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STATES OF EMERGENCY*

Essay from Cass R Sunstein "Can It Happen Here?"

ABSTRACT

War and emergency talks are attractive to presidency. "War on terror" that US has conducted clearly demonstrates what threats stem from unilateral power. Although terrorist attacks since 9/11 have not resulted in the deaths of thousands, attackers demonstrate their media savvy by choosing symbolically central locations for their assaults. These incidents have sufficed, however, to catalyze draconic revisions in antiterrorist legislation in both Britain and France. It is not hard to imagine what might happen when mass death is a real threat. Global pandemic of 2020 has made this fantasy a reality. Governments around the world are applying emergency powers. The foregoing essay by Bruce Ackerman, excerpted from another leading legal scholar's Cass R. Sunstein's book is an opinion on what is necessary to sustain the similar power of the US president, how sufficient the judiciary is and what role the political branches play in creating a democratic system of checks and balances.**

STATES OF EMERGENCY

There is something about the presidency that loves war talk. Even at its most metaphorical, martial rhetoric allows the president to invoke his special mystique as commander in chief, calling the public to sacrifice greatly for the good of the nation. Perhaps the clarion call to pseudo-war is just the thing the president needs to ram an initiative through a reluctant Congress. Perhaps it provides rhetorical cover for transforming the courts into rubber stamps. Or perhaps it serves as a grand occasion for ego gratification.

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Or all of the above. We are not dealing with a constitutional novelty. Almost two centuries ago, Andrew Jackson was famously making war on the Bank of the United States, indulging in legally problematic uses of executive power to withdraw federal deposits from The Enemy, headed by the evil one, Nicholas Biddle.

To be sure, the "war on terrorism" isn't as much of a stretch, say, as the "war on poverty" or the "war on drugs." Classical wars traditionally involve sovereign states attacking one another's territorial integrity, and it may seem a small matter to expand the paradigm to cover non-state actors engaging in similar assaults: is there really such a big difference between December 7th and September 11th?

The panic-driven responses of the Bush and Obama administrations only begin to suggest the dangers of equating the two events. The torture chambers at Guantánamo and elsewhere have largely been reserved for foreigners. Yet the presidential embrace of war talk could have also legitimated the sweeping detention, torture, and summary execution of countless Americans on the massive "watch lists" compiled by the security services. This danger is not merely hypothetical – there have been notorious cases involving citizens and legal residents. Nevertheless, their actual number has been relatively small.

I hardly wish to minimize the terrible crimes against humanity committed by the American government over the past fifteen years. Worse yet, its utter failure to make a serious effort to hold the responsible officials accountable only serves to compound our national disgrace. Nevertheless, we should recognize that this dark chapter in American history has not yet led to an all-out presidential assault on liberal democratic life in the United States itself.

There may be worse yet to come. Recent terrorist incidents have not involved the deaths of thousands, as at the Pentagon and Twin Towers, or even hundreds, as at the Oklahoma City Federal Building. They have involved small numbers of deaths inflicted by a small number of attackers – whose weapons are primitive, but who often demonstrate their media savvy by choosing symbolically central locations for their assaults. These incidents have sufficed, however, to catalyze draconic revisions in antiterrorist legislation in both Britain and France, as well as increasingly tough talk by Europe's sensible centrist politicians. What to expect, then, of Donald Trump on the terrible day when Americans learn that five or ten or twenty thousand have been slaughtered in some new disaster?

Make no mistake: we live in an age in which smaller and smaller numbers of terrorists can buy more and more destructive weapons at lower and lower prices. The state is losing its monopoly on mass destruction, and it will be impossible to preempt all future attacks. This is not, I should emphasize, a problem that has anything in particular to do with the threat posed by ISIS or its counterparts. There are 330 million people living in America, and it takes only a few hundred extremists with a few million dollars to obtain weapons that could devastate a major American city. The question is not whether our security services will preempt some of these attacks, - they will. It is whether they will prevent all of them - they won't.

We may be lucky. When the tragedy occurs, the sitting president may turn out to be a sober defender of our democratic traditions. But as *The Federalist Papers* remind us,

“[e]nlightened statesmen will not always be at the helm,” and we would be wise to seize the moment and consider how we might create a new statutory framework to control a full scale presidential assault on our liberal democratic tradition.

From this perspective, the transparent demagogy of President Trump may well represent the last realistic political opportunity to take this question seriously. Within a few short months, Trump's terrorist-tweeting has already generated a bipartisan congressional initiative by Senators Jeff Flake and Tim Kaine to frame a new Authorization for Use of Military Force that would allow the House and Senate to reassert their constitutional authority over unilateral presidential war-making abroad. While this is important, it is no less important to frame an appropriate congressional response to the prospect of the abuse of presidential powers at home.

It would be a mistake for Congress to rely on the Supreme Court to do the job for it. Suppose President Trump responds to a massive attack with a massive roundup of domestic terrorists. It would probably take a year or so before a legal challenge would reach the Supreme Court. Based on the Justices' performance since September 11, it isn't at all clear how they would respond: while a majority has sometimes upheld basic principles of due process in dealing with terrorism, they have failed to fashion effective modes of relief for obvious victims of injustice. Worse yet, they have never formally overruled their infamous World War II decisions – *Korematsu* only one of several – upholding the long-term detention of Japanese-Americans by the commander in chief. Unless they do so, it will be tough to forge effective constraints on the president's power to make war on his fellow citizens. Despite these caveats, it is too soon to dismiss the Court as a paper tiger. Depending on the course of future appointments, the majority may well emerge as a significant force at its moment of truth.

But I wouldn't count on it. Paradoxically, Trump's huffing and puffing, together with his demagogic behavior, may jolt serious Democrats and Republicans in Congress to take seriously the prospect of a draconian response to the next major attack – and seize the moment to consider a new statutory framework that would increase the chance of preserving our democracy before it is too late. The new initiative should explicitly reject the claim, made most explicitly by Jay Bybee and John Yoo for the Bush administration, that the commander in chief has the unilateral power to make never-ending war on the home front. It should instead create a new system of checks and balances based on a different, and commonsense, notion: that a major terrorist attack will predictably create a "state of emergency," warranting extraordinary measures over the short term – so long as decisive steps are taken to guarantee that they won't endure beyond the period of their obvious necessity.

These basic principles are already a familiar part of the legal terrain. The newscasts constantly report declarations of emergency by governors responding to natural disasters – and though this is less familiar to ordinary citizens, presidents regularly declare emergencies in response to foreign threats. The challenge is to adapt these principles to deal with the distinctive features of the problem raised by the increasing ease with which relatively small terrorist networks can obtain weapons of mass destruction.

First and foremost, the new framework should impose strict limits on unilateral presidential

power. While President Trump has forsworn daily briefings, he will undoubtedly hear his national security advisor let him know of the latest looming threats by terrorist networks lurking somewhere in this great land of ours. These threats should never be enough for him to trigger a state of emergency. Instead, only an actual attack on the scale of September 11 creates the distinctive "second-strike problem" that justifies extraordinary action.

The problem is simply this: On the one hand, the major attack has taken the security services by surprise – otherwise, they would have seized the key actors in the terrorist network. On the other hand, the fact that the terrorists have managed to pull off a major attack vastly increases the risk that they are in a position to follow up with a second attack unless decisive steps are taken immediately to preempt the threat. Putting both hands together, the emergency rationale goes like this: Given the ignorance of the security forces, the only way to minimize the chances of a second strike is to detain terrorist suspects on the basis of reasonable suspicion, rather than the higher standards required for criminal prosecution. If they must convince judges that they have probable cause to target particular terrorists, this will give the network enough time to strike again and escalate the panic further – eroding public confidence that the crisis will ever end.

The commonsense case for a state of emergency is, then, compelling. But it comes with a commonsense caveat: there is every reason to expect that the security agencies will systematically abuse the extraordinary powers they have been granted. Since they are unable to pinpoint the key actors in the terrorist network, they will be obliged to rely on “watch lists" they have prepared before the event, which identify tens of thousands of Americans who have been identified as potentially involved in problematic activities. As a consequence, the only way they can disrupt the terrorist network in the short term is to use these watch lists as the basis for massive detentions. Yet while such a step might – or might not – be effective, only one thing is clear. Most of the prisoners behind bars will be entirely innocent.

Given these obvious risks, Trump should be authorized to act unilaterally only for the time it takes for Congress to consider whether a "state of emergency" is truly justified-say, a week or two. Unless the president can persuade a majority of both chambers to approve his initial declaration, the state of emergency should immediately lapse. Even if they do approve, this vote should be valid for only two months – and the matter should then return to Congress to determine whether conditions have sufficiently returned to normal to require the security services to establish that they have “probable cause" for each and every one of their arrests. On this second round of reappraisal, moreover, it shouldn't be enough for a simple majority to go along with Trump's demands for further antiterrorist sweeps. The president must persuade a supermajority of 60 percent of both chambers that extraordinary measures are justified. This supermajoritarian threshold should continue to increase with further presidential requests. When Trump returns after two more months, he must gain a 70 percent majority; and he will confront an 80 percent threshold every time he returns for a further renewal.

This "supermajoritarian escalator" puts the ongoing exercise of emergency power in control of the minority party in Congress – precisely the group that will be especially alive to the

danger that Trump will use his extraordinary powers to further his political ambitions. Especially as election day approaches, they will be especially skeptical of presidential requests for renewal – unless, of course, the terrorist network is continuing to wreak havoc. Rather than depending on judges as the principal check on the abuse of presidential power, the new statute should rely on the political branches to play a central role in creating a democratic system of checks and balances.

Yet courts will also have critical oversight functions to play. As we have seen, the emergency statute should authorize short-term detention on reasonable suspicion, without insisting on probable cause. But given the probable innocence of most of those swept into prison, this is only acceptable on a short-term basis. Once a suspect has been held, say, for forty-five-day period, the security services must inform the court of the reasons why their targets have acted suspiciously, detailing the data provided in their "watch lists" with appropriate provisions for confidentiality. It should never be enough simply to lock a person up on the arbitrary hunch by somebody – or – other in the security hierarchy. Similarly, the statute should provide for an independent civilian authority, supervised by the courts, to prevent torture and other inhumane techniques at detention centers.

But it is not enough to rely on proactive measures by judges and civilian watchdogs during the emergency. The statute should also grant financial compensation to everybody whose fundamental rights have been abused by the emergency sweeps. This includes, most obviously, detainees who have been thrown into jail on the basis of an arb include also the mass of individuals whose names have appeared on "watch lists" but who are never charged with a crime in connection with the attack. They have not only sacrificed their personal liberty for the public good. While trapped in overcrowded cells, they may well have lost their jobs and generated traumatic anxiety among their families and friends. This is fundamentally wrong. The statute should instead provide all innocent victims of the emergency a weekly payment of $3,000 – three times the median weekly income for an American family. This award will not only respond to their material losses; it will also help them deal with the stigma that will otherwise be associated with the fact of their incarceration. By paying them generous compensation, the government will be demonstrating that these victims of the watch list should not be treated as presumptive terrorists by the rest of society – but that they have instead been called to sacrifice their personal lives as part of a broader effort by American citizens to sustain their republic at a challenging moment in its history.

I FIRST PROPOSED A “STATE OF EMERGENCY" REGIME IN THE IMMEDIATE aftermath of September 11 – and my initiative generated a broad-ranging discussion that has had some practical impact both in the US and abroad.[1] But more recently, serious attention to the problem has declined, and this essay is an attempt to revive the conversation. Much

[1] See, e.g., Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal* 113, no. 5 (March 2004): 1029-1091; David Cole, "The Priority of Morality: The Emergency Constitution's Blind Spot," *Yale Law Journal* 113, no. 8 (June 2004): 1753; Laurence Tribe and Patrick Gudridge, "The Anti-Emergency Constitution," *Yale Law Journal* 113, no. 8 (June 2004): 1801; Bruce Ackerman, *Before the Next Attack* (New Haven: Yale University Press, 2006); Bruce Ackerman, *The Decline and Fall of the American Republic* (New Haven: Yale University Press, 2010), 166–74.

that was said during the first round of debate remains important – clarifying critical issues of statutory design as well as fundamental questions dealing with the place of emergency legislation in the larger constitutional order. But I hope that I have persuaded you that recent events have made it more, not less, imperative to confront these questions once again.

In placing emergency legislation back on the action agenda, we will be redeeming a tradition that goes back to the Philadelphia Convention. In writing the original Constitution, the founders paid very little attention to the nature and scope of fundamental rights – leaving it to the first Congress to fill this gap with a series of amendments. But they made an exception when it came to states of emergency – which they treated in a fashion that parallels the dualistic approach taken here. On the one hand, Article One insists that the guarantee against arbitrary arrest and conviction is indeed foundational; on the other, it recognizes that emergency conditions may justify temporary limitations. To put this dualism in the founders' words: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”

The eighteenth-century language invites us to reflect more deeply on our twenty-first-century problem. As I have emphasized, it is of high importance to limit emergency powers to those occasions on which a terrorist organization has successfully engaged in an attack on the scale of September 11. In terms of the founding text, I suggest that such an act of organized violence represents a modern-day version of “rebellion" – in which the extremist group, either secular or religious, seeks to overthrow the very foundations of our constitutional democracy. Our twenty-first-century challenge is to respond in the spirit of the founders – and adapt the principles of checks and balances so that emergency powers may be invoked when “the public safety may require it.” At that same time, we must prevent the exercise of extraordinary authority from destroying the very constitutional order the declaration of emergency purports to protect.

Are we equal to the challenge?