

2013

# The Emergency Constitution: Necessary and Problematic

Michael R. Rudolph

Follow this and additional works at: <https://scholarship.shu.edu/pa>



Part of the [Political Science Commons](#)

---

### Recommended Citation

Rudolph, Michael R. (2013) "The Emergency Constitution: Necessary and Problematic," *Political Analysis*: Vol. 15 , Article 3.  
Available at: <https://scholarship.shu.edu/pa/vol15/iss1/3>

# The Emergency Constitution: Necessary and Problematic

**Michael R. Rudolph**

*Michael Rudolph is an undergraduate student studying Political Science and English Literature at Seton Hall University.*

In his article "The Emergency Constitution," Bruce Ackerman lays out the groundwork for a detailed set of emergency provisions that would take effect in the event of a large scale terrorist attack. According to him, "Terrorist attacks will be a recurring part of our future. [...] we urgently require new constitutional concepts to deal with the protection of civil liberties"<sup>26</sup>. Although the idea of emergency powers calls to mind various dictators who used emergency provisions to install themselves as

lifelong rulers, Ackerman's proposal attempts to mitigate this concern.

Ackerman argues that instituting a well formed, regulated, and highly temporary "emergency constitution," can do more to protect civil liberties than the government's prior attempts at responding to emergency situations. Since publishing his proposal, critics have debated the need for such a set of provisions. In addition to the problems pointed out by his critics, there are other blind spots that must be addressed in order to make Ackerman's proposal a more practical framework with regard to civil liberties. Despite the criticisms,

---

<sup>26</sup> Ackerman, Bruce. "The Emergency Constitution." *Yale Law Journal*. 113 (2004): 1029-1090.

the fact that the "war on terror" policies have continued to be used by the Obama administration makes Ackerman's proposal, or perhaps a revised version, more necessary today than it was in 2004.

To begin, an inconsistent element of Ackerman's proposal is the way that it identifies criminal law and the common law tradition as being insufficient in addressing the threat of terrorism. Issues surrounding Ackerman's view of the courts have been widely criticized. Recognizing this, he states, "My commentators mount an energetic and thoughtful defense of the courts as a bulwark in times of crisis"<sup>27</sup>. However, where critics like David Cole disagree with Ackerman on the value of common law, there is also an intrinsic problem in the way Ackerman views criminal law.

Despite acknowledging the success of the courts in addressing issues associated with organized crime Ackerman writes, "Even the most successful organized crime operations lack the overweening pretensions of the most humble terrorist cell. [...] terrorists' challenge to political authority is greater"<sup>28</sup>. This claim seems to be inherently flawed. While terrorist groups *do* represent an overt challenge to governments, criminal organizations, historically in the United States, and currently in a number of countries, also represent an extraordinary threat to political authority. As the Secretary-General of the United Nations stated on June 26, 2012, "Illicit drugs and related criminal networks undermine the rule of law. And the impunity with which they go about their business causes tremendous fear and sows disillusion

---

<sup>27</sup> Ackerman, Bruce. "This is not a war" *Yale Law Journal*. 113.8 (2004): 1894.

---

<sup>28</sup> Ackerman. "The Emergency Constitution." 1035-6.

## Political Analysis

with governance at all levels"<sup>29</sup>. Drug trafficking organizations, are prime examples of such groups. Individuals in these groups disrupt political stability by contributing large amounts of violence and widespread corruption.

Given this reality and Ackerman's acknowledgement of criminal law's success in combating organized crime in the United States, it seems unwise to judge criminal law as being unable to sufficiently handle terrorist conspiracies. However, this is not to say that Ackerman is completely wrong in turning away from criminal law with regard to emergency scenarios. The courts have not had tremendous success in restraining the executive branch throughout the "war on terror." Therefore, as recent examples illustrate, elements in Ackerman's emergency constitution are still

desirable compared to current legal processes. Ackerman's provisions, unlike traditional ones, restrain the executive to a small time frame in which to use extraordinary powers.

With regard to common law, Ackerman worries about the possibility of judges relying on precedents, set during times of war, as a way of enforcing oppressive practices. He specifically points to *Korematsu v. United States*, the case which upheld use of Japanese internment camps in the United States during World War II. In response to this concern, David Cole writes:

When one pans back and reviews the influence of judicial decisions over time on emergency measures, the picture is decidedly less bleak. The Supreme Court eventually adopted rules that prohibit punishment for subversive speech and guilt by association, and these

---

<sup>29</sup> Ki-Moon, Ban. "Secretary-General's Message for 2012." United Nations. *Secretary-General's Messages*. 26 June 2012.

## *The Emergency Constitution: Necessary and Problematic*

decisions essentially take those options off the table for future emergencies<sup>30</sup>.

It is difficult to determine which scholar has the upper hand in this dispute. Ackerman's reference to *Korematsu* depicts a certain willingness of judges to kowtow to political and public pressure. In contrast, Cole's explanation of how the common law tradition, albeit slowly, corrects these errors and in doing so affords citizens added protection in the future is compelling. Regardless of whom is ultimately correct, this dichotomy reveals another important flaw in Ackerman's proposal; namely, the extent to which judges can be trusted. Ackerman explains that, "my own proposal continues to depend heavily on judges<sup>31</sup>. Considering judges are a vital part of his plan, it

seems that Ackerman's proposal requires serious, exhaustive analysis of the reliability of judges' ability to uphold the law during emergency situations. After all, if the Supreme Court was capable of erring so egregiously in the case of *Korematsu*, it seems equally plausible that judges could be just as errant in fulfilling their duties within Ackerman's emergency framework.

Concern about how far judges can be trusted to act responsibly is partially assuaged with regard to the issue of torture. Ackerman is very straightforward on this issue, stating, "Do not torture the detainees"<sup>32</sup>. Moreover, he goes on to say that this prohibition should be an official ban enforced by judges. However, some scholars have pointed out that Ackerman only really deals with the issue of torture in terms of an outright, but narrow, ban. As Andrew Arato

---

<sup>30</sup> Cole, David "The Priority of Morality: The Emergency Constitution's Blind Spot." *Yale Law Journal* 113.8 (2004): 1753-1800.

<sup>31</sup> Ackerman. "This is not a war." 1894.

---

<sup>32</sup> Ackerman. "The Emergency Constitution." 1071.

## *Political Analysis*

explains, "Selecting a narrow detention statute allows critics to say both that it is dangerous and that it would not stop the later adoption of all sorts of additional repressive measures concerning searches, wiretaps, trials, and so on"<sup>33</sup>. While Arato's critique was certainly relevant in 2006, more recent events have only confirmed his concerns.

The U.S. targeted killing program of suspected terrorists, resulted in the deaths of "U.S. citizens Anwar Al-Aulaqi, Samir Khan, and [...] Abdulrahman Al-Aulwqi"<sup>34</sup>. While many justify the strikes, it is nonetheless concerning that the United States government assassinated three of its own citizens

without affording them due process of the law. In light of this, Ackerman's proposal would be much better off if it included a comprehensive list of bans on specific practices. Such a list would both provide explicit protection of innocent civilians against the most severe types of abuses and would put a sizable limit on judges. Although the reliability of judges during emergencies is questionable, an enumerated list banning certain policies would at least limit the leeway that judges have on rulings that might affect one's sense of justice, fairness, or morality.

Finally, with regard to the problematic elements of Ackerman's emergency constitution, one would be remiss to neglect mentioning the practical problems involved with changing the United States Constitution. Article V of the Constitution states, "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose

---

<sup>33</sup> Arato, Andrew. "Their Creative Thinking and Ours: Ackerman's *Emergency Constitution* after *Hamdan*." *Constellations* 13.4 (2006): 546-572.

<sup>34</sup> American Civil Liberties Union. "Al-Aulaqi v. Panetta: Lawsuit Challenging Targeted Killings" December 14, 2012. Retrieved from [www.aclu.org](http://www.aclu.org).

Amendments to this Constitution, [...] which [...] shall be valid [...] when ratified by the Legislatures of three fourths of the several States"<sup>35</sup>. Indeed, Ackerman understands the, "notorious difficulty of formal constitutional amendment"<sup>36</sup>. As a result, he believes that his proposal should be introduced as a "framework statute"<sup>37</sup> thus avoiding the massive requirements involved in passing a formal amendment. However, as a statute, these emergency provisions, regardless of how well thought out, are always vulnerable to repeal by the Congress. Andrew Arato rightly asks, "how can one hope that a legislative framework could be established that would not only restrain the executive, but also self-limit Congress when the next attack occurs"<sup>37</sup>. While Ackerman makes an

effort to show how public pressure might save such a "framework statute", his defense ultimately does not offer any assurances. In order for his emergency constitution to be truly secure, the only solution would be to muster the political will to actually make these emergency provisions part of the Constitution.

Given the problems within Ackerman's proposal, one might ask why anyone would consider an "emergency constitution" as being necessary for protecting civil liberties. Indeed, many arguments have been advanced that suggest there is no need for such new constitutional provisions. Regarding Ackerman in particular, Andrew Arato goes so far as to say, "Unfortunately, his proposal neither sufficiently justifies the need for such a regime nor succeeds in producing an entirely new one"<sup>38</sup>. Similarly, Eric A. Posner, in

---

<sup>35</sup> United States Constitution. Amendment V.

<sup>36</sup> Ackerman. "The Emergency Constitution." 1077.

<sup>37</sup> Arato. "Their Creative Thinking and Ours" 548.

---

<sup>38</sup> Arato. "Their Creative Thinking and Ours" 549.

## *Political Analysis*

addressing the concern that each new national emergency provision will increase the power of the Executive (which he labels the "ratchet theory") writes, "the lawmaking system adjusts fluidly, if unpredictably, to emergencies, exogenous shocks, and other changes in the political and social environment; few changes are unidirectional and irreversible in the strong sense that ratchet accounts suppose"<sup>39</sup>. However, certain events in recent years have shown that there is indeed justification for implementing laws that limit the growing power of the executive branch, even if the limit only amounts to a temporal restraint on how long certain powers can be active. One example of the need for restraint on the executive, as discussed earlier, is the practice of targeted killings. International law

already indicates that these kinds of killings are illegal when used against suspected terrorists in combat zones. Therefore, the use of assassination on American citizens by their own government, without any kind of due process, is shocking to put it mildly.

Furthermore, Ackerman seems to make a prediction when he writes, "If the President is allowed to punish as well as detain, the logic of war-talk leads to the creation of a full blown, alternative legal system of criminal justice for terrorism suspects"<sup>40</sup>. The approval of the National Defense Authorization Act (NDAA) of 2012 seems to substantiate Ackerman's worst fears about "emergency" capabilities being afforded to the executive under current laws. This act, "could allow the military to detain American

---

<sup>39</sup> Posner, Eric A. "Accommodating Emergencies." *Stanford Law Review* 56.3 (2003): *Political Science Complete*. Web.

---

<sup>40</sup> Ackerman. "The Emergency Constitution." 1033.



## *The Emergency Constitution: Necessary and Problematic*

citizens indefinitely without a trial"<sup>41</sup>. Despite a brief injunction against the law, the NDAA is in effect. The existence of the NDAA and the targeted killings of three American citizens without due process, certainly suggests that Arato is incorrect in claiming that the need for controlling the powers of the executive over the long term is not justified. Moreover, the Aulaji case clearly demonstrates that there are indeed some executive actions that are "irreversible." Clearly, if any citizens are assassinated and later posthumously exonerated, the irreversibility of such an executive action would be brought into even sharper relief.

Additionally, other scholars have supported constitutional emergency powers. John Ferejohn writes, "The second justification for constitutional emergency powers,

and the one we have stressed here, is to protect or insulate the regular operations of the legal system from what takes place in emergency circumstances"<sup>42</sup>. Ackerman's plan makes an effort to address this concern. In contrast to the current state of affairs, it would be virtually impossible for emergency powers to be afforded to the executive eleven years after a major terrorist attack; as is the case with the 2012 NDAA. According to Ackerman, his emergency constitution would be triggered by "a terrorist attack that kills large numbers of innocent civilians in a way that threatens the recurrence of more large-scale attacks"<sup>43</sup>. Moreover, a series of increasingly large majorities in Congress would be needed to sustain the state of emergency. As much as 90% of Congress might be needed

---

<sup>41</sup> Bell, Melissa. "Indefinite detention' provision stirs online anger - and Jon Stewart." *The Washington Post*. December 8, 2011.

---

<sup>42</sup> Ferejohn, John. "The Law Of The Exception: A Typology of Emergency Powers." *International Journal of Constitutional Law* 2.2 (2004): 210-239.

<sup>43</sup> Ackerman. "The Emergency Constitution." 1060.

## *Political Analysis*

to maintain the emergency beyond a full year.

Although Ackerman's plan is not without areas in need of improvement, the provisions he suggests would at the very least prevent a President in 2013 from using a massive terrorist attack like September 11, 2001, to justify the need for emergency powers. Of course, Ackerman's plan also allows for extraordinary amounts of confinement, however, once the limited timeframe he allows for in an "emergency" expires, those detained will either be charged, or released and compensated. Indefinite confinement would not be as large of a threat under Ackerman's plan as it is under the current laws.

In closing, "The Emergency Constitution" underscores the need for clear limits on growing executive power. Obviously, this proposition is quite far from perfect. In order to be

acceptable, this constitutional change would need to be accompanied by a rather extensive list of explicitly banned practices in order to prevent egregious abuses during the periods of emergency. Moreover, Ackerman's largest weakness is the inconsistency with which he approaches the court systems. Concerns that judges will be too panicked to follow the letter of the law after an attack is problematic coupled with Ackerman's assertion that judges should play a vital role in the emergency regime. These concerns would need to be addressed before an emergency constitution could be seriously considered. However, the strict temporal limits on emergency powers are desirable and necessary for restricting the President's power. This is where the primary allure of the emergency constitution lies. With such provisions enacted, emergency actions could be taken when necessary, just as they were following September 11, 2001. With safeguards

*The Emergency Constitution: Necessary and Problematic*

similar to what Ackerman proposes,  
there would be less need to worry  
about these emergency powers

slowly continuing to intensify a  
decade later.