"Rethinking Crisis Government"

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The rush to broaden executive prerogative following the September 11 terrorist attacks has generated criticism among liberal jurists who rightly point out that the rule of law was designed for bad times as well as good ones. Bruce Ackerman, Ronald Dworkin, and many others have persuasively argued that Washington's legal response to September 11 opens the door to secret detentions, the destruction of attorney-client confidentiality, and military tribunals that make a mockery of international law no less than well worn ideas of due process.[1] Despite the Bush Administration's repeated emphasis on the novel character of the attacks, its response has relied disproportionately on a legal instrument hearkening back to a pre-liberal era in which royal prerogative and "reason of state" determined the texture of political life: unilateral executive authority. Unfortunately, President Bush has hardly been alone in his insistence that terrorism is best fought by dramatically augmenting executive discretion. Passed with virtual unanimity by both Houses of Congress, the so-called "Patriot Act" hands over substantial poorly defined authority to the intelligence and security apparatus. An immediate consequence is that 9.3 million resident aliens are now denied many basic legal protections and find themselves directly subservient to administrative agencies –in particular, the FBI– long known for their inefficiency and incompetence.[2]

Yet even liberal critics of the stampede to dismantle civil liberties fail to recognize the extent to which Washington's response to September 11 places traditional preconceptions about crisis government in a fresh light. An unquestioned presupposition among both Republican and Democratic lawmakers has been that the terrorist attacks call for dramatically expanding the scope of executive

authority, and especially the discretionary leeway available to administrative agencies (for example, the Justice Department and FBI) allegedly best suited to the task of doing battle with terrorism. To be sure, Democrats in Congress have criticized the President's unilateral appeal to inherent executive authority. Yet their enthusiasm for the Patriot Act suggests that they have few qualms about expanding the discretionary powers of federal agencies as long as they have some say in delegating it. Nor do liberal critics typically challenge the assumption that the best answer to the terrorist attacks should be executive-driven and thus necessarily entails more-or-less generous delegations of discretionary authority to the security and intelligence agencies.[3] Their chief worry is that President Bush and a cowed opposition in Congress have gone too far in doing so.

Unless we challenge the well-nigh universal view that terrorism necessitates enlarging executive discretion, however, we face the prospect of a downward spiral in which civil liberties will soon represent a shadow of their former selves. Ackerman is probably correct to predict that terrorist attacks may be "a recurring part of our future" in part because "[t]he balance of technology has shifted, making it possible for a small band of zealots to wreak devastation where we least expect it."[4] The orthodox view that expanding the scope of executive authority represents a sensible response to terrorism rests on assumptions about the nature of executive power with deep roots in modern political and legal theory (I). Nonetheless, those presuppositions represent a misleading starting point for those of us intent on tackling the difficult intellectual and political tasks at hand, not the least of which requires figuring out how we can maintain the basic rudiments of a law-based state in a globalizing political universe (II).

I.

What presuppositions about executive authority have motored the U.S. response to September 11?

The most fundamental one seems so trivial that it is rarely articulated let alone openly defended. The immediate source of the rush to strengthen the executive's hand since September 11 is the presumption that the executive is best capable of rapid-fire or high-speed action, and thus should be most adept at warding off no less rapid-fire surprise attacks like those we witnessed on September 11. The Bush Administration has expressly appealed to this traditional view in order to justify unilateral executive fiat.[5] What could be more self-evident than the executive's capacity for acting swiftly and energetically in the face of a dire crisis?

This assumption can lay legitimate claim to an impressive intellectual provenance. Machiavelli points out in the Discourses that assemblies are ill-suited to "remedying a situation which will not brook delay," arguing that the executive is better suited to the imperatives of crisis government. While elected representatives "have to consult with one another, and to reconcile their diverse views takes time," the single person of the executive can act speedily and avoid the undue "temporizing" that necessarily plagues large assemblies.[6] The intellectual history is a complicated one, yet a persuasive argument can be made that Machiavelli's ready association of the executive with speed was accepted by subsequent theorists who otherwise harshly criticized the legacy of "reason of state" with which Machiavelli's name soon was (unfairly) associated.[7] Montesquieu, Locke, and Hamilton contrast the fast-paced character of executive action with the unhurried texture of legislative politics no less categorically than Machiavelli. Following Machiavelli, they assume that popular assemblies are inherently slow-moving, whereas the executive possesses a built-in capacity for fast-paced action.[8]

At one level, this view underlines the obvious point that deliberative exchange in any relatively numerous group, regardless of its quality, is sure to be a slow-going affair merely because of its

sequential character. Because "two speakers at an assembly cannot be heard by everyone if they try to speak simultaneously," even a cognitively unimpressive debate in an elected body made up, for example, of a mere fifty representatives is destined to be time-consuming.[9] At another level, this temporal assumption expresses the considerable weight placed by Enlightenment liberalism on free-wheeling rational deliberation as a source of legitimate lawmaking. The Enlightenment faith in the emancipatory potential of human reason played a central role in liberalism's conceptualization of elected legislatures as requiring robust– and necessarily unhasty– rational debate.[10]

The high temporal and cognitive demands placed on modern assemblies within the liberal tradition simultaneously suggested their limitations as an effective instrument of crisis government, however. No less than Machiavelli, Montesquieu, Locke, and Hamilton describe the executive as best suited to crisis management by insisting that the unitary character of the executive assures its superiority in crises "which will not brook delay." The fact that the executive consists, most fundamentally, of a single actor means that it can act quickly. This simple intuition also helps explain the pervasive hostility to the idea of a plural executive in modern liberal thought: Montesquieu's influential argument that a plural executive undermines the fundamental goal of executive power, namely the ability to act with dispatch, soon became a dogmatic article of faith among liberals.[11] Those who challenged the notion of a singular executive –for example, the Anti-Federalists-- consistently found themselves relegated to the status of obscure footnotes in the history of liberalism.[12]

In this traditional account, the rapid-fire unitary executive generates additional institutional virtues that render it especially adept at grappling with crises. A temporally inefficient plural executive lends

itself to inconsistent and even incoherent state action. As Hamilton notes in arguing against the Anti-Federalist case for a plural executive, "whenever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion," thereby threatening to "weaken the authority, and distract the plans and operations of those whom they divide."[13] In contrast, the "personal firmness" of the unitary executive is generally best attuned not only to the imperatives of speed, but also at assuring consistency in legal implementation and the overall monitoring of state activity.[14] And what could be more desirable during an unpredictable and fast-moving crisis than making sure that all units of government operate together as parts of one coherent and harmonious whole? Even more famously, Hamilton links the unitary executive to effective democratic oversight and accountability of its activities. "The public opinion is left in suspense about the real author" of a specific action because plurality in the executive allows its members to shift blame and obscure their responsibility for political mistakes, whereas the unitary executive offers the public a genuine "opportunity of discovering with facility and clearness the misconduct of the persons they trust."[15] Not only is the unitary executive best equipped for initiating rapid-fire action, but its unitary character also means that the public possesses a real chance of identifying, in a temporally efficient manner, which political actor should be held responsible for a particular action. Especially during an emergency, this institutional attribute becomes particularly valuable. Members of a plural executive typically "pass the buck" when undesirable results follow from their actions, requiring the public to engage in an unnecessarily time-consuming game of figuring out who is to blame for incompetent or ineffective action. Amidst the fast-moving temporal imperatives of the emergency situation, however, such temporally costly deliberations might easily prove extravagant and thus politically disastrous.

The conventional view of the executive as best suited to rapid-fire crisis government rests on additional unstated assumptions which continue to shape the legal response to September 11. Why does the terrorist attack require fast-paced or high-speed action in the first place? In other words, why not a slow and deliberate answer, in which old-fashioned modes of legislative rule-making, along with legally circumscribed and carefully supervised grants of authority to government agencies, predominate? Notwithstanding the obvious internal tensions in the Bush Administration's rhetoric, one consistent theme since September 11 has been that the attacks represent a direct assault on the physical integrity of the American polity, a violent invasion probably no less threatening than Pearl Harbor because it means the penetration of the territory or "body" of the American polity.[16] To be sure, such rhetoric possesses an obvious empirical plausibility, in light of the murder of thousands of innocent civilians on September 11, as well as the no less self-evident view that an indispensable function of the modern state is the guarantee of basic physical security to its members. Nonetheless, neither observation provides a sufficient logical justification for the mad rush to augment executive discretion that we have witnessed since September 11. Why does the task of assuring physical security necessarily require rapid-fire executive action?

Here as well, the missing arguments can be gleaned from some of the most familiar –and thus rarely scrutinized– dogmas of modern political thought. Recall how pervasive the metaphor of the "body politic" has been within western political theory. The idea that political entities possess far-reaching affinities to actual corporeal (human) bodies has taken many different forms in the western political tradition, but the crucial point here is that this metaphor probably played a pivotal role in the shaping of modern liberalism. Hobbes' description of the "Artificiall Man" of the Leviathan is famous.[17] Yet Locke

–a more obvious influence on modern liberalism– similarly employs the metaphor of a body politic at a number of crucial junctures: Locke not only describes the all-important legislative power as "the soul that gives form, life, and unity" to the political community, thereby transforming it "into one coherent body," but his influential picture of international relations as constituting part of the state of nature immediately suggests a picture of individual commonwealths as strikingly akin to the individual persons who populate Locke's state of nature before the establishment of what he calls "political society."[18] To be sure, Locke was chiefly underscoring the point that sovereign states should be seen as legal or juridical persons, and the "analogy of sovereign commonwealths in a state of nature to individual men in that state is not meant to be taken too literally."[19]

Nonetheless, this analogy helps explain the conventional view that physical threats to the physical community require rapid-fire action. During moments of crisis, high-speed executive action is necessary because the stakes are so high. Why are the stakes high? Because the political community constitutes a body politic strikingly akin to the individual human body, and as we all know, even relatively modest physical invasions of our corporeality represent violations of our physical integrity and potentially dangerous threats to our existence. By allowing others to assault us physically, we place our physical well-being and perhaps even our existence itself in alien hands. Life itself becomes precarious. Our fundamental right to self-preservation is subject to forces beyond our control. At least implicitly, certain influential strands in modern liberalism thus rely on seemingly credible preconceptions about physical self-defense in order to justify the necessity of high-speed executive action: when physically assaulted, individuals lack the luxury of debating with their peers or allies about the best conceivable response. Instead, they must move quickly to ward off immediate threats to their physical well-being, and such

moments call for action rather than deliberation, dispatch instead of delay. If physical violence is imminent or already at hand, individual self-preservation can only be achieved by the imperatives of physical self-defense, where agility and swiftness are at a premium. In the political universe, the unitary executive, and not a numerous deliberative assembly, is the most likely source of such agility and swiftness.

This aspect of conventional thinking about crisis government is perhaps most noteworthy because of its implicit hostility towards pluralism and the necessary deliberative give-and-take of democratic politics. In the traditional view, a dire crisis requires the body politic not only to act as a unitary whole but probably with one voice as well. After all, dangerous foes might easily take disagreement and dispute as evidence of vulnerability. As that part of the body politic outfitted with the task of swiftly responding to the physical threat at hand, the executive typically claims the authority to speak on behalf of the political community as a whole. Needless to say, the implications of this traditional imagery are profoundly anti-pluralistic and even anti-political. Yet it is precisely this imagery that the Bush Administration has relied on to suppress legitimate political difference and disagreement, as those who challenge the President's far-right policies on a host of domestic issues fundamentally unrelated to terrorism now risk getting branded as "soft" on terrorism.[20]

Locke is also revealing because he helps shed light on a final conspicuous facet of the U.S. legal response to terrorism. Although the metaphor of physical self-defense has played a crucial role in the proliferation of executive discretion since September 11, the fact that the physical threat at hand is somehow foreign in origin has also obviously worked in the same direction. Locke not only conceives of international relations as a state of nature populated by individual corporeal persons, but he argues that

the executive's foreign policy powers (in Locke's terminology, the federative power) cannot "be directed by antecedent, standing, positive laws...and so must necessarily be left to the prudence and wisdom of those whose hands it is in, to be managed for the public good." Far-reaching executive discretion is necessitated by "the variation of designs and interests" in foreign affairs, where the unpredictability and fast-paced character of events require swift and unhindered executive action. In Locke's account, war therefore "admits not of plurality of governors."[21] The Lockean vision of a body politic residing in a fundamentally lawless state of nature continues to haunt contemporary U.S. political and legal discourse. In striking accordance with this traditional notion of foreign affairs as constituting a fundamentally lawless sphere requiring scope for significant executive prerogative, U.S. courts have long been hesitant to restrict the scope of executive discretion in foreign affairs.[22] In addition, foreign affairs have been defined by courts as including not only defense and national security, but international economic policy, immigration and asylum law, and many other areas as well, meaning that the U.S. executive presently enjoys an awesome arsenal of highly discretionary legal instruments in a broad array of so-called "international" arenas.[23]

The judiciary's ingrained habit of kowtowing to the executive in foreign relations is undoubtedly one of the reasons the Bush Administration has been so confident about its aggressive push to extend the scope of executive discretion after September 11. Describing terrorism as a foreign military threat brings obvious legal dividends to those who believe that heightened executive discretion is the best way to fight it. A legal tradition chary of restricting executive discretion in foreign affairs is sure to work to the advantage of policy makers eager for further extensions of executive prerogative in the face of what is now widely interpreted as a foreign invasion.

II.

Each of these presuppositions about executive power is now implausible. Each of them rests on historically specific preconditions that no longer readily accord with the realities of political life. Each prevents us from thinking creatively about the best way to respond to terrorism.

The belief in the high-speed capacities of the unitary executive rests, to a significant extent, on the metaphor of a single leader at the helm of state affairs: the singular character of the executive (in contrast to the numerous legislature) purportedly allows him to act with dispatch. When first introduced into modern political thought by Machiavelli, this metaphor possessed empirical credibility, in light of the fact that rulership in many places was effectively exercised by a single leader and relatively small group of advisors.[24] Yet this simple vision of executive power was formulated for the most part prior to the maturation of some of the core features of the modern state. When Machiavelli or even Locke sketched out the virtues of a singular executive, modern bureaucracies, the professionalization of officialdom, rational systems of tax collection, and even modern forms of military organization remained underdeveloped. Does the metaphor of the swift "prince" make sense given the nature of modern executive power? Perhaps not. At the very least, it fails to do justice to crucial components of the modern executive or administrative state. The modern executive is a complex and multi-headed creature, composed of a host of (oftentimes competing) administrative and bureaucratic units, whose members are no less numerous than other branches of government. Disagreement and interest conflict are no less a part of our many-headed executive than our elected legislatures. Prominent scholars of the U.S. presidency now speak of the "plural presidency," persuasively arguing that a more appropriate focus for contemporary empirical research than traditional notions of the unitary executive "is the plural

nature of the presidency, its policy environment, and the demands placed upon the institution by different groups and nations."[25]

Not surprisingly, even when the executive undertakes unilateral action, relatively straightforward undertakings can prove enormously complex and time-consuming; the colossal difficulties faced by "Homeland Security" Chief Tom Ridge in coordinating the Administration's domestic response to terrorism provide an obvious illustration of this point. Even if it remains true that the executive can "act first" in some areas of policy, the complexity of the modern executive means that its undertakings at times can seem even less coherent and consistent than those of deliberative legislatures.[26] Preliminary empirical support for this claim is also provided by the history of executive-dominated dictatorships, which typically promise rapid-fire responses to domestic and foreign crises and thus implicitly rely on the dogma of the swift executive in order to garner legitimacy. More often than not, however, executive-centered dictatorship ends up mired in internal bureaucratic conflict and stymied by administrative inefficiency and incoherence.[27]

In a similar vein, one might legitimately wonder whether Hamilton's justly famous arguments about the popular accountability of the unitary executive obtain in light of present-day political realities. At the very least, our "plural presidency" raises tough questions for the doctrinaire view. The mind-boggling institutional complexity of the modern executive certainly makes it much easier for political actors to "pass the buck" than Hamilton's argument anticipated; examples of federal agencies scrambling to blame their administrative rivals for unpopular policies are legion. The complexity of the modern administrative state also makes it difficult for the chief executive to oversee its wide-ranging activities and thereby assure their coherence and consistency, and there may be legitimate institutional reasons

why voters sometimes seem reluctant to hold the executive responsible for a particular administrative course of action. Politically precocious politicians, of course, have manipulated this genuine institutional dilemma to their personal advantage on many occasions.[28] In any event, it is by no means self-evident that the contemporary executive lives up the Hamiltonian promise of assuring effective popular accountability in part by allowing the public to link state action directly to particular political personalities in a timely and temporally efficient fashion.[29]

Perhaps other attributes of the traditional account still buttress the intuition that the executive is best capable of high-speed action. For example, one might argue that the executive, in contrast to the legislature, is not required to undertake a demanding process of deliberative give-and-take, where a multiplicity of arguments and competing interests is considered, and all affected viewpoints receive a fair hearing. Whereas parliament "as a collective organization takes definitive action through the legislative process, which is cumbersome, difficult to navigate, and characterized by multiple veto votes," the administrative apparatus might seem relatively well-equipped for acting with dispatch.[30] Indeed, conventional (for example, Weberian) models of administrative activity picture decision making as based on top-down command directives. In these models, administration is an efficient time-saving instrument since it minimizes the need for time-consuming deliberation during the implementation of policy. Officials need not engage in ambitious debate, or worry about reaching an agreement about the aims of policy, since others have already done so for them. However, scholars of administration have not only questioned the empirical relevance of this orthodoxy to the actual workings of the contemporary state, but have also pointed out that it presupposes conditions unlikely to be met. When policy goals remain at least somewhat unclear and open-ended, or when policy goals are clear but bureaucratic and technical

experts (as well as interested private groups) understandably disagree about the best way to achieve the goals at hand, an arduous process of consensus-building will have to take place within administrative bodies. If that process is going to achieve more-or-less satisfying results, it too will have to be subject to the constraints of relatively time-consuming deliberative exchange and interest mediation. Forcing administrative actors to rush their decisions is then sure to generate irrational and undesirable results no less than in the case of overhasty legislatures.[31]

The implicit presupposition that political entities constitute corporeal entities whose self-defense calls for swift action is misleading as well. Here again, we can easily see why the metaphor seemed so tenable to early modern political thinkers. Writing amidst the extreme political upheavals that plagued the European world between 1500 and 1700, they witnessed the elimination of countless political units unable to protect themselves effectively against more advanced forms of bureaucratic and military organization.[32] When many political entities (for example, the city-states of sixteenth-century Italy) confronted the distinct possibility of political and legal extinction, the notion that political units should be modeled on the metaphor of a physically vulnerable body politic, against which even a seemingly modest physical assault might pave the way for profound peril, closely matched political realities. Here as well, however, one might ask whether this metaphor meshes with the contours of a our relatively stable contemporary state system, in which the legal let alone physical elimination of competing state units is rare. Wars obviously can be even more brutal and destructive than they were in early modern Europe. Yet even the most bloody of them no longer typically result in the extinction or territorial appropriation of competing states. Implicit representations of the state as fragile physical bodies, for whom physical assault can quickly become a fundamental threat to self-preservation, necessarily obscure crucial facets

of contemporary international relations.

In a similar spirit, Brien Hallett has pointed out that we need to avoid simplistically conflating the experience of modern war with acts of physical violence. Hallett correctly observes that "in the minds of many, conceding that war often involves violent combat is tantamount to defining war as violence. Logically...this should not be done because it confuses the whole of war [and its many distinct facets] with one of its parts...". [33] Wars are waged for political reasons, and include a complex mix of economic, cultural, and ideological elements. Because war is immediately linked to the physical violence of the battlefield, however, the metaphor of physical self-dense, along with a concomitant vision of war as consisting of life-or-death physical combat, unduly color our political and legal ideas about war. In contrast, if we recognize that modern wars consist of a complicated set of undertakings of which physical violence is a key but hardly exclusive attribute, we can begin to challenge the metaphor of physical self-defense undergirding conventional ideas about war making. Hallett's chief concern lies in resurrecting what he describes as the lost art of formal legislative declarations of war, which increasingly play second fiddle to wars motored by the executive and unbridled by traditional legislative restraints. Because war consists of more than direct physical violence, Hallett persuasively argues, the traditional preference for a deliberate and reasoned legislative declaration of war, where war aims are carefully detailed, should again play a central role in guaranteeing control of war-making by civilian-dominated lawmaking bodies.

Hallett's warnings are even more apt as a critical account of the risk of crude conflations of violence and terrorism. Terrorism is a no less complex or multi-faceted than war making. More fundamentally, actual physical violence is a crucial facet of terrorism, but by no means its chief attribute. Psychological

"weapons" (for example, fomenting fear and hysteria) are just as pivotal. Just as modern wars are comprised of more than physical combat and therefore leave more than enough room for deliberative legislatures to outline the goals of military action as well as its political purposes, so too should we be skeptical of the claim that terrorism is ultimately inconsistent with careful legislative rule making and the vigilant oversight of executive activities. The rush to hand over open-ended decision making authority to the executive in the aftermath of September 11 is by no means a necessary response to terrorism. On the contrary, it suggests that we have already caved in to the terrorists, as we rush to imitate their autocratic structures of decision making and sacrifice our commitment to the rule of law.

The traditional intuition that foreign threats call for free-wheeling executive prerogative requires reconsideration as well. Despite the familiar weaknesses of the existing international legal system, picturing that system as a lawless state of nature terribly misconstrues the nature of international legal relations at least since the founding of the United Nations.[34] If executive prerogative is chiefly justified by the legal unpredictability and fast-changing character of the international arena, that justification no longer obtains. Today, recourse to anachronistic visions of international life as a lawless state of nature chiefly functions as an ideological cover for an irresponsible unilateralism in foreign policy. In addition, judicial reticence in the face of executive discretion in the "international" arena is now a recipe for destroying civil liberties and the rule of law at home. If globalization means that the domestic and foreign no longer can be neatly separated, the courts' refusal to insist on traditional rule of law standards whenever "foreign" issues are at stake means that Americans should ready themselves for the obliteration of basic legal protections in a vast array of policy arenas.[35]

The ongoing (and potentially endless) "war on terrorism" vividly underscores the increasing

difficulties of clearly distinguishing the domestic from the foreign arena. The September 11 attacks were planned abroad by citizens of other states, but some preparations appear to have been undertaken here in part by legal residents in the United States. In addition, the terrorists made use of instruments –the internet, for example, and electronic financial transactions– that have helped make national borders so porous.

Washington's response no less vividly sheds light on the profound dangers at hand unless we reconsider our legal system's traditional deference to executive discretion in foreign affairs. Emphasizing the foreign origins of the threat, the Bush Administration responded to September 11 by rounding up nearly 1200 non-citizens, many of whom long remained in jail even though formal charges were never leveled against them. Those who have been charged face detention for minor immigration law violations that otherwise would have gone unpunished. The only "crime" committed by most of those rounded up is that they remain resident aliens from countries where the Administration suspects terrorist activity. For its part, the Patriot Act provides little more than window dressing for an emerging exceptional legal regime encircling 9.3 million neighbors, friends, and loved ones, many of whom have lived here for years, work alongside of us, pay taxes, and participate in a host of civic activities. If we keep in mind that many millions of others are intimately linked via family or personal ties to the 9.3 million directly affected by the Patriot Act, a sizable number of legal residents is now directly subject to irregular and potentially arbitrary agency decision making. The Act offers a disturbing illustration of how the blurring of the domestic/foreign divide might be allowed to undermine once sacrosanct legal protections. Terrorism is not only vaguely defined by the legislation, but the Attorney General merely must declare that he has "reasonable grounds" for suspecting resident aliens of terrorism; the Attorney General is then

given equally expansive authority to determine the fate of suspects. The Act also unmasks the illusion that one can begin to strip resident aliens of basic rights without simultaneously harming the rights of citizens: under the auspices of fighting terrorism, the Act allows for secret searches of the premises and property of citizens as well as resident aliens.[36] The assault on citizens' rights is more than an example of sloppy legislative draftsmanship, however. It is a direct consequence of the growing dilemma of neatly delimiting foreign from domestic activity now characteristic of countless arenas of human endeavor, as well a failure of political and legal imagination to challenge the increasingly perilous dogma that the rule of law stops at our nation's borders.

III.

So is there no role for what Hamilton famously described as the "energetic executive" in the battle against terrorism? Of course not. Our political system calls for a powerful presidency, and there are good grounds why Americans remain skeptical of parliamentary government. Nonetheless, there is no reason to assume that our distinct brand of liberal democracy requires the massive and arguably unprecedented enlargement of executive discretion that we have witnessed since September 11. My aim here merely has been to reconsider the tired cliches that plague our political thinking about executive power. The most immediate implication of that reconsideration is that we need to be skeptical of the knee-jerk tendency to expand executive prerogative amidst crisis.[37] The burden of proof lies with those who insist that the growth of executive discretion is not only our best protection against future terrorist attacks, but that it need not unduly sacrifice civil liberties and the rule of law. Thus far, neither the Bush Administration nor the Democrats in Congress have come close to meeting that burden of proof.

Acknowledgments

Many thanks to David Alexander, Bruce Altschuler, Ed Fogelman, and Steve Macedo for extensive critical comments on an earlier rendition of this paper. I am also grateful to the participants at the Princeton University Program in Law and Public Affairs Antiterrorism Colloquium for a lively discussion of an earlier version of the paper, and Christopher Eisgruber for an opportunity to participate.

I also would like to express my heartfelt gratitude to the public employees of the city of New York, and particularly the firemen and policemen from my hometown of Staten Island, for helping my sister escape uninjured from the World Trade Center on September 11.

Endnotes

1. Bruce Ackerman, "Don't Panic," London Review of Books (7 February 2002), pp. 15-16; Ronald Dworkin, "The Threat to Patriotism," New York Review of Books (February 28, 2002), pp. 44-49. See also recent issues of The American Prospect for a host of critical comments. Although the Bush Administration has responded to criticisms of the proposed military tribunals, those modifications fail sufficiently to guarantee basic legal protections. The tribunals will permit the admittance of hearsay, allow for no civilian review or independent judicial appeal, and permit indefinite detentions. Secretary of Defense Rumsfeld has confirmed the validity of these accusations by admitting that even accused terrorists acquitted by the military tribunals are likely to remain imprisoned (Katherine Q. Seelye, "Rumsfeld Backs Plan to Hold Captives Even if Acquitted," New York Times [March 29, 2002], p. A12). Both Amnesty International and conservatives like William Safire of the New York Times have denounced the final proposal (Safire, "Military Tribunals Modified," New York Times [March 21, 2002], p. A33; Katherine Q. Seelye, "Government Sets Rules for Military on War Tribunals," New York Times [March 21, 2002], p. A1). The Administration has now made it perfectly clear that it plans to wield vast discretionary authority, including the indefinite detention and denial of basic rights to U.S. citizens accused of aiding and abetting the terrorist cause.

2. For a detailed account of the attack on immigrants' rights, see Dworkin, "The New Threat to Patriotism."

3. For example, Ackerman is now calling for a "constitutional regime for a limited state of emergency," in which the executive would be given expansive –but temporary– emergency authority. Unfortunately, constitutionally-based "regimes of exception" have hardly worked very well as a protection for civil liberties or the rule of law. For one historical survey, see Brian Loveman, The Constitution of Tyranny:

Regimes of Exception in Spanish America (Pittsburgh: University of Pittsburgh Press, 1993). A similar argument has been made by John P. McCormick in "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," in Law as Politics: Carl Schmitt's Critique of Liberalism, ed. David Dyzenhaus (Durham: Duke University Press, 1998), pp. 217-51.

4. Ackerman, "Don't Panic," p. 15. The inanities of recent U.S. foreign policy certainly belong among the indirect sources of the terrorism now directed against us.

5. "[S]peed is of the essence, administration officials say [in justifying a broad range of unilateral executive actions], arguing that even a wartime Congress would not move fast enough to help the authorities counter new terrorism threats" (Robin Toner and Niel A. Lewis, "White House Push on Security Steps Bypass Congress: New Executive Orders –Administration Urges Speed in Terror Fight, But Some See Constitutional Concern," New York Times [November 15, 2001], p. A1).

6. Machiavelli, Discourses, trans. L. J. Walker (London: Penguin, 1970), pp. 194-95. I am referring to Machiavelli's espousal of a Roman-style constitutional dictatorship.

7. On the Machiavellian background to modern executive power, see Harvey Mansfield, Jr., Taming the Prince: The Ambivalence of Modern Executive Power (New York: Free Press, 1989).

8. Montesquieu, The Spirit of the Laws, trans. Thomas Nugent (NY: Hafner Press, 1949), p. 165 [Book XI, ch. 6]; Locke, Second Treatise of Government, ed. C.B. Macpherson (Indianapolis: Hackett, 1980), p. 160 [paragraph 160]; Publius, The Federalist Papers, ed. Clinton Rossiter (New York: NAL, 1961), pp. 426-27, 431-33 [Federalists #70 and #71].

9. Robert Dahl and Edward Tufte, Size and Democracy (Stanford: Stanford University Press, 1973), p. 72.

10. Juergen Habermas, The Structural Transformation of the Public Sphere, trans. Frederick Lawrence (Cambridge: MIT Press, 1989), pp. 57-88.

11. Montesquieu, The Spirit of the Laws, p. 156 [Book XI, ch. 6]; Federalist Papers [Federalist 70], p. 424.

12. Yet some countries –for example, Uruguay– have opted for a plural executive during some junctures in their histories. For a discussion, see Harry Kantor, "Efforts Made by Various Latin American Countries to Limit the Power of the President," in Arend Lijphart, Parliamentary Versus Presidential Government (New York: Oxford University Press, 1992), pp. 101-111.

13. Federalist Papers [Federalist 70], pp. 425-26.

14. Federalist Papers [Federalist 71], p. 431.

15. Federalist Papers [Federalist 70], pp. 427-29.

16. I leave it to others to explore the gender subtext that underlies this rhetoric. The continuing influence of corporeal metaphors in the aftermath of September 11 was brought home to me during an intense political argument with a family member who repeatedly exclaimed "But our back is against the wall!" Indeed, when your "back is against the wall" during a physical assault, you may need to act swiftly and forcefully to assure self-preservation.

17. "For by Art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE...which is but an Artificiall Man...and in which, the Soveraignty is an Artificiall Soul, as giving life and motion to the whole body..." (Hobbes, Leviathan, ed. C.B. Macpherson [New York: Penguin, 1985], p. 81). There is a rich tradition of thinking about political organization in medieval English political thought in terms of a "body." See Ernst H. Kantorowicz, The King's Two Bodies: A Study in Medieval Political Theology (Princeton: Princeton University Press, 1985).

18. "It is in their legislative that the members of a commonwealth are united, and combined together into one coherent body. This is the soul that gives form, life, and unity...[T]herefore, when the legislative is broken, or dissolved, dissolution and death follows..."(Locke, Second Treatise, pp. 107-8 [para. 212]). On foreign relations, see pp. 76-77 (para. 145-46).

19. Richard H. Cox, Locke on War and Peace (Oxford: Clarendon, 1960), p. 147.

20. I am grateful to Ed Fogelman for bringing this point to my attention.

21. Locke, Second Treatise, para. 108, 146-48.

22. Louis Fisher, Constitutional Conflicts Between Congress and the President, 3rd. Ed. (Lawrence: University of Kansas Press, 1991), pp. 216-80; Thomas M. Franck, Political Questions/Judicial Answers: Does The Rule of Law Apply to Foreign Affairs? (Princeton: Princeton University Press, 1992); Harold H. Koh, The National Security Constitution: Sharing Power After the Iran Contra Affair (New Haven: Yale University Press, 1990). The claim that U.S. jurisprudence has been influenced by Locke on this point requires more documentation. Nonetheless, there is already an impressive body of literature underscoring the Lockean background of U.S. legal and political practice in the context of crisis government. See Jules Lobel, "Emergency Power and the Decline of Liberalism," Yale Law Journal, Vol. 98, No. 7 (1989), pp. 1385-1433.

23. William E. Scheuerman, "The Twilight of Legality? Globalization and American Democracy," Global Society, Vol. 14, No. 1 (2000), pp. 53-78.

24. In other words, the image of rulership presented, for example, in Machiavelli's Prince, captured

core features of early modern political life. Small autocratic "principalities" and city-states still flourished.

25. Gary King and Lyn Ragsdale, The Elusive Executive: Discovering Statistical Patterns in the Presidency (Washington, D.C.: Congressional Quarterly, 1988), p. 11)..

26. The quote is from Kenneth R. Mayer (With the Stroke of a Pen: Executive Orders and Presidential Power [Princeton: Princeton University Press, 2001], p. 26), whose otherwise excellent study relies on a modest restatement of the traditional association of the executive with dispatch.

27. This is a central theme in Franz L. Neumann's neglected Behemoth: The Structure and Practice of National Socialism, 1933-44 (New York: Oxford University Press, 1944). It also has been a major theme in debates among historians about the "polycratic" structure of the Nazi dictatorship.

28. For example, think of former President Reagan's success in disassociating himself in popular political consciousness with the flagrant criminality of the Iran-Contra Affair. Perhaps President Bush is now in the process of accomplishing something similar: many of the more controversial attacks on civil liberties and the rule of law seem to be most closely linked in everyday political discourse to the figure of Attorney General John Ashcroft.

29. In addition, the Bush Administration's recourse to far-reaching secrecy –also a traditional prerogative of the executive (see, for example, Hamilton in Federalist 70 [p. 424])– raises difficult questions for effective public accountability. For a good discussion of the perils in the context of the Administration's proposed military tribunals, see Edward J. Klaris, "Why Public and Press Have a Right to Witness Proceedings in Military Tribunals: Justice Can't Be Done in Secret," The Nation (June 10, 2002), pp. 16-20. In addition, the mere fact that our political system has pursued an endless series of necessary yet slow-going investigations of executive action (Watergate, Iran-Contra) might suggest that assuring the popular accountability of the executive is more complicated and time-consuming than Hamilton's discussion in The Federalist Papers presaged.

30. Kenneth R. Mayer, With the Stroke of a Pen: Executive Orders and Presidential Power, p. 26.

31. Niklas Luhmann, "Die Knappheit der Zeit und die Vordringlichkeit des Befristeten," Politische Planung. Aufsaetze zur Soziologie von Politik und Verwaltung (Opladen, Germany: Westdeutscher 1971), pp. 150-56.

32. Theodore K. Rabb, The Struggle for Stability in Early Modern Europe (Oxford: Oxford University Press, 1975); on European state formation, see Charles Tilly, Coercion, Capital, and European States, AD 990-1992 (Oxford: Blackwell, 1992).

33. Brien Hallett, The Lost Art of Declaring War (Urbana: University of Illinois Press, 1998), p. 99.

34. David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan

Governance (Stanford: Stanford University Press, 1995), pp. 73-120.

35. I develop this argument in length in "The Twilight of Legality?: Globalization and American Democracy."

36. Dworkin, "The Threat to Patriotism," p. 44.