of emergency. Most importantly, should our constitutional framework require an actual attack, or should it allow the government simply to invoke a "clear and present danger"?

I would insist on an actual attack. Recall the *reassurance function* which serves as my rationale for the state of emergency. Something large and dramatic like September 11th shakes ordinary citizens' confidence in their government's capacity to discharge its most fundamental sovereign function -- the preservation of a framework of law and order.

The best way for government to respond to these fears is by doing something large and dramatic to reassure the populace that the breach of sovereignty was only temporary.

This rationale simply doesn't apply to risks -- however "clear and present" they may seem to some. The world is always a very risky place, and yet we all somehow manage to survive, and sometimes thrive, despite our awareness of this pervasive reality. Though the television image of the latest militant threatening the West with another attack isn't pleasant, neither are other telecasts telling us about countless other risks to well-being -- involving the food we eat, the air we breathe, the cars we drive, the places we work, and so forth. The mere addition of a free-floating risk of terrorism isn't nearly enough to disrupt our sense of normality.